NOVA SCOTIA COURT OF APPEAL

Citation: *Can-Euro Investments Ltd. v. Ollive Properties Ltd.*, 2013 NSCA 80

Date: 20130627
Docket: CA 413747
Registry: Halifax

Between:

Can-Euro Investments Limited

Appellant

v.

Ollive Properties Limited and Halifax Regional Municipality and The Attorney General of Nova Scotia And The Nova Scotia Utility and Review Board

Respondents

Judges:	MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A.
Appeal Heard:	June 12, 2013, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. and Beveridge, J.A. concurring.
Counsel:	Dennis James and Kimberley Pochini, for the appellant Nancy Rubin, Q.C., for the respondent Ollive Properties Ltd. not participating E. Roxanne MacLaurin, for the respondent Halifax Regional Municipality not participating Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia not participating Elaine Wagner, for the respondent Nova Scotia Utility and Review Board not participating

Reasons for judgment:

[1] At the end of the hearing we took a brief recess and then returned to announce our unanimous decision that the appeal was allowed with reasons to follow. These are our reasons.

[2] I will start by providing a brief summary of the facts which are set out in detail in the excellent factum filed by Mr. James, counsel for the appellant.

[3] The case before the Nova Scotia Utility and Review Board concerned an appeal taken by Ollive Properties Limited of a development agreement which had been approved by the Harbour East Community Council on July 5, 2012, to the benefit of Can-Euro. This development agreement approved a 27-storey residential building with commercial and retail space on the first three floors of the structure. Ollive's appeal was based on the argument that Council's decision did not reasonably carry out the intent of the Dartmouth Municipal Planning Strategy.

[4] The Board (comprising a single member, Dawna J. Ring, Q.C.) sat for four days in January, 2013, and one additional day in February, with two more days scheduled for March, 2013. At the start of the afternoon session on February 25, 2013, Ollive's counsel advised that she had been instructed by her client to withdraw their appeal. A brief discussion ensued between the parties and the Board about the way in which the proceeding would be concluded. Can-Euro's counsel asked for an order dismissing the appeal by consent. Ollive's counsel said her client had only provided instructions to withdraw the appeal. The Board made no further comment on Can-Euro's request for a dismissal and simply concluded the proceedings with the statement, "The proceedings are terminated."

[5] On March 1, 2013, the Board released its decision and order which are the subject of this appeal. Both the decision and the order expressed findings of fact which were very critical of Can-Euro and its president, Otto Gaspar (who died unexpectedly three weeks ago, before this appeal could be heard), and bore no relationship to Ollive's withdrawal of their appeal.

[6] Counsel for Can-Euro immediately corresponded with the Clerk of the Board by letter dated March 5 outlining its concerns and objections to the Board's actions. Counsel asked the Board to withdraw its decision and issue a new order in a form Can-Euro considered would accurately reflect the outcome.

[7] Can-Euro's objections were supported by the Halifax Regional Municipality. On that same date HRM's senor solicitor sent a letter to the Clerk of the Board echoing Can-Euro's position. HRM argued that once Ollive had withdrawn its appeal the Board became *functus officio* and ought not to have reached or expressed any conclusions concerning the conduct of Can-Euro or its president without at least first providing them with notice and giving them an opportunity to be heard.

[8] Both Can-Euro's and HRM's letters were answered that same day with a brief reply from the Clerk of the Board which read:

> Receipt is acknowledged of your letter dated and received today.
>
> The Board's Decision and Order stand and speak for themselves.

[9] The original parties in proceedings before the Board were Ollive Properties Ltd. (the appellant) and the Halifax Regional Municipality and Can-Euro Investments Ltd. (as the two respondents).

[10] On appeal to this Court and in accordance with Civil Procedure Rules 90.07 and 90.16 (ss. (1) and (6)), the appellant is Can-Euro Investments Limited, and the possible respondents are Ollive Properties Limited; Halifax Regional Municipality; the Attorney General of Nova Scotia; and the Nova Scotia Utility and Review Board. Each of these potential respondents has confirmed in writing that they have chosen not to participate in this appeal.

[11] Accordingly, the only "party" appearing was the appellant, Can-Euro Investments Limited. Mr. James filed a comprehensive factum and extensive book of authorities (2 volumes) in support of his client's position. I will turn now to the issues on appeal.

