NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*, 2017 NSCA 72

Date: 20170822
Docket: CA 459462
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

3230813 Nova Scotia Limited and Janet Helen Morris

Respondents

Judges:	Fichaud, Bryson and Van den Eynden, JJ.A.
Appeal Heard:	June 6, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Bryson, J.A.; Fichaud and Van den Eynden, JJ.A. concurring
Counsel:	E. Roxanne MacLaurin, for the appellant Brian Casey, Q.C. and Meghan Russell, for the respondent 3230813 Nova Scotia Limited Ms. Morris, respondent, watching brief only

Reasons for judgment:

Overview

[1] Janet Helen Morris lives at 1597 Dresden Row in Halifax. It is one of the oldest areas in the city. Her house was built in the 1840's. It abuts three streets: Dresden Row, Sackville and Queen Streets.

[2] Ms. Morris wanted to construct a small garden shed at the rear of her property. It would replace an existing plastic one, to house garden tools, garbage cans and two bicycles.

[3] Unsurprisingly, the nineteenth-century builders did not anticipate twenty-first century planning requirements. The land-use by-law required a street setback of 9.5 metres. So Ms. Morris applied for a variance permitting construction 2.4 metres from the street. A Development Officer granted her application.

[4] The respondent Company owns the next-door property to the south. It appealed the variance to HRM's Community Council because the shed would block the view from one of the windows in the Company's building and on heritage grounds, relating to the appearance of Ms. Morris' house.

[5] In accordance with s. 30(4) of the HRM *Charter*, (S.N.S. 2008, c. 39) Community Council stands in place of HRM Council in proceedings such as this involving planning matters (s. VIII of the *Charter*). Council on a variation appeal enjoys the same authority as the Development Officer (s. 252(1) of the *Charter*). Hereafter, references to "Council" mean "Community Council".

[6] The Company wanted its architect to make its presentation to Council. The appeal was set down for a date inconvenient to the Company's architect, and the Company sought an adjournment. It was denied. The Company presented its appeal through another agent. When its appeal was dismissed by Council, the Company sought judicial review in the Supreme Court arguing:

1. The development officer lacked authority to approve a variance application under the relevant land-use by-law.
2. The variance breached section 250(3)(b) of the *Halifax Regional Municipality Charter*, which does not permit a variance if the difficulty experienced is general to properties in the area.

3. The refusal of an adjournment denied the Company procedural fairness.

Ms. Morris did not participate in the judicial review or the appeal to this Court. The appeal has been carried by the Company alone.

[7] The Honourable Justice Denise Boudreau granted the Company's application for judicial review, (2016 NSSC 340). She found that denying the Company an adjournment constituted procedural unfairness. She declined to deal with the substantive grounds of review.

[8] HRM appeals to this Court, arguing that the judge erred in her application of the law. The Company has filed a Notice of Contention, reiterating its substantive objections to the Development Officer's authority to approve the variance. HRM takes the procedural point that the Company cannot advance these arguments by way of Notice of Contention.

[9] The judge erred in law when deciding that the Company had been denied procedural fairness because she failed to conduct the contextual analysis required to define that duty. An appropriate analysis discloses that the summary process contemplated by the appeal to Council attracted a standard of reasonableness. Applying that standard, Council's decision to refuse an adjournment in the circumstances of this case was not unreasonable.

[10] HRM's objection to the Company's Notice of Contention should be rejected, but the grounds advanced in the Company's Notice should be dismissed. I would allow the appeal, and restore Council's decision which dismissed the Company's appeal and upheld the Development Officer's variation decision.

The adjournment

[11] Whether to grant an adjournment raises a question of procedural fairness. Where a question of procedural fairness is raised, the first step a court must undertake is an analysis of the content of that duty, (*Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40 at ¶ 54).

[12] In this case, the judge observed that ". . . an assessment of procedural fairness should not normally grant deference to the decision-maker. In other words, an assessment of procedural fairness should lean towards "correctness" rather than "reasonableness" . . ." (¶ 17)

[13] As Justice Fichaud explained in *CanMar*, there is no standard of review for procedural fairness where no decision is involved:

> [47] The reason there is no "standard of review" for a matter of procedural fairness is that *no tribunal decision* is under review. The court is examining how the tribunal acted, not the end product. ***If, on the other hand, the applicant asks the court to overturn a tribunal's decision – including one that discusses procedure – a standard of review analysis is needed.*** The reviewing court must decide whether to apply correctness or reasonableness to the tribunal's decision. (e.g. *Coates, supra*, paras. 43-45) (emphasis in original)
>
> [Emphasis added (Bold/Italics)]

[14] Like *CanMar*, the Company's complaint of procedural unfairness here involved challenging a decision of Council on the very point raised: the request for the adjournment. So two steps must be undertaken: first, a contextual analysis of the duty of fairness in the circumstances of this case; second, consideration of Council's decision in light of that analysis.

[15] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the court set out the following non-exhaustive list of factors guiding definition of the content of the duty of fairness (¶ 23-28):

1. the nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates";
3. the importance of the decision to the individual or individuals affected;
4. the legitimate expectations of the person challenging the decision;
5. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[16] The judge in this case conducted no analysis of the content of the duty of fairness. After commenting that procedural fairness should "lean toward correctness", she moved immediately to her analysis of whether there was a denial of procedural fairness. This is prohibited reasoning as Justice Cromwell cautioned in *Burt v. Kelly*, 2006 NSCA 27 at ¶ 21:

> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. ***But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been.*** Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
>
> [Emphasis added]

[17] *Kelly* accords some latitude to the statutory decision-maker regarding both the content of the duty of fairness and the decision under review – at least where that decision involves some discretion. This looks a lot like a "reasonableness" standard. Apposite here are: *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, and *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, ¶ 48 and following.

[18] These observations of Justice Evans in *Re: Sound* are telling :

> 34 The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.
>
> 35 ***Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts.*** This is evident from the discussion in *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190 at paras. 77 et seq. (*Dunsmuir*) of whether David Dunsmuir was entitled to procedural fairness before his employment in the provincial public service was terminated.
>
> 36 ***However, the standard of review applicable to an allegation of procedural unfairness concerning the content of the duty in a particular context, and whether it has been breached, is more nuanced.*** The content of the duty of fairness is variable because it applies to a wide range of administrative action, actors, statutory regimes, and public programs, with differing impacts on individuals. Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.

> 37 In the absence of statutory provisions to the contrary, ***administrative decision-makers enjoy considerable discretion in determining their own procedure,*** including aspects that fall within the scope of procedural fairness: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-569 (*Prassad*). ***These procedural aspects include:*** whether the "hearing" will be oral or in writing, ***a request for an adjournment is granted,*** or representation by a lawyer is permitted; and the extent to which cross-examination will be allowed or information in the possession of the decision-maker must be disclosed. Context and circumstances will dictate the breadth of the decision-maker's discretion on any of these procedural issues, and whether a breach of the duty of fairness occurred.
>
> 38 ***Dunsmuir does not address the standard of review applicable to tribunals' procedural choices when they are challenged for breach of the duty of fairness.*** However, the Court held (at para. 53) that ***the exercise of administrative discretion is normally reviewable on a standard of reasonableness.*** This proposition would seem applicable to procedural and remedial discretion, as well as to discretion of a more substantive nature. It is therefore not for a reviewing court to second-guess an administrative agency's every procedural choice, whether embodied in its general rules of procedure or in an individual determination.
>
> [Emphasis added]

[19] So, we must first look to the *Baker* criteria to determine the context of Council's duty of fairness.

Decision being made and process

[20] Fairness in the context of the Company's requested adjournment requires some consideration of what was before Council for decision and the process in making it.

[21] The question for substantive decision was the proximity of Ms. Morris' shed to the streetline. The procedural question was whether to adjourn.

[22] HRM points out that variance hearings are considered as an agenda item at regular monthly Council meetings. In this case, there were six Council members present for the Company's appeal, as well as HRM solicitor, Ms. Donna Boutilier, and a legislative assistant. Ms. Morris was in attendance with her contractor, Mr. Forbes. A principal for the Company was present with its representative, Mr. Post. The process was as follows. First, there was a staff presentation with questions of clarification. Then, the Company addressed council for five minutes, followed by questions for clarification. The owner of the property seeking the variance was

allowed another five minutes to reply, together with questions for clarification. No one else spoke, although speakers were called for. The motion was read, seconded, decided.

[23] The process is informal. No one is sworn. There is no cross-examination. Oral submissions are permitted or parties can file submissions in writing.

[24] The Company's principal added during the course of the hearing that he was hoping to get an adjournment to have an architect speak about heritage considerations, but the record shows that HRM's heritage planner and the Province confirmed that the installation of a free-standing shed unattached to the house would not affect or alter the property's heritage character. This argument was not pursued at the judicial review. In resisting HRM's arguments, the Company now repeats the judge's findings and adds that it was denied representation by "its chosen representative". That is not the test.

[25] It would appear that the Company was well-represented at the appeal hearing when it advanced the arguments that were also made at the judicial review, some of which have been repeated to this Court. Mr. Post argued that the variance was, in fact, an amendment to the Land-Use By-Law and contradicted the intent of the existing by-law. He added that it would be a dangerous precedent, damaging the integrity of HRM's planning and heritage conservation regime. Mr. Post submitted a sketch prepared by an architect which depicted the impact on the Company's property, once the shed was built. Mr. Post urged that the variance was not minor. He argued that Ms. Morris' difficulty was not peculiar to her property, but was general to the area. He spoke about the heritage character of her property.

Statutory scheme

[26] The Company was notified of the variance appeal hearing approximately two weeks before it was scheduled. The notification letter referred to a link to the Staff Report to Council. The letter invited the Company to contact the Development Officer with any questions or if clarification was required.

[27] The eleven clear days' notice of the variance appeal hearing exceeded the statutory period required by s. 251(1A)(5) of the *Charter* which permits seven days' written notice to an appealing owner. It is reasonable to infer that an interested party who appealed would have no greater entitlement to notice than an applicant for the variance in the first place.

[28] Other than the notice periods respecting timing of the appeal to Council, there were no statutory constraints respecting process.

[29] The statutory scheme does little to inform the fairness inquiry, except by implication—the property owner and notified neighbours have a right to appear and make submissions.

Importance of decision

[30] The decision on the merits of the Company's appeal would be of some importance to both parties; the refusal of the adjournment itself would not be especially important, unless it compromised the company's ability to address the merits.

Legitimate expectations

[31] Both parties would expect some opportunity to present their respective positions. In particular, the legitimate expectation of the Company would be to receive fair treatment – specifically not to be prejudiced in its appeal on the merits by refusal of an adjournment.

Procedural choices

[32] The choice of Council to refuse an adjournment was procedurally available to it as part of its control of its own process, and was not inhibited by relevant legislation.

[33] Although she does not use this language, it appears that the judge found the Council's decision to refuse an adjournment unreasonable because the appeal was brought in good faith, no prior adjournment had been requested, it was reasonable that "parties" may not be available during the summer, there was no special urgency, and the matter was "significant" for the Company. The judge added that the absence of reasons was "important", (*Decision*, ¶ 22).

[34] HRM submits that fairness in the adjournment context addresses the opportunity to present one's case and answer the opposing case, citing *Grand Central Properties Inc. v Cochrane (Town)*, 2013 ABCA 69 and *Seabolt Watershed Association v. Yellowhead (County)*, 2002 ABCA 124. The party moving for an adjournment should show that the failure to grant the adjournment could reasonably be expected to have affected the result.

[35] Despite finding that she could not presume what the Company's architect could have contributed to the debate, the judge later said, "It is reasonable, in my view, to believe that the applicant's architect, familiar with all of the relevant considerations, could have contributed and assisted in the analysis of this issue." There is no evidentiary foundation for this speculation. This error is significant because it goes to the issue of prejudice. There was no evidence that the Company was prejudiced because its architect did not address Council.

[36] The judge failed to respect Council's procedural discretion respecting adjournments. Generally, deference is owed to the administrative decision-maker on procedural issues, as Justice Cromwell explained in *Kelly*:

> [28] The fifth contextual factor is the nature of the deference owed to the decision-maker. ***What the duty of fairness requires in a particular case "... should ... take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures ..."***: *Baker, supra* at para. 27 per L'Heureux-Dubé, J.; *Knight, supra* at p. 685 per L'Heureux-Dubé, J. Subject to the applicable statutes and regulations, an administrative body is the "... master of its own procedure and need not assume the trappings of a court . The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair." per L'Heureux-Dubé, J. in *Knight* at p. 685.
>
> [Emphasis added]

And see ¶ 17-18, above.

[37] The Company knew the arguments against its position and was able to respond. There was no evidence that the absence of its architect compromised that response. The hearing was informal, but fair. Accordingly, the judge should have deferred to Council's procedural choice to refuse an adjournment and erred in failing to do so.

Adequacy of reasons

[38] Absence or inadequacy of reasons is not a standalone ground of appeal, but is an aspect of fairness (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, ¶ 14).

[39] The judge found that Council's decision was:

> [22] . . . woefully lacking in explanation or reasons. I am certainly not suggesting that a detailed legal analysis, considering all the factors of *Igbinosun*, would have been expected in such circumstances. Even so, it is completely unclear to me why the Chair felt that the matter should go ahead that day. He appears to have simply deferred the question to Councillor Mason. The Chair's reasons are unsaid and unexplained.

[40] With respect, the foregoing complaint suggests the answer – Councillor Mason's explanation was satisfactory and obviously the Chair accepted it. The summary and expedited process of an appeal before Council should not normally attract an obligation to provide detailed reasons. If a reasonable basis for the outcome can be inferred from the circumstances, that will often be adequate. In *Gardner v. Canada (Attorney General)*, 2005 FCA 284 at ¶ 28 the Federal Court of Appeal put it this way:

> [28] But the Court recognized that there were practical reasons for providing that "... any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient." (para. 40). The duty to give reasons is grounded in a person's interest in knowing why profoundly important decisions affecting them are made as they are (para. 43). ***If, as a result of an intimate involvement in the process leading to the decision, a person understands, or has the means to understand the reason for the decision, the duty to give reasons will vary accordingly.***
>
> [Emphasis added]

Gardner was approved in *Green v. Nova Scotia (Human Rights Commission)*, 2011 NSCA 47 at ¶ 42.

[41] HRM draws the Court's attention to the comments of Justice Watson in *Sellors v. Greenview (Municipal District No. 16)*, 2016 ABCA 312:

> [24] The applicant's submission as to inadequate reasons is not unfamiliar in cases of local government bodies such as this. Such emanates of local government are often populated by persons without legal training. Rather, they are usually local persons with a variety of other valuable skills and backgrounds representative of the community in its broadest sense. Consequently, their reasons may be of brief compass and appear to be conclusory. Such brevity does not necessarily reveal error.

[42] In many cases reasons may be necessary. But not all processes need explicit reasons to be fair. This is one of them. The local councillor summarized the

situation. The appeal concerned variance for a garden shed. There was adequate time to prepare and Council received oral and written submissions. There was nothing before Council suggesting that a hearing on the merits could not proceed fairly at that time.

[43] The reviewing judge erred in law when failing to define the content of Council's duty of procedural fairness. She simply conducted her own analysis without the benefit of that context, and substituted her own opinion for the Council's.

[44] I would allow HRM's appeal of the judge's finding that the failure to grant an adjournment was unfair.

Notice of contention

[45] The Company seeks to affirm the judge's decision by reasserting grounds advanced before her, on which she declined to rule. They are put forward by way of Notice of Contention, to which HRM objects, saying these issues should have been raised by cross-appeal, relying on *Cox v. Cox* (1982), 52 N.S.R. (2d) 298 (C.A.) which held that a Notice of Cross-Appeal should be used where a respondent seeks to uphold or challenge an outcome based on a cause of action other than the cause appealed. Nevertheless, the Court of Appeal in *Cox* went on to consider the merits of the respondent's Notice of Contention.

[46] The Company contends that *Cox* does not apply to a judicial review. The Company says it seeks affirmation of the judge's decision on grounds on which the judge declined to rule: so the Company is not appealing the decision.

[47] Failure to abide by the *Rules* of Court is generally an irregularity and does not "invalidate" a step in any proceeding, (*Rule* 2.02(1)). Subject to certain mandatory directions, the Court has a discretion to excuse non-compliance, (*Rule* 2.03). Somewhat enigmatically *Rule* 90.22 (Respondent's Notice of Contention) preserves the Court's "power":

> 90.22 (1) A respondent who does not cross-appeal and wishes to contend that the judgment under appeal should be affirmed for reasons different than those expressed in the decision or the judgment under appeal must file a notice of contention.
>
> [. . .]

> (4) A failure of a respondent who contends for affirmation for different reasons to file a notice of contention does not diminish the power of the Court of Appeal, but it may be grounds for an adjournment and an order for costs.

[48] The purpose of the *Rules* favours expeditious and inexpensive resolution of proceedings:

> 1.01 These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[49] Whether HRM's interpretation of the *Rules* is correct, this Court has discretion to entertain the arguments advanced by the Company – regardless of the manner in which the arguments have been put forward – if satisfied that it is in the interests of justice to do so. In this case, HRM is not in any way taken by surprise by the arguments which the Company makes, but has had full opportunity to respond to them.

[50] The Company raises two issues in its Notice of Contention. First, that the Development Officer did not have authorization to approve a variance application under s. 5(14) of the *Downtown Halifax Land Use By-Law*. Second, the variance approved by the Development Officer breached s. 250(3)(b) of the HRM *Charter*. That section prohibits a variance where the difficulty involved is "general to the properties in the area".

Approval of the variance

[51] The Company submits that what is really being varied here is the setback from the street. The Company says that variation of street setbacks is not something that the Development Officer can authorize. The Company continues by arguing that it is a question of characterization, putting it this way in its factum:

> 43. Three factors lead to the conclusion that this requirement is in relation to streetwall setbacks. In the first place, the application had to be re-advertised when Morris got the streetwall setback calculation wrong. (Reasons, para 7; A.B. Vol 2, p. 45). If the variance did not relate to the setback calculation, it would be unnecessary to re-advertise. In the second place, Morris in her application noted she was seeking to vary "size of yards (setbacks)" and "lot coverage". (A.B. Vol 2, p. 45). Her characterization of the application is significant. Third, setbacks are treated separately from accessory building requirements in the DHLUB; the change sought is not to the accessory building requirements of the bylaw but to the streetwall setback requirements of the bylaw. The bylaw itself should be read as a whole in determining whether this variance relates to accessory buildings or

> whether it relates to set backs. Those provisions appear in the Appeal Book, Vol 2. The index to the bylaw shows the different treatment of streetwalls and built form requirements:
>
> [. . .]

[52] The Company adds that the only variations permitted under s. 246(5)(11) of the Land-Use By-Law are non-substantive. These are described in s. 5(11):

> 5 (11) The following developments are non-substantive site plan approval applications:
>
> ***(a) accessory buildings and structures;***
>
> (b) development that does not materially change the external appearance of a building facing streetlines;
>
> (c) new window and door openings or alterations to existing window and door openings abutting streetlines;
>
> (d) alteration of external cladding material that does not affect the external appearance of a building facing streetlines;
>
> (e) signs;
>
> (f) decks, patios, and similar unenclosed features; and
>
> (g) steps, stairs and other entryways.
>
> [Emphasis added]

[53] The Company maintains that street setback variation is substantive and any substantive application must be approved by the Design Review Committee, citing s. 5(13) of the *Land Use By-Law*:

> 5(13) Any application that is not listed in sub-sections (10) or (11) is a substantive site plan approval application and shall be referred to the Design Review Committee.

[54] The Company says that because street setbacks are not identified as a provision that may be varied by the Development Officer, there is no authority for the officer to vary plans involving a change in setback.

[55] HRM responds, pointing out that accessory buildings are explicitly identified in the by-law as non-substantive (or minor) site planning applications and remain under the authority of a Development Officer. Such minor site plan applications do not fall under the purview of the Design Review Committee. HRM argues that s. 5(14) of the *Land-Use By-Law* does not give Design Review

Committees power to consider s. 250 variances. That authority is described in s. 250(1) and (2):

> 250(1) A development officer may grant a variance in one or more of the following terms in a development agreement, if provided for by the development agreement, or in land-use by-law requirements:
>
> (a) percentage of land that may be built upon;
>
> (b) size or other requirements relating to yards;
>
> (c) lot frontage or lot area, or both, if
>
> (i) the lot existed on the effective date of the bylaw, or
>
> (ii) a variance was granted for the lot at the time of subdivision approval.
>
> (2) Where a municipal planning strategy and land-use by-law so provide, a development officer may grant a variance in one or more of the following terms in a development agreement, if provided for by the development agreement, or in land-use by-law requirements:
>
> (a) number of parking spaces and loading spaces required;
>
> (b) ground area and height of a structure;
>
> (c) floor area occupied by a home-based business;
>
> (d) external appearances of structures in the HRM by Design Downtown Plan Area and the Centre Plan Area;
>
> (e) height and area of a sign.

[56] Relaxations permitted by Design Review Committees are set out in the Design Manual and relate only to substantive site plan applications. That was not Ms. Morris' site plan application in this case. HRM emphasizes that the Development Officer has two statutory powers relevant in this case: first, to grant a variance under s. 250 of HRM's *Charter*, and second, to approve non-substantive site plan applications under s. 246 and ss. 5(11)(a) and 5(12) of the *Land-Use By-Law*.

[57] HRM says that the Development Officer could grant a variance of the size or other requirements relating to yards permitted by s. 250(1)(b) or he could have granted a site plan approval relaxation respecting the location of the shed as permitted by s. 246(3)(a) of the *Charter*.

[58] Municipal legislation – including subordinate legislation – should be read purposively, as the Supreme Court directed in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19:

> [8] A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. This approach is also consistent with s. 10 of Alberta's *Interpretation Act*, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[59] To similar effect: *Martell v. Halifax (Regional Municipality)*, 2015 NSCA 101:

> [28] It is worthy to note that this Court has previously considered the tug between restrictive versus purposive interpretation of planning legislation. In *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50, this Court, after noting Professor Côté's description of the interpretative dichotomies referenced above, stated:
>
> > [97] Therefore, there is case law to support the view that a liberal and purposive approach to the interpretation of planning policies is appropriate. The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality.
> >
> > [98] Support for a pragmatic approach to interpretation is to be found in *Berardinelli v. Ontario Housing Corporation*, [1979] 1 S.C.R. 275, where Mr. Justice Estey stated at p. 284:
> >
> > > ***"When one interpretation can be placed upon a statutory provision which would bring about a more workable and practical result, such an interpretation should be preferred if the words invoked by the Legislature can reasonably bear it . . ."***
> >
> > [Emphasis added]

[60] The Company's argument is untenable because it would lead to this absurd result: a variance to permit construction of a shed cannot be granted at all.

[61] The Development Officer is the only one who may approve a non-substantive site plan application. That power is granted by s. 5(11) and (12) of the

Land-Use By-Law. A shed is an accessory building and, by definition, involves a non-substantive site plan application. The Design Review Committee may only consider substantive site plan applications—it has no authority to entertain non-substantive applications, (s. 13 *Land-Use By-Law*). It could not approve an application to build a shed.

[62] On the Company's interpretation, the Development Officer's apparent authority to approve Ms. Morris' shed disappears because the shed incidentally encroaches on the 9.8 metre street setback. Nor can the Design Review Committee approve the shed, because a shed is an accessory building, which is non-substantive and the Committee may only consider substantive applications. This makes no sense and offends the salutary interpretive principle that favours practical outcomes.

[63] The Development Officer's power to authorize the minor variance here is set out in s. 5(11)(a) of the *Land-Use By-Law*. That power is undiminished because its exercise incidentally affects the streetline setback. The Development Officer's interpretation of his authority was correct, as was Council's apparent acceptance of that authority by its dismissal of the Company's appeal.

Variance under s. 250(3)(b) of the *Charter*

[64] This section prohibits a variance where the difficulty is "general to the properties in the area". The Company argues that none of the properties in the area of Ms. Morris' house could comply with required street setbacks and so the "difficulty experienced is general to properties in the area".

[65] The Company augments its submission by objecting that Council did not give reasons and so one does not know why Council concluded s. 250(3)(b) was inapplicable.

[66] Council's application of s. 250(3)(b) of the HRM *Charter* involves an application of the Statute to the properties in question. The Court reviews Council's decision on a reasonableness standard.

[67] Council had the benefit of the Staff Report which HRM quotes in its factum:

> 63. . . .
>
> It is the Development Officer's opinion that the difficulty experienced is not general to the area. This property has an irregular lot configuration

> with streets bordering 3 of its 4 boundaries. As a result, it has no back yard or side yards and only a front yard. There is no other location on the property for a shed to be situated. In any other location, the proposed shed would either block the front entrance and walkway to the dwelling or encroach over the property boundary. As such, the difficulty experienced is not general to properties in the area.

[68] HRM also notes that Council had before it a staff presentation showing photographs of the property, and site plan drawings. Council also heard from Ms. Morris and the Company's representative, both of whom addressed descriptions of the property and the surrounding area. Council meeting minutes show that Council considered the size, shape, grade and historical aspects of the property.

[69] In the result, HRM submits that the decision of Council on the merits of the variance application was not unreasonable, and is entitled to deference from the Court.

[70] The Staff Report explains the Development Officer's conclusion, and it is reasonable to assume that Council agreed. Whether one accepts Council's conclusion, it has a rational basis grounded in the evidence. The outcome and its foundation are apparent on the record. The Court should defer to Council's conclusion.

Conclusion

[71] I would allow the appeal, dismiss the substantive grounds argued by the Company, and restore the Development Officer's decision permitting the variance so that Ms. Morris may construct her shed.

[72] Costs awarded against HRM at the judicial review should be returned. I would award HRM $1,000.00 costs on appeal, inclusive of disbursements.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Van den Eynden, J.A.