NOVA SCOTIA COURT OF APPEAL

Citation: Oakland/Indian Point Residents Association v. Seaview Properties Ltd., 2010 NSCA 66

Date: 20100729
Docket: CA 319856
Registry: Halifax

Between:

Oakland/Indian Point Residents Association

Appellant

v.

Sea View Properties Limited and
Municipality of the District of Lunenburg

Respondents

Revised decision: The text of the original decision has been corrected according to the erratum dated August 4, 2010. The text of the erratum is appended to this decision.

Judges: MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.

Appeal Heard: May 12, 2010, in Halifax, Nova Scotia

Held: Appeal is dismissed with costs and disbursements per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.

Counsel: Peter M. Rogers, Q.C. and Sarah Mahaney, law student, for the appellant
J.C. Reddy and Tabitha J. Veinot, for the respondent, Municipality of the District of Lunenburg
Seaview Properties Limited, not participating

Reasons for judgment:

[1] The development officer for Municipality of the District of Lunenburg approved the subdivision of land owned by the respondent, Seaview Properties Limited. In his decision dated December 4, 2008 and reported as 2008 NSSC 367, Justice Kevin Coady dismissed the appellant's application for an order in the nature of *certiorari* quashing the final subdivision plan approval and seeking declaratory relief. His order issued on October 19, 2009. The appellant appeals. For the reasons which follow, I would dismiss the appeal.

Background

[2] The facts are set out in the decision under appeal. Briefly, in August 2006, Seaview applied for a development agreement which contemplated the construction of a condominium complex in the form of 26 single family residential units serviced by an on-site sewage treatment facility which would be owned by the condominium corporation. Such applications are reviewed by the Oakland Area Advisory Committee, which holds public meetings and makes recommendations to the Municipality. It raised several concerns, including ones pertaining to the proposed sewage system.

[3] In June 2007, Seaview applied to subdivide, as of right, its property into eight lots and a residual lot. Its application included the developer's certification that the subdivision was "for a purpose [of] vacant/future residential which will not require the installation of an on-site sewage disposal system." This subdivision application replaced the then ongoing development agreement application. Unlike that procedure, an as of right subdivision application does not require review and advice from planning staff, the Oakland Area Advisory Committee, and the Municipal Planning Advisory Committee, nor a decision by the municipal council.

[4] The development officer is responsible for the administration of the Subdivision By-Law of the Municipality of the District of Lunenburg, and the subdivision process. On July 25, 2007, in accordance with sewage disposal regulations, she sent Seaview's subdivision application to the Nova Scotia Department of Environment for review. The Department responded with a letter stating that the lots were not suitable for the construction and installation of an on-site sewage disposal system because they had not been assessed to demonstrate that

the minimum lot size requirements in those regulations had been met. Although Seaview's application had stated that such a system would not be required, it had certified that the subdivision was for a "vacant/future residential" purpose. This triggered the Department's response which sought additional information, namely an assessment.

[5] The development officer had advised Seaview earlier that any reference to "residential" would have to be removed from its application in order to get the property subdivided as non-development lots. Seaview immediately resubmitted its subdivision approval application to the Municipality, with the section which had certified the purpose of the subdivision as "vacant/future residential" replaced with "vacant woodlot".

[6] On September 10, 2007, the development officer approved Seaview's subdivision application. The approved subdivision plan bore a stamp stating that the lots have "been created for a purpose which does not require an on-site sewage disposal system and will not be eligible for a permit to install a system unless the requirements of the Department of the Environment are met."

[7] While its subdivision application was underway, Seaview started an application for development permits for the construction of residential units on its property. On the development permit application form, the "proposed use of land and new/existing structure" was described as "residential, single family". The plan which accompanied the application showed 26 residential units on six of the eight lots and a proposed sewage treatment system on a seventh lot. As it had during the course of its subdivision application, Seaview sought and received advice from the Municipality's development officer. She received Seaview's development permit application before she approved its subdivision application for eight vacant lots.

[8] The development officer later issued development permits for 26 units on Seaview's property. However, because they had expired before the hearing on the *certiorari* application, it was determined that the issues concerning those permits were moot.

