NOVA SCOTIA COURT OF APPEAL
Citation: ***Royal Environmental Inc. v. Halifax (Regional Municipality)***, 2012 NSCA 62

Date: 20120608
Docket: CA 357310
Registry: Halifax

Between:

Royal Environmental Inc.

Appellant

v.

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

Respondents

Judges:	Oland, Fichaud and Bryson, JJ.A.
Appeal Heard:	May 28, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud, J.A.; Oland and Bryson, JJ.A., concurring
Counsel:	Robert G. Grant, Q.C., and Tanya L. Butler for the appellant Karen L. Brown, for the respondent Halifax Regional Municipality The respondents Attorney General of Nova Scotia and Utility and Review Board not appearing

Reasons for judgment:

[1] Royal Environmental applied to Halifax Regional Municipality for a development permit for Royal's property on Kearney Lake Road. The permit would allow the installation of concrete and metal pylons to enable the supply of lighting and heat to 52 parking stations on the property. This would facilitate the use of the property as a depot by Royal Environmental's fleet of garbage disposal vehicles. The municipal Development Officer refused the permit. Royal Environmental appealed to the Utility and Review Board. The Board determined that Royal Environmental's use of the property as a garbage truck depot was an illegal non-conforming use, and the permit would promote that illegal use. Accordingly, the Board held that the Development Officer's refusal of the permit did not conflict with the *Halifax Regional Municipality Charter* - the Board's appellate standard - and dismissed Royal Environmental's appeal.

[2] Royal Environmental appeals further to the Court of Appeal, and submits that the Board erred in law and its decision was unreasonable. The submissions focus on whether the garbage truck depot is a legal non-conforming use.

1. Background

[3] I will summarize the facts from the findings in the decision of the Utility and Review Board ("Board") [see *In the Matter of the Halifax Regional Municipality Charter and In the Matter of an Appeal by Royal Environmental Inc.*, 2011 NSUARB 141].

[4] The subject property at 209 Kearney Lake Road is near the southeastern end of Kearney Lake in Halifax Regional Municipality ("HRM"). The Board (para 25) said the property comprises 30 acres. Royal Environmental's factum says it is only 21 acres. Residences line the shore in that area. Across the Lake from the subject property's entrance is a public beach. For many decades, the primary uses of the southeastern end of Kearney Lake's shore have been residential and recreational.

[5] The subject property outcrops with bedrock, and its terrain is rocky. In the late 1960s the subject property was zoned G (General Use).

[6] At that time, the property was owned by Standard Paving Maritime Limited ("Standard Paving"). Some years later, Standard Paving was acquired by LaFarge

Canada Inc.. LaFarge initially employed the Standard Paving name, then gradually introduced its own corporate name. Nothing turns on the Standard Paving/LaFarge interface. As was done in the Board's reasons and by counsel's submissions, these reasons will refer to the historical uses of the property by "Standard Paving", not LaFarge, throughout the chronology.

[7] Standard Paving was in the business of road construction, and used the subject property for an asphalt plant and for parking, maintenance and dispatch of some 331 pieces of heavy equipment, including tractors, front end loaders, earth movers, rock crushers and portable asphalt plants. This equipment would be stored and maintained at the subject property, and moved, often on flatbed trucks, to job sites. In November 1967, Standard Paving obtained a building permit to erect an office, machine shop and plant, and by March 1968 had moved its head office to the site. Standard Paving had a permanent staff of 50, with peak summer employment of 300. The Board found:

> [39] From the evidence before the Board, the season for Standard's highway, road, and driveway construction work ran from early spring to late fall, or about eight months. On the limited evidence before it, the Board finds that the practices followed by Standard Paving in the late 1960's were likely similar to those followed by it in the 1980's (about which the Board has some direct evidence). It also finds that those practices continued in later years (although likely at a gradually lowering level of activity), until Standard Paving finally sold the subject property.

As I will discuss, Standard Paving (or LaFarge) sold the property in April 2009.

[8] From 1967 to the mid-1980s, another company, Atlantic Sand and Gravel Limited ("Atlantic Sand & Gravel") operated a quarry on the property. That use involved blasting and rock crushing. The crushed rock would be used in Standard Paving's asphalt, or as gravel by Standard Paving or other companies, and trucked off the site.

[9] Around 1970, the quarry use incited some civic controversy. Local residents complained to the City Council. In February 1970, an alderman read into the Council record a petition from 300 people protesting, among other things, the use of a stone crusher. On March 26, 1971, City Council held the first of a series of public hearings on the uses of the subject property. The Board's Decision (paras

54-61, 65-66) recounts particulars of the residents' complaints and the responses of counsel for Atlantic Sand & Gravel.

[10] In September 1970, City Council ordered a public hearing to deal specifically with the proposed amendment to the Zoning By-Law, so the area surrounding the subject property would be re-zoned from G (General) to R-2 (Low Density Residential). If this occurred, Standard Paving and Atlantic Sand & Gravel could continue their operations, but only as legal non-conforming uses.

[11] In April 1971, responding to the impetus for re-zoning, Standard Paving and Atlantic Sand & Gravel obtained from the City permits for their existing activities. These included a building permit to Standard Paving to "install and operate temporary portable asphalt plant, on terms and conditions in attached letter dated April 28, 1971". Also, Atlantic Sand & Gravel received permits to "operate quarry (on terms and conditions in attached letter dated April 28, 1971)", and to construct and "occupy screening plant, offices and to stockpile aggregate, on terms and conditions in attached letter dated April 28, 1971", and a blasting permit "on terms and conditions in attached letter dated April 28, 1971". The letter of April 28, 1971 said:

> This permit is issued under Ordinance No. 40 Respecting Quarrying and Excavating and is subject to the following terms and conditions:
>
> a) The provision of a bond in the amount of $10,000 conditioned upon compliance by the applicant, the owner of the property and the contractor engaged in the work (if any), with the provisions of Ordinance No. 40 and the terms and conditions included in this letter.
>
> b) The property owner shall immediately erect a fence around the perimeter of the quarry site.
>
> c) The property owner shall be responsible for the control of water-borne dust (mineral dust suspended in water) from the entire property. Such control shall include a definite drainage plan for the property at all stages of the quarrying operation and provision shall be made for settling basins or ponds in which the suspended material will separate from the water before such water is delivered into Kearney Lake.
>
> d) The property owner shall be responsible for ensuring that the site, after completion of the quarry operation, will conform to the grades shown on

