NOVA SCOTIA COURT OF APPEAL

Citation: *Williams Lake Conservation v. Chebucto Community Council*, 2004 NSCA 79

Date: 20040611
Docket: CA 213652
Registry: Halifax

Between:

Williams Lake Conservation Company, a body corporate pursuant to the *Companies Act* of Nova Scotia

Appellant

v.

Chebucto Community Council of Halifax Regional Municipality, a municipal corporate body pursuant to the *Municipal Government Act* of the Province of Nova Scotia

Respondent

and

Kimberly-Lloyd Developments Ltd., a corporate body pursuant to the laws of the Province of Nova Scotia

Interested Party

Judges: Roscoe; Oland and Fichaud, JJ.A.

Appeal Heard: May 18, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed with costs per reasons for judgment of Oland, J.A.; Roscoe and Fichaud, JJ.A. concurring.

Counsel: Kathleen Hall, for the appellant
Michael Moreash, for the respondent
Michael Wood, Q.C., and Brian Curry for the interested party

Reasons for judgment:

Introduction

[1] Following the hearing of the appeal we advised the parties that the appeal was dismissed with reasons to follow. These are those reasons.

[2] The Chebucto Community Council of Halifax Regional Municipality (the Community Council) approved the re-zoning of certain lands owned by Kimberly-Lloyd Developments Ltd. Before it voted in favour of re-zoning, the Community Council had received a report prepared by planning staff and had held a public information hearing at which members of the public spoke. It had also received written submissions from the public and, following the hearing, a supplemental report from planning staff.

[3] Williams Lake Conservation Company (Williams Lake) has appealed the approval of the re-zoning application to the Nova Scotia Utility and Review Board. That appeal has not yet been heard. It also applied for an order in the nature of *certiorari* to quash the Community Council decision. That application was unsuccessful. Justice Glen G. McDougall of the Supreme Court of Nova Scotia sitting in Chambers was not convinced that there had been any procedural unfairness or any denial of natural justice.

[4] Williams Lake appeals the decision and the December 12, 2003 order of the Chambers judge to this court. It submits that the Chambers judge erred in his characterization of the supplementary report and in failing to find that the Community Council's consideration of that report without permitting a reply from members of the public was a breach of the *audi alteram partem* principle. It also says that the Chambers judge had possessed a predetermined mind set that made it impossible for him to hear the matter in an unbiased manner.

[5] For the reasons which follow, I would dismiss the appeal.

Background

[6] The Chambers judge's decision of December 15, 2003 is reported as 2003 NSSC 239. The subject of that public hearing and of those staff reports was the proposed development of approximately 156 acres in Mainland South. That property, located between McIntosh Run and Colpitt Lake, includes lands with tree cover, areas of rock outcropping, steep slopes, and the McIntosh Run flood plain. The proposed Governor's Brook development would be built in phases over a number of years. When completed, it would contain 870 residential units.

[7] The staff report dated December 2, 2002 (the initial report) by the Director of Planning & Development and Gary Porter, a planner, recommended that the Community Council approve the proposed re-zoning from H (Holding) to RDD (Residential Development District) and, subject to the re-zoning, the development agreement necessary to permit the residential development. The initial report consisted of 25 pages and several attachments. It is undisputed that it was made available far enough in advance that the public had time to prepare meaningful responses.

[8] The proposed development attracted a great deal of interest in the community. As anticipated, the public information hearing held on February 3, 2003 was very well attended. Presentations could be made orally or in writing. That evening, each person who addressed the Community Council orally was limited to a five minute presentation and no one was allowed to speak more than once. The Chair stopped speakers when the five minute maximum allotment was up. Some were stopped before his or her presentation was finished and a few in mid sentence. Even so, it became apparent that not everyone who wanted to speak would be able to do so before the end of the meeting. Thirty-four people were heard that evening. The Community Council announced that those who put their names on a sign up sheet would be heard on a second hearing night.

[9] The public information hearing continued on February 12, 2003. While attendance that evening was down from that on February 3rd, it was still substantial. Of the 15 individuals who had signed up at the first hearing, 13 made oral presentations and one submitted a written presentation. Anyone whose name was not on the sign up sheet circulated on February 3rd was not permitted to speak.