[9] In its application for judicial review, the appellant Oakland/Indian Point Residents Association submitted that the granting of Seaview's subdivision application was supported by a false certificate from Seaview that was accepted by

the Municipality's development officer with full knowledge of its falsity, and that the granting was contrary to the provisions of the applicable statutes, regulations and by-laws. Seaview filed a demand of notice pursuant to *Rule 12.07* of the *Civil Procedure Rules (1972).* This allows a plaintiff to proceed as if the defendant had failed to file a defence or to appear on the hearing, except that the defendant is entitled to notice of all subsequent steps taken in the proceeding against him and final judgment may only be obtained on notice to him. Seaview did not participate in the hearing of the *certiorari* application.

[10] The judge determined that the proper standard of review of the development officer's decision was reasonableness. His decision read in part:

> [34] In relation to the conversion of the Development Agreement Application to an "as of right" application, I am unable to conclude that there was any bias or unfairness exhibited on the part of the Respondent Municipality. It was open to Seaview to proceed in the way that best met their objectives. The Development Agreement route required greater consultation and investment than the "as of right" route. The option to proceed with the "as of right" application was legally available to Seaview. The consequences of that choice limits the uses that can be made of these lots. In the event that Seaview decides to revisit the original plan, they will have to comply with the same requirements they avoided by the conversion. While there was some overlap between the two approaches, I am not satisfied that such amounts to unfairness, bias or fraud.
>
> [35] In relation to the "vacant-woodlot" certification, I come to the same conclusion. This certification was nothing more than the vehicle required to effect the conversion. I do not accept that the Municipality's assistance to the developer detracts from this conclusion.

The judge concluded that the development officer's decision to grant subdivision approval was reasonable, and dismissed the application.

Issues

[11] On its appeal to this court, the appellant set out several grounds of appeal:

> (a) Whether the Court erred in holding that it was reasonable and lawful for the Development Officer to grant a subdivision application predicated upon a "vacant woodlot" purpose for the subdivision when she had before her Development Permit Applications from the subdivision applicant unequivocally

> showing that the subdivided lands were to be used for "residential, single family" purposes;
>
> (b) Whether the Court erred in finding it to be reasonable for the Development Officer to grant subdivision approval without complying with the central sewer system requirements of the Subdivision By-law when she knew the developer's intention was to provide sewer services by means of a central sewer system;
>
> (c) Whether the Court erred in failing to draw an inference that the developer's certification of a "vacant woodlot" purpose for the subdivision was untrue, in attaching no legal consequence to the falsehood, and in permitting the developer to obtain approvals for which he would have been ineligible in the absence of the falsehood;
>
> (d) Whether the Court erred in not finding the Development Officer to have acted unfairly or in a biased manner in all the circumstances and further erred in applying a deferential standard of review to the decision of the Development Officer in the particular circumstances;
>
> (e) Whether the Court erred in refusing the [sic] grant the declaratory relief which was sought on the basis that it would require "reading into" the By-law;

Standard of Review

[12] The standards of review in this appeal are those applicable to civil matters. In *Maritime Travel Inc. v. Go Travel Direct.com Inc.*, 2009 NSCA 42, Saunders, J.A. for the Court stated:

> [14] The key decision on appellate standards of review in civil matters is the Supreme Court of Canada decision in **Housen v**. **Nikolaisen**, 2002 SCC 33, [2002] 2 S.C.R. 235. In that case, the majority reiterated that the appropriate standard of review for factual findings and inferences of fact is palpable and overriding error (¶19-23). The standard of review for errors of law is correctness (¶10). Questions of mixed fact and law are subject to two standards; where there is an extricable legal error, that is assessed on a standard of correctness; where a legal principle is not readily extricable, the standard of review is more deferential and should not be disturbed absent palpable and overriding error (see for example ¶ 36).

[13] The “palpable and overriding error” standard accords the trial judge’s findings of fact or inferences of fact a high degree of deference. An error is palpable if it is which is plainly seen or clear. It is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue: *Housen, supra* at ¶ 1 to 5.

Analysis

[14] According to the appellant, two things were lost when Seaview switched from a development agreement application to an application for subdivision as of right. The first was a procedural loss. The appellant says it and the public were deprived of certain opportunities to raise concerns regarding the proposed use of the land. The development agreement application process which Seaview initially filed with the Municipality does provide greater transparency and permits the public more avenues to raise and address concerns than the as of right subdivision application process. For example, residents could make their views known through the Oakland Area Advisory Committee consultations and also before the elected members of the municipal council.