> plan No. E6-238 by Mettam Wright and Associates, dated October 20, 1970 and landscaped as indicated in a colour photograph submitted by the owner dated September 1970. Such landscaping will include a screen of trees and shrubbery between Kearney Lake Road and the quarry site and planting of appropriate vines and similar plants which are likely to survive and multiply in the crevices and other lodging places on the sides and rear wall of the excavated area.
>
> e) The operator shall maintain mufflers on rock drills.
>
> f) The operator shall ensure that all material handling equipment including excavators, loaders and trucks have standard factory quality mufflers maintained in good condition.
>
> g) The quarry operator shall restrict operations to the hours 7 A.M. to 6 P.M. inclusive on weekdays. Operation is not permitted on Saturdays, Sundays and public holidays which fall on a Monday. A maximum of 50 days of overtime (to 9 P.M.) will be permitted in the period May 1st to October 31st provided that no more than five days of such overtime shall be permitted in each of the months of July and August. The Building Inspector may, on request permit additional overtime days or operations to 11 P.M. during July and August.

Plan No. E6-238, cited in the letter's para (d), shows the slopes to be achieved when quarrying operations ceased and adds the following:

> Greenery on rock cliff face to be climbing honeysuckle, big leaf winter creeper, and various types of ivy. Level landscaped areas to comprise up to 3'-0" of soil, and peat moss, etc., for planting of the following trees: LINDEN, MAPLE, & ASH.

[12] On May 27, 1971, a plan for the re-zoning was produced, followed by public hearings before Council on June 23 and December 8, 1971. On December 16, 1971, the City Council unanimously approved the re-zoning of the subject property from G to R-2. Thereafter, Standard Paving and Atlantic Sand & Gravel could continue their existing operations as legal non-conforming uses.

[13] In 1975 a building permit authorized alterations to Standard Paving's office space. In 1981 there was a permit to construct a fence parallel to Kearney Lake Road. In 1990 there was a permit to replace underground storage tanks.

[14] By 1985, the blasting and quarrying activities on the subject property had ceased. Until 2009, Standard Paving continued to operate its road construction business from the subject property.

[15] For about a decade after 1999, Standard Paving contracted with several other companies to use the subject property. These included Antigonish Construction Limited (which brought in lumber, storage trailers and pipe), Brookfield Concrete Products Limited (a manufacturer of pre-cast septic tanks), Elmsdale Landscaping (which brought in large quantities of topsoil) and Miller Construction (which was in the business of applying crusher dust to streets). Standard Paving did not seek approval from HRM for any of these activities. The Board made no finding, and there is no issue in the submissions whether or not these were legal non-conforming uses.

[16] In 2006, HRM re-zoned the subject property from R-2 to a US (Urban Settlement) zone. The US zone permits only single unit dwellings and passive recreational uses, public parks and playgrounds.

[17] In April 2009, LaFarge Canada Inc., Standard Paving's successor, agreed to sell the subject property. The Board (para 101) said that the purchaser's corporate identity was "not, in the view of the Board, entirely clear on the evidence before it". But the Board found that the purchaser was "part of a family of intimately-connected companies" which included the appellant Royal Environmental Inc. ("Royal Environmental"). Others in the corporate family included Highland Asphalt, The Municipal Group, Royal Flush, Green Waste, Enviro Waste and Dexter Construction Co. Ltd. I will refer to these companies collectively as the "Municipal Group".

[18] On April 3, 2009, the purchaser's counsel asked HRM for information respecting "a building permit and occupancy permit" and zoning for the subject property. On April 14, 2009, HRM replied that the "authorized (legal) use" was:

> Building Permit to create an office, machine shop and plant, Nov 22/67; Building Permit # 61321 to blast for quarry operations, Mar 17/82; Development Permit # 98433 Operation of Quarry April 22/85

[19] By the end of April 2009, the LaFarge signs on the property were replaced by Highland Asphalt signs. Highland Asphalt was part of the Municipal Group, as

were several companies operating in the garbage business. By September 2009, concerns were expressed to HRM staff about a change from the non-conforming quarry and asphalt plant uses to a garbage related use on the subject property.

[20] On September 29, 2009, HRM's Development Officer, Mr. Andrew Faulkner, spoke with Mr. Gary Rudolph, the General Manager of Highland Asphalt. In May 2010, Mr. Rudolph became Director of Aggregates for the Municipal Group. Mr. Faulkner's email account of the conversation, accepted as accurate by Mr. Rudolph's testimony to the Board, said:

> ... there are no plans to do anything with the property until, perhaps, next Fall. He understands that there is a non-conforming use on the lands and that any change of use (except to one permitted in the Urban Settlement Zone) cannot be approved.

[21] In April or May of 2010, Highland Asphalt's operations on the subject property ceased. Near the end of May 2010, Royal Environmental and associated companies in the garbage business began moving in and commenced operations from the subject property. On May 25, 2010, residents reported seeing garbage trucks on the subject property. On June 1, 2010, trucks belonging to Enviro Waste were being serviced in the service bays. By July 2010, large garbage trucks regularly were operating from the subject property. Initially these trucks bore markings of several companies in the Municipal Group. Eventually the trucks bore the standardized Royal Environmental logo.

[22] No permission for any change of use had been sought from HRM. Royal Environmental's counsel acknowledges this, but says that none was required.

[23] The Board summarized Royal Environmental's use of the subject property:

> [347] ... Royal's activities on the subject property include the parking and dispatch of its large diesel powered garbage trucks; storage of steel garbage containers and other equipment; servicing of its trucks, garbage containers and other equipment; sales of equipment, and other support functions.

