NOVA SCOTIA COURT OF APPEAL

Citation: *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 43

Date: 20150512
Docket: CA 412729
Registry: Halifax

Between:

Northern Construction Enterprises Inc.

Appellant

v.

The Halifax Regional Municipality,
The Nova Scotia Utility and Review Board and
The Attorney General of Nova Scotia

Respondents

and

Dwight Ira Isenor and Staceylee Rudderham

Intervenors

Judges:	MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A.
Appeal Heard:	February 11, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs
Counsel:	Peter Rogers, Q.C., for the appellant E. Roxanne MacLaurin, for the respondent, Halifax Regional Municipality Nova Scotia Utility and Review Board, not appearing Edward Gores, Q.C., for the respondent, The Attorney General of Nova Scotia Paul Miller, for the intervenors, Dwight Ira Isenor and Staceylee Rudderham

Reasons for judgment:

OVERVIEW

[1] The Appellant, Northern Construction Enterprises Inc., (Northern) proposes to develop an aggregate quarry near the Halifax Stanfield International Airport. This appeal involves the Respondent Municipality's (HRM) refusal to grant the Appellant a development permit to do so. This refusal was sustained by the Respondent Board, prompting Northern's appeal to this Court. The Intervenors are concerned residents.

BACKGROUND

The Proposal and the Regulatory Process

[2] The Appellant describes its proposed operation in its factum:

> Once an area is cleared, overburden removed, and a working rock face established, aggregate production begins by drilling and blasting the rock face with explosives. The blasted rock would be passed through crushing and screening equipment, known as a crushing spread, to reduce it to useable dimensions and specifications for building foundations, road construction and manufacture of cement and asphalt. The Proposed Quarry would have an access road, a scale and scale house/office, quarry floor and working face(s), a staging area for equipment set-up and storage, a crushing spread (i.e., crushers, conveyors and screens), a wash station, designated stockpile areas, and a settling pond and drainage ditch.

[3] Its venture into the regulatory process has left Northern with a major quandary. The fundamental problem involves confusion over whether approval is even required from HRM. As I will explain, my reference to a quandary may be an understatement.

[4] The Province has retained exclusive jurisdiction over the location of quarries. That is simple enough and the Appellant concedes that provincial approval will be required regardless of the outcome of this appeal. However, it becomes complicated because the Province has ceded, to HRM, jurisdiction over "developments adjacent to…quarries". Thus emerges this insidiously complex question: what is a quarry? Is it limited to that area where material (in this case

rock) is extracted from the land? Or, does it include more such as, in this case, a crushing facility, a wash station and stockpiling areas for processed aggregate. If it includes the latter, then regulatory approval will fall exclusively to the Province, leaving HRM with no say in the matter. On the other hand, if it is limited to the former, then the above-noted impugned operations would be considered "developments adjacent to…quarries", thereby requiring HRM approval.

[5] To further complicate matters, HRM's enabling by-law purports to control all activities except those "fundamental to…extraction". Yet, to fully respect the Province's retained jurisdiction, one might expect the exception to include activities fundamental to a "quarry" as opposed to "extraction". This, therefore, begs further questions. Is there a difference between a quarry and an extraction? Would the latter be considered just one aspect (a subset if you will) of the former? If so, then, says Northern, the HRM by-law trespasses into the regulation of quarries.

[6] Yet, why, asks HRM, would the Province expressly cede to HRM jurisdiction over "developments adjacent to…quarries" if it intended to retain authority over more than mere extraction. There would be no need for such a provision because everyone agrees that planning within the HRM, aside from the location of quarries, is within HRM control. So Northern's proposed interpretation would render the provision meaningless.

[7] It gets even more complicated because, according to the HRM Charter (a provincial statute), the Province must consider the applicable municipal planning documents before authorizing a development (*s. 213*). In fact, Northern began its efforts by seeking just provincial approval, only to be told by the Province to either obtain HRM approval or verification that it would not be required. This prompted Northern's failed attempt to secure HRM approval, which, in turn, led to the present appeal.

[8] Then there are the procedural complications. For example, Northern maintains that HRM's by-law is illegal (to the extent that it trespasses into the regulation of quarries). However, it alternatively challenges HRM's interpretation of the by-law, maintaining that the impugned activities are excepted as being "fundamental to …extraction". Yet, its challenge to the legality of the by-law had to be advanced by seeking a declaration in the Supreme Court of Nova Scotia, while its challenge to HRM's interpretation of the by-law had to be advanced by way of an appeal before the Respondent Board.