[15] However, it is without question that, as the judge stated, in these particular circumstances Seaview could have gone either route. In the end, the developer applied for subdivision approval. I observe that the procedural loss accrued when the development agreement application was abandoned. It did not result from the change in certification for subdivision purposes.

[16] Subdivision approval simply results in the division of property into two or more parcels. Other approvals must still be obtained before the property can be developed. These include approval by entities such as the provincial Department of Transportation and, in regard to sewer services, the Department of the Environment.

[17] The second loss the appellant identifies pertains to the quality of the sewer system for the proposed development. This is the focus of its second ground of appeal. In its written submission, the appellant summarized its argument thus:

> 81. . . . the Learned Chambers Judge fundamentally erred in his legal analysis in paragraphs 34 and 35 of his Decision wherein he concluded that the vacant woodlot certification was simply a vehicle to effect a lawful conversion of a

> Development Agreement Application into an "as of right" application. He incorrectly concluded that Seaview would ultimately have to comply with the same requirements irrespective of the vacant woodlot certification. On the contrary, the vacant woodlot certification was a method of avoiding the requirement to have a central sewer system assessed by the Municipal Engineer and accepted for ownership by the Municipality as an integral part of the subdivision process.

[18] Part IX of the *Municipal Government Act*, S.N.S. 1998, c. 18, as amended ("*MGA*") deals with subdivision. Its s. 278(2) provides:

> 278 (2) An application for subdivision approval shall be refused where:
>
> …(c) the proposed lots would require an on site sewage disposal system and the proposed lots do not comply with requirements established pursuant to the *Environment Act* for on site sewage disposal systems, unless the owner has been granted an exemption from technical requirements by the Minister of the Environment, or a person designated by that Minister;
>
> … (f) the proposed subdivision does not meet the requirements of the Subdivision By-law and no variance is granted;

As I will explain later in this decision, the appellant argues that the sewer system for the subdivision Seaview proposed did not satisfy the requirements of the Subdivision By-Law of the Municipality of the District of Lunenburg.

[19] The subdivision process can be by stages with a tentative plan of subdivision filed before a final plan of subdivision. Section 283 of the *MGA* reads:

> 283 Where a tentative plan of subdivision is approved pursuant to the subdivision by-law, a lot or lots shown on the approved tentative plan shall be approved at the final plan of subdivision stage, if
>
> (a) the lots are substantially the same as shown on the tentative plan;
>
> (b) any conditions on the approval of the tentative plan have been met;
>
> (c) the services required by the subdivision by-law at the time of approval of the tentative plan have been constructed and any municipal service has been accepted

> by the municipality or acceptable security has been provided to the municipality to ensure the construction of the service; and
>
> (d) the complete application for final subdivision plan approval is received within two years of the date of the approval of the tentative plan. (Emphasis added)

[20] Part 9 of the Municipal Planning Strategy explains the rationale for municipal ownership of central sewer systems, namely, the reduction or elimination of maintenance problems for lot owners on privately owned systems, especially if their construction was inadequate in the first place. Council will agree to the construction of new central sewage systems only if they are constructed to a standard suitable for maintenance by the municipality. These systems are to be conveyed to it before subdivision approval is granted for the lots serviced by them. According to the appellant, because it would become the owner of the system and responsible for its ongoing maintenance, a municipality would likely require the central sewage systems to be built to higher construction standards than might be required by, for example, the Department of the Environment which would never acquire an ownership interest. As part of this process, the municipal engineer would inspect and assess the system to ensure that the municipal standards were met.

[21] The appellant submits that Seaview's plans for development of its property always included a central sewer system. It relies on the definition of a "central sewer system" in s. 4.1 of the Subdivision By-Law:

> a system of pipes and associated facilities for the collection and disposal of sewage from more than one lot.

It submits that the proposed subdivision did not meet the Subdivision By-law requirements in regard to central sewer systems and thus was contrary to s. 278 (2)(f) of the *MGA*. The requirement alleged to have been breached is s. 8.1 of the Subdivision By-law:

> Where lots are not to be serviced by on-site sewage disposal systems, the subdivider shall design, layout and construct all central sewer systems to service each proposed lot in conformance with the requirements contained in "Schedule G" and where possible connect these sewers with an existing municipal central sewer system.