[24] The Board's findings on the current use also include:

> [123] On the evidence before the Board, it appears that Royal Environmental is currently basing 40 large garbage trucks at the subject property, all of which

> depart from, and return to, the subject property each workday. Roger Hamshaw [who lives a few hundred yards from the subject property] describes the added truck traffic as “phenomenal”.
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> ...
>
> [127] While there clearly remained as of the date of the Board hearing concern by at least one resident with respect to pollution of the lake, including, runoff, there is, however, no evidence before the Board establishing that the Department of Environment concluded that Royal Environmental activities breach any of its requirements.
>
> [128] Further, it is the Board’s view that, whatever problems (legal and otherwise) there may be with Royal Environmental’s present use of the property, the presence of garbage (paradoxically, given the company’s business) is not one of them.
>
> [129] It appears that some (but by no means all) of the initial anxiety experienced by residents with the arrival of Royal Environmental related to a fear that garbage would be brought to the subject property, and that Royal Environmental’s large garbage trucks, and steel garbage containers, would have their interiors cleaned of garbage residue on the subject property.
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> [130] The Appellant submits, however, and the Board accepts, that Royal Environmental does not clean dirty garbage containers on the property. These are cleaned elsewhere before being returned to the property. Further, large roll-off compactors of the type used by, for example, grocery stores, to deal with, in part, wet garbage, are taken to a third party for cleaning prior to being returned to the customer. Further, the Appellant asserts, and the Board accepts, on the evidence before it, that the Appellant’s business on the subject property does not include the storage and washing of portable toilets.

[25] HRM”s Community Standards Officer for by-laws enforcement, Mr. Keith Cahoon, visited the subject property on several occasions, including December 9, 2010 to take photographs.

[26] On December 16, 2010, the Municipal Group submitted to HRM a Permit Application - Renovate Commercial Building. The application shows Royal Environmental as the property owner, the Municipal Group of Companies as contractor and Dexter Construction Co. Ltd. as the applicant. The application related to a project for the installation of concrete and metal pylons to enable the

supply of lighting and heat to 52 parking stations on the subject property ("pylon project"). Then 52 diesel garbage trucks could be parked overnight, kept warm and prepared for early morning departure. The project would occupy about two acres plus additional space for the associated road work. There would be a new electrical room in the existing facility, with a dedicated transformer, and a secondary electrical room to deliver power to the pylons. There would be 26 pylons, thirteen feet high, comprising a three foot elevated concrete base and a ten foot metal pole, with light fixtures affixed to the pole. Each apparatus could accommodate two garbage trucks.

[27] On January 24, 2011, HRM's Development Officer, Mr. Faulkner, responded with a letter that refused the permit. The letter said:

> The above noted application proposes "replacement of portable safety lighting and block heaters" for the purpose of parking and dispatch of Royal Environmental's waste management vehicle fleet.
>
> ...
>
> The property was re-zoned in September of 1971 to a low density residential zone. The area of land legally occupied by the quarry is clearly identifiable in air-photographs from 1969 to 1982. The quarry ceased operation approximately 25 years ago and all new uses must be those permitted in the US Zone. The current proposal of parking, vehicle dispatch and storage for a fleet of waste management vehicles, is not permitted in the US Zone and therefore not permitted in the area of land once occupied by the quarry.
>
> The above noted application must be ***refused*** given it does not meet the requirements of section 255 Non-conforming use of land of the Halifax Regional Municipality Charter. [emphasis and underlining in original letter]

2. Royal's Appeal to the Board

[28] On February 8, 2011, Royal Environmental appealed the Development Officer's decision to the Nova Scotia Utility and Review Board under the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (*HRM Charter*). Sections 262(3)(a), 265(2) and 267(2) of the *HRM Charter* permit an appeal to the Board on the ground that the Development Officer's refusal of the permit "does not comply with the land-use by-law" or "conflicts with the provisions of the land-use by-law".

[29] As noted by the Board (para 165) HRM's *Land Use By-Law* "links" its definition of "non-conforming use" to the definition in the *HRM Charter*. Section 2 of the *Land Use By-Law* says:

> "**Nonconforming Use**" shall have the same meaning as contained in the Municipal Government Act as may be amended from time to time.

The *HRM Charter*, S.N.S. 2008, c. 39 replaced the *Municipal Government Act*, S.N.S. 1998, c. 18, as the governing legislation for HRM. Section 390 of the *HRM Charter* says:

> A reference in an enactment to the Municipal Government Act, or part thereof, is, to the extent that it relates to the Municipality, to be read as including a reference to the provisions of this Act relating to the same subject-matter.

So the reference to the *Municipal Government Act* in s. 2 of the *Land Use By-Law* should be read as a reference to the *HRM Charter*.

[30] Section 209(j) of the *HRM Charter* defines "non-conforming use":

> "non-conforming use of land" means a use of land that is not permitted in the zone

Section 255 of the *HRM Charter* adds:

> A non-conforming use of land may not be
>
> (a) extended beyond the limits that the use legally occupies;

> (b) changed to any other use except a use permitted in the zone; or
>
> (c) recommenced, if discontinued for a continuous period of six months.

[31] From those provisions, the issue before the Board on Royal Environmental's appeal was whether the Development Officer's refusal of the permit "conflicts", or "does not comply" with the principles governing non-conforming uses in the *HRM Charter*, that are incorporated by HRM's *Land Use By-Law*.

[32] Before the Board, and again in this Court, the parties agreed that the Board had jurisdiction to hear the appeal.

[33] On June 2-3, 22, 30, and July 7, 2011, the Board heard the testimony of two witnesses for Royal Environmental and six witnesses for HRM, admitted many exhibits and received oral and written submissions by counsel for Royal Environmental and HRM. The Board issued a decision on September 13, 2011 (2011 NSUARB 141).