[9] With this backdrop, I will now consider the proceedings to date.

The Proceedings to Date

[10] As noted, Northern began the regulatory process by seeking approval only from the Provincial Department of Environment. However, with the Province insisting on either HRM approval or confirmation that none was required, Northern approached HRM. Through its development officer, HRM asserted jurisdiction over and denied approval, maintaining that the impugned operations were prohibited by the applicable land use by-law. Specifically, they were deemed to be "extractive facilities" as defined in the by-law and prohibited in that particular area (Zone AE-4):

> 2.29 EXTRACTIVE FACILITIES means all buildings, aggregate plants, material storage areas and weigh scales associated with extractive uses but does not include structures or storage areas which are fundamental to the activities of mining or extraction.

[11] This prompted Northern to appeal to the Board, comprised of a single member, Roberta J. Clarke Q.C. She framed the appeal as follows:

> II GROUNDS OF APPEAL
>
> [4] The Notice of Appeal was filed with the Board on April 26, 2012, and the grounds of appeal were stated as follows:
>
> > The decision of the development officer fails to comply with the land-use by-law or the development agreement in that:
> >
> > (a) The development is expressly excluded from the definition of an "extractive facility" in the *Land Use By-law for Planning Districts 14 and 17* (the "*Land Use By-Law*") as it is fundamental to the activities of mining and extraction, and therefore it is not regulated by Halifax Regional Municipality through the *Land Use By-Law*;
> >
> > (b) The development is a manufacturing use, which is allowed in the AE-4 (Aerotech Business) Zone in the *Land Use By-Law*; and

> (c) The development is a construction industries and contractors use, which is allowed in the AE-4 (Aerotech Business) Zone in the *Land Use By-Law*.
>
> [Exhibit N-1(a), p. 1]

> [5] An amended Notice of Appeal was filed on May 1, 2012, and added the following ground of appeal:
>
> > The decision of the development officer fails to comply with s. 253 of the Halifax Regional Municipality Charter in that:
> >
> > (d) The same property has been used for the same general type of use, namely to extract aggregate and is accordingly an existing non-conforming use.
> >
> > [Exhibit N-1(b), p. 1]
>
> [6] During the course of closing submissions, Counsel for the Appellant advised that the new ground of appeal, relating to non-conforming use, was no longer being pursued.

[12] In the end, the Board sustained the Municipality's decision, thus, prompting the instant appeal to this Court. I now turn to the Board's reasoning.

The Decision under Appeal

[13] The Board began by identifying its mandate. It could allow the appeal only if Northern established that the development officer's decision (to refuse the development permit) conflicted with the provisions of the land use by-law. Thus, the fundamental issue became whether the development officer was correct to conclude that the impugned operations were not (according to the definition) "fundamental to the activities of extraction":

> [12] Mr. Creaser refused the development permit sought by Northern, stating in part in a letter dated April 20, 2012:
>
> > As previously indicated to you in my letter dated November 17, 2011, quarries are regulated by the Province of Nova Scotia through Nova Scotia Environment and the land use bylaw does not regulate quarries or structure(s) or storage areas that are fundamental to the activities of mining and extraction. However, activities beyond mining and extraction are considered "extractive

> facilities" as defined by the following definition contained in the Land Use By-law:
>
> > "EXTRACTIVE FACILITIES means all buildings, aggregate plants, material storage areas and weigh scales associated with extractive uses but does not include structures or storage areas which are fundamental to the activities of mining or extraction."
>
> The activities described in your application comprise an "extractive facility" as defined by the Land Use By-law. Extractive facilities are not a permitted use in the AE-4 Zone. Therefore, your application for a Development Permit is refused. [Emphasis added]
>
> [Exhibit N-2, Tab 4, p. 11]

[13] Pursuant to s. 267(2) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, as amended, ("*HRMC*"), the Board must determine whether Mr. Creaser's decision to refuse the development permit conflicts with the relevant Land Use By-law ("LUB").