[22] Schedule G sets out general specifications and design requirements for water and sewer systems. It also states that all sewer designs must comply with standards as set out in certain material prepared by the Department of the Environment. The appellant submits that the Schedule G requirements are more exacting than those of the Department of the Environment. According to it, when subdivision approval was granted before the requirements of s. 8.1 and Schedule G were met, s. 15.6 of the Subdivision By-law was also breached:

> Where a central water system, or a central sewer system is required by Sections 7.1 and 8.1, no approval of the Final Plan may be given until the applicant has obtained the required approvals of these systems from the appropriate provincial authority.

[23] With respect, I cannot accept the appellant's argument that Seaview had to comply with higher central sewer system requirements in Schedule G and that, in finding that Seaview would ultimately have to comply with the same sewer requirements, whether it followed the development agreement process or the subdivision followed by the development permit process, the judge erred.

[24] Prior to subdivision approval, Seaview had applied for a development permit for 26 residential units on its undivided property. The application form has boxes to check to indicate, among other things, whether a central sewer system or an on-site sewer was proposed. Seaview's August 22, 2007 application did not identify the type of sewer system that would be utilized. The submission from Terrain Group which accompanied the application stated that the sewage treatment system would be developed in accordance with the standards of the Department of Environment.

[25] The development permit application was superseded by Seaview's application for subdivision approval. As indicated earlier, the developer certified that the purpose of the subdivision was for vacant woodlot and no on-site system was required. After subdivision, its application for development permits indicate that Seaview would provide on-site sewer, not a central sewer system. The schematic which accompanied that application showed a proposed drip irrigation bed, proposed recirculating sand filter system, and proposed septic tanks. In her September 18, 2007 letters to the developer issuing the development permits, the development officer wrote:

> Prior to a building permit being issued confirmation of sewage disposal approvals from the Department of the Environment . . . will be required to be submitted with the building permit application. It is your responsibility to acquire these approvals prior to submission.

[26] In the result, it appears that whether Seaview had proceeded by way of development agreement or, as it did, by subdivision followed by development permits, its sewer system was intended to be one built to Department of Environment standards and approved by it. Whichever route was followed made no difference in regard to the substantive environmental and sewer requirements.

[27] Moreover, s. 8.1 of the Subdivision By-law clearly contemplates sewage disposal by either on-site systems or central sewer systems. The central sewer requirements that the appellant says would be lost, including those in Schedule G, are only effective where the lots "are not to be serviced by on-site sewage disposal systems". As I have explained, Seaview's development agreement application did not identify any type of sewer system and fell by the wayside. Its subdivision application was for vacant lots, and its development permit application proposed an on-site system, not a central sewage system. There is nothing in the record that demonstrates that a central sewer system as contrasted with an on-site system was ever contemplated.

[28] The judge was not asked to determine what type of sewer system Seaview intended to install. That not having been an issue, no finding was made. In setting out the facts, the judge stated that in its development agreement application, Seaview "proposed the construction of 26 single family residential units which were to be serviced by a central sewage treatment facility to be owned privately by a condominium corporation". There was no finding that the "central sewage treatment facility" to serve the residences on the unsubdivided lot was a "central sewer system" such as would trigger Schedule G. Furthermore, before Seaview's property was subdivided through the development agreement process, that facility would not satisfy the definition of a "central sewer system" in the Subdivision By-Law which stipulates the collection and disposal of sewage from more than one lot.

[29] The confusion arises from some ambiguity in the terminology relating to various types of sewer systems in different legislation. For example, Part XIV of the *MGA* which deals with sewers includes s. 338(c) which provides:

338 No person shall...

(c) discharge sewage anywhere except into a municipal sewer, private onsite sewage system or central sewage collection and treatment system.

While s. 3(a) defines a "private on-site sewage disposal system" as a "private system for sewage disposal serving one lot", the *MGA* does not define "central" sewage collection and treatment systems. Nor does the *Environment Act*, S.N.S. 1994-95, c. 1, as amended. The On-Site Regulations made pursuant to the *Environment Act* defines a number of systems:

2 In these regulations, the following definitions apply:

...

(b) "approved central sewage collection and treatment system" means a system for central sewage collection and treatment that has been approved in writing by the Minister, and includes an approved extension or modification of a system;

(c) "cluster system" means a system intended to service more than 1 building, structure or dwelling;

...