[10] At the end of that second evening, the Community Council asked the planning staff to prepare a further report for its meeting on March 3, 2003. That

report was to clarify comments from the community, to answer questions posed by the councillors, and to provide additional information. The Chair then indicated that the public hearing was closed. In response to a question from the floor, she advised that the public would not have an opportunity to respond to the further staff report that had been requested.

[11] The Director of Planning and Gary Porter prepared a supplementary report dated February 28, 2003 (the supplementary report). It consisted of 15 pages and a number of attachments. The supplementary report was delivered to Community Council members on the Friday before its meeting on Monday, March 3, 2003. It was not available to the public until the morning of that meeting.

[12] At the March 3rd meeting, Mr. Porter presented the supplementary report to the Community Council. He reviewed various aspects and responded to questions from councillors. The motion to approve the re-zoning of the Kimberly-Lloyd property from H to RDD was then put to a vote. It passed two to one. There was no motion to approve a development agreement for the same property. A decision on that agreement cannot be made until the RDD zoning is in effect.

[13] The Chambers judge decided that the five minute rule for addressing the Community Council at the hearing did not result in any procedural unfairness. Nor, in his view, did a change in the venue of the first meeting, the use of the sign up sheet, or the decision not to adjourn the second hearing night, amount to unfairness. His determination of these issues has not been appealed.

[14] The Chambers judge also decided that the timing of the supplemental report and the lack of any opportunity to challenge its contents did not result in any procedural unfairness or a denial of natural justice.

Issues

[15] The grounds of appeal raised by Williams Lake are two-fold:

(a) whether there is evidence of a reasonable apprehension of bias on the part of the Chambers judge; and

(b) whether he erred in law in finding that the consideration of the supplementary report by Community Council did not constitute a breach of the rules of natural justice and procedural fairness.

Reasonable Apprehension of Bias

[16] Williams Lake argues forcefully that the decision of the Chambers judge provides a basis for a reasonable apprehension of bias. It points, in particular, to a certain passage of his decision as the foundation for its submission. Having reviewed that passage and the decision as a whole, I am unable to agree.

[17] In *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 105, Cory J. described bias as "a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues." The presumption that a judge is impartial can be displaced with "cogent evidence" that demonstrates that something the judge has done has given rise to a reasonable apprehension of bias: *S.(R.D.)* at para. 117. The high threshold for a successful allegation of perceived judicial bias can be met, submits the appellant, by an examination of this portion of the Chambers judge's decision:

> 25 I realize that this is a very sensitive issue for all concerned. A great deal of time and effort has gone into this process.
>
> 26 Public participation in the decision-making process is not only welcomed but encouraged. I can see from the information provided and the excellent submissions of all counsel that this process has been motivated by genuinely concerned citizens - people who are concerned with the environment and the preservation of our natural surroundings. I commend them for that. Fortunately or unfortunately, <u>development of hitherto unused and unspoiled land is inevitable in a growth area such as HRM.</u>
>
> 27 It is thanks to people who care about the environment that such on-going development can occur with proper regard for what Mother Nature has provided. <u>This concern for planned development is also shared by many developers who are motivated by a social conscience and not simply by financial success.</u>
>
> 28 Hopefully the concerns of both can be successfully accommodated as our population continues to grow. [Emphasis added]

[18] De Grandpré, J. in his dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 stated at p. 394:

> . . . [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”
>
> . . . The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience."

This test is well-established in Canadian law: see *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 60. The reasonable person contemplated by this test is one who approaches the question of whether such a reasonable apprehension exists with a complex and contextualized understanding of the issues in the case: *S.(R.D.)* at para. 48.

[19] That the Chambers judge stated in his decision that “development is inevitable” causes the appellant deep concern. It points out that the definition of “inevitable” in the Oxford Dictionary includes meanings such as “unavoidable”, “sure to happen”, and which imply preclusion of any alternative result. This phrase, it argues, gives rise to a reasonable apprehension of bias.