[14] The parties reached an agreement prior to the hearing respecting specific activities in issue, which Counsel for the Appellant identified in a letter to the Board as follows:

> The parties agree that the primary issue on the appeal is whether the quarry described in the development permit application did not comply with the land use by-law because of its inclusion of one or more of the following features:
>
> 1. Scale and scale house/office;
> 2. Crushing equipment;
> 3. Staging area for crushing equipment;
> 4. Portable conveyor and screens;
> 5. Wash station;
> 6. Storage areas for stockpiling crushed or processed aggregate.
>
> [Letter to Board from Peter Rogers, July 17, 2012]

[15] The issue then becomes whether or not Mr. Creaser was correct in concluding that the listed features are not "…fundamental to the activities of extraction" in the words of the LUB.

> [16] For the reasons discussed below, the Board has concluded that the decision of the development officer, Mr. Creaser, does not conflict with the LUB. Accordingly, the appeal is dismissed.

[14] After a detailed review of the relevant legislation and evidence, the Board began its analysis by declining the Appellant's invitation to determine the legality of the land use by-law. That, said the Board, was for the Supreme Court to decide. This prompted Northern's failed attempt to secure a declaration of illegality from that Court. This in turn has prompted a second appeal to this Court that we heard at the same time and for which we have today filed separate reasons. I will say more about that matter at the end of these reasons.

[15] Then, to interpret the by-law, the Board turned to "the ordinary or dictionary meaning" of the relevant words:

> [176] Looking further at the LUB, the Board has examined the words used, and, as Ms. Tsang did, considers the ordinary or dictionary meaning of the words in the definition of "extractive facilities". The key words, in the Board's view, are "extractive", "facilities", "fundamental", "activities" and "extraction".
>
> [177] The Board has turned to definitions from the Canadian Oxford Dictionary (Second Edition):
>
> > "extractive" adjective of, involving, or concerned with the extraction of natural resources or products, esp. non-renewable ones…
> >
> > "facility"… **2** (esp. in *pl.*) the physical means, equipment, resources, or opportunity required to do something. **3** *N Amer.* A building designed for a specific purpose.
> >
> > "fundamental" *adjective* of, affecting, or serving as a base or foundation, essential, primary, original (a fundamental change; the fundamental rules; the fundamental form).
> >
> > "activity" *noun* (*pl.* –**ities**)**1a** the condition of being active or moving about; **b** the exertion of energy; vigorous action. **2** (often in *pl.*) a particular occupation or pursuit (outdoor activities)…
> >
> > "extraction" *noun* **1** the act or process of extracting or being extracted…
>
> [178] The Board notes that the LUB does not contain a definition of pit or quarry. The ordinary meaning of "quarry" from the same dictionary is:

> "quarry" *noun* (*pl.* **–ries**) **1** an open-air excavation from which stone for building etc. is or has been obtained by cutting, blasting, etc. **2** any place from which stone etc. may be extracted… *verb* (-**ries**) **1** *transitive* extract (stone) from a quarry. **2** *transitive* obtain or extract something by laborious methods.

[16] By taking this approach, the Board rejected Northern's suggestion that the associated operations were "fundamental to the activities of extraction":

> [179] Counsel for the Appellant submits that the term "extraction", as used in the LUB, is a compendious reference to pits and quarries. With respect, the Board does not agree. The Board explores its reasons for this disagreement later in this decision.
>
> [180] Even if the Board were to agree with the Appellant on this point, it would be necessary to then conclude whether the components are "fundamental" in the words of the LUB, or essential as in its ordinary meaning, to the activities of pits and quarries. The Board is not persuaded by the evidence from Golder that this is the case. For example, as noted above, the panel agreed that crushing and screening could take place off-site; Mr. Ahmed confirmed that a wash station is generally required if a quarry is producing material to meet ready-mix or asphalt industries. Ms. Ray had noted in her evidence that not all quarries produce this type of material.
>
> [181] The Board notes that Ms. Tsang relied on the evidence of Golder and information in Northern's application in her determination of whether the proposed development fell within the exemption. She acknowledged that she has no expertise in matters relating to quarries. For this reason, the Board attributed little weight to her evidence that the components are fundamental to the proposed quarry operation and thus were not extractive facilities.
>
> [182] The Court of Appeal in the *Anglican* decision said, at para. 29:
>
> …The Board should interpret the LUB not formalistically, but pragmatically and purposively, to make the LUB work as a whole…
>
> [183] While it might be argued that to look at the ordinary meaning of words in a particular provision of the LUB is a formalistic – or even narrow – approach, the Board considers that when it looks at the LUB as a whole, it is impossible to ignore a number of factors which the Board believes support its ultimate conclusions in this matter. First, the LUB sets out permitted uses in various zones, and "extractive facilities" is not one of those uses; secondly, the LUB explicitly states that a use which is not permitted is prohibited in the zone; finally, the LUB specifically provides for "extractive facilities" by development permit.