[34] The Board held that the Development Officer's refusal of the permit for the pylon project did not conflict with the *HRM Charter*. So the Board dismissed Royal Environmental's appeal. The Board gave two alternative reasons. Later I will review the Board's reasons in some detail. The Board summarized its conclusions:

> [352] The Board's dismissal of the appeal is based on two fundamental grounds.
>
> [353] First ... the Board accepts Counsel for HRM's argument that the purpose to which the Appellant is putting the subject property simply falls outside any fair definition of the legal pre-existing non-conforming uses of the property. While these uses are described in detail in the decision, they may be broadly described as quarrying (which ceased by 1985) and road construction. The Board considers that a garbage truck depot has nothing to do with either of these uses. For greater certainty, it is the Board's opinion that a garbage truck depot has nothing whatsoever to do with road construction, which was the last of the pre-existing legal non-conforming uses being carried on the subject property.
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> [354] As a second ground (in the alternative, should the Board be considered to have erred in its first finding), the Board also finds ... that the Appellant Royal's activities (which, again, the Board finds to be extremely remote from the

> previously existing legal non-conforming uses) amount to a significant intensification of use of the subject property, with resulting serious adverse neighbourhood effects. To use the language of *Saint-Romuald* [*Saint-Romuald (City) v. Olivier*, [2001] 2 S.C.R. 898], Royal's use of the property can be characterized as a difference in degree which creates a "difference in kind".
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> [355] This intensification by Royal includes a complete change in the type of vehicles and other equipment used by Royal, as opposed to those used in road construction.
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> [356] Much more importantly (in the view of the Board), the intensification also includes very significant changes in how Royal uses vehicles and equipment. These include: Royal Environmental's much longer working hours; Royal Environmental's continuous year-round operations, unaffected by the seasons; and Royal Environmental's much greater magnitude of daily utilization.
>
> [357] On the basis of either the first or the second ground, Royal's operation of a garbage truck depot is (in the judgment of the Board) not a legal non-conforming use of the subject property. Since the pylon project is in support of Royal's operations on the subject property, and since the Board has found those operations to be illegal, it follows that the Development Officer's decision to refuse a permit for the project does not conflict with the provisions of the *Charter*.

3. Issues in the Court of Appeal

[35] Royal Environmental appealed to the Court of Appeal under s. 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c. 11.

[36] Royal Environmental's factum says that the Board (i) "erred in law by failing to conclude that the proposed work is consistent with the legal non-conforming use of the subject property" and (ii) "erred in law in substituting its own views for those of the Development Officer concerning the characterization of the current and pre-existing use of the subject property".

[37] I will consider both issues together.

4. Standard of Review

[38] I adopt the approach stated in *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38, paras 21-27, which reviewed the authorities from the Supreme Court of Canada on the general approach, and of this Court for appeals from planning decisions of the Utility and Review Board.

[39] Before considering the standard of review, the Court isolates the threshold grounds of appeal that are permitted by the statute: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para 36. Sections 26 and 30(1) of the *Utility and Review Board Act* state that the Board's findings of fact made within its jurisdiction are "binding and conclusive", and that an appeal lies to the Court of Appeal only on questions of jurisdiction or law. Royal Environmental accepts that the Board had jurisdiction and confines its stated grounds of appeal to whether the Board erred in law.

[40] The Court applies correctness to the Board's selection of the Board's standard of review.

[41] What is the Board's standard of review? As stated in *Halifax v. Anglican Diocesan Centre*, para 23:

> The Board, itself an administrative tribunal under a statutory regime, does not immerse itself in *Dunsmuir*'s standard of review analysis that governs a court's judicial review. The Board should just do what the statute tells it to do.

[42] As noted earlier, ss. 262(3)(a), 265(2) and 267(2) of the *HRM Charter* permit an appeal to the Board on the ground that the Development Officer's refusal of the permit "does not comply with the land-use by-law" or "conflicts with the provisions of the land-use by-law". The Board's task on this appeal was to decide whether the Development Officer's refusal of the permit for Royal Environmental's pylon project conflicted (or did not comply) with HRM's *Land Use By-Law*.

[43] The Board, in this case (para 357, above para 34), decided that the *Land Use By-Law*'s definition of non-conforming use adopted the definition in the *HRM*

Charter, and that the Development Officer's refusal of the permit "does not conflict" with that definition. The Board correctly identified its standard of review.

[44] The remaining issue in this Court is whether the Board committed an appealable error of law in its analysis that led to the Board's dismissal of the appeal from the Development Officer's refusal.

[45] The Board said, and both parties accept that the legal principles governing non-conforming uses are stated by Justice Binnie for the majority in *Saint-Romuald (City) v. Olivier*, [2001] 2 S.C.R. 898 (quoted below para 49). If the content of those legal principles were in issue here, then the Board's interpretation of a ruling by the Supreme Court of Canada might be a general issue of law lying outside the Board's specialized expertise, and subject to correctness review: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paras 51 and 60, per Bastarache and LeBel, JJ. for the plurality. But the Board did not re-interpret Justice Binnie's formulation. The Board just applied that formulation to the circumstances of this case. The components of the Board's analysis, that are attacked on this appeal, either are factual or involve issues "where the legal and factual issues are intertwined ... and cannot be readily separated", attracting a reasonableness standard of review: *Dunsmuir*, paras 51 and 53.

[46] An extensive standard of review analysis is unnecessary where existing jurisprudence has already determined the degree of deference to be accorded by the reviewing court to the tribunal on the issue: *Dunsmuir*, paras 57 and 62. In *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78, paras 45-56, Justice Hamilton determined that reasonableness governed this Court's assessment of whether the Board committed an appealable error of law in the Board's analysis for an appeal to the Board from a development officer's refusal. In *Halifax v. Anglican Diocesan Centre*, para 26, this Court again adopted reasonableness for that issue. Royal Environmental and HRM agree, as do I, that the Court's standard of review to the Board's analysis is reasonableness.

[47] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, Justice Abella for the Court recently elaborated on the meaning of "reasonableness":

> [11] It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

> 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. [Justice Abella's emphasis]
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> . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . [paras 47-48.]
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> ...
>
> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result [citation omitted]. It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own

> reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion [citation omitted]. In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[48] In determining whether the tribunal's conclusion occupies the range of acceptable outcomes:

> The court then assesses the outcome's acceptability through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime". This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. The reviewing court does not ask whether the tribunal's conclusion is right or preferred. Rather the court tracks the tribunal's reasoning path, and asks whether the tribunal's conclusion is one of what may be several acceptable outcomes.