[20] In addition, the appellant maintains that the Chambers judge had missed how the public felt about the proposed re-zoning and development of the Kimberly-Lloyd property. It questions whether he had heard and understood what they had said or even what had happened. The record was clear and the Chambers judge had reserved his decision after hearing the *certiorari* application. Yet in his decision he erroneously wrote - not once, but twice - that the Community Council had approved the development agreement when it had not done so.

[21] Moreover, Williams Lake notes that Dr. Martin Willison, a professor of biology and environmental studies, and Dr. Patricia Manuel, an environmental scientist and planner had spoken at the public information hearing opposing the proposed development. Both had written detailed submissions to the Community Council. Both gave affidavit evidence and were cross-examined in the course of

the *certiorari* application. Yet, as the appellant points out, the Chambers judge made no mention of those presentations nor of any of the many other presentations, oral and written, by members of the public to the Community Council. It objects to the Chambers judge's characterization of the staff reports as "the best possible information on which to base a decision."

[22] In my opinion, a reasonable and informed person, viewing the matter realistically and practically and having thought the matter through, would not conclude that there was a reasonable apprehension of bias. The factual error made by the Chambers judge does not relate to the re-zoning application. It concerns the development agreement which was not before him on the *certiorari* application. In addition there is no indication that his description of the staff reports affected his analysis or decision on the issue of procedural fairness.

[23] Moreover, the words regarding the inevitability of development must be read in context. That context has to do with the pressures of urban growth in general, not this particular development. After all the complete sentence reads: "Fortunately or unfortunately, development of hitherto unused and unspoiled land is inevitable in a growth area such as H[alifax] R[egional] M[unicipality]." Furthermore two sentences later, the Chambers judge hopes for the accommodation of the views of both those who care about the environment and developers "as our population continues to grow".

[24] Furthermore, his statement regarding the concern for planned development and the motivation attributed to "many developers" is not specific. It does not refer to this development, developers in general, or Kimberly-Lloyd.

[25] I would add, however, that it is regrettable that the Chambers judge chose to include in his decision the paragraphs upon which this ground of appeal is based. Here is why. The record of the public information hearing, the affidavit evidence, the oral testimony given by affiants, and the other materials and submissions presented to the Chambers judge made it very clear that strong and passionate views were held in regard to the Kimberly-Lloyd re-zoning application. Persons representing organizations and individuals described the property as, among other things, a large natural area of unique habitat, one of the few remaining forested areas and the only jack pine area around Halifax, environmentally sensitive, and as land having particular recreational value. Several argued that it ought not to be lost to development but preserved for future generations. The councillor for the

district, who also served as chair of the Community Council, received a storm of e-mails and communications. It being evident from them and the public information hearing that her constituents were very strongly against the proposed development, she did not vote for the re-zoning application when it was put to a vote.

[26] Yet - against this backdrop and where the very issue to be decided in the *certiorari* application before him was whether members of the public had received a fair hearing or had been denied natural justice - the Chambers judge chose to add to his decision comments which were neither essential to his reasoning nor, in my respectful view, appropriate. It could be that his intention was to provide solace to those who had argued ardently and honourably against the re-zoning application but who had been unsuccessful before the Community Council and again before him. Just why he did so in a reserved decision cannot be known. But whatever may have been the case, this portion in his decision was less than helpful. His extraneous remarks infuriated people who had poured their energies into opposing the development. They served only to exacerbate the dismay and frustration of those who already felt that their submissions had neither been heard nor respected and that the entire process has been adverse to their interests. Once he had determined the issues before him, it would have been preferable had the Chambers judge ended his decision without more.

[27] I want to make it clear that my comments are not intended to limit, in any way or to any degree whatsoever, what a judge says or write in his or her decision. That is entirely a matter for the judge. I merely suggest that there are proceedings which call for additional care in the giving of reasons.

Supplementary Report

[28] Williams Lake argues that the Chambers judge erred in law in finding that the consideration of the supplementary report by Community Council did not constitute a breach of the rules of natural justice and procedural fairness. The procedural remedy of *certiorari* granted by the Chambers judge is discretionary. This court will not interfere with a discretionary order unless wrong principles of law have been applied or a patent injustice would result: see *Dowling v. Securior Canada Ltd.*, [2003] N.S.J. 237, 2003 NSCA 69 at para. 7.