[184] The Court of Appeal in *Anglican* went on to say, at para. 29:

> (3) Subsections 234(1) and (3) of the *HRM Charter* direct that the LUB "enables" and should "carry out the intent" of the MPS. The MPS does not amend the LUB. But the LUB's interpretation may be assisted by the MPS, and the Board's purposive approach should encompass the LUB and MPS together. The Board here (¶ 84) cited the interpretive reflexivity between the MPS and LUB (discussed later ¶ 46-49).

[185] This follows a line of decisions by the Board and the Court of Appeal as noted at para. 47 of the *Anglican* decision:

> . . .
>
> Though the MPS does not amend the LUB, the MPS' intent should be the LUB's backbone. For that reason, the MPS may be an interpretive tool to elicit meaning from ambiguity in the LUB: *Bay Haven Beach Villas Inc v. Halifax (Regional Municipality)*, 2004 NSCA 59 (CanLII), 2004 NSCA 59, ¶ 26; *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* 1994 CanLII 4114 (NS CA), (1994), 128 N.S.R. (2d) 5 (CA), at ¶ 123, *Archibald*, ¶ 24(8).

[17] The Board (as did the development officer) relied as well on the corresponding Municipal Planning Strategy ("MPS") for guidance, highlighting the strategy's acknowledgement that the location of quarries remained within provincial authority:

> [186] As noted above, Mr. Creaser testified that he had given consideration to the MPS provisions because he "required assistance from an external source to satisfy himself". In fact, the Board notes that Mr. Creaser would have had to turn his attention to the MPS because LUB s. 3.6(n), which indicates that "extractive facilities" might be permitted in the Resource Designation area, specifically refers to MPS P-136.
>
> [187] The Board considers that examining the MPS as an interpretive tool in this case assists in the purposive approach commended by the Court of Appeal. In this regard, the Board agrees with Counsel for the Respondent that the MPS must be considered as a whole, and not just the specific section dealing with "Aggregates" as suggested by Counsel for the Appellant.
>
> [188] As a starting point, the Board observes that, as set out in para. 19 of this Decision, there are a number of instances in the MPS where resource and/or industrial uses of land are addressed. For example, under the heading "EXISTING

LAND USE" at page 8, the MPS notes the interspersion of resource related uses with residential development, and the number of pits and quarries located throughout the Plan area, and at page 10, the MPS discusses concerns arising from "…new industrial uses seeking to locate in the area…".

[189] Further, the MPS states:

> Industrial Development
>
> Although industrial development has occurred throughout the Plan Area, it has generally concentrated where road and rail or road and air services meet. Pressures from new industrial concerns seeking to locate in the area have raised concerns over their potential impacts on both the residential and natural environments. Mismanaged industrial wastes could have repercussions in the areas of public health and safety as well as the maintenance of water quality in the highly prized lake system. Stringent locational and environmental controls are strongly supported.
>
> Resource Areas
>
> Large parts of the Plan Area are not generally accessible from the public road network. Much of this land has served as a resource base for many primary industries including forestry and quarry operations. Although development is slowly expanding into these resource lands, the suitability of much of this land for development and the effects it might have on existing communities is of concern. There is a need to evaluate and minimize the effects of large subdivisions or the creation of new industrial developments within these areas prior to their being permitted. [Emphasis added]
>
> [Exhibit N-3(a), p. 10]

[190] The MPS refers to the Generalized Future Land Use Map which designates a number of land use areas, including a "Resource" designation. It is described thus:

> In addition, there are a number of resource-based activities scattered throughout the area but largely occurring in proximity to the resource used. These uses consist of quarries and mines, as well as limited agriculture and forestry operation. [Emphasis added]
>
> [Exhibit N-3(a), p. 54]

[191] In the descriptions of the various designations of land uses, the MPS states the following:

> Resource activities such as farming, mining, pits and quarries and sawmill operations, although few in number, are dispersed throughout the area. [Emphasis added]
>
> [Exhibit N-3(a), p. 65]
>
> …
>
> RESOURCE DESIGNATION
>
> Much of the original settlement of the Plan Area was based on the utilization of natural resources. This settlement was further spurred by the construction of roads, rail lines and the Shubenacadie Canal System through the Plan Area.
>
> The predominant resource activities in the past were mining, agriculture and forestry. In more recent years, although there has been little commercial mining, extensive lands have been devoted to quarry operations and changes in the value of gold in international markets have improved the climate for gold mining.
>
> . . .
>
> With regard to resource uses, the scale of such operations and the size of the lot on which they are located are of importance, as is the maintenance of adequate separations from open water bodies, adjacent uses and property boundaries. [Emphasis added]
>
> [Exhibit N-3(a), p. 87]

[192] The MPS also sets out the details of the Airport Industrial Zone, noting in Policy P-103, the intention to create a "…campus like atmosphere within Aerotech Business Park…", which the MPS states is to "…provide sites for the developments of industries at the leading edge of modern technology…".

[193] Counsel for the Appellant referred in particular to that portion of the MPS under the heading "Aggregates" at pages 89-90 of Exhibit N-3 because he says it is clear from that section that HRM recognizes a limited ability to regulate pits and quarries. The Board agrees that Policy P-133 and its preamble acknowledge that "…municipal governments do not have the authority to control the location of pits and quarries…", and that Council intends to encourage the Province to give it such authority.

[194] The preamble to Policy P-135 and the policy itself state:

> When and if the Municipality is empowered to specifically regulate and prohibit the location of pits and quarries, it is important to have an established policy and regulatory structure. In this regard, it is appropriate for the Council to provide for the development of new pit and quarry operations in specific portions of the Resource Designation while prohibiting the expansion of existing operations.
>
> P-135 In recognition of both the need for aggregates and the importance of expanding communities, when so empowered by statute, it shall be the intention of Council to permit the development of new pits and quarries only in those portions of the Resource Designation located to the north of the Oldham and Goffs Roads as well as to the south of the Goffs Road and to the east of Halifax international Airport.
>
> [Exhibit N-3, p. 90]

[18] In the end, the Board agreed with the development officer and dismissed the appeal:

> [212] Northern made an application to HRM for a development permit to operate a construction aggregate quarry on two parcels of lands at Goffs, located within the AE-4 zone. Trevor Creaser, the development officer, refused to grant the permit because he concluded that the activities and components proposed constituted "extractive facilities", and they were not fundamental to the activities of extraction, as defined in the LUB, and therefore were not permitted in the zone. He testified that the LUB only permitted such activities by development agreement in the Resource Designation area defined in the MPS.
>
> [213] The Board's jurisdiction is set out in s. 267(2) of the *HRMC* and is restricted to a determination of whether Mr. Creaser's decision conflicts with or does not comply with the LUB.
>
> [214] The Board has not been persuaded, on a balance of probabilities, by the evidence of the Appellant that the impugned activities or components are fundamental to extraction as set out in the LUB. The Board reviewed the MPS as an aid to interpreting the LUB. The Board found that the proposed development did not fall within the permitted uses of "construction industries and contractors" or "manufacturing".
>
> [215] The Board agrees with the decision of the development officer and finds it does not, in the words of s.267(2) of the *HRMC*, conflict with the LUB. As a result, the appeal is dismissed.

ISSUES

[19] In its notice of appeal, Northern lists the following grounds:

> 1. The Utility and Review Board erred in law and failed to exercise its jurisdiction by refusing to consider that its interpretation of the Land Use By Law would make the Land Use By-law *ultra vires* the Halifax Regional Municipality Charter;
>
> 2. The Utility and Review Board erred in law by failing to follow binding precedent providing that the Province of Nova Scotia has exclusive regulatory authority over pits and quarries and that associated activities of rock crushing and aggregate washing not adjacent to, but actually within a pit or quarry, are not subject to municipal land use by-laws;
>
> 3. The Utility and Review Board erred in law in interpreting "extractive facilities" in the By law to include a) crushing equipment; b) a related staging area, c) a conveyor and screens, and (d) wash stations when these attributes are located in the quarry
>
> 4. The Utility and Review Board erred in law by finding that the Appellant's proposed use of a) crushing equipment; b) a related staging area, c) a conveyor and screens; and (d) wash stations are not fundamental to the activities of mining or extraction;

[20] The first two grounds deal with the jurisdictional question. Issues 3 and 4 deal with the development officer's decision. I, therefore, distill and re-state the issues as follows:

> Did the Board commit reviewable error by,
>
> a. acknowledging HRM's jurisdiction over this matter; or
> b. sustaining the development officer's decision?