(s) "municipal system" means a sewage collection system owned and operated by or on behalf of a municipality;

(t) "on-site sewage disposal system" means a system for disposing of sewage that is not directly connected to a central sewage collection and treatment system or a municipal system and includes all of the following:

(i) a septic tank, a disposal field and inter-connecting pipes,

(ii) a holding tank,

(iii) a pit privy,

(iv) a vault privy,

> (v) a sewage disposal system, other than one described in subclauses (i) to (iv) or a wastewater treatment facility, that is approved or adopted by the Department as an on-site sewage disposal system and meets any specifications established by the Department;
>
> ...
>
> (ab) "sewage" means any human waste or wastewater emitted from a building, dwelling or structure and includes wastewater from ablutions, culinary activities or laundering;
>
> ...
>
> (ah) "system" means, except where the context requires otherwise, an on-site sewage disposal system, or any part of an on-site sewage disposal system;
>
> (aj) "wastewater treatment facility" means a wastewater treatment facility as defined in the *Water and Wastewater Facilities and Public Water Supplies Regulations* made under the Act;

The On-Site Regulations do not differentiate systems on the basis of connection to one or more lots, but rather by connection to an approved central sewage collection and treatment system or to a municipal system.

[30] In any event, as explained earlier, there was no evidence and no finding that any sewer system proposed by Seaview would be other than an on-site sewer system. That being the case, the central sewer requirements set out in Schedule G are not applicable.

[31] I add that it is not clear that the requirements in Schedule G are indeed different or more stringent than those imposed by the Department of the Environment. The record is silent in this regard. The appellant could only say that because the municipality would have ownership interests in a central sewer system, presumably it would require any system to be transferred to it built to a higher standard.

[32] I can identify no palpable and overriding error nor any error in law in the judge's statement that Seaview would have to comply with the same requirements

in regard to sewer services whether it proceeded by way of development agreement or subdivision approval and development permits, which would warrant appellate intervention. I would dismiss the second ground of appeal.

[33] I now turn to the first, third and fourth grounds of appeal. The first submits that the judge erred in holding that it was reasonable and lawful for the development officer to grant subdivision approval in these particular circumstances; the third, that the judge failed to draw certain inferences; and the fourth, that the judge erred in not finding the development officer to have acted unfairly or in a biased manner in all the circumstances. For each of these grounds, the circumstances relate to Seaview's certification that the purpose of its subdivision was vacant woodlot.

[34] It is helpful to here set out the standard of review the judge was to apply to the decision of the development officer. Unless it is demonstrated that the decision of a development officer is patently unreasonable, a judge is to defer to the decision: *Grove v. Chester (Municipality)*, 2003 NSCA 4 at ¶ 18. With *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, the two variants of reasonableness review, patent unreasonableness and reasonableness *simpliciter*, were collapsed into a single form of reasonableness review: see ¶ 45. In his decision, the judge correctly identified reasonableness as the standard of review for the issues before him.

[35] I begin by identifying the requirement that a developer certify the proposed use of the property sought to be subdivided. The Subdivision By-Law includes the following:

> 16.2.2 d) For a proposed lot 9000 square metres (96.878.4 square feet) or less in area or with a width of less than 76 metres (249.3 feet) that is being created for a purpose that will not require the construction of an on-site sewage disposal system, the certification section of the application in the form specified in Schedule "A" must be completed.

[36] Schedule "A" is the form of application for subdivision approval. It first requires particulars identifying the applicant and the land to be divided. Then, in a separate block, it reads:

CERTIFICATION - ON-SITE SYSTEM NOT REQUIRED (unserviced areas)

I certify that _____ (is, are) being subdivided for a purpose
(lots being created and/or remainder)
(_____)
(specify use)
which will not require the installation of an on-site sewage disposal system.

SIGNATURE _____

Below this certification and signature is a further certification that the applicant is the owner or acting with the owner's consent, and all persons with a legal interest in the land have co-signed the application. At the bottom of the form are signature lines for the owner/agent and any co-signees to complete. Thus, the subdivision application form requires the owner or its agent to sign twice: first, expressly in respect of the use of the property and that an on-site sewage disposal is not required and, second, in respect of the application information as a whole.

