NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax (Regional Municipality) v. Tarrant*, 2019 NSCA 27

Date: 20190409
Docket: CA 479196
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Cyril Tarrant and Teresa Jacqueline Tarrant

Respondents

and

Robin Boudreau, Barb Wright and Margo Riebe-Butt

Respondents

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: March 20, 2019, in Halifax, Nova Scotia

Subject: Planning – variance appeal – procedural fairness

Summary: The municipal development officer approved a setback variance for a parcel owned by Ms. Tarrant. Several neighbours appealed to the Community Council, the appellate tribunal under the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, s. 252(1). All parties received notice of the Council's hearing. The Tarrants emailed a submission for the Council's consideration. The email said they would not appear at the hearing. The Tarrants did not request an adjournment. After the hearing, the Council allowed the neighbours' appeal and overturned the variance.
The Tarrants applied for judicial review of the Council's Decision. The judge of the Supreme Court of Nova Scotia acknowledged that the Council's Decision was "reasonable" on its merits but held that the Council's process offended procedural fairness. The judge said the Council should have adjourned on its own motion when the Tarrants did not appear

for the hearing. The Supreme Court's Order quashed the Council's Decision and remitted the variance appeal to the Council for another hearing.
The Municipality appealed to the Court of Appeal.

Issues: Did the applications judge err by ruling the Council's process offended principles of procedural fairness?

Result: The Court of Appeal allowed the appeal, overturned the Supreme Court's Order and restored the Decision of the Council.
The applications judge had omitted the first step of procedural fairness analysis – namely, the consideration of the criteria to establish the applicable standard of procedural fairness. The Court of Appeal considered the criteria and determined that the standard allowed the Council a discretion whether to adjourn. The Council's process did not offend its duty of procedural fairness.

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Judges:	Beveridge, Fichaud and Derrick JJ.A.
Appeal Heard:	March 20, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed and decision of the North West Community Council restored, without costs, per reasons for judgment of Fichaud J.A., Beveridge and Derrick JJ.A concurring
Counsel:	E. Roxanne MacLaurin for the Appellant Aaron J. Schwartz for the Respondents Cyril Tarrant and Teresa Jacqueline Tarrant The Respondents Boudreau and Wright attending

Reasons for judgment:

[1] Bedford's Land Use By-law stipulates minimum setbacks for new construction. The landowner wished to build closer to the lot lines. The landowner applied for, and the Municipality's development officer granted, a setback variance. Several neighbours appealed to the Community Council, the appellate tribunal under the *Halifax Regional Municipality Charter*. All parties received notice of the scheduled appeal hearing before the Council. The landowner emailed a brief written submission, said he would not appear, and did not request an adjournment. The written submission was provided to the Council. After the hearing, the Council allowed the neighbours' appeal and overturned the variance.

[2] The landowner sought judicial review of the Council's decision. The reviewing judge ruled that the Council's decision was "reasonable" on its merits, but the Council's process offended principles of fairness. The judge said that, when the landowner did not appear for the hearing, the Council should have adjourned on its own motion. The judge remitted the matter to the Council for a re-hearing.

[3] The Municipality appeals. In this Court, the issue is whether the Council's process offended its duty of procedural fairness.

Background

[4] The Respondent Ms. Teresa Tarrant owns an undeveloped property on Rocky Lake Drive in Bedford, Halifax Regional Municipality ("HRM"). The Respondent Mr. Cyril Tarrant is her attorney further to a power of attorney.

[5] The Bedford Land Use By-law zones the property as Residential – Two Dwelling Unit. This permits the construction of a two-unit building if the front and rear yards have setbacks of 15 feet and 20 feet respectively.

[6] The Tarrants' land is narrow and close to a railway. They wanted to build a duplex but believed the By-law's setbacks would unduly restrict the building's size. On April 7, 2017, the Tarrants applied for a variance to permit setbacks of 12.1 feet and 10 feet for the front and back yards respectively.

[7] The *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 ("*Charter*"), Part VIII, governs planning in HRM. Section 250(1)(b) permits a municipal

development officer to grant a variance respecting "size or other requirements relating to yards". On June 20, 2017, the development officer approved the Tarrants' requested variance.