Archibald v. Nova Scotia (Utility and Review Board), 2010 NSCA 27, para 22, and authorities there cited. See also *Halifax v. Anglican Diocesan Centre*, para 27.

5. Analysis

[49] In *Saint-Romuald (City) v. Olivier*, [2001] 2 S.C.R. 898, Justice Binnie for the majority defined the principles for the identification of legal non-conforming uses:

39 I therefore approach the issue of limitations on the respondents' acquired right as follows:

1. It is firstly necessary to characterize the purpose of the pre-existing use (*Central Jewish Institute, supra*). The purpose for which the premises were used (i.e., "the use") is a function of the activities actually carried on at the site prior to the new by-law restrictions. [Justice Binnie's underlining]

2. Where the current use is merely an intensification of the pre-existing activity, it will rarely be open to objection. However, where the intensification is such as to go beyond a matter of degree and constitutes, in terms of community impact, a difference in kind (as in the hypothetical case of the pig farm discussed above), the protection may be lost.

3. To the extent a landowner expands its activities beyond those it engaged in before (as where a custom picture-framing shop attempted to add a landscaping business in *Nepean (City) v. D'Angelo* (1998), 49 M.P.L.R. (2d) 243 (Ont. Ct. (Gen. Div.)), the added activities may be held to be too remote from the earlier activities to be protected under the non-conforming use. In such a case, the added activities are simply outside any fair definition of the pre-existing use and it is unnecessary to evaluate "neighbourhood effects".

4. To the extent activities are added, altered or modified *within* the scope of the original purpose (i.e., activities that are ancillary to, or closely related to, the pre-existing activities), the Court has to balance the landowner's interest against the community interest, taking into account the nature of the pre-existing use (e.g., the degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right) and the new or aggravated neighbourhood effects (e.g., the addition of a rock crusher in a residential neighbourhood is likely to be more disruptive than the addition of a fax machine). The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right. This approach does not rob the landowner of an entitlement. By definition, the limitation applies only to added, altered or modified activities.

5. Neighbourhood effects, unless obvious, should not be assumed but should be established by evidence if they are to be relied upon.

> 6. The resulting characterization of the acquired right (or legal non-conforming use) should not be so general as to liberate the owner from the constraints of what he actually did, and not be so narrow as to rob him of some flexibility in the reasonable evolution of prior activities. The degree of this flexibility may vary with the type of use. Here, for example, the pre-existing use is a nightclub business which in its nature requires renewal and change. That change, within reasonable limits, should be accommodated.
>
> 7. While the definition of the acquired right will always have an element of subjective judgment, the criteria mentioned above constitute an attempt to ground the Court's decision in the objective facts. The outcome of the characterization analysis should not turn on personal value judgments, such as whether nude dancing is more or less deplorable than cowboy singing. I am unable, with respect, to accept as legally relevant my colleague's observation that "[w]hereas erotic entertainment seeks to sexually arouse the audience by the stripping and suggestive behaviour engaged in by the performers, country and western shows seek to entertain by providing a showcase for the special talents of singers, musicians and dancers" (para. 76). Serious music is also commonly thought to arouse the passions profoundly, but in terms of acquired rights, music stores should not be differentiated by whether they offer Muzak or Mozart.

These principles govern whether there has been a change of use within s. 255(b) of the *HRM Charter* (above para 30).

[50] The Board gave two alternative reasons, each grounded in *Saint-Romuald*'s principles, for dismissing Royal Environmental's appeal: (1) change of purpose or use, to something outside any fair definition of the prior use (# 3 from *Saint-Romuald*), and (2) intensification of use - a difference in kind and not just degree - causing serious neighbourhood impact (#2 and #4 from *Saint-Romuald*). To overturn the Board's Decision in this Court, Royal Environmental must show that the Board's conclusions were unreasonable, under the Court's standard of review, for both analyses.

The Board's First Reason: Change of Use

[51] I will start with the Board's first conclusion - that there was a change of purpose or use.

[52] Royal Environmental submits that its dispatch of garbage collection vehicles is a permissible continuation of Standard Paving's former dispatch of road construction equipment. The submission is not premised on Atlantic Sand & Gravel's former quarry activity. Royal Environmental's factum says:

> 63. ... the uses in 1971 were office use and equipment and vehicle maintenance inside the building; equipment and vehicle parking, maintenance, cleaning, and storage outside the building; quarry; and asphalt plant.
>
> ...
>
> 65. ... the current uses of the Property are still office use and equipment and vehicle maintenance inside the building, and equipment and vehicle parking, maintenance, cleaning, and storage outside the building.
>
> ...
>
> 80. ... Rather than characterizing the use in terms of the activities actually taking place on the Property - i.e., storage of trucks and heavy equipment and containers, along with parking, maintenance, and dispatch of trucks and heavy equipment - the Board focused on the activities undertaken by the trucks and heavy equipment once it left the Property. Thus, the Board characterized the use in terms of what was in the trucks and equipment leaving the Property, whether it was empty recycling and waste containers or asphalt, gravel, and other pieces of heavy equipment.
>
> ...
>
> 81. ... Whether the vehicles being parked and dispatched carry recycling and waste containers or asphalt, and whether the garage bays are used for the repair of Royal Environmental trucks or Standard Paving equipment, the purpose or type of use is the same: parking, dispatch, and maintenance of heavy equipment. Thus parking, dispatch, and maintenance of heavy equipment is a use in its own right, not a use that is incidental to a waste haulage facility or the headquarters of a road building company.

[53] The Board made specific findings on the uses of the subject property in 1971, when the property was re-zoned to R-2:

> [39] From the evidence before the Board, the season for Standard's highway, road, and driveway construction work ran from early spring to late fall, or about eight months. ...

[40] The equipment that Standard moved onto the subject property in 1968 included tractors, front-end loaders, earth movers, asphalt plants and rock crushers. Asphalt commonly has an aggregate (i.e., gravel, or other form of crushed rock) component.