In my analysis that follows, I will, for each issue, identify and apply the appropriate standard upon which we should review the Board's decision.

ANALYSIS

The Jurisdiction Issue

[21] I will first address the applicable standard of review. Here, the Board was considering the extent of its jurisdiction, concluding that it was limited to interpreting the land use by-law. In other words, it felt it had no authority to question the legality of the by-law. Questions involving the extent of an administrative tribunal's jurisdiction are matters of law, commanding a correctness standard. In other words, when the Board interpreted the limits of its jurisdiction, it had to be right. It is entitled to no deference on this issue. See *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at para. 59.

[22] In declining jurisdiction, the Board reasoned:

> [145] Counsel for the Appellant questioned the validity of the LUB, suggesting that it was not within the powers of the municipality because pits and quarries are regulated under the *Environment Act*. Counsel for HRM said that the Board's limited jurisdiction does not permit it to make a determination of the *vires* of the LUB. She urged the Board to accept that the LUB is in full force and effect.
>
> [146] It is clear to the Board from the decision of the Court of Appeal in *Kynock* that the Board must restrict itself to the limits on its powers prescribed by the *HRMC*. More recently, the Court of Appeal said in *Halifax (Regional Municipality)* v. *Anglican Diocesan Centre Corporation*, 2010 NSCA 38 ("*Anglican* decision"), at para. 23:
>
> > …The Board should just do what the statute tells it to do.
>
> [147] This was confirmed by the same Court in *Royal Environmental Inc.* v. *Halifax (Regional Municipality)*, 2012 NSCA 62, at paras. 41-42.
>
> [148] Under the provisions of s. 207 of the *HRMC*, it is the Supreme Court of Nova Scotia which has the jurisdiction to determine the legality of a by-law.
>
> [149] As will appear from the Board's consideration of whether the decision of Mr. Creaser to refuse the development permit conflicts with the LUB, as set out below, the Board has determined that it need not, and indeed should not examine or question the legality of the LUB. It must interpret the LUB. The Board does, however, consider the interplay between the *Environment Act* and the *HRMC*, the LUB, and the MPS below.

[23] In my view, the Board got it right. It is a creature of statute and its jurisdiction is limited to the parameters of the enabling legislation. Here, Northern appeals a refusal to issue a development permit. Its right to do so is limited by the HRM Charter:

> 265 (2) An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land-use by-law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area.

[24] In turn, the Board's jurisdiction is limited:

> 267 (2) The Board may not allow an appeal unless it determines that the decision of the Council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

[25] These provisions are clear. In the context of this ground of appeal, the Board's jurisdiction is limited to interpreting HRM's land-use by-law. It has no authority to question its legality. In fact, under the Charter, that power appears to be expressly reserved for the Supreme Court of Nova Scotia:

> 207 (1) A person may, by notice of motion that is served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the Council, in whole or in part, for illegality.

[26] I would dismiss this aspect of the appeal.

The Development Officer's Decision

[27] Again, I will first deal with the applicable standard of review. Here, in assessing the development officer's decision, the Board heard evidence (an advantage we did not have) and interpreted a statute with which it has significant experience. This, therefore, commands deference, meaning that we will interfere only if the Board's decision is unreasonable. In other words, it is not necessarily our interpretation of the facts and legislation that will prevail. Instead, as long as the Board followed a reasonable decision-making path and the decision falls within a range of acceptable outcomes, it will be the Board's analysis that will prevail. This Court, in *Halifax (Regional Municipality)* v. *United Gulf Developments*, 2009 NSCA 78, in a similar context, explained this Board's right to deference:

> **56** Taking into account the privative clauses, the purpose of the planning provisions of the **MGA** and the role the Legislature has set for the Board in relation to them, the discrete and administrative regime created for the Board by the **URB Act**, the Board's expertise in planning matters and the nature of the issues before the Board and before this court, I am satisfied the Board's decisions in this case are entitled to deference. The standard of review is one of reasonableness.
>
> 57 In **Dunsmuir, supra**, the Supreme Court of Canada indicates that when applying the reasonableness standard, the reviewing court is to consider both the process by which the decision was reached and the outcome:
>
> > 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. **In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.** (Emphasis added)

[28] Applying this framework, I find the Board's decision meets the reasonableness standard. I say this for the following reasons.