[37] While the word "certification" is not defined in the Subdivision By-Law, the separate certification and signature of the applicant within the application underscore the expectation that the purpose of the subdivision will be set out accurately and truthfully. That this is so is supported by dictionary definitions such as those in ***Black's Law Dictionary (8th ed., 2004)*** which defines a "certificate" as:

> "1. A document in which a fact is formally attested …",

"certification" as:

> "1. The act of attesting.
>
> 2. The state of having been attested.
>
> 3. An attested statement. …"

and the verb "attest" as:

> "1. To bear witness; testify.

> 2. To affirm to be true or genuine; to authenticate by signing as a witness."

[38] In its subdivision application, Seaview certified that the proposed use of its property was “vacant woodlot”. The development officer acknowledged that before subdivision approval was granted on September 10, 2007, she had received from Seaview a development permit application which identified the proposed use of the land as residential single family. On cross-examination, counsel for the appellant put it to her that she did not believe that the purpose for which Seaview was dividing the lots was for vacant woodland purposes. The development officer responded that she did not get to have an opinion when an application is submitted and could only approve and review what was before her and decide whether it complies with the regulations. Her evidence was that the purpose of the subdivision was to create lots and a developer then had the option to develop the land later.

[39] The appellant argues that the judge’s conclusion in ¶ 35 of his decision that the “certification” was nothing more than the vehicle required to effect the conversion” from a development agreement application to an as of right subdivision application ignores the point that the latter could not have proceeded without what it described as a fake certification as to its purpose. As indicated earlier, Seaview did not participate in the *certiorari* application before the judge so the record is silent as to its intentions with regard to its property.

[40] I am not persuaded that the judge made any error that would attract appellate intervention. Neither he, nor we on this appeal, were presented with any jurisprudence suggesting that a development officer can do other than deal with the information certified by a developer and placed before her or under what, if any, circumstances a development officer can speculate as to whether signed certifications are truthful. The judge correctly observed that deference must be paid to the decision of the development officer, unless it had been determined that it was unreasonable. The development officer had been employed in the development control field since 1990, was the development officer for the Municipality from 1998 to early 2008, and had been certified as a senior development officer, one of fewer than ten in this province, since 2007. In my view, the judge’s acceptance of her view does not amount to a palpable and overriding error.

[41] The third issue is whether the judge erred in failing to draw an inference that Seaview's "vacant woodlot" certification was untrue, in attaching no consequence to the falsehood and in permitting the developer to obtain approvals for which he would otherwise have been ineligible. Here the appellant argues that since Seaview filed a demand of notice and did not defend the allegations against it, an adverse inference should have been drawn that its certification was untrue.

[42] The judge did not fail to address or make a finding as to the falsity of the certification. In his decision, he reviewed the appellant's submission that how Seaview had proceeded amounted to fraud and that its actions were encouraged by the development officer. The judge at ¶ 34 of his decision was not satisfied that fraud had been established. Accordingly, the error alleged by the appellant does not exist. I would dismiss this ground of appeal.

[43] In its fourth ground of appeal, the appellant submits that the judge erred in not finding the development officer to have acted unfairly or in a biased manner in all the circumstances, and in applying a deferential standard of review to her decision in the particular circumstances. It says that the development officer encouraged Seaview to pursue development by way of subdivision approval and development permit when it should have proceeded by way of the development agreement process, thus disregarding the intent of the Oakland Secondary Planning Strategy which identified public disclosure through public hearing and opportunities for residents to participate in the planning process as important aspects of that process. According to the appellant, the development officer acted in a manner that did not allow public participation and gave extraordinary assistance to a developer's avoidance of by-law requirements. It says that she misconceived her role.

[44] In his decision, the judge summarized the appellant's arguments in this regard, the affidavit and oral evidence of the development officer, and the submissions of the respondent Municipality. He was unable to conclude that there was any bias or unfairness exhibited by the respondent. I can see no palpable and overriding error in this finding, and would dismiss this ground of appeal.

[45] I now turn to the ground of appeal pertaining to the four declarations restricted to the Seaview property which the appellant sought at the *certiorari* application. The appellant submits that the judge erred in refusing to grant the

declarations. The declarations sought are attached as an Appendix to this decision. The appellant says that they do nothing more than summarize the subordinate legislation applicable to the Seaview property, except to the extent that they authorize a development officer to reject a subdivision application which is supported by a certificate which he or she reasonably believes to be false.