[41] According to the evidence, portable asphalt plants were sometimes delivered to remote job sites, for use at those sites.

[42] Most or all of the other equipment (while stored, and repaired as necessary, at the Kearney Lake Road site) was moved to and from jobsites elsewhere, some on flatbed trucks.

[43] In rare instances, such as work on crowded paving sites in downtown Halifax, equipment might be moved from the subject property in the morning and returned in the evening. This, however, was unusual; the main business carried out by Standard Paving, not just in 1968, but in the decades to follow, involved its moving equipment to a site - for example, for the construction of a piece of highway or roadway - and leaving the equipment at that site until the Company had completed its work.

...

[82] Counsel for the Appellant in the present proceeding emphasizes that the 1971 Jefferson letter (addressed to both Atlantic Sand and Gravel and Standard Paving) [the letter of April 28, 1971 - see above, para 11, item (g)] states the basic time limits of 7:00 a.m. to 6:00 p.m. as being applicable to “the quarry operator,” i.e., Atlantic Sand and Gravel only, without mentioning Standard Paving. In response, Counsel for HRM argues that Standard Paving was nonetheless subject to the time restriction.

[83] Whether Standard Paving was not subject to the time restriction (as Counsel for Royal Environmental says) or was (as Counsel for HRM argues), Standard seems to have nonetheless generally adhered to hours of work which were similar to those specified in the 1971 Jefferson letter.

[84] Darvill Hamshaw’s evidence was that both Atlantic Sand and Gravel and Standard Paving’s operations commenced around 7:00 a.m. and finished up by 6:00 p.m.

[85] Roger Hamshaw’s evidence was similar; ...

> [86] Gary Rudolph, who joined Standard Paving in 1985, says that employees would "start arriving" as early as 6:00 a.m., but Standard Paving's expectation was that employees would be "out the gate by" 7:00 a.m.
>
> ...
>
> [95] In the years after 1985, through to 2009, Standard Paving continued to operate its road construction business on the subject property. The Board concludes there was perhaps somewhat less business being carried on at the subject property by the Company in later years than in earlier ones.
>
> ...
>
> [98] The Board concludes from the evidence of Mr. Rudolph, as well as other evidence before the Board, that at least some of the vehicles operated by Standard Paving in the winter had block heaters. These were connected by extension cords to electrical power to assist in winter cold-morning starts. Standard Paving appears to have operated only a small portion of its inventory of vehicles in the winter, and of those, generally only smaller ones: the bulk of its heavier road building equipment inventory stood largely unused in the winter, as it was used for road construction, which occurred over a maximum period of eight months, from early spring to late fall.

[54] I will digress briefly on the issue of area extension, which was the topic of some argument before the Board and in this Court.

[55] The Board [paras 213-16] referred to the history of Nova Scotia's legislation on the area extension of a non-conforming use. The current s. 255(a) of the *HRM Charter* [above para 30] was enacted in 2008 and was preceded by the similarly worded s. 240(a) of the *Municipal Government Act*, enacted in 1998. Section 240(a) in turn was preceded by the similarly worded s. 92(2) of the former *Planning Act*, [S.N.S. 1987, c. 51, s. 18, amending S.N.S. 1983, c. 9, s. 85]. Section 92(2) was enacted in 1987. All these provisions stated that a non-conforming use could not be extended beyond the area that the use initially occupies. Before 1987, there was no legislative restriction on area extension of a legal non-conforming use.

[56] The Board explained the relevance of area extension to this case:

> [45] ... The Board concludes from the limited evidence before it in this proceeding that, in 1971 (when the status of the subject property became that of a

> legal non-conforming use), Standard Paving's operations were still relatively close to the front of the property, with maintenance being done in the shop, and immediately behind it.
>
> [46] At the same time, Atlantic Sand and Gravel was gradually developing the property as a quarry, working from the front (near the Kearney Lake Road) towards the rear.
>
> ...
>
> [47] The Board concludes from the evidence before it that, as Atlantic Sand and Gravel moved rearwards on the quarry site, Standard Paving expanded the footprint of the area that it was using on the subject property.
>
> ...
>
> [92] By the mid-1980's Standard Paving was parking equipment not only at the front of the subject property, but towards the rear as well. The Board further concludes, on the balance of probabilities, that by the mid-1980's Standard Paving was doing some maintenance work on equipment in parts of the subject property which were well away from the front portion where the Standard Paving office and maintenance shed was located.
>
> ...
>
> [223] Accordingly, the Board finds that, between 1971 and 1987, neither the applicable legislation nor the common law prevented the extension of a legal non-conforming use of land beyond the limits which it occupied at the time of the rezoning.
>
> [224] For the purposes of this decision, the Board finds that Standard Paving's use of the subject property (for such things as parking and occasional maintenance of heavy equipment) had, by 1987, extended sufficiently far back in the subject property that it included all of the area upon which the Appellant Royal Environmental proposes to build its pylon project.

[57] Accordingly, the Board characterized the issue as a comparison of Royal Environmental's purpose or type of current use, regardless of the usage area on the subject property, to the purpose or type of use in 1971:

> [227] Nevertheless, the Board finds that - while the *purpose* or *type* of the uses were fixed as of 1971 - the *extent* of the subject property over which these uses could be exercised could, and did, increase between 1971 and 1987.

[58] The Board concluded that Royal Environmental's current use lay outside any fair description of the property's 1971 purpose and use, under Justice Binnie's principles 1 and 3 in *Saint-Romuald*. The Board said:

> [257] In the view of the Board, having considered all the evidence, the purpose or type of non-conforming use in existence on the subject property in 1971 was quarrying (Atlantic Sand and Gravel), together with a highway, road, and driveway construction business, including an asphalt plant (Standard Paving).
>
> ...
>
> [262] ... The Board sees no connection whatsoever between a road construction business and a garbage truck depot.

[59] Royal Environmental made the same submission to the Board as it made to this Court (quotations from Royal's factum, above para 52) - that in 1971 and now the property was used for the maintenance and dispatch of heavy equipment (see Board's Decision, paras 263, 266).

