NOVA SCOTIA COURT OF APPEAL

Citation: *Kings County (Municipality) v. Methot*, 2019 NSCA 21

Date: 20190327
Docket: CA 472549
Registry: Halifax

Between:

Municipality of the County of Kings

Appellant

v.

Donavan Methot, Juanita Methot, Mike Stoddart, Lori Stoddart, Jeff Carty, Wendy Carty, Rick Rood, Heather Rood, the Attorney General of Nova Scotia and the Nova Scotia Utility and Review Board

Respondents

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	September 13, 2018, in Halifax, Nova Scotia
Subject:	*Municipal Government Act*; development agreement; statutory interpretation
Summary:	Contrary to the Municipal Planning Strategy and Land Use By-laws for the area, the eight individual respondents (Owners) placed four recreational vehicles (RVs) on their lands. The Owners applied for a development agreement to permit the RVs. Their application was rejected and no development agreement was ever negotiated or prepared. The Municipality directed the RVs be removed. The Owners appealed to the Nova Scotia Utility and Review Board. The Board allowed the appeal and ordered the Municipality to approve a development agreement permitting the RVs in addition to the existing cottage. The Municipality claimed the Board had no authority to so order.
Issues:	Did the Board have the statutory authority to order that Council approve a Development Agreement when no draft

agreement had ever been prepared for its consideration?

Result: Appeal allowed. The Board lacked authority to order that Council approve a DA when no draft agreement had ever been prepared for its consideration. The legislative provisions are clear and the fact that there was no "written agreement" is not a technicality to be overlooked. No costs awarded.

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Respondents

Judges:	Bryson, Oland and Van den Eynden, JJ.A.
Appeal Heard:	September 13, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Van den Eynden, J.A.; Bryson and Oland, JJ.A. concurring
Counsel:	Jonathan Cuming, for the appellant Donavan Methot on behalf of the respondents Donavan Methot, Juanita Methot, Mike Stoddart, Lori Stoddart, Jeff Carty, Wendy Carty, Rick Rood, Heather Rood Edward Gores, Q.C. for the Attorney General of Nova Scotia (not participating) Bruce Outhouse, Q.C. for the Nova Scotia Utility and Review Board (not participating)

Reasons for judgment:

Overview

[1] The eight individual respondents (Owners) purchased two adjacent lots near Lake George in Kings County, Nova Scotia. There was a cottage on one of the lots. The Owners placed four recreational vehicles (RVs) on the lots, and used them and the cottage for recreational purposes. The RVs contravened the Municipal Planning Strategy and Land Use By-laws for the area.

[2] After the Municipality of the County of Kings (Municipality) directed them to remove the RVs, the Owners applied for a development agreement to permit the RVs to remain on their lots. These agreements can be used in limited circumstances to allow land uses that would not normally be permitted and once concluded are legally binding. No development agreement was negotiated and reduced to writing. Municipal Council refused the Owners' application and confirmed its directive to remove the RVs.

[3] The Owners appealed to the Nova Scotia Utility and Review Board. The Board allowed the appeal (2017 NSUARB 197) and ordered the Municipality "to approve a development agreement to permit four recreational vehicles in addition to the existing cottage …" on the two lots. The Municipality argues the Board had no authority to make such an order. I agree. For the reasons that follow, I would allow the appeal.

Background

[4] As an over-arching observation, it is clear from the record that no development agreement was ever prepared for consideration by Council or by the municipal solicitor in advance, as is required. At one point, Council directed municipal planning staff to prepare a draft; however, planning staff never executed that direction. They took the position that the governing development framework could not accommodate the use of the RVs and thus did not act on Council's direction. Council accepted the opinion of planning staff and refused the Owners' application. What now follows is a summary of how all this unfolded.

[5] The Owners bought two small adjacent lots in Lake George. Each lot is approximately 150 x 150 feet and zoned S1 Seasonal Residential. The lots are

within 350 feet of the lake shoreline. One lot had an existing small cottage which the Owners repaired. It also had a septic holding tank.

[6] The Owners then moved four RVs onto their property; two on the lot with the existing cottage and two on the other lot. The Owners did not seek a development permit. They also installed a second septic holding tank. Other property enhancements were carried out such as clearing, landscaping, construction of decks for each RV and a second driveway was added.

[7] There are specific Municipal Planning Strategies (MPS) and Land Use Bylaws (LUB) in place respecting development in this area. MPS contain policies that regulate land use and development. These policy statements guide Council's decision making (s. 213 of the *Municipal Government Act*, S.N.S. 1998, c. 18 (*MGA*)) and Council's actions must be consistent with these strategies (s. 217(1)). To implement planning strategies Council adopts LUB (s. 219).

