C.A. No. 119703

NOVA SCOTIA COURT OF APPEAL
Cite as: MacDonald v. Kings (County), 1996 NSCA 78

**Clarke, C.J.N.S.; Bateman and Flinn, JJ.A.**

**BETWEEN:**

| | |
|---|---|
| R.A. MacDONALD and R & G CONSULTING LIMITED<br><br>Appellants<br><br>- and -<br><br>MUNICIPALITY OF THE COUNTY OF KINGS<br><br>Respondent | Harry W. How, Q.C.<br>for the Appellants<br><br>James E. Dewar, Q.C.<br>for the Respondent<br><br>Appeal Heard:<br>April 16, 1996<br><br>Judgment Delivered:<br>April 16, 1996 |

**THE COURT:** Appeal dismissed per oral reasons for judgment of Flinn, J.A.; Clarke, C.J.N.S. and Bateman, J.A. concurring.

The reasons for judgment of the Court were delivered orally by:

FLINN, J.A.:

In 1992, as mandated by the **Planning Act**, R.S.N.S., c. 346, the Council of the respondent reviewed its Municipal Planning Strategy. Following public hearings, of which notice was given, the Council approved a new Municipal Planning Strategy. This led to changes in the respondent's Land Use By-law.

The appellants' property had been zoned Commercial C-1. The appellants intended to operate a lounge on the property, which was permitted in a Commercial C-1 zone. As a result of the changes to the respondent's Land Use By-law, the appellants' property was rezoned to Neighbourhood Commercial C-7. A lounge is not a permitted use in a C-7 zone.

The appellants applied to the Council of the respondent to re-zone the property back from C-7 to C-1; or, alternatively, to enter into a development agreement to permit the operation of a lounge on the property. The Council of the respondent refused the application.

The appellants appealed the respondent Council's refusal to the Nova Scotia Utility and Review Board (the Board) and the Board dismissed the appeal.

Section 70 of the **Planning Act** deals with appeals to the Board from decisions of a council with respect to amendments to a land use by-law. Section 70 (8) provide as follows:

> "70 (8) Notwithstanding subsections (6) and (7), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

In the appellants' appeal to this Court, the grounds of appeal are that the Board erred in law in determining that the appellants would not suffer undue hardship; and also

erred in law in determining that there were no extraordinary or compelling circumstances which would warrant appellate interference. Counsel also suggests, in oral argument, that the Board erred in law in upholding the rezoning, when that rezoning was, as he suggests, contrary to the Municipal Planning Strategy.

An appeal from the Board to this Court lies solely on a question of law or jurisdiction.

In its decision the Board concluded:

> ".....the decision of Council to refuse to amend the LUB [Land-Use By-Law] so as to rezone the property to C-1 Zone in order to permit the Appellants to construct and operate a lounge on the premises cannot reasonably be said to violate the intent of the M.P.S. [Municipal Planning Strategy]."

In finding, as it did, that the action of the respondents was consistent and in accordance with the intent of the Municipal Planning Strategy, and the provisions of the **Planning Act**, the Board acted within its jurisdiction and reached a decision that cannot be said to be patently unreasonable.

Whether undue hardship and compelling circumstances are present are questions of fact which were determined by the Board. The resolution of those issues was within the jurisdiction of the Board, and its findings cannot be said to be unreasonable.

In our opinion, after reviewing the record and considering the submissions of counsel, the Board made no reviewable error in jurisdiction or in law.

The appellants made an application for the admission of fresh evidence consisting of minutes of a Public Participation Meeting held July 16th, 1991; and its financial statements. After hearing argument, and upon taking time to consider, we are of the opinion that the application fails because the requirements for admission, mandated by the Supreme Court of Canada in **R. v. Palmer** (1979), 50 C.C.C. (2d) 193, have not been satisfied.

The appeal is, therefore, dismissed without costs.

Flinn, J.A.

Concurred in:

Clarke, C.J.N.S.

Bateman, J.A.

C.A. No. 119703

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

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| R.A. MacDONALD and<br>R & G CONSULTING LIMITED<br>Appellants | ) | |
| - and - | ) | R E A S O N S |
| | ) | FOR<br>JUDGMENT |
| | ) | BY:<br>FLINN, J.A. |
| MUNICIPALITY OF THE COUNTY OF KINGS<br>Respondent | ) | (orally) |