[8] The *Charter* permits an appeal from a development officer's variance to the Community Council, in lieu of the HRM Municipal Council:

> 3(o) "Council" means the Council of the Municipality.
>
> …
>
> 30(4) A community council stands in the place and stead of the Council with respect to variances and site-plan approvals and Part VIII applies with all necessary changes.
>
> …
>
> PART VIII
>
> PLANNING AND DEVELOPMENT
>
> …
>
> 252(1) Where the Council hears an appeal from the granting or refusal of a variance, the Council may make any decision that the development officer could have made.

[9] Section 251 requires the development officer to notify neighbouring property owners of the variance. By a written notice dated June 20, 2017, the development officer notified the neighbours of the Tarrants' variance. The recipients included Ms. Barbara Wright, Ms. Robin Boudreau, Ms. Margo Riebe-Butt and Mr. Michael Ryan. Further to s. 251(3), these individuals filed appeals from the variance. Their concerns included impact on wildlife, wetlands and the environment. The appeals were to the North West Community Council ("Council").

[10] By letters of November 28, 2017, the development officer notified Ms. Tarrant and the appealing neighbours of the appeal hearing:

> This is to advise that a hearing on the matter will be held by North West Community Council on **Monday December 11th, 2017, 7:00 p.m. at Acadia Hall, 650 Sackville Drive, Lower Sackville**. If you wish, you will have an opportunity to speak to Community Council at this meeting.

> A copy of the staff report to Community Council on this item will be available online at https://www.halifax.ca/city-hall/community councils/north-west-community-council (North West Community Council, Variance 21137).
>
> If you have any questions or require clarification of any of the above, please call Melinda Francis at 490-1201.

[11] At 12:34 p.m. on December 11, 2017 – a few hours before the hearing – Mr. Cyril Tarrant emailed HRM's Ms. Francis, stating:

> Hi Melinda do i have to be at the hearing? Im in Antigonish and not feeling the best. I see planning is recommending denying a appeals so what does that mean? I can give you a statement of my position on this affair if that works. "I have reviewed the "appeals" and it seems that at best they are frivolous as well as being completely off topic. These folks seem to be saying they do not want any building on the lot because may hurt muskrats and turtles. I can get a permit to build tomorrow but only for a bldg that is about 12 to 14 feet deep. It would look like a mini home and no where near as nice as what im proposing. If I build a 1000 sq ft house or the 1500 sq ft that im proposing it will make no difference to any muskrats pr turtles that maybe in the neighbourhood.. one appeal seems to be sayong in some language that my bldg may cause train accidents. Really??
>
> I spent a few thousand dollars proving to HRM satisfaction that my bldg with variance will have no negative effect. Appellants, if they have a valid sppeal, should have to hire engineers as well to prove their point. Otherwise where is thr fairness?
>
> [*sic* throughout]

[12] Ms. Francis forwarded Mr. Tarrant's email to the legislative assistant, who provided it to the Council for the hearing that evening.

[13] Neither Mr. nor Ms. Tarrant attended the hearing before the Council or requested an adjournment.

[14] On the evening of December 11, the hearing proceeded before the Council in the Tarrants' absence. The Council comprised three elected municipal councillors from that area. The development officer spoke to the written staff presentation, whose link had been specified in the development officer's letters of November 28. The development officer set out the background, responded to councillors' questions and explained the rationale for the variance. The Council called for comments from those in attendance. Ms. Barbara Wright spoke to her appeal against the variance. The development officer replied and answered questions from councillors. Finally the municipal solicitor explained the process for voting on the

motion. There was neither sworn evidence nor cross-examination, and little debate. The Council voted unanimously to allow the appeal and overturn the variance. There was no formal statement of reasons.

[15] By a letter of December 12, 2017, the development officer notified Ms. Tarrant of the Council's decision.

[16] On March 8, 2018, the Tarrants applied to the Supreme Court of Nova Scotia for judicial review of the Council's decision. On July 23, 2018, Justice Kevin Coady heard the application. After the submissions, the judge issued an oral decision on July 23, followed by an Order on August 28, 2018, that quashed the Council's decision and remitted the matter for a re-hearing before the Council. The judge accepted that the Council's decision was "reasonable" under *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, but held that the Council's process offended procedural fairness.

[17] On August 13, 2018, HRM filed a notice of appeal to the Court of Appeal from the Order of the Supreme Court of Nova Scotia. HRM asks this Court to restore the Council's decision of December 11, 2017. There is no cross-appeal or notice of contention.

Issue

[18] Did the judge commit an appealable error by ruling the Council had breached its duty of procedural fairness?

Appellate Standard of Review

[19] On appeal from a decision that disposed of a judicial review, this Court stands in the shoes of the reviewing court to focus on the administrative decision. In other words, this Court decides whether the reviewing judge correctly selected and applied the standard of judicial review to the administrative decision: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, paras. 45-47; *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92, para. 40.

[20] The appeal court applies correctness to both the reviewing judge's analysis of the content of a duty of procedural fairness and determination of whether it was breached. *Jono Developments*, para. 42, and authorities there cited.

Analysis

[21] The applications judge's decision said:

> While I have no doubt there are solid reasons to dismiss this judicial review on the basis of the decision being reasonable, I'm somewhat troubled by the lay of the land in relation to the entire proceeding to date. First, the Tarrants were not present at the hearing. I have difficulty accepting that Mr. Tarrant was told that it was a slam dunk. I suspect that he viewed the appeal as such. Given his investment in the property and his experience in developing property, he would have known better. Obviously, Mr. Tarrant's confidence got the better of him. Nonetheless, he was not present and, no doubt, that absence sent a message to council. It would have been more advisable to adjourn.
>
> Second, the record does not contain the actual written submissions of the Tarrants. I'm satisfied they exist. I'm satisfied they were circulated to council members before the hearing but I have no inkling as to what … of the content.
>
> Third, while there were several appellants, only one spoke to council; Ms. Wright. A review of the record satisfies me that their appeal notices were generic and not specific and, as such, very little compelling evidence emerged on the appeal as to the significance, if any, of the wildlife, the existence of wetlands, or the issue of landfilling.
>
> I am of the view that this matter should go back to the North West Community Council for reconsideration specifically by the application of prerogative writ. I find support for this decision in the Nova Scotia Court of Appeal case called **Nova Scotia (Minister of Agriculture) v. Millett, carrying on business as Rocky Top Farm**, 2017 NSCA 2.
>
> …

[22] HRM appeals the judge's ruling on procedural fairness. The Tarrants have neither cross-appealed nor filed a notice of contention. At the hearing in this Court, the Tarrants' counsel reiterated the Tarrants' submissions on fairness, but confirmed that whether or not the merits of the Council's decision are reasonable under *Dunsmuir*'s standard of review is not under appeal.

[23] Consequently, this Court is to focus on procedural fairness. In my respectful view, the judge's reasons erroneously applied those principles. I say this for the following reasons.

[24] *Kelly v. Nova Scotia Police Commission* [sometimes cited as *Burt v. Kelly*], 2006 NSCA 27, is the leading decision in this Province on the approach to procedural fairness. Justice Cromwell said:

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. **The first addresses the content of the Board's duty of fairness** and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
>
> [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 up 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]

[25] In *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd*, 2016 NSCA 40, leave denied [2016] S.C.C.A. No. 358, the reviewing judge held that an administrative decision was procedurally unfair. This Court overturned that ruling for several reasons, including:

> [54] … The judge's brief reasons do not address the factors cited by Justice Binnie in *C.U.P.E.* [*C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539], para. 103, citing *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817], and by Justice Cromwell in *Kelly*, para. 21. There is no analysis of the statutory scheme, expertise of the Board to oversee certification, or deference to the Board's discretion to set its own procedures for certification. The judge's ruling overlooked Justice Cromwell's first step from *Kelly*, which reiterated the Supreme Court's approach from *Baker*. Rather, the judge moved directly to what *Kelly* termed as forbidden reasoning – "simply by

> comparing the tribunal's procedure to the court's own views about what an appropriate procedure would have been".

[26] Similarly, in *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*, 2017 NSCA 72, Justice Bryson said:

> [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 para 21 … .

[27] To like effect: *Jono Developments*, paras. 52-53.

[28] In this case, with respect, the applications judge made the same error. The judge introduced his analysis by saying he was "somewhat troubled by the lay of the land in relation to the entire proceeding to date". The Tarrants' factum to the Court of Appeal puts it this way:

> 44. … His Lordship was not comfortable with Council's decision given the Respondents Tarrant absence at the hearing and the nature of the appeals. The Respondents Tarrant submit that implicit in His Lordship's decision was his comfort level with Council's decision based on the foregoing.

[29] Being troubled or uncomfortable does not suffice for *Kelly*'s first step. The judge did not analyze *Baker*'s criteria to establish the standard of procedural fairness.

[30] *Baker*, paras. 23-28, summarized the non-exclusive criteria as: (1) the nature of the decision being made and the process followed in making it, (2) the statutory scheme that governs the tribunal, (3) the importance of the decision to those affected, (4) the legitimate expectations of those challenging the decision and (5) the choices of procedure made by the tribunal, particularly when the statute leaves the tribunal with procedural discretion, or when the tribunal has expertise in determining the appropriate procedures. To similar effect: *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504, para. 42, per Binnie J.; *Jono Developments*, para. 53.

[31] As quoted above, the applications judge set aside the Council's decision because: (1) the Council did not adjourn on its own motion, (2) according to the judge, the judicial review record omitted Mr. Tarrant's email of December 11 to HRM's Ms. Francis, (3) the neighbours' appeal notices were "generic" and (4) the

Council's decision was supported by "very little compelling evidence". The judge also said he was (5) "somewhat troubled by the lay of the land in relation to the entire proceeding to date" and (6) found support from this Court's ruling in *Millett*.

[32] I will address these points in turn.

[33] **Failure to adjourn:** In *Halifax v. 3230813 Nova Scotia Ltd.*, a development officer granted a variance to reduce the setback for a development. A neighbour appealed to the Council. The Council scheduled a hearing. The appealing neighbour requested an adjournment to prepare evidence from an architect. The Council declined to adjourn, then after the hearing dismissed the neighbour's appeal, meaning the variance was upheld. The neighbour sought judicial review. The reviewing judge set aside the Council's decision because the Council's refusal to adjourn offended procedural fairness. This Court overturned the reviewing judge's ruling and restored the Council's decision. Justice Bryson (paras. 26-36) reviewed the application of *Baker*'s factors to the Council's decision not to adjourn.

[34] I adopt Justice Bryson's review of *Baker*'s factors respecting adjournments of variance hearings, and his conclusion on the standard of fairness:

> [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.

[35] In *Halifax v. 3230813 Nova Scotia Ltd.*, the appealing party wanted to appear and requested an adjournment that Council refused. Here Mr. Tarrant notified the Council the Tarrants would not attend, did not request an adjournment and left Council with the impression the Tarrants were content that the matter proceed in their absence. The issue is whether the Council had a duty to adjourn on its own motion. Such a duty would represent a standard of procedural fairness distinctly more severe than that which this Court rejected in *Halifax v. 3230813 Nova Scotia Ltd*. It would mean that the Council could not rely on the party's expressed preference to stand on its written submission without personal appearance.

[36] Nothing in *Baker*'s criteria, nor in any authority cited to this Court, supports such an outcome.

[37] In my respectful view, under *Kelly*'s first step and *Baker*'s criteria, the standards of procedural fairness for a variance appeal under s. 252 of the *Charter* may be synopsized as follows. The outcome is of importance to both sides of the dispute. The nature of the decision, the process, the statutory scheme and the legitimate expectations contemplate a hearing that is informal compared to a judicial proceeding. This means, in particular:

- There is to be a notice of hearing to the parties in advance, access by the parties to the material provided to the Council, and an opportunity for the parties to present their written or oral submissions, should they opt to do so.
- The hearing is to be managed by elected representatives who are not legally trained. Usually they are assisted by a staff presentation giving the background, and available legal advice from the municipal solicitor.
- The hearing may generate input from the interested parties on matters of community interest. The input need not be under oath, nor constrained by judicial rules of pleading and rules of evidence.
- While the councillors need not conform to a judicial code of conduct, they must act objectively, in good faith and without bias.
- The statutory scheme contemplates a *de novo* analysis, as opposed to a finding of error by the development officer.
- Normally, the hearing is followed in short order by a vote, without formal reasons.
- Subject to the above, the management of the hearing is in the Council's discretion. That includes whether there should be an adjournment, either on request or on Council's own motion.

[38] Here the Council satisfied those standards.

[39] **Content of judicial review record:** The judge's comment that the judicial review record omitted Mr. Tarrant's email of December 11 was mistaken. The judicial review record included the email (Appeal Book, vol. 2, p. 113 and again on p. 115). Further, as the judge found, the email was provided to Council for the hearing on December 11.

[40] Had there been an omission from the judicial review record, the remedy would be to order that the missing item be provided to the court, not to set aside the Council's decision.

[41] **Generic submissions:** The judge was concerned that the neighbours' submissions were "generic".

[42] It is expected that, on a variance motion, the Council may hear expressions of community interest. This is why the *Charter* assigns the hearing to a community council. *Baker*'s criteria do not require that considerations on a variance appeal be restricted by rules of pleading citing causes of action known to the law. The Council had written notices of appeal and Ms. Wright's oral presentation. These submissions challenged the variance as having potentially deleterious effects by construction that would overstep what the by-law prescribed as a presumptively appropriate building lot. *Baker*'s criteria do not preclude the Council from considering those submissions and their implications.

[43] **Little compelling evidence:** The judge was troubled that there was "very little compelling evidence" to support the outcome.

[44] The Council is not required to hear sworn evidence. Council had the staff presentation with the basic data, elaboration from the development officer, letters from the appealing neighbours and Ms. Wright's oral presentation. This form of material does not offend the *Baker* criteria in the context of a variance appeal to a community council.

[45] Whether the presentations were sufficiently compelling does not pertain to procedural fairness. It is a merits issue, to be assessed under *Dunsmuir*.

[46] Had there been a cross-appeal or notice of contention on the merits issue, the standard of review would not be whether there was "compelling" evidence. *Dunsmuir*'s standard would have been reasonableness, involving significant deference to Council.

[47] The judge ruled "I have no doubt there are solid reasons to dismiss this judicial review on the basis of the decision being reasonable". The Tarrants have not challenged *Dunsmuir* reasonableness in this Court.

[48] **The "lay of the land":** I have discussed the applications judge's particular concerns. To those, I will add the following.

[49] From the record, it is apparent that, until the municipal solicitor offered assistance, the Council struggled with the procedure associated with a vote on the appeal. The Chair expressed unfamiliarity with variance appeals, noting they are

rare. The Chair was confused whether the development officer's recommendation (supporting the variance) constituted the motion. It did not. To the contrary, the motion was to allow the neighbours' appeal from the development officer's variance.

[50] These hiccups did not affect the outcome. With advice from the municipal solicitor, the motion was clearly articulated, seconded, voted on and passed unanimously. The initial disarray was tidied and did not offend any standard of procedural fairness.

[51] Nonetheless, one can envisage how procedural stumbling, if uncorrected, might occasion a fairness concern in a future appeal. The functioning of community councils would benefit if, on future variance appeals, the motion to allow an appeal was prepared in advance in coherent form and was available and understood by everyone involved from the outset.

[52] **The *Millett* decision:** The judge cited this Court's decision in *Millett* as authority for the remedy of remitting the matter back to the Council, once the judge had set aside the Council's decision of December 11, 2017. He did not cite *Millett* as authority for his ruling that the Council's decision offended the duty of fairness. *Millett* says nothing about procedural fairness and does not pertain to whether or not the Council's decision of December 11 should be set aside.

Conclusion

[53] The Council's process did not offend its duty of fairness. I would allow the appeal, overturn the Supreme Court of Nova Scotia's Order dated August 28, 2018, and restore the Council's Decision of December 11, 2017, without costs.

Fichaud J.A.

Concurred:

Beveridge J.A.

Derrick J.A.