[8] The Municipality received a complaint about the Owners' RV development. The Municipal Development Officer wrote to the Owners advising their RVs were not a permitted use for the Zone. The RVs fell outside the definition of "dwelling", "seasonal dwelling" or "mini-home". Even if they had met those definitions, the maximum number of seasonal or permanent dwellings permitted in the S1 Zone is one per lot. The Owners were directed to remove the RVs.

[9] In an attempt to legalize their use of the property the Owners submitted an application for a Development Agreement (DA). Short of amendments to the governing development framework, this was the only possible way out of the Owners' predicament. The Municipal Planner advised the Owners that the decision to approve or deny their application would be made by Council and there was no guarantee they would receive a DA.

[10] As is typical, an initial public information meeting was held to inform the public of the application and the process. During the meeting, the Municipal Planner outlined the following process:

1. Receipt of Application;
2. Public Information Meeting;
3. Staff review;
4. Area Advisory Committee (if necessary);
5. Planning Advisory Committee;

6. Initial Consideration of Council;

7. Public Hearing;

8. Final Consideration of Council; and

9. 14-day appeal period.

[11] Some members of the public present at the information meeting voiced no objection to the development, some expressed concerns. After the meeting, several local residents contacted planning staff expressing concern over the density, noise and level of activity on the Owners' property. In addition, some said it would be inequitable to permit four illegal RVs, in addition to the cottage, when other landowners are only permitted to have a single cottage or home on their property.

[12] Planning staff also gathered information from the Department of Natural Resources respecting the impact the proposed development might have on local wildlife as well as information from the Department of Environment respecting the installed septic tanks.

[13] Lake George is deemed a significant wildlife habitat because of its loon population. Although the Department of Natural Resources did not voice concerns respecting the Owners' two parcels of land, the staff wild life biologist advised:

> […] it is terribly difficult to ascertain when residential densification and associated recreational activities tip the balance to the detriment of loons and other wildlife. Squeezing a few extra RVs on to these cottage lots may not be problematic today. However, if in future the rest of Lake George's currently undeveloped shoreline was to be developed in the same manner and to the same density, then it is safe to say that wildlife will suffer […]

[14] The Department of Environment advised it had no objections with current load/use of the two septic holding tanks provided there were no further changes to the operation. Should loads increase or operations change, an additional assessment would be required.

[15] After the public information session and the gathering of this and other information, planning staff began its review of the Owners' development proposal and prepared a report to the Planning Advisory Committee (PAC). Planning staff considered the applicable MPS Policies. The report noted that although MPS Policy 3.5.8.1.4 permitted multi-unit residential development within the Seasonal Residential (Sl) Zone, the intent of that section was to allow for summer camps, resorts and campgrounds with careful site analysis and development agreement

conditions aimed at preserving natural vegetation and maintenance of septic systems to help maintain lake water quality.

[16] Planning staff asked the PAC to pass a motion recommending that Council refuse the application for a DA and directing the removal of the RVs. The report to PAC contains this conclusion:

> Staff are recommending refusal of the application as the proposed development does not meet the requirements of the underlying zone and is not consistent with the DA and general policies of the MPS. Lake George is above its carrying capacity threshold of Chlorophyll a concentrations, and this lake has passed the number of as-of-right dwelling units outlined in the LUB Section 14. 4.13. The proposal is not compatible with adjacent low density uses and poses a level of risk to the lake water based on the current septic configuration, relying on a frequently pumped out holding tank rather than a traditional septic system. There is also concern relating to negative impacts on the significant wildlife habitat identified on Lake George ...

[17] The PAC met and reviewed the planning staff report. It accepted the recommendation of planning staff and in turn passed the following motion making this recommendation to Council:

> […] Planning Advisory Committee recommends that Municipal Council refuse the application for a Development Agreement to permit multiple RVs in addition to the existing cottage 103 03 Road, Lake George. Further, Council also wishes to reiterate that requirement for immediate compliance by the removal of the RVs.

[18] Although the PAC made this recommendation, it was rejected by Council. Instead, Council passed a motion which directed that planning staff prepare a draft DA with the view of allowing the four existing RVs. The Owners were subsequently advised in a letter that the matter would again be considered at an upcoming PAC meeting.