[29] In my view, the Chambers judge did not apply any wrong principle of law and no patent injustice has resulted. The supplementary report was prepared by

planning staff and not by any interested party. Moreover, there is nothing in that report in the nature of new information or new evidence or new issues or changed positions. Finally, it is not apparent that Williams Lake had any further new material to put forward to the Community Council. An analysis of my reasons follows.

[30] In his decision the Chambers judge quoted a short extract from a legal text describing the principles of natural justice and procedural fairness. He then set out Williams Lake's concerns regarding the availability of the supplemental report and the lack of any provision to challenge it before the re-zoning application went to a vote. He did not cite nor did he quote from any case law. His conclusions on this point read:

> 21 The timing of the supplemental report might possibly have been a concern if it had been substantially altered to include things not mentioned in the initial report or if it had resulted in a different recommendation based on completely different factors.
>
> 22 This is not the case here. Staff, by way of the supplemental report, addressed the issues raised by concerned members of the public by providing additional information to clarify these points. As well they provided answers to the questions put to them by members of the CCC.
>
> 23 Based on the foregoing I am not convinced that there has been any procedural unfairness nor a denial of natural justice. The process of public participation required of the [Chebucto Community Council] under the *Municipal Government Act* has been conducted fairly, in my opinion.

[31] Where a municipal council considers submission by an opponent or proponent of development after the close of a public hearing, it is generally required to hold further public hearings. In *Friends of the Public Gardens v. Halifax (City)* (1984), 65 N.S.R. (2d) 297 (N.S.S.C.) council considered two further submissions from the developer after the public hearing had been held. At para. 74, Nathanson, J. stated:

> . . . The principles of natural justice require that there must be fuller and earlier disclosure than provided for in (a); that council should not receive evidence or

> representations after the date of the public hearing or, if it does, it shall disclose the same to all other parties who will then have a fair opportunity to respond; and that interested persons making representations at public hearings before council will have the opportunity to make full and meaningful presentation of their cases, including replies. [Emphasis added]

[32] Here, unlike the situation in *Friends of the Public Gardens*, supra the material considered by the Community Council was not submitted by or on behalf of a proponent or an opponent to the proposed re-zoning. The supplementary report was prepared by municipal planning staff. Furthermore it was prepared only when the Community Council asked or directed staff to provide a further report containing clarification and additional information.

[33] Since it does not originate with a partisan source, the supplementary report does not contain "representations" which must not be considered in the absence of hearing from the opposing side or sides. In *Re Bourke and Township of Richmond* (1978), 87 D.L.R. (3d) 349 the British Columbia Court of Appeal quashed a re-zoning by-law adopted by council. The planning committee had heard a proponent of the by-law in the absence of opponents to that by-law. Its subsequent report was considered by council without the opponents being heard. After stating that it would have been improper for council to have heard the developer in their absence and without the opponents being afforded an opportunity to be heard, Taggart, J.A. added at para. 11:

> In reaching that conclusion I wish to make it clear that I do not question the right of a municipal council, following the conclusion of public hearings, to receive advice concerning a by-law, such as the one now under consideration, from its municipal staff or from experts retained by council to advise it. Both Davey C.J.B.C. and McFarlane J.A. approved of that procedure being followed in *McMartin v. Vancouver*. That, however, was not what was done by council in the present case.

[34] F. A. Laux in **Planning Law and Practice in Alberta,** 3rd ed., looseleaf (Edmonton) addressed the receipt of undisclosed reports from council staff at § 7.3(4)(d) as follows:

> While it may be appropriate for a council to seek out "advice" from its staff following a public hearing without being obligated to make affected persons privy to that advice and to afford them an opportunity to respond, it is unlikely that an Alberta court would countenance such action where the "advice" contained fresh material of an evidentiary nature. Support for this proposition can be found in an Alberta Court of Appeal decision in *Budge v. Alberta (Workers' Compensation Board)* (1985), 66 A.R. 13, 42 Alta. L.R. (2d) 26 at 27, [1987] 1 W.W.R. 83, (C.A.). In that case, after concluding the hearing related to a worker's compensation entitlement, the board directed its staff to investigate the circumstances further. A staff report was submitted to the board which included a summary of information obtained from the worker's employer, all of which was highly relevant to the board's ultimate decision. In a judgment setting aside the board's decision, the court characterized the report as constituting "new facts and information" that should have been disclosed to the worker.

