NOVA SCOTIA COURT OF APPEAL

Citation: *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2019 NSCA 77

Date: 20191001
Docket: CA 485334
Registry: Halifax

Between:

Cape Breton Regional Municipality

Appellant

v.

Attorney General of Nova Scotia, Nova Scotia Utility and Review Board, Roy MacInnis, Maureen Campbell, David Moffatt, Debra Moffatt, Ed MacIntyre, An MacIntyre, Helen Doherty and Chris Skidmore

Respondents

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	September 16, 2019 in Halifax, Nova Scotia
Subject:	Utility and Review Board – appeal from rezoning by a municipal council – *Municipal Government Act*, S.N.S. 1998, c. 18, ss. 250(1) and 251(2)
Summary:	The Council of the Cape Breton Regional Municipality (CBRM) rezoned a property to permit use for recreational vehicles and related amenities. Residents in the area appealed to the Utility and Review Board. The Board held that the rezoning did not reasonably carry out the intent of CBRM's Municipal Planning Strategy. The Board allowed the appeal. CBRM appealed further to the Court of Appeal.
Issues:	Did the Board unreasonably determine that the Council's decision to rezone "does not reasonably carry out the intent of the municipal planning strategy" within the meaning of ss. 250(1) and 251(2) of the *Municipal Government Act*?

Result: The Court of Appeal dismissed the appeal. Policy 17.e of CBRM's Municipal Planning Strategy governed the issue before the Council. The Board reasonably concluded that the Council had misinterpreted Policy 17.e. and that, according to a proper interpretation of that Policy, the rezoning should be denied. Those conclusions entitled the Board to overturn the Council's decision under ss. 250(1) and 251(2) of the *Act*.

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Respondents

Judges:	Bryson, Saunders and Fichaud JJ.A.
Appeal Heard:	September 16, 2019, in Halifax, Nova Scotia
Written Release:	October 1, 2019
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud J.A, Saunders and Bryson JJ.A. concurring
Counsel:	Demetri Kachafanas for the Appellant Chris Conohan for the Respondent Chris Skidmore Guy LaFosse, Q.C. for the Respondents Roy MacInnis, Maureen Campbell and Ed MacIntyre The Respondents David Moffatt, Debra Moffatt, Ann MacIntyre and Helen Doherty unrepresented The Respondents Attorney General of Nova Scotia and Nova Scotia Utility and Review Board not appearing

Reasons for judgment:

[1] The Council of Cape Breton Regional Municipality rezoned a property from Rural to Campground use. On appeal, the Utility and Review Board overturned the Council's decision. The Board held the rezoning did not reasonably carry out the intent of the municipal planning strategy. The Municipality appealed. After the hearing, this Court dismissed the appeal with reasons to follow. These are the reasons.

Background

[2] The Respondent Chris Skidmore owns or controls 103 acres straddling the East Bay Highway at Big Pond Centre in Cape Breton. The property was zoned Rural CBRM. Mr. Skidmore wishes to redevelop the property as a campground for recreational vehicles and tenting. The Land Use By-law did not permit a campground or recreational vehicle park in a Rural CBRM zone. Mr. Skidmore applied to the Municipal Council ("Council") of Cape Breton Regional Municipality ("CBRM") for rezoning to permit campground and recreational vehicle use.

[3] Mr. Skidmore's proposed redevelopment has several phases. Phase 1 involves 211 serviced recreational vehicle sites north of the East Bay Highway. Phases 2 and 3, on the other side of the Highway, would include sites for up to 330 recreational vehicles and 64 tents. Related amenities would include an administrative office, convenience store, liquor store, restaurant, propane depot, amphitheatre and recreational facilities such as a zipline, mini golf, water play area, and trails for bikes, all terrain vehicles, snowmobiles, cross-country skiing, snowshoes and hiking.

[4] Mr. Skidmore's application to Council requested an amendment to the Land Use By-law that would create a site specific and use specific zone to add campground and recreational vehicle uses to the Rural CBRM uses.

[5] Land use by-laws are supposed to carry out the intent of the municipal planning strategy. The pertinent provision in CBRM's Municipal Planning Strategy (adopted by the Council on August 25, 2004, as amended) is Policy 17.e:

> 17.e Unless there is specific policy direction regarding a type and scale of business development elsewhere in this Municipal Planning Strategy, it shall be a

policy of Council to permit all other business developments not allowed by policy statements elsewhere in this Part throughout rural CBRM by zoning amendment, *except in neighbourhoods subject to Policy 18 of this Part and planned residential subdivisions.*

A site specific, use specific, zone shall be considered for each zoning amendment application. The purpose of the zone shall be to ensure:

- the site itself;
- the site plan; and
- management of the business development,

mitigate any adverse affects [*sic*] **the development will have on low density residential development in proximity. If zone provisions cannot be established that provide reasonable protection to residential development in proximity, the application shall be denied.** More specifically, this means evaluating the proposal from the perspective of:

- visual compatibility;
- dust or fumes emanating from the site;
- traffic attracted to, and leading from, the site; and
- noise emanating from the development.

[bolding added, italics in original]

[6] CBRM staff planner Karen Neville wrote a report dated February 15, 2018. Her report recommended that the Council approve Mr. Skidmore's proposed rezoning on the north side (Phase 1). That conclusion was based on Ms. Neville's interpretation of Policy 17.e.

[7] Ms. Neville's Report said:

The Authority to consider this application

Part 2, Policy 17e. of the Municipal Planning Strategy indicates Council may consider a zone amendment to permit business developments throughout rural CBRM. In this case, the property is located in a rural zone, and therefore the request *is in keeping with the Municipal Planning Strategy***.**

What Council has to Consider

Part 2, Policy 17e. of the Municipal Planning Strategy states that a site specific/use specific zone *should be created* that ensures the site itself, the site plan, and management of the business development *will mitigate any adverse effects* on low density residential development in the vicinity. The criteria from the Municipal Planning Strategy that must be considered are:

> 1.Visual Compatibility and Noise
>
> 2.Dust or Fumes Emanating from the Site
>
> 3.Traffic attracted to, and leading from, the site
>
> …
>
> Part 2, Policy 17e. of the Municipal Planning Strategy states that if zone provisions cannot be established that provide reasonable protection to residential development the application *can be denied*. …
>
> [italics added]

[8] Council was not given the text of Policy 17.e. The interpretation in Ms. Neville's Report was the only information given to Council about Policy 17.e.

[9] There was a public hearing on February 20, 2018.

[10] On March 7, 2018, the Council approved Mr. Skidmore's rezoning application for Phase 1. The Council's approval followed a vote and, according to the normal practice, was unaccompanied by reasons.

[11] Roy MacInnis, Maureen Campbell, David Moffatt, Debra Moffitt, Ed MacIntyre, Ann MacIntyre and Helen Doherty own properties in Big Pond Centre. On March 23, 2018, they filed a Notice of Appeal with the Nova Scotia Utility and Review Board ("Board"). Their appeal challenged the Council's approval of the rezoning.

[12] The Board's three-member panel heard the appeal on July 4-6, and September 25, 2018. The Board Appellants called 16 witnesses. CBRM called two witnesses – Karen Neville and Malcolm Gillis, a senior planner. Witnesses were cross-examined by counsel. Mr. Skidmore did not testify and offered no witnesses. Further to an invitation in the Board's advertised Notice of Hearing, the Board received 42 letters of comment. On July 4, 2018, the Board heard from eight members of the public. Most of the comments described the proposed campground's incompatibility with the existing rural character and land use. On September 24, 2018, the Board conducted a site visit.

[13] The appeal to the Board was governed by ss. 250(1)(a) and 251(2) of the *Municipal Government Act*, S.N.S. 1998, c. 18, as amended:

> 250(1) An aggrieved person or an applicant may only appeal

> (a) An amendment or refusal to amend a land-use by-law, on the grounds that the decision of the council **does not reasonably carry out the intent of the municipal planning strategy**;
>
> …
>
> 251(2) 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.
>
> [bolding added]

[14] The issue before the Board was whether the Council's rezoning reasonably carried out the intent of Policy 17.e.

[15] On January 22, 2019, the Board issued a unanimous 95-page Decision that allowed the appeal (2019 NSUARB 9).

[16] The Board (paras. 184-208) determined that: (1) the Council was not given the text of Policy 17.e, and was left only with the interpretation of the Policy contained in Ms. Neville's Staff Report; and (2) the Staff Report misinterpreted Policy 17.e. Later I will elaborate on the misinterpretation. The Board concluded that the Council's Decision did not reasonably carry out the intent of the Municipal Planning Strategy:

> [208] To the extent that Council relied upon the expression of the test under Policy 17.e, as described by Ms. Neville in the Staff Report, the Board finds, on the balance of probabilities, that Council relied on an interpretation of the test which was wrong and was not based on an interpretation that the language of the Policy could reasonably bear. Accordingly, to the extent it relied on Ms. Neville's interpretation of Policy 17.e, Council's decision approving the zoning amendment did not reasonably carry out the intent of the MPS.

[17] The Board then considered whether, according to a proper interpretation of Policy 17.e, Mr. Skidmore's rezoning application should be granted. The Board held that it should not:

> [209] While the Board has found that CBRM Council's decision, to the extent that it relied on the Staff Report, did not reasonably comply with the intent of the MPS, that does not conclude the matter. In the circumstances, the Board must go further and determine whether Council's decision could be based on another interpretation that the MPS can reasonably bear, such that it could be found that its decision does reasonably comply with then intent of the MPS [citation omitted]

…

[290] Under s. 251(2) of the *Municipal Government Act*, the Board must determine whether the decision of CBRM Council approving the LUB amendment failed to reasonably carry out the intent of the MPS.

[291] The central issue in this appeal involved CBRM Council's review of the Developer's proposed rezoning under Part 2, Policy 17.e, of the MPS, the policy which allows for campgrounds in the Rural CBRM Zone.

[292] Policy 17.e states that in assessing whether zone provisions provide reasonable protection to a residential development in proximity, the proposal is to be evaluated from the perspective of the following four criteria:

- visual compatibility;
- dust or fumes emanating from the site;
- traffic attracted to, and leading from, the site; and
- noise emanating from the development.

[*sic* – no para. 293]

[294] Taking into account all of the evidence, the Board finds that, in terms of visual compatibility and noise, the zone provisions in the proposed Big Pond Campground Zone approved by Council would provide no protection whatsoever to the properties located below it on Lochmore Harbour (i.e., on the barachois), including the residential properties of the Gowans, Sutherlands and the Moffatts. There are no zone provisions that would provide any protection measures, let alone reasonable ones, for these properties located in proximity to the campground. In the Board's opinion, the zone provisions in the LUB amendment will be ineffective.

[295] Given the topography of the entire area and the higher elevation of the campground site (relative to the properties on the barachois), the residents located on the barachois will be able to observe most, if not all, of the proposed campground and recreational uses being carried out on the subject lands. This is especially so when one considers the potentially imposing nature of up to 211 RVs parked on the hill up from the barachois.

[296] Policy 17.e states that where the zone provisions do not provide reasonable protection to residential development in proximity, the application shall be denied.

[297] Therefore, the Board concludes that Council's decision does not reasonably comply with the intent of the MPS.

[298] Accordingly, the appeal is allowed.

[18] On February 21, 2019, CBRM filed a Notice of Appeal (Tribunal) to this Court. On September 16, 2019, the Court heard the appeal and, afterward, unanimously dismissed the appeal with reasons to follow.

Issue

[19] The Notice of Appeal lists eleven grounds, reduced to ten in CBRM's factum. These include what CBRM terms as legal, jurisdictional and factual errors and violations of principles of procedural fairness.

[20] As I will discuss, the appeal turns on one issue:

> Under the standard in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, did the Board unreasonably determine that the Council's rezoning decision "did not reasonably carry out the intent of" Policy 17.e within the meaning of ss. 250(1) and 251(2) of the *Municipal Government Act*?

Appealable Issues

[21] The reviewing court's "first order of business" is to determine what grounds of appeal are permitted by the legislation: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para. 18, and also paras. 36, 41 and 51, per Binnie J. for the majority. See also *Teal Cedar Products Ltd. v. British Columbia*, [2017] 1 S.C.R. 688, paras. 41-42.

[22] The appeal to this Court is under s. 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c. 11, which permits an appeal only on grounds of "jurisdiction" or "law". Section 26 says the Board's findings of fact are "binding and conclusive".

[23] A finding of fact for which there is *no* evidence – not even circumstantial evidence that may support an inference – may be arbitrary and appealable as an issue of law. A tribunal errs in law by acting arbitrarily in any respect, including fact-finding. On the other hand, the Board's finding for which there is *some* evidence is not appealable. The statutory appeal provisions do not authorize this Court to allow a ground of appeal based merely on weight, credibility or the fact-finder's preference of the evidence of one witness over that of another. See *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, paras. 44-47, and authorities there cited.

Standard of Review

[24] Next is the standard of review.

[25] **Jurisdiction:** CBRM cites several issues as jurisdictional and proposes judicial review for correctness. The proposed jurisdictional issues include that the Board failed to defer to the Council's decision, wrongly appraised the Council's reasons and considered the impact of the rezoning on a property whose owner had submitted a letter of comment to the Council, but did not testify at the Board.

[26] An element of the Board's ruling that applies the substantive or procedural provisions of its home or a related statute is assessed for reasonableness. It is not assessed for correctness under the guise of "jurisdiction". Put another way, the reviewing court does not treat an early step in the Board's analytical path, where the Board applies its home or a related statute, as a "jurisdictional" gateway to the next step. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, paras. 33-34, per Rothstein J. for the majority; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, para. 24, per LeBel and Cromwell JJ. for the Court; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, para. 26, per Karakatsanis J. for the majority; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, paras. 31-41, per Gascon J. for the majority.

[27] The Board applied the standards in ss. 250(1) and 251(2) of the *Municipal Government Act*, one of its home or related statutes, to assess whether the Council's decision reasonably carried out the intent of Policy 17.e in the Municipal Planning Strategy. The Board followed its normal appellate process on planning appeals. In this respect, s. 19 of the *Utility and Review Board Act* permits the Board to receive any information that, in the Board's view, may assist with the matter, even if the information is not under oath or would be inadmissible in court. In *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, para. 24, this Court cited the authorities and summarized the elements of the appropriate approach to this type of appeal. In this case, the Board followed that approach (paras. 101, 175 ff.).

[28] The issues that CBRM identifies as "jurisdictional" pertain to the standards and process that the Board's home or related statutes, as interpreted by this Court, assign to the Board. There is no issue of jurisdiction. Whether the Board committed a reviewable error is to be assessed for reasonableness.

[29] **Procedural fairness:** CBRM also submits the Board offended principles of procedural fairness by giving more weight to the evidence of "unqualified" witnesses over the evidence of CBRM's planner and by misapprehending the evidence. CBRM says these grounds should be reviewed for correctness.

[30] With respect, those are not issues of procedural fairness. CBRM's submissions challenge elements of the Board's findings and reasoning that are set out in the Board's Decision. The Board's Decision is the "end product" to which *Dunsmuir*'s standard of review analysis applies. Procedural fairness does not circumvent the standard of review analysis by enabling a correctness challenge to the Board's end product: *Labourers International Union of North America, Local 615 v. Stavco Construction Limited*, 2019 NSCA 53, paras. 43-46; *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40, paras. 45-53, leave to appeal refused [2016] S.C.C.A. No. 358, and authorities there cited.

[31] **Reasonableness:** This appeal turns on the Board's treatment of Policy 17.e in the Municipal Planning Strategy under ss. 250(1) and 251(2) of the *Municipal Government Act*. The standard of review is reasonableness: *Archibald, supra*, para. 21; *Nova Scotia v. S&D Smith Central, supra*, paras. 51-65, and authorities there cited.

[32] What does reasonableness mean? The reviewing court follows the tribunal's analytical path to assess whether the tribunal's reasoning is understandable and leads to an outcome that is permitted by the legislation. If the answer is Yes, the court dismisses the application for judicial review without asking whether the court would prefer another outcome. If the answer is No, the court overturns the decision as unreasonable: *Nova Scotia v. S&D Smith Central*, paras. 68-70, and authorities there cited.

Analysis

[33] I requote the key wording in Policy 17.e:

> A site specific, use specific, zone shall be considered for each zoning amendment application. The purpose of the zone shall be to **ensure**:
>
> …
>
> **mitigate any adverse [e]ffects** the development will have on low density residential development in proximity. **If zone provisions cannot be**

> **established that provide reasonable protection** to residential development in proximity, **the application shall be denied**. …
>
> [bolding added]

[34] The Board interpreted those words to mean:

- The threshold question is – Can there be zoning provisions that provide reasonable protection to proximate residential development?
- If the answer is No, the application "shall be denied".
- If the answer is Yes, the amended by-law should include those reasonable protections that would mitigate the adverse effects.

[35] The Council's only information about the test was the interpretation of the Policy contained in Ms. Neville's Staff Report. The Board found:

> [184] The Board notes that unlike many staff reports provided by planners in other appeals heard by the Board with respect to other municipalities across the province, inexplicably, CBRM's planners did not provide a copy of the actual text of Policy 17.e to Council, either within the Staff Report itself, or as an appendix to the Report. As such, there is no evidence on the record that CBRM's Council had before it the actual wording of Policy 17.e when it considered the Developer's zoning amendment application.

[36] "Inexplicably", the Council was not given the text of Policy 17.e. Instead, the Council was given Ms. Neville's interpretation as dispositive.

[37] From this the Board concluded, reasonably in my view, that the Council applied the interpretation of Policy 17.e stated in Ms. Neville's Staff Report. CBRM's counsel submits that the Board erred by attributing to the Council Ms. Neville's interpretation of Policy 17.e. That submission would carry more weight if Council had been given the Policy's text, from which the councillors could draw their own conclusions.

[38] Earlier I quoted passages from the Staff Report that interpreted Policy 17.e [above, para. 7]. The Report did not notify the Council that, without "reasonable protection", the application "shall be denied". Rather, the Council was told the Campground zoning "can be denied" if there was no reasonable protection, but "should be created" if there were mitigative measures. Ms. Neville's testimony at the Board's hearing reiterated her interpretation. The Board's reasons say:

> [191] Ms. Neville's own interpretation of Policy 17.e appeared, at the hearing, to focus on the mitigation of any adverse effects, without regard to the reasonableness of such measures. Throughout the hearing, in numerous responses to cross-examination by the Appellants, and in questions by the Board, Ms. Neville repeated her view that **the test was to "mitigate, not eliminate".** She repeated this interpretation of the test on several occasions during the hearing: …
>
> [bolding added]

After quoting passages from Ms. Neville's testimony, the Board continued:

> [193] Again, above, Ms. Neville focused on her "mitigate/not eliminate" exercise, to the exclusion of a determination of the reasonableness of such mitigation.

[39] The Board concluded that Ms. Neville's interpretation, and hence the approach taken by Council, was wrong in law. That was because the "mitigate, not eliminate" approach skipped the threshold question: can there be reasonable protection to the proximate residential development?

[40] In my view, the Board's interpretation of Policy 17.e is reasonable. The Policy says if there is no "reasonable protection ... the application shall be denied". It does not say "can be denied" – signalling a discretion – as Ms. Neville's Report informed the Council. The Policy intends that, if there can be no reasonable protection, the prospect of rezoning shall be eliminated, not just reduced in impact by mitigation. The "mitigate, not eliminate" paradigm misconstrued the intent of the municipal planning strategy.

[41] The Board then considered the threshold question the Council had omitted: can there be any reasonable protections for proximate residential development under the Policy's listed criteria (visual, dust or fumes, traffic and noise)? The Board examined the evidence and found the zone provisions "do not provide reasonable protection to residential development in proximity" [passage quoted above, para. 17]. The Board's findings of fact were supported by evidence. Insofar as they are appealable, the findings are reasonable.

Conclusion

[42] I would dismiss the appeal without costs.

Fichaud J.A.

Concurred: Saunders J.A.

Bryson J.A.