[29] First of all, the Board's reasoning path (*Dunsmuir's* first category) cannot be seriously questioned. In other words, whether one agrees or disagrees with the outcome, the path taken is clear. The Board considered the development officer's decision, weighed the evidence, assessed the planning strategy, and interpreted the governing by-law, before concluding that the development officer's decision to refuse the permit "did not conflict with the provisions of the land use by-law".

[30] Instead, Northern's real concern is with the outcome, which it insists is unreasonable. Simply put, it says that it would be futile to have an aggregate quarry without the impugned facilities. They are fundamental to such a quarry. By interpreting the by-law so as to prohibit them is essentially having a municipality control the location of aggregate quarries; something that, everyone agrees, is in

the exclusive domain of the Province. Therefore, the impugned operations must be considered activities "fundamental to…extraction" as contemplated in the by-law. Northern explains it this way in its factum:

> 48. The bylaw must be interpreted to give it meaning other than as a colourable regulation of the location of pits and quarries – as otherwise it would not be implementing the clear language of the MPS acknowledging the limits of municipal authority. There was no evidence before the Board of any change in Municipal empowerment to regulate the location of pits and quarries. On the contrary, the planning provisions in Provincial statutes enabling municipal land use planning have remained stable and materially unchanged for decades even while those provisions migrated from the *Planning Act* of 1983, through the *Municipal Government Act* of 1998 to the *HRM Charter*. As argued in our Factum in CA 428571, that empowerment specifically authorizes the land use regulation of developments adjacent to a quarry, and it would be distorting the legislative intent to read it as anything but a recognition that quarrying activities within a quarry were not intended to be within the purview of Municipal land use regulation.
>
> 49. The evidence from the only experts on the subject of pits and quarry operations was that rock-crushing was fundamental to the activities of an aggregate quarry.[37] Both HRM and the Intervenors have acknowledged that crushing of blasted rock is a necessary step in the production of construction grade aggregates.[38] HRM's Development Officer acknowledged that the operation of a quarry is "extracting large rock and making it smaller."[39] While there was evidence referred to by the Board that it was theoretically possible to take blasted rock off-site, the evidence was that this was uneconomic, not environmentally sound, and contrary to transportation constraints.[40] All but one of the 16 quarries in Nova Scotia whose Environmental Assessments are publicly available crushed the rock on the quarry site, and the remaining one transported rock to a crusher located in an adjoining quarry under common ownership.[41] The Board acknowledged that rock crushing may be essential to the production of construction aggregate.
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> 50. It would be contrary to the purpose and intent of the planning documents to deem blasting activities and equipment to be non-fundamental to the activities of aggregate extraction on the basis that it is only in the past few centuries that quarrying has used blasting, and both the Development Officer and the Board quite rightly accepted that blasting was fundamental. It is likewise just as unreasonable and contrary to the intent and purpose of the LUB and MPS to consider rock crushing as non-fundamental to the extraction of aggregate. Both activities are ubiquitous methods of making large pieces of rock smaller in modern aggregate quarries.

51. Additionally, it must be concluded that the phrase "fundamental to the activities of mining or extraction" refers to things that are fundamental to the particular type of mining or quarrying operation that is proposed by a developer and regulated by the Province. Otherwise, for example, a municipality could effectively control the location of all types of strip mining because some mining is done underground without surface strip mining equipment, and conversely could regulate the location of underground mines because some underground mining equipment is not necessary in a trip mine: i.e almost no equipment is fundamental to all mining. The possible absence of rock crushing at a granite headstone quarry or at a marble quarry does not mean rock-crushing is not fundamental to aggregate quarries, and does not provide an excuse for impermissible municipal regulation of the location of aggregate quarries. The MPS concerned itself with aggregate quarrying, not granite or marble quarries, and the Board fundamentally misdirected herself[43] in considering those types of quarries as a measuring rod for what activities are fundamental to aggregate quarries.