[60] The Board rejected Royal's submission, for the following reasons:

> [268] At times, the arguments put forward on behalf of the Appellant seemed to the Board to describe the subject property in terms very nearly suggesting that the quarry itself was almost an incidental, or ancillary, use.
>
> [269] For example, Counsel for the Appellant observed at one point in their written brief:
>
> > "Part of the [subject] property was also used as a quarry..."
>
> [270] With respect, the subject property was not merely "also used" as a quarry - it *was* a quarry. [Board's italics]
>
> [271] Further, not just "part" of it was so used - all of it was. Atlantic Sand and Gravel quarried the subject property all the way from its front, adjoining the Kearney Lake Road, to its rear boundary.

> [272] Moreover, the purpose or type of use to which it was put by both Atlantic Sand and Gravel and Standard Paving related to its status as a quarry. Aggregate produced by Atlantic Sand and Gravel was used by Standard Paving in its asphalt plants on the subject property, and elsewhere, for its road-construction work.
>
> [273] ... [Royal Environmental's counsel] argued that their client's activities and those of Standard Paving were similar in that neither could be said to "make money" on the subject property itself. Instead, they argue, each firm uses (or used) the subject property simply to dispatch vehicles to other sites where services are (or were) provided away from the subject property. The Board notes that this argument ignores, among other things, the asphalt plant operation on the subject property, which used aggregate from the subject property as a component, in producing pavement for road construction.
>
> ...
>
> [275] Returning to the Appellant's principal argument (that the use of heavy equipment, in the circumstances of this proceeding, is itself a non-conforming use, separate and apart from quarrying and road construction), it is the view of the Board that this could - if accepted - justify a wide range of additional, and quite different, activities on the site, in addition to those of Royal.
>
> ...
>
> [283] The Board has previously noted the Supreme Court of Canada's comment in *Saint-Romuald* that the issue in non-conforming use litigation is deciding "how widely or narrowly to circumscribe the description of the purpose" of a pre-existing use. [*Saint-Romuald*, para 5] The Board's conclusion, as already stated, is that to so broadly circumscribe the description of the purpose of the pre-existing use on the subject property as to include the Appellant's activity would move "outside any fair definition of the pre-existing use of the property" and would not be "the same general land-use purpose." [*Saint-Romuald* para 34]

[61] Applying the reasonableness standard, is the Board's conclusion within the range of acceptable and defensible outcomes?

[62] In my respectful view, it is.

[63] In 1971 the property was used for more than just the parking and dispatch of heavy equipment, with ancillary maintenance and offices. There was a quarry and rock crushing on site by Atlantic Sand & Gravel.

[64] I will inject a comment on the quarry use. Section 255(c) of the *HRM Charter*, enacted in 2008, says that a "non-conforming use of land may not be ... recommenced, if discontinued for a continuous period of six months". The quarrying and blasting activity on the subject property had ended by 1985. Because of s. 255(c), after Royal Environmental acquired the land in 2009, quarrying and blasting could not re-commence as legal non-conforming uses. Royal Environmental does not seek to justify its current use as an extension of quarrying or blasting.

[65] In 1971, there was an asphalt plant operated on site by Standard Paving. Standard Paving's asphalt plant, on the subject property, would use the crushed rock from the quarry, which connected the quarry and rock crushing uses to Standard Paving's road construction business. Royal Environmental's current use involves none of this.

[66] The equipment employed on site (rock crushers and asphalt plant) or parked on site then dispatched (tractors, front end loaders, earth movers, rock crushers, portable asphalt plants), often on flatbeds, for the 1971 uses differed significantly from Royal Environmental's garbage trucks.

[67] The differences in purpose (road construction and quarry *versus* garbage collection) have materially affected the scheduling and duration of activity on the subject property. In 1971, Standard Paving and Atlantic Sand & Gravel generally would begin daily operations about 7 A.M. Standard Paving's road construction business lasted approximately eight months per year from spring to fall. Now, Royal Environmental's convoy of about forty garbage trucks departs at 5 A.M., and operates year round. The Board (para 303) found that Royal Environmental's activities on the subject property run "much later at night" than those of Standard Paving and Atlantic Sand & Gravel. Standard Paving's flatbed trucks would, with some exceptions, deposit its heavy equipment on the job site for the duration of the road project. Royal Environmental's fleet comes and goes daily. All these differences are significant to the neighbours. The Board quoted one witness who said that the increase in activity was "phenomenal" (Board Decision para 123, quoted above para 24).

[68] Royal Environmental's submission treats the former (and no longer legal) quarry use as ancillary and focusses only on Standard Paving's road construction business. But Royal's submission ignores Standard Paving's equipment use on site

(the asphalt plant, use of crushed rock, loading of gravel or road construction material, placement of construction equipment on flatbeds, all occurring on the property) that related to its road construction business. The submission then says that Standard Paving and Royal Environmental each dispatched equipment from the subject property to earn income elsewhere. But Royal's submission sidesteps any additional neighbourhood disturbance from Royal's earlier (5 A.M.) fleet departures because, as stated in its factum (para 96):

> "... the departure of trucks from the Property is not properly characterized as a use of the Property. Rather, it is a use of the roads, ..." ;

Royal Environmental deals with what the Board (para 355) described as a "complete change in the type of vehicles and other equipment" dispatched by Royal Environmental, compared to Standard Paving, by ignoring the particular equipment, generalizing the common denominator and saying that both companies dispatched "heavy equipment". Royal Environmental avoids the differences between the purposes of road construction and garbage collection by saying these are irrelevant off site activities. But Royal attributes its much heavier daily and annual usage and earlier and later hours of activity on the subject property - results of the change from road construction to garbage collection - to "reasonable evolution" of the business activity.

[69] In the Board's opinion, Royal Environmental's theory disregarded inconvenient facts and forced the test to fit the convenient facts. The Board said:

> [280] Royal's argument, if accepted, would enable owners to hopscotch happily from one use to the next, relying on one purportedly common factor or another, with the end result - already achieved in the present case, in the Board's view - that the purpose of the newest allegedly legal non-conforming use would have no real resemblance to what was there before at all.