[46] The judge was of the view that granting this declaratory relief "would amount to reading into the by-law" and held that the case law did not support such a ruling. He relied upon *Babiuk v. Calgary (City)* (1992), 95 D.L.R. (4th) 158 at ¶ 18:

> Declaratory relief is an extraordinary remedy which the court has the jurisdiction to entertain. C.J. Harvey of the Alberta Supreme Court in *Gilmore v. Callies* (1911), 19 W.L.R. 545, held that the power vested in the court to make a declaratory judgment or order is a discretionary one and is not to be lightly exercised and that it cannot be doubted that the courts are not inclined in the exercise of this discretion to give "declarations in the air."

The appellant submits that the judge erred in refusing to grant the declarations.

[47] The decision to grant a declaration is a discretionary one. Only if the exercise of that discretion is based on an error in principle or gives rise to a patent injustice, will it be interfered with on appeal: *Jesty v. Nova Scotia (Chief Firearms Officer)*, 2003 NSCA 135 at ¶ 6. In exercising its discretion, a court may also consider the availability of alternative remedies: *Allen v. Royal Canadian Legion*, 2007 NSCA 44 at ¶ 38.

[48] Here there is another way by which the appellant could potentially achieve the goals sought in the declaratory relief. It can pursue an amendment to the relevant by-law. Indeed, the record shows that this process was contemplated by the appellant during Seaview's applications. The existence of this alternate mechanism supports the judge's refusal to grant declaratory relief.

[49] I am not persuaded that the judge's refusal to grant declaratory relief in this case amounts to an error in principle or gives rise to a patent injustice. I would dismiss this ground of appeal.

Result

[50] I would dismiss the appeal with costs and disbursements in the total amount of $3,000 to be paid by the appellant to the respondent.

Oland J. A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.

NOVA SCOTIA COURT OF APPEAL

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Sea View Properties Limited and
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Respondents

Revised judgment: The first page (cover page) of the original judgment has been corrected according to this erratum dated **August 4, 2010**.

Judges: MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.

Appeal Heard: May 12, 2010, in Halifax, Nova Scotia

Held: Appeal is dismissed with costs and disbursements per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.

Counsel: Peter M. Rogers, Q.C. and Sarah Mahaney, law student, for the appellant
J.C. Reddy and Tabitha J. Veniot, for the respondent, Municipality of the District of Lunenburg
Seaview Properties Limited, not participating

Erratum:

The spelling of counsel's name, Tabitha J. Veniot is incorrect and should be replaced with Tabitha J. Veinot.

APPENDIX

(1) A declaration that for a lot of less than 9,000 square meters in area, intended by a proposed subdivider to be eligible for residential, commercial, institutional or industrial development in the present or future, a developer seeking to subdivide must either have approval of the lot for an on-site septic system from the Nova Scotia Department of Environment and Labour, or must have approval from the Municipality to connect with a municipal sewer system (which in turn has been approved by the Department), or approval for a specific alternate system which has been reviewed and assessed by the Nova Scotia Department of Environment and Labour for its suitability for the site;

(2) A declaration that where a certificate is given by a developer pursuant to provincial or municipal subdivision legislation certifying that the purpose of subdividing a lot of less than 9000 square meters in area is for a use that does not require an on-site septic system, the Development Officer shall not accept the certificate as compliant if she reasonably believes it to be false or if the certified usage is one involving present or future residential, commercial, institutional or industrial use unless the developer has the approvals described (in the previous declaration);

(3) A declaration that where a subdivision has been approved subject to a qualification that it has been approved for a purpose that does not require an on-site sewage disposal system, no development permit shall be issued for a residential, commercial, institutional or industrial or other sewage-generating use by the Development Officer until and unless the developer has the approvals described (in the first declaration);

(4) A declaration that where a subdivision is sought for a development using a single access driveway into the Oakland Road for a series of lots intended for residential use, and using a single sewage treatment system for such lots, that approval to subdivide must be withheld unless the Nova Scotia Department of Transportation and Public Works has approved a commercial grade driveway access into the Oakland Road, and unless the Nova Scotia Department of Environment and Labour has approved the central sewer system, with the driveway and sewage treatment facility both being shown on the Subdivision Plan for which the approval is sought.