52. The Board also misdirected herself[44] by considering the following routine provision in the LUB as offering any interpretive assistance in this case:

> 3.5 USES PERMITTED
> Uses permitted within any zone shall be determined as follows:
> (a) If a use is not listed as a use permitted within any zone, it shall be deemed to be prohibited in that zone.

53. The MPS acknowledges that pits and quarries are not subject to Municipal land use prohibition. That being the case, 3.5 (a) has no scope for operation in defining the extent of the provincially permitted pit and quarry use.

54. The Appellant's interpretation of s.2.29 and the other provisions of the LUB is the only one that fits with the MPS and provides a meaningful scope of operation: structures and storage areas that are fundamental to and situate within a particular pit and quarry are unregulated, but other facilities connected with quarrying must be located in the particular area described in P-135, and even then, are only permitted by development agreement. One cannot, for example, set up a crushing spread elsewhere that would take rock size down from 3" to ¾". That is Appellant's interpretation of what is accomplished. Appellant's interpretation takes this part of the bylaw to be regulating permanent facilities typically associated with quarries, and precluding them when they are not part and parcel and fundamental to a quarry, just as the newer bylaw provision found in s. 412 (b)-(g) regulates temporary use of rock crusher where there is a cut-and-fill on a development site.[45] The Board's interpretation is not reconcilable with the explicit recognition in the MPS of the absence of municipal empowerment over the location of pits and quarries, because if a facility is fundamental to an aggregate quarry, and yet is barred by the bylaw, then HRM has done the very thing it acknowledges in the MPS that it cannot do – regulating the location of a quarry.

[31] Yet, the Board, after viewing the evidence and applying its expertise in interpreting the strategy and the by-law, saw it differently. It accepted the development officer's narrower view as to what activities were "fundamental to…extraction". In doing so, the Board noted that the concept of extraction was different than that of a quarry. In other words, while the impugned activities might be fundamental to a quarry, they were not fundamental to the extraction process:

> [196] Given the number of references in the MPS to "pits and quarries" or "quarries" alone, the Board draws the inference that the use of "extractive facilities" was not intended to be a compendious description as the Appellant claims: it must be intended to mean something else. Council could have easily used the words "pits and quarries" in P-136. It could just as easily have used them in the LUB definition of "extractive facilities" when it refers to "…fundamental to the activities of extraction". This is why the Board finds that "extractive facilities" are something different from a pit or a quarry, although the Board agrees with Mr. Creaser that they may include a pit or quarry. It is also why the Board finds that what is "fundamental to the activities of extraction" as defined in the LUB is not what is "fundamental" to a construction aggregate quarry, or even to a quarry of any sort.
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> [197] Based on the evidence before it, the Board finds that what is essential to extraction is the activity of drilling and blasting to remove pieces of consolidated rock of varying sizes from the ground. Further, from the evidence of the Golder panel, the Board accepts that a scale and scale house or office is more likely than not to be essential, as is a stockpile of unprocessed aggregate because it may not be able to be removed all at once. However, the Board finds that the crushing equipment, related staging area, conveyor and screens and wash station are not fundamental or essential to extraction. They may possibly be essential to the processing of the extracted rock and production of construction aggregate, which the Board finds to be a different operation from extraction, but that is not what the LUB exception covers.
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> [198] The Board observes that while Ms. Ray's table of the components of the aggregate quarries over 4 ha demonstrates that many construction aggregate quarries have the components which Mr. Creaser found to be excluded, she provided no evidence of the relevant municipal by-laws or MPSs. The Board therefore has no evidence or knowledge of whether they refer to "extractive facilities" or any other term, or have provisions at all. In any event, as the Board has found that "extraction" is the activity which the LUB addresses and not "pits and quarries", the Board has given no weight to this evidence.

[32] This conclusion, in my view, falls within the range of acceptable outcomes. There is, therefore, no basis for us to interfere with the Board's decision.

The Supreme Court Matter

[33] At ¶ 14 above, I referred to our decision filed today, regarding the Supreme Court matter. There we declared the impugned by-law to be invalid. That outcome, therefore, renders this Board appeal academic. However, in case we are wrong in our resolution of the Supreme Court matter, it remains important to consider the merits of this appeal.

DISPOSITION

[34] For all these reasons I would dismiss the appeal, but without costs.

MacDonald, C.J.N.S.

Concurred in:

Beveridge, J.A.

Farrar, J.A.