[70] The Board (paras 275-8) gave some examples, that I will not repeat, of what the Board considered to be illogical extensions from Royal Environmental's theory. Basically, under Royal's theory, any heavy equipment that leaves and returns regularly for any business purpose, supported by on site offices, parking and maintenance, would be a natural extension of Standard Paving's road construction usage. If air planes are heavy equipment, then an airport use might qualify. As the Board saw it, black does not become a "reasonably evolved" white just because a grey is strategically inserted in between.

[71] The Board concluded that Royal Environmental's use is outside what *Saint-Romuald* described as "any fair definition of the pre-existing use" and not "within the same general land-use purpose" as existed in 1971. In my respectful opinion, this is an acceptable and defensible conclusion, and is reasonable under the standard of review.

The Board's Second Reason: Over-Intensification

[72] The Board stated an alternative conclusion, that Royal Environmental has significantly intensified any prior use, causing serious neighbourhood effects, under the second and fourth tests from *Saint-Romuald*. The Board noted: (1) Royal Environmental's use of significantly different equipment has negatively affected the neighbourhood (Board's Decision, paras 291-2); (2) Royal Environmental's earlier daily departures and later nightly activity (paras 303-17); (3) Royal Environmental's year round activities, seasonally undiminished, compared to Standard Paving's activity that concentrated on eight months from spring to autumn during road construction season (paras 318-21); (4) Royal Environmental's "much greater magnitude of daily utilization of the subject property", that the Board described as "continuous" and "involving essentially its entire fleet every day", instead of the "much more sporadic" usage in Standard Paving's time (paras 322-30, 338).

[73] The Board found:

> [337] ... In the view of the Board, the evidence before it establishes, well beyond the balance of probabilities, the negative effects (including noise and traffic) on the surrounding community of Royal Environmental's intensified use of the subject property.

The Board concluded that the circumstances: (1) "amount (in the Board's opinion) to (as *Saint-Romuald* puts it) 'serious evidence of adverse neighbourhood effects'" (para 339), and (2) "a significant intensification of use of the subject property, with resulting serious adverse neighbourhood effects" (para 354). The Board said:

> [354] ... To use the language of *Saint-Romuald*, Royal's use of the property can be characterized as a difference in degree which creates a "difference in kind".

[74] Royal Environmental's factum (paras 87-88) notes that "the Board was influenced by evidence from residents of the Kearney Lake area" and submits that "the evidence of [Municipal Group's] Gary Rudolph regarding activity on the Property since 1985 is more relevant to a determination of intensification of use". Based on Mr. Rudolph's testimony, Royal Environmental submits (para 90) that "it is not reasonable to conclude that intensification tantamount to a difference in kind, rather than degree, took place". Royal Environmental also submits that, again based on the testimony of Mr. Rudolph instead of the local residents upon whom the Board relied, "the current neighbourhood effects are not materially different from those in previous years" (para 92). The neighbourhood disturbances that were related by local residents are, according to Royal's factum (para 95), just "an aberration".

[75] Those submissions are factual. This Court is limited to considering whether the Board erred in law or jurisdiction. This Court does not have the mandate to re-calibrate the evidentiary scale and determine whether the Board should have given Mr. Rudolph's testimony more weight and the testimony of community witnesses less. There is no error of law or jurisdiction in the Board's treatment of this topic. In any case, the Board's findings were supported by evidence of witnesses, such as Messrs. Roger and Darvil Hamshaw, and are reasonable under the standard of review.

[76] At the hearing in this Court, when questioned about the factual nature of this submission, Royal Environmental's counsel made the following argument, that does have a significant legal component. Whether there is a significant intensification of use depends on the choice of baseline usage to which the current degree of usage is compared. Counsel said that the Board should compare Royal's current usage to the most intense usage that would have been permissible, as a non-conforming use, in Standard Paving's time. According to the argument, by not doing so, the Board misdefined the baseline, which would be an error of law.

[77] For two reasons, I disagree with Royal's submission. First, if the baseline already assumes the most intense possible usage, there is no room for "intensification", and the test would be pointless. Second, in *Saint-Romuald*, para 39(#4) [quoted above, para 49], Justice Binnie's premise for the "intensification" criterion was that "activities are added, altered or modified". He said the baseline involves the "original activity", and "[b]y definition, the limitation applies only to added, altered or modified activities". He added that "[n]eighbourhood effects,

unless obvious, should not be assumed but should be established by evidence if they are to be relied upon". The comparison is actual current activity with its actual effects, to a baseline of former actual activity, not hypothetical usage.

Development Officer's Changed Reasoning

[78] Royal Environmental next submits that the Development Officer's statements about the use, in a document he authored earlier in the process, differed from aspects of his later testimony to the Board. The Board's finding was consistent with the Development Officer's later testimonial view. Royal says this supports its submission that the Board's Decision is unreasonable.

[79] I respectfully disagree.

[80] Royal's factum (para 106) "acknowledges that, when undertaking a correctness review, an administrative decision maker may undertake its own reasoning process to arrive at the result that it judges to be correct". That acknowledgement is consistent with the approach to correctness review by a court: *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, para 50.

[81] The Development Officer refused the permit as an illegal non-conforming use (above para 27). The Board concluded that the refusal did not conflict with the *HRM Charter*. The Board's Decision (para 228) acknowledged that the Development Officer's views had changed. But the Board made its own findings, based on the testimony of all the witnesses, including the Development Officer, and undertook its own reasoning process. The Board's findings were well supported by evidence, and were explained in the Board's comprehensive reasons. That a witness once held a view different than the one he expressed in his testimony, neither gives this Court the mandate to overturn the Board's factual findings, which are "binding and conclusive" and unappealable under ss. 26 and 30(1) of the *Utility and Review Board Act,* nor leads me to the conclusion that the Board's overall decision was unreasonable under the standard of review.

6. Conclusion

[82] I would dismiss the appeal. At the hearing, neither party requested costs. The parties should bear their own costs.

Fichaud, J.A.

Concurred:

Oland, J.A.

Bryson, J.A.