[19] Planning staff pushed back on the direction to prepare a draft DA. Additional staff reports were prepared, and the matter came back before Council. In their supplemental reports, planning staff concluded that notwithstanding Council's direction to prepare a draft DA, they were of the opinion that the existing MPS could not accommodate the development and thus did not prepare a draft. Planning staff reported:

> Staff have reviewed the matter and are of the opinion that no applicable policy exists within the current Municipal Planning Strategy (MPS) which would permit

> the Municipality of the County of Kings to enter into a Development Agreement pertaining to allowing existing RVs on the subject property.
>
> […]
>
> As indicated above, Staff are of the opinion that the proposed development, as currently configured, cannot be accommodated through the existing policies of the MPS.
>
> If Council believes this type of development is appropriate and should be encouraged then an amendment to the MPS would be required to establish a set of criteria and enabling policy to consider RVs on properties around lakes through a development agreement.
>
> […]
>
> Staff are not able to follow the direction of Council as the proposed development agreement is not consistent with the development agreement criteria and general polices of the MPS.

[20] At the end of planning staff's presentation to Council and after some debate on the issue, Council passed a motion which refused the Owners' application. Based on the record, it is clear to me that it did so on the basis that the current development framework did not enable the development. Hence, the parties never moved forward with negotiation and preparation of a draft DA for Council's consideration which is a required step in the process.

[21] The Owners appealed this decision of Council to the Board.

[22] It is unnecessary to delve into the specifics of the zoning restrictions, applicable MPS Polices and LUBs and why planning staff concluded this governing framework could not accommodate or enable the development of the RVs in this Zone. Nor is it necessary to set out why the Board disagreed with the opinion of planning staff. That is because a prerequisite for Board intervention was not present. I will explain that further in my following analysis.

Issue

[23] I would frame the dispositive issue on appeal as follows:

> Did the Board have the statutory authority to order that Council approve a Development Agreement when no draft agreement had ever been prepared for its consideration?

Analysis

[24] The Municipality advocated for a correctness standard of review. I do not need to determine whether the applicable standard of review is reasonableness or correctness because I am satisfied that even on the more deferential standard, the Board's decision is unreasonable. As I will explain, since there was no DA the Board should have dismissed the appeal. There is a clear process for creating a DA; however, in this case the process was aborted part way through. The Owners may have other remedies as discussed later, but not one that the Board could provide.

[25] It is helpful to start by understanding the required steps for approval of a DA. Section 230 of the *MGA* sets out how these agreements are to be adopted or amended:

> 230 (1) A council shall adopt or amend a development agreement by policy.
>
> (2) A council shall hold a public hearing before approving a development agreement or an amendment to a development agreement.
>
> (3) Only those members of the council present at the public hearing may vote on the development agreement or the amendment.
>
> (4) Upon approving a development agreement or an amendment to a development agreement, the clerk shall place a notice in a newspaper circulating in the municipality stating that the development agreement is approved and setting out the right of appeal.
>
> (5) The clerk shall file a certified copy of a development agreement or amendment with the Minister when notice of the development agreement or an amendment to it is published.
>
> (6) Within seven days after a decision refusing to approve a development agreement or an amendment to a development agreement, the clerk shall notify the applicant in writing, giving reasons for the refusal and setting out the right of appeal.
>
> (7) Amendments to those items in a development agreement that the parties have identified as not substantive, if the substantive items were identified in the agreement, or that were not identified as being substantive, do not require a public hearing.

[26] Subsection 230(1) stipulates that Council adopt a DA "by policy". Policy 6.3.4.2 of the MPS goes on to provide:

> It shall be the intention of Council that Staff of the Municipality's Department of Community Development Services be responsible for negotiations with the

> proponents of Development Agreements to secure draft written agreements for consideration by Council.
>
> Draft agreements shall be reviewed by the Municipal Solicitor before Council will consider entering the agreement. Council shall have it registered at the Registry of Deeds.

[27] Next, I turn to the Owners' scope of appeal and the Board's statutory appeal powers. The *MGA* provides the Owners with this right of appeal:

> 250(1)(b) An aggrieved person or an applicant may **only** appeal (b) the approval or refusal of a **development agreement** or the approval of an amendment to a development agreement, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy; [emphasis added]

[28] The *MGA* provides the Board with these limited statutory powers when considering planning appeals:

> 251(1) The Board may:
>
> (a) confirm the decision appealed from;
>
> (b) allow the appeal by reversing the decision of the council to amend the land use by law or to approve or amend a development agreement;
>
> (c) allow the appeal and order the council to amend the land use by law in the manner prescribed by the Board or order the council to approve the development agreement, approve the development agreement with the changes required by the Board or amend the development agreement in the manner prescribed by the Board; […]

[29] Subsection 251(2) says:

> The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

[30] In general terms, an appeal of Council's decision respecting a DA involves a review of the specific terms of the DA in the context of the MPS as a whole. In my view, the governing framework presupposes that there is a draft written DA in existence. Providing this is the case, the Board then moves on to conduct its analysis under s. 251(2). To state the obvious, where a specific DA has not been prepared, it cannot be examined within the context of the MPS as a whole and the applicable LUBs.