[35] Whether the supplementary report contains any "fresh material of an evidentiary nature" or any new facts or information is a factor in determining whether its consideration by Community Council amounts to procedural unfairness. Whether those alleging such unfairness had information which had not been presented earlier to the decision maker can be another factor. In *Jones v. Delta District (Municipality)* (1992), 92 D.L.R. (4th) 714 (B.C.C.A.), council continued to receive submissions from proponents of a golf course development after a public hearing had been held to consider a zoning amendment. The court of appeal held that council had not breached the *audi alteram partem* rule. Among other things, Southin, J.A. writing for the court stated at para. 66:

> To say that there ought to be a further hearing in this kind of process merely to enable someone who has already made his point to repeat his point yet again is to undermine the whole process of deliberation. Many deliberative bodies, both public and private, have, if not rules against repetition, at least a policy encouraging an absence of repetition. In the court-room, judges consider they have the right to stop counsel who is repeating himself or is merely echoing what has been said by other counsel and only in the rarest of cases do judges permit a matter to be reargued.

[36] The court held that the proponents' submissions did not vitiate the process because they did not relate to changes in the proposed golf course concept but only to changes to habitat to satisfy the concerns of farmers. Southin, J.A. continued:

> To give effect to the argument which was made to us would mean that municipal councils could never address concerns expressed at a public hearing, or a series of public hearings essentially on the same point, without having a further public hearing. I cannot think that the legislature intended by promulgating s. 956 to discourage municipal councils from adopting measures, no matter how useless those opposed to a by-law think the measures, to lessen the harm which those opposed have argued, as the grounds of their opposition, will come from adopting the by-law.

In concurring reasons, Goldie, J.A. added at para. 119 that it would be regressive to hold that a municipal council could not direct its planning staff to address matters of detail without requiring a further public hearing. In his view, such a hearing would only derogate from the legislative and executive responsibilities of municipal councils.

[37] The supplemental report does not contain any new information in respect of the re-zoning application that had not been raised before the Community Council in the initial report, in written submissions from the public, or during the public information hearing. It did not present any new studies or set out any new facts. It did not include any new submissions from Kimberly-Lloyd or other proponents of the proposed development.

[38] Asked to provide its best example of information in that supplemental report for which its inability to respond likely resulted in prejudice to it, Williams Lake chose the subject of a cash donation to the McIntosh Run Watershed Association. The initial report had stated that the developer would donate $50. for each dwelling unit. The supplemental report stated that the developer had agreed with that Association to make such a donation and that the cash donation is reflected in the proposed development agreement. However, as the appellant emphasizes, Dr. Willison, a director of that Association, gave uncontroverted affidavit evidence that this was incorrect.

[39] The appellant's best example is not persuasive. Whether or not such an agreement between the developer and the Association exists or is binding does not relate to the re-zoning application. Rather, it is a matter which pertains to the proposed development agreement which was not voted upon by the Community Council. While the initial and supplemental reports deal with the re-zoning and the development agreement matters, the alleged cash donation by the developer relates

exclusively to the latter. Indeed the supplemental report deals with it under the heading “Matters Pertaining to the Proposed Development Agreement.”

[40] As its further example of new information contained in the supplemental report, Williams Lake selected the interpretation of Policy 7.3 of the Municipal Planning Strategy policies. It is necessary to examine how each of the initial report and the supplementary report dealt with that policy. The initial report read in part:

> **MPS Environmental Policies**
>
> Policy 7.3 states:
>
> *7.3 Where development proposals are being considered through rezoning or development agreement, the City shall protect environmentally sensitive areas.*
>
> *7.1 . . . Areas of high sensitivity are identified on the Environmental Sensitivity Maps. These maps shall be used as general resource documents in evaluating zone changes and contract development applications