Issues

[12] Can-Euro's Notice of Appeal lists the following grounds:

> (1) That upon the withdrawal of the appeal by Ollive Properties Ltd. ("Ollive") on February 25, 2013, the Nova Scotia Utility and Review Board (the "Board") became *functus officio*.
>
> (2) That after the withdrawal of Ollive's appeal, the Board had no jurisdiction to render any decision other than to note the withdrawal of the appeal before it.
>
> (3) That the decision rendered by the Board after Ollive's withdrawal violated the principles of administrative law and procedural fairness, in

> that the parties were not notified of the Board's intention to render a decision, and were not provided the opportunity to make submissions thereon; and
>
> (4) That the decision rendered by the Board after Ollive's withdrawal violated the principles of administrative law and procedural fairness insofar as the Board made its decision with the knowledge that, as a result of the withdrawal, it had not heard all of the evidence.
>
> (5) That as a result of the errors by the Board, Can-Euro suffered an unfair treatment by the Board and its conclusion that the proposal presented to the public, during the development agreement application process with the Halifax Regional Municipality, was misleading, which conclusion was reached without completion of the evidence, without notice that the Board intended to address the issue, and without opportunity by Can-Euro to be heard on the matter.

Standard of Review

[13] An appeal to this Court from a decision of the Utility and Review Board is limited to questions of law or jurisdiction. The **Utility and Review Board Act**, S.N.S. 1992, c. 11, s. 30 states:

> 30(1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

[14] This case does not relate to the Board's interpretation of its home (or close to home) statute, nor engage any aspect of its specialized areas of expertise, such that the Board's decision-making would enjoy a tolerance of acceptance along a spectrum defined by the margins of reasonableness. On the contrary, the issues that arise in this case concern pure questions of jurisdiction, administrative law and procedural fairness. Grounds #1 and 2 are directly tied to the Board's jurisdiction to make a decision in the face of Ollive's withdrawal of their appeal. Grounds #3, 4 and 5 are questions of law as they address the Board's application of the principles of administrative law and procedural fairness in rendering the decision and order dated March 1, 2013. Thus, the appropriate standard of review for each of these five grounds is one of correctness. See, for example, **Dunsmuir v. New Brunswick**, 2008 SCC 9; **Amherst (Town) v. Nova Scotia (Superintendent of Pensions)**, 2008 NSCA 74; **Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board)**, 2008 NSCA 123; **Canada (Citizenship and Immigration) v. Khosa**, 2009 SCC 12; **Smith v. Alliance Pipeline Ltd.**, 2011 SCC 7; **Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association**,

2011 SCC 61; **Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62; and **Robinson v. Nova Scotia Power Incorporated**, 2012 NSCA 93.

Analysis

[15] I would distil Can-Euro's five grounds of appeal down to two principal arguments. First, Can-Euro says the Board's order should be quashed because the Board lacked jurisdiction to issue it. Second, Can-Euro says the Board's order should be quashed because the Board's actions violated fundamental principles of administrative law and procedural fairness.

[16] Its first submission is based on the proposition that once Ollive Properties announced during the fifth day of the hearing that it was withdrawing its appeal, the Board no longer had any role to play in the proceedings and was therefore *functus officio*. While this assertion has merit, I prefer not to dispose of the appeal on that basis. I can imagine situations where in somewhat similar circumstances a decision-maker might *not* be *functus* and might have continuing responsibilities to fulfil in the ongoing exercise of its jurisdiction. It seems to me that whether the decision-maker would or would not retain jurisdiction is very much dependent upon the nature of the proceedings and the precipitating event, and might therefore be an issue that can only be assessed on a case by case basis. As well, such a dispute would clearly be a matter that required thorough submissions on both sides of the issue to resolve. Only the appellant has participated in this appeal. We have not had the benefit of any opposing views. Accordingly, I prefer to dispose of this case on the basis of the second argument put forward by Mr. James in his able submissions on behalf of the appellant.

[17] To better understand the substance of Can-Euro's complaint it is important to first provide some context. The hearing before the Nova Scotia Utility and Review Board commenced at 9:30 a.m. on January 15, 2013. The nature of the proceeding was nicely described by Ms. Ring in her opening statement:

> This is a commencement of the appeal of Ollive Properties Ltd. in relation to the decision of the Harbour East Community Council of July the 5th which approved a development agreement with Can-Euro Investments for a 27-storey residential building having office and commercial space on the first three floors, located on the corner of Micmac Boulevard and Horizon Court.

[18] Several witnesses, including experts, were questioned and cross-examined over the course of the first five days of hearings (January 15, 16, 17, 18; resuming on February 25 and with two more days scheduled for March, 2013). Dr. Otto

Gaspar, Can-Euro's president, concluded his testimony at noon on February 25 at which point Mr. James, counsel to Can-Euro indicated that his next witnesses would be Ms. Jenifer Tsang, their expert on land use, planning and community development, to be followed by their architect Mr. Nick Fudge on behalf of Geoff Keddy and Associates who would provide testimony on the design features of the proposed development. The Board recessed for lunch. Proceedings resumed at 2:00 p.m. As soon as Ms. Tsang took the stand to testify we see this exchange:

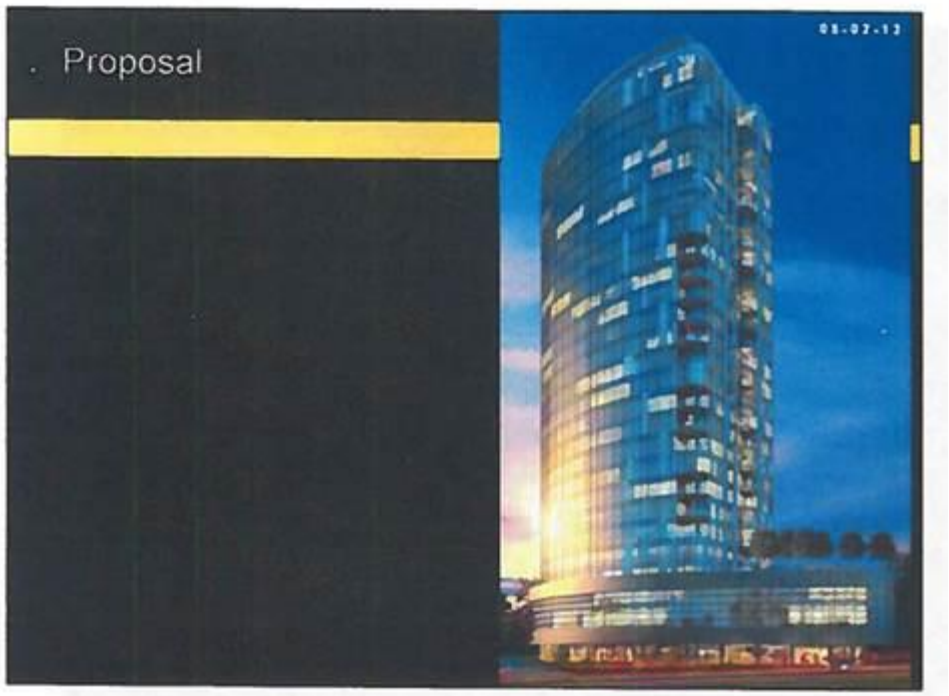
> THE CHAIR: ... Thank you. Ms. Song (sic – should be spelled T-S-A-N-G), do you want to swear or affirm today?
>
> MS. SONG: I will affirm.
>
> THE CHAIR: Sure.
>
> MS. RUBIN: Madam Chair? I'm sorry.
>
> THE CHAIR: Oh, sorry.
>
> MS. RUBIN: Sorry to interrupt the proceedings. Before we go further, my client has instructed me to withdraw the appeal.
>
> THE CHAIR: Okay.
>
> MR. JAMES: So an order would issue ... I prefer an order dismissing the appeal by consent.
>
> THE CHAIR: I assume you have no difficulty with that, Ms. Rubin?
>
> MS. RUBIN: My instructions are only to withdraw the appeal.
>
> THE CHAIR: Okay. Thank you.
>
> MR. JAMES: I would ask for the right to consider costs. I know it's not something that the Board often does.
>
> THE CHAIR: I believe we're ... well, Ms. Rubin?
>
> MS. RUBIN: My understanding is that there's no provisions for costs in planning matters.
>
> THE CHAIR: Yeah, it was exactly what I was going to say. We're restricted, I think you'll find, on the ...
>
> MR. JAMES: Mm-hmm.
>
> THE CHAIR: ... Nova Scotia Utility and Review Board Act. We're not permitted to grant costs in planning matters. In fact, it specifically says ...
>
> MR. JAMES: Yes.
>
> THE CHAIR: ... we can't. So I don't have the ability to do that.
>
> MR. JAMES: Okay. Thank you.
>
> THE CHAIR: Okay. Thank you. That concludes our proceedings. Oh, sorry?

> MR. JAMES: My client just asked me to break for a minute before we conclude. If I can just pause.
>
> THE CHAIR: Sure.
>
> OFF RECORD
>
> ON RECORD
>
> MR. JAMES: Thank you, Madam Chair. There's nothing further.
>
> THE CHAIR: Thank you. Proceedings are terminated. Thank you, everyone.
>
> HEARING CONCLUDED

[19] I accept Mr. James' representations on behalf of the appellant that until he heard Ms. Rubin's interjection he had no idea that Ollive Properties was about to abandon its appeal. He fully intended to present the balance of Can-Euro's case over the course of the remaining two and a half days. As soon as Ms. Rubin announced her client's withdrawal, then as far as all parties were concerned, the case was at an end, subject to the Board's issuance of its terminating order. Nobody expected, or was waiting for a decision.

[20] A few days later, the appellant was surprised to receive the Board's decision dated March 1. It is not a lengthy decision and I will repeat it verbatim:

> [1] During the fifth day of the public hearing of this planning appeal, regarding a development agreement for a 27/28 storey mixed-use residential/commercial building of Can-Euro Investments Limited ("Can-Euro") on Horizon Court, the Appellant Ollive Properties Ltd. ("Ollive") withdrew its appeal. Can-Euro requested the Board issue an order dismissing the appeal. Under the circumstances of this case, the Board is not prepared to exercise its discretion and grant a dismissal order.
>
> [2] The Board finds that Can-Euro intentionally misled the public by providing inaccurate drawings of a building it had, and has, no intention of constructing. The drawings provided to Council and the public throughout the entire planning process was the following very attractive high quality virtually all glass building with the south face curved to maximize exposure to the sun and views of the Harbour:



[3] Otto Gaspar, President of Can-Euro, testified before the Board on February 25, 2013, that an all glass building is too expensive. He stated he had no intention of building an all glass building as depicted in the pictures. Furthermore, he testified that if he is required under the Development Agreement to build an all glass building, he would not construct it.

[4] To the extent the public supported this development because of these misleading drawings the Board finds such support was falsely obtained.

[5] Drawings of a building for a development agreement application are critical. They must accurately depict the building, including details of the building materials and colors, the patterns and size of windows, amongst other aspects of the proposal [Exhibit O-2, Tab 1A, p. 6]. Varying levels of detail are incorporated into the development agreements considered by Council.

[6] Mr. Gaspar considered it acceptable to provide drawings of a building he had no intention of constructing, because on the fifth page of his letter to Council dated March 26, 2012, he stated: "The glass portion will be less than 40% …" [Exhibit O-27, p. 39] [emphasis added]. Nowhere is this letter or the above statement found in the Appeal Record. Furthermore, the Board notes this letter was not disclosed to the Appellant or the Board until Ollive requested an undertaking which was subsequently received on February 6, 2013.

[7] The Board finds the proposed building depicted above and used throughout the planning process is not the building contemplated in the March 26, 2012, letter.

[8] Under the circumstances of this case, the Board will not grant Can-Euro's request for an Order dismissing the Appeal.

[9] The Appeal has been withdrawn.

[10] An Order will be issued accordingly.

DATED at Halifax, Nova Scotia, this 1st day of March, 2013

Dawna J. Ring

[21] Receipt of the Board's decision and order prompted counsel for Can-Euro to send this letter by email to the Clerk of the Board dated March 5:

Dear Ms. Wagner:

In the matter of an appeal by Ollive Properties Ltd. from a decision of the Harbour East Community Council dated July 5, 2012, approving a development agreement with Can-Euro Investments Ltd. for a 27 story mixed-use building at 7 Horizon Court, Dartmouth
Your File Number: 2013 NSUARB 56; M05086

We have reviewed the decision of the Board dated March 1, 2013, in the above noted matter and provide the following response on behalf of our client, Can-Euro Investments Ltd. ("Can-Euro"). Can-Euro is extremely concerned about the statements therein and, respectfully, with the Board's manner of dealing with this matter.

It is Can-Euro's position that the withdrawal of the appeal by Ollive Properties Ltd. ("Ollive") ended the Board's jurisdiction over this matter. Respectfully, it would follow that any Order which extends beyond the Board taking notice of the withdrawal is outside the jurisdiction of the Board. This was the position taken by the Board in the hearing on February 25th, when the withdrawal occurred. Can-Euro asked for an Order of Dismissal and in absence of agreement from Ollive Properties, the Board indicated it could not be so ordered. Can-Euro submits that the same principles apply to any written decision which follows.

Respectfully, Can-Euro says further that the Board erred by dealing with this matter without having given notice to the parties that it intended to deal with the issue. The Board did not advise at any time that it was going to reach conclusions on any matter and invited no submissions on the point. The Board was aware Can-Euro had not completed its evidence. Specifically, Can-Euro did not have the benefit of the evidence of the planner and the architect, as the withdrawal occurred before they were called. As a result, Can-Euro is left with the record from the Board without an opportunity to tender all of its evidence; without knowledge that the Board planned to address the issue; and without having been given the right to address the matter.

> Aside from these fundamental errors, Can-Euro disputes the conclusions drawn. However, in light of its position on the lack of jurisdiction of the Board, Can-Euro is not submitting its analysis at this time.
>
> Can-Euro specifically requests that the Board withdraw this decision and issue an Order that simply confirms the withdrawal of Ollive's appeal which is in its jurisdiction. To refuse or do otherwise causes Can-Euro an unjust result and leaves on the record a decision that appears to cast aspersions on the character of Mr. Gaspar and Can-Euro.
>
> Can-Euro felt it was prudent to state their concerns with respect to this decision.
>
> Yours truly,
>
> Dennis J. James

[22] Can-Euro's concerns and objections were echoed by the Halifax Regional Municipality. That same day the Municipality's senior solicitor, Ms. Roxanne MacLaurin sent this letter to the Clerk of the Board;

> Dear Ms. Wagner:
>
> **Re: PL-12-10/M05086 – An appeal by Ollive Properties Limited from the Decision of the Harbour East Community Council July 5, 2012, approving a development agreement with Can-Euro Investments**
>
> **Your File – 2012 NSUARB 56 M05086**
>
> **And Re: March 1, 2013 decision of Dawna J. Ring, Q.C., Board Member**
>
> We have received the decision of the Board dated March 1, 2013 in the aforementioned matter. Respectfully, HRM refers this Board to the general principle of administrative law that a party must be given an opportunity to answer before an administrative tribunal renders a decision.
>
> Procedural fairness dictates that administrative decisions are to be made using a fair and open procedure, with an opportunity for those affected by the decision to put forward their views and evidence fully, and to have them considered by the decision maker.
>
> On February 25, 2013, the Appellant Ollive Properties Ltd. withdrew its appeal. Subsequent to the withdrawal, the Board made findings of fact based on a partial hearing of the evidence. As the Board is aware, the Respondent's Architect and Planner did not have an opportunity to give evidence as the withdrawal occurred prior to their testimony.

> The Board stated on February 25, 2013, that it was not prepared to grant a dismissal order without the consent of the Appellant. There was no indication at that time that any other reason was being considered by the Board in relation to its refusal to grant the order requested by Mr. James. Upon leaving the hearing HRM was of the view that the matter was concluded and that the Board was from that time, *functus officio*.
>
> The Parties were not given an opportunity to make submissions of the Board on the issue regarding the dismissal order, nor were they given an opportunity to make submissions on the ability of the Board to make findings of fact without having afforded the Parties the opportunity of a full hearing.
>
> All of which is respectfully submitted.
>
> Yours very truly,
>
> **HALIFAX REGIONAL MUNICIPALITY**
>
> E. Roxanne MacLaurin
>
> Senior Solicitor

[23] Mr. James and Ms. MacLaurin's letters were acknowledged with the same terse reply reproduced at ¶8 of these reasons, supra.

[24] Respectfully, the Board's decision and order must be set aside.

[25] t appears obvious to us that the Board's actions violated fundamental principles of administrative law and procedural fairness. Principally, the parties were not given notice of the Board's intention to render a decision, nor offered the opportunity to make submissions with respect to it.

[26] As the transcript of the proceedings before the Board makes clear, as soon as Ollive's counsel withdrew their appeal, Can-Euro's counsel asked the Board to issue an order dismissing the appeal by consent. Ollive's counsel reiterated her position that her instructions were only to withdraw the appeal. The discussion between the parties and the Board then turned to the subject of costs. Nothing more is said about an order, let alone any decision from the Board. Ms. Ring simply states "That concludes our proceedings." After a short break requested by Can-Euro, the Board's final statement to the parties before closing the hearing was "Thank you. Proceedings are terminated."

[27] There is nothing at all in the transcript to even remotely suggest that the Board was reluctant to issue an order, or had any concerns about its content, or was in any way contemplating dealing with the merits of the case which was far from

over, or was intent on making factual findings relating to the proceedings which had, at that point been "terminated".

[28] Further evidence that matters were "over" as far as the parties were concerned is apparent from the letters Can-Euro and HRM sent immediately upon receipt of the Board's decision and order.

[29] While it is trite to observe that in conducting hearings and invoking its own procedures the Board is not bound to strictly apply the rules of evidence, nonetheless the parties are still afforded the well-recognized protection of procedural fairness. In **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817, Justice L'Heureux-Dubé noted:

> 22 ... purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[30] L'Heureux-Dubé, J. went on to cite five factors which assist in the determination of the requirements of procedural fairness in a particular case:

> a) the nature of the decision being made and the process followed in making it;
>
> b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
>
> c) the importance of the decision to the individual or individuals affected;
>
> d) the legitimate expectations of the person challenging the decision; and
>
> e) the choice of procedures made by the agency itself, particularly when the statute leaves to the decision maker the ability to choose its own procedures.

[31] Can-Euro says the Board's actions in this case violated important, fundamental requirements of procedural fairness on any number of fronts. Respectfully, I agree. To my mind, the most serious failings were the Board's adjudicating the merits before hearing all the evidence; making adverse findings after the appeal had been abandoned and without notice to the parties or giving those affected any chance to be heard; and expressing conclusions which impugned the integrity and good faith of Can-Euro and its president, the late Dr. Otto Gaspar which found no support in the record and would very likely have been dispelled had all the evidence been heard.

[32] I can do no better than repeat and adopt the arguments made by Can-Euro in its factum:

> 40. In this case, the parties were four and one-half days into the hearing of the planning appeal brought by Ollive when Ollive withdrew its appeal. The matter was scheduled for additional two and one-half days, which was to include testimony from witnesses for Can-Euro, including Planner Jenifer Tsang, and the architect for the proposed development, Nicholas Fudge. Mr. Fudge would have spoken to presentations made on behalf of Can-Euro to the Public Information meeting and HRM's Harbour East Community Council, which included a description of the exterior features and materials of the proposed development.
>
> 41. The Board's decision and Order made findings of fact about Can-Euro's presentation to the public and to Council, and cast aspersions upon Can-Euro, and its President, Otto Gaspar. The basis for the Board's decision and Order was the Board's determination that Can-Euro "intentionally misled the public by providing inaccurate drawings to Council and the public throughout the entire planning process…"
>
> **Appeal Book, Volume I, Tab G, pg. 68**
>
> 42. At paragraph 6 of Board's March 1, 2013 decision, the Board referenced a letter, written by Can-Euro's President Otto Gaspar, dated March 26, 2012. The Board stated:
>
> > [6] Mr. Gaspar considered it acceptable to provide drawings of a building he had no intention of constructing, because on the fifth page of his letter to Council dated March 26, 2012, he stated "The glass portion will be less than 40% …"…Nowhere is this letter or the above statement found in the Appeal Record. Furthermore, the Board notes this letter was not disclosed to the Appellant or the Board until Ollive requested an undertaking which was subsequently received February 6, 2013. [Emphasis in the Board's decision].
>
> **Appeal Book, Volume I, Tab F, pg. 66**
>
> 43. With respect, the Board's conclusions on Mr. Gaspar's March 26, 2012 letter are erroneous and leave the impression that Can-Euro was somehow hiding and/or misrepresenting the truth about this letter, its contents, or Can-Euro's intentions for construction of the proposed development.
>
> 44. Firstly, it should be noted that the March 26, 2012, letter in question was written by Mr. Gaspar, to the Halifax Regional Municipal Planning Services, and specifically to the attention of Councillors Gloria McCluskey, Jim Smith, Bill Karsten, Lorelei Nicoll, Darren Fisher, and Jackie Barkhouse. The five-page letter provided a number of details about the proposed building. On page 5, the letter states:

> It is a nice building. We received only complements and we are proud of this building and especially of the floor plans. The glass portion will be less than 40% as required by the City of Toronto to minimize heat loss and heat gain and the rest will be some sort of architectural panels, probably Aluminum, but possible Zinc or another metal. A combination of three different colours and shades should be attractive, darker grey, lighter grey and some blue, but this may not be final.
>
> **Appeal Book, Volume VII, Tab T-27, pg. 2703**

45. The March 26, 2012 letter denotes enclosures of a "Shadow Study; Email December 27, 2011 Re: Traffic Study; two articles from the Globe and Mail; Excerpts from the "City Shaped, Spiro Kostof; Typical Floor Plans; Site Plan; Elevation Plan." Can-Euro submits it is reasonable to conclude this letter was merely intended to provide an overview of the proposed development to Councillors.

46. In its March 1, 2013 decision, the Board appeared to be implying that the letter was somehow undisclosed.

47. With respect, the Appeal Record before the Board was created and submitted by HRM, as required by legislation. Accordingly, it should not be implied that Can-Euro was somehow responsible for excluding it from the record.

48. While Can-Euro concedes the letter was not a part of the Appeal Record before the Board and should have been; there is no question it was a part of the public record, and was before HRM's Harbour East Community Council when they made their determination that the proposed development agreement was consistent with the intent of the relevant municipal planning strategy.

49. Can-Euro submits that the fact the letter was a part of the public record well before the Board's July 5, 2012, decision to approve the development agreement, provides direct evidence contrary to the Board's assertions in its March 1, 2013 decision.

50. Can-Euro further submits that that Board gave no opportunity for Can-Euro or HRM to make submissions regarding the failure to include Mr. Gaspar's letter in the Appeal Record.

51. The Board did not notify the parties that it intended to make any findings of fact and did not permit any further submissions, either written or oral, on the facts upon which the Board later based its decision. With respect, this does not accord with the requirement of procedural fairness as discussed in Baker, supra.

52. When one applies the five factors enunciated by Justice L'Heurex-Dube to the circumstances here, Can-Euro submits that in order to make the

findings of fact that it did, the Board was obliged to notify the parties of its intent and allow the parties to provide submissions thereon.

....

59. There is no evidence whatsoever to suggest that if Ollive had not withdrawn their appeal that the Board would have refused to permit testimony from Ms. Tsang and Mr. Fudge. Indeed, immediately prior to Ollive's counsel's notice of withdrawal, the Board was in the process of having Ms. Tsang make her affirmation prior to commencing her testimony.

60. The fact that the proceeding was terminated by Ollive's withdrawal does not negate the duty of procedural fairness. In light of the withdrawal and the duties of procedural fairness, Can-Euro submits the Board ought not to have made findings of fact.

61. Can-Euro submits that the Board's failure to provide notice of its intention to render a decision, and the failure to provide opportunity for submissions thereon, violates principles of procedural fairness.

...

62. The fourth issue deals with the fact that the Board rendered a decision and Order after Ollive's withdrawal, which Can-Euro submits violated the principles of administrative law and procedural fairness insofar as the Board made its decision with the knowledge that, as a result of the withdrawal, it had not heard all of the evidence.

63. As previously noted, Can-Euro was in the midst of presenting its case when Ollive withdrew its appeal. An additional two and one-half days were scheduled for submissions, with Planner Jenifer Tsang and Architect Nicholas Fudge still to provide evidence on behalf of Can-Euro. The Will-Say Statement of Mr. Fudge provided to the Board and parties prior to the hearing noted that Mr. Fudge would, "… provide testimony on the design features of the proposed development." As the Board and other parties were aware from previous testimony, when Can-Euro was making its application to Council seeking approval of the development agreement, Mr. Fudge, on behalf of Can-Euro, made presentations at the Public Information Meeting and before Council with respect to the design elements of the building. Clearly then, the testimony of Mr. Fudge was directly relevant to the findings of fact ultimately reached by the Board in its March 1, 2013 decision and Order.

...

66. The last ground of appeal deals with the consequences of the Board's error. Can-Euro submits that as a result of the Board's errors, it suffered unfair treatment by the Board. The Board made findings of fact that the proposal presented to the public, during the development agreement application process with the Halifax Regional Municipality, was misleading, which conclusion was reached without completion of the

evidence, without notice that the Board intended to address the issue, and without opportunity by Can-Euro to be heard on the matter.

67. In its March 1, 2013 decision, the Board reached the conclusion that Can-Euro "intentionally misled the public by providing inaccurate drawings of a building it had, and has, no intention of constructing."

Appeal Book, Volume I, Tab F, pg. 65

68. In its March 1, 2013 Order, the Board went even further, concluding that "… Can-Euro intentionally misled the public by providing inaccurate building drawings to Council and the public throughout the entire planning process that it had, and has, no intention of constructing."

Appeal Book, Volume I, Tab G, pg. 68

69. With respect, the conclusions drawn by the Board, in the absence of complete evidence on the point, without notice of the Board's intention to draw conclusions thereon, and without opportunity for submissions, are inaccurate, inflammatory, and defamatory.

70. Furthermore, Can-Euro submits that the appeal record which was before the Board, including but not limited to building specifications which detailed building material options, further illustrates the Board's erroneous conclusions; insofar as these materials provide evidence that directly contradict the Board's findings.

71. Mr. Fudge, on behalf of Geoff Keddy Architect and Associates and Can-Euro, made a power point presentation to the Harbour East Community Council and the public on July 5, 2012. This presentation became a portion of the appeal record before the Board, submitted with Can-Euro's written and visual evidence prior to the hearing of this matter. As the Board was aware, Mr. Fudge was scheduled to testify before the Board, and would have been able to speak to the contents of these documents. In Mr. Fudge's presentation, a number of the diagrams which depict building specifications and materials clearly show a building which was not, and was not depicted as, all glass. In particular, Mr. Fudge's presentation depicted specifications for the building exterior, which clearly indicate the intended extensive use of "Aluminum Wall Panel System", and differentiates the use of these panels from glass windows, which are denoted separately. Mr. Fudge's presentation also provides colour photos of sample tiles which were being considered for use on the exterior of the building. These depictions squarely accord with Mr. Gaspar's testimony before the Board that he was considering the use of aluminum and/or ceramic tile as exterior cladding options, and that said options were presented to Council and the public.

Appeal Book, Volume VII, Tab S-15, pgs. 2518-2539

72. There was no evidence before the Board as to the subjective element of what was "attractive" versus "unattractive" with respect to the exterior façade of the proposed building; nor had any member of the public

indicated that a building of less than 40% glass would be less attractive than an all-glass building. Furthermore, this was not an issue raised in Ollive's appeal before the Board. With respect, the Board's personal opinion regarding comparable levels of attractiveness of various exterior materials is not relevant to the issue before the Board; i.e., whether the development agreement reasonably carried out the intent of the municipal planning strategy.

73. Can-Euro further submits that there was no evidence before the Board upon which it could draw the conclusion that the public supported the building based on perception of an all-glass façade.

74. In addition, the Board's finding that Can-Euro "intentionally misled the public" is not supported by the evidence. There was no evidence before the Board of any action or intent to mislead on the part of Can-Euro or Mr. Gaspar. The appeal record before the Board contained Revisions to Drawings (for the proposed development) from Geoff Keddy Architect and Associations, dated February 8, 2012. The included elevation drawings therein clearly denoted the use of "dri-design wall panel system" in three different areas of the exterior of the building, which was further differentiated from "spandrel sections" and "curtain walls." Furthermore, Mr. Gaspar's March 26, 2012 letter of March 26, 2012, was specific about the volumes of glass in the exterior materials of the building.

Appeal Book, Volume III, Tab S-2, pgs. 1057-1058

75. Can-Euro would also respectfully draw the attention of this Honourable Court to Section 3.4.2 of the development agreement as approved by the Harbour East Community Council on July 5, 2012, which provides:

> The design, form and exterior materials of the building shall, in the opinion of the Development Officer, generally conform to the Building Elevations including with this Agreement as Schedules F, G, and H.

Appeal Book, Volume III, Tab S-2, pg. 1176

76. Schedules "F" and "G" to the development agreement as approved by the Harbour East Community Council on July 5, 2012, respectively entitled "South Building Elevation" and "East and West Building Elevations", indicate the use of a "dri-design wall panel system".

Appeal Book, Volume III, Tab S-2, pgs. 1191-1192

77. The development agreement and attached schedules clearly contemplated and referenced the building's proposed exterior materials including materials other than glass. Furthermore, as noted in Section 3.4.2, the development agreement left the final decision regarding the use of said materials to HRM's Development Officer. On this basis, Can-Euro submits it was not open to the Board to find that Can-Euro "intentionally misled" the public and Council. In light of this information, even if Can-

> Euro had applied for an all-glass building and was approved for same (which was not the case), clause 3.4.2 would have still allowed Can-Euro to seek the development officer's approval to change the exterior materials.
>
> 78. Can-Euro further submits that there was no evidence before the Board to draw the conclusion that any inaccuracies in the building drawings (which is not admitted, but specifically denied), were intentional, or were intended to mislead the public.
>
> 79. Furthermore, the conclusions reached by the Board as noted in the preceding paragraphs were not issues raised by Ollive in their fulsome appeal of the development agreement approval by Council. Accordingly, even if this matter had not been terminated by Ollive's withdrawal, and even if the parties had been given notice and an opportunity to respond, the Board's conclusions were outside the scope of the appeal.
>
> 80. Can-Euro submits the Board's findings of fact were incorrect and were a violation of the principles of administrative law, as discussed in reference to grounds (C) and (D), above. The effect of these errors caused Can-Euro significant injury in the media coverage that followed the release of the decision and Order.

[33] I accept Mr. James' submissions. The appeal is allowed, the Board's decision is set aside, the Board's Order is quashed, and by our Order we confirm that the appeal taken by Ollive Properties Limited to the Utility and Review Board as matter ID. M05086 was in fact withdrawn, as stipulated on the record by its solicitor, Nancy Rubin, Q.C. at the hearing before the Board on February 25, 2013.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.

Beveridge, J.A.