[31] As noted, MPS Policy 6.3.4.2 refers to "draft written agreements" and requires the draft be reviewed by the municipal solicitor before Council is to consider entering into the agreement. Further, it is clear that s. 230 of the *MGA* contemplates a DA to be in writing. The processing of the Owners' application did not get that far.

[32] In my view, the absence of any draft written development agreement is fatal. The Board was wrong to overlook this important requirement and it led the Board into reversible error. To use a metaphor, it was akin to putting the cart before the horse.

[33] The Board focused intently on the opinion of planning staff. As noted, planning staff opined that Council could not entertain any DA without first amending its MPS. The Board disagreed and went down the path of conducting a very extensive review of staff opinions and why the Board found them to be incorrect. Having determined that the development framework could permit or enable such an agreement the Board then imposed one—which was to approve the status quo of the four RVs on the two lots.

[34] The Board viewed the development of the land to be complete and the opportunity to gather additional information and/or seek the inclusion of any additional development terms was spent. The Board said:

> [222] …The County has completed its process. The County had its opportunity to decide what additional information, studies, plans, drawings or documents it wanted to evaluate and it chose only those which it had received, engineering report and biologist. The County does not have the ability to now redo the entire process. Council can do nothing but put into a formal document the one clause Council considered and the one clause the Board has ordered.

[35] This "one clause" was "to permit four (4) recreational vehicles, in addition to the existing cottage, on two adjacent lots at 103 03 Road, Lake George, Kings County, Nova Scotia". The origin of this limited and cursory language was from the Owners' application, which required them to provide a short explanation of their proposal to which they replied: "To be able to use our recreational vehicles for summer use on our cottage lots".

[36] I agree with the Municipality's submission that the Board's conclusion that the "… County had completed its process. …" ignores the clear and express requirements imposed by s. 230 of the *MGA* that DA's are to be adopted by Policy,

following a public hearing. That did not happen nor could it because there was no draft written agreement to present to the public or for Council to consider.

[37] The Municipality claims the process stalled at step 5—the PAC stage (see para. 10 herein)—when Council directed planning staff to prepare a draft DA with a view to allowing the existing RVs. The Municipality says this motion constituted a simple instruction to begin the processes contemplated by Policy 6.3.4.2 (negotiation, solicitor review and council consideration). I repeat the provision of this Policy for convenience:

> It shall be the intention of Council that Staff of the Municipality's Department of Community Development Services be responsible for negotiations with the proponents of Development Agreements to secure draft written agreements for consideration by Council.
>
> Draft agreements shall be reviewed by the Municipal Solicitor before Council will consider entering the agreement. Council shall have it registered at the Registry of Deeds.

[38] In short, the contention is that the process remained in its infancy as Council had yet to have a draft agreement to consider. In my view, that is not just a fair assessment of what occurred—it is what the record fully supports.

[39] The process was not "over" as the Board found. And in the context of these circumstances the Board erred in principle by concluding "Whatever additional clauses the County may have wanted to negotiate into a DA, it had that opportunity during the process and did not do so." The Municipality suggests that perhaps the Board's use of "County" indicates a blurring of roles between planning staff and Council.

[40] The MPS affords Council significant discretion with respect to the content of a DA. While planning staff made inquiries regarding septic and environmental concerns, it is Council, as the primary steward of planning decisions, who must be satisfied before approving a proposed development, that all necessary protections and precautions have been considered and addressed (s. 190(b) *MGA*). There are many objectives and detailed criteria set out in the development framework of the *MGA* for Council to consider. I accept the Municipality's contention that this would require Council be provided with a draft DA, so it could consider what additional information, studies, plans, drawings or other documents it might require or what terms should be embedded in the DA to ensure compliance.

[41] The Board gave short shrift to the Municipality's argument that without a draft DA the Board could not consider Council's decision under the *MGA*. The Board reasoned:

> [201] Council was asked whether they would approve the current and existing use of the Lands. The Board finds that the technicality of putting this DA into a form such that both parties can sign is not determinative of the Board's jurisdiction under the MGA.
>
> …
>
> [204] The Board finds that in reading the MGA as a whole, the intent of the MPS is to enable people, including lay appellants, to appeal from a decision of their Council when they have requested a development agreement. There is nothing in the *Act* that specifically keynotes the form the development agreement must be in for Council to render a decision or for the Board to consider a subsequent appeal.

[42] The Board properly noted that the *MGA* is to be read as a whole and given a broad and purposive interpretation. However, without any apparent regard to or analysis of the express and clear wording that draft DAs need to be in writing to be considered by Council, the Board found:

> [205] The Board also finds that the consequences of the County's interpretation would not meet the objects of the *Act*. All a municipal council would have to do, to avoid any appeal from its decision, is refuse to put the development agreement into a formalistic written contract, as was done in this case. The consequence would be to eliminate the right of appeal for some, in particular lay people like the Owners in this case.

[43] It is obvious that the Board was concerned with eliminating the Owners' right to appeal and denying them any potential remedy if the development process terminated prematurely. This was particularly troublesome to the Board given its view that planning staff failed to provide proper advice to Council respecting its development/enabling options. Further, the time span that elapsed between the filing of the Owners' application and Council's ultimate rejection was about 19 months. No doubt the lay Owners found the process confusing and frustrating.

[44] While it is understandable these factors would be of concern, the powers of the Board are only as prescribed in the *MGA*. The appellant Municipality argues that neither the provisions of the *MGA* nor the MPS contemplate or permit an appeal of a decision to refuse a DA application where no agreement has been prepared and placed before Council for consideration. I agree.

[45] The Municipality addressed the Board's concern over limiting the Owners' appeal rights and the need to guard against a Municipality looking to avoid an appeal by refusing to prepare a DA in writing. The Municipality properly pointed out that the Board's concern failed to consider *Rule* 7 of the *Civil Procedure Rules of Nova Scotia* which permits the Nova Scotia Supreme Court to review decisions of "decision making authorities", including municipal councils, and, pursuant to *Rule* 7.11, to order Council to take a particular action.

[46] The Municipality says that in the circumstances of the matter under appeal, and given the requirements of MPS Policy 6.3.4.1 and the limited remedies offered to the Board pursuant to s. 251(1)(c) of the *MGA*, a judicial review application would have been the proper way to proceed. Through this process the Owners could seek a declaration that the MPS constituted an enabling Policy and/or seek an order requiring planning staff to draft a DA for consideration by Council and its municipal solicitor.

[47] The Owners were self represented before the Board and on appeal. Their submissions on appeal were rather brief and with respect, not very responsive to the arguments advanced by the Municipality. From a fairness perspective they maintained that they should be permitted to keep the RVs on their lots. They mentioned the matter before Council took some time to wind through and seemed to candidly acknowledge that even in the end "… (19) months after the application was filed. There was still no draft DA and no discussions had been opened with the applicants." The Owners see planning staff as having "usurped itself over Council, thereby dismissing the DA adoption process. Denying the applicants of fair and due process…" .

[48] Principles of statutory interpretation dictate that the words of an *Act* must 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 the legislature. Further, when the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. However, in all cases the court must seek to read the provisions of an *Act* as a harmonious whole. The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at para. 21).

[49] Under s. 251(1)(c), the Board had three options:

(a) Allow the appeal and order Council to approve the DA;

(b) Approve the DA with changes required by the Board; or

(c) Amend the DA.

[50] The Board chose option (a) notwithstanding there was no draft DA ever prepared because the application process stalled at an earlier stage in the process. With respect, the Board got caught up with assessing planning staff's enabling opinion and overlooked or misinterpreted the impact the absence of any DA had on the scope of the Board's authority to intervene.

[51] In summary, the Board did not have the statutory authority to order that Council approve a DA when no draft agreement had ever been prepared for its consideration. The legislative provisions are clear and the fact that there was no "written agreement" is not a technicality to be overlooked. The Owners may have had a remedy as identified by the Municipality, but not one the Board could provide in these circumstances.

Conclusion

[52] I would allow the appeal. Because the appeal is allowed on the above dispositive ground, I need not address whether the Board reasonably found that the MPS and LUB enabled a DA nor the other grounds of appeal raised by the Municipality. No costs were sought and I would not award costs.

Van den Eynden, J.A.

Concurred in:

Bryson, J.A.
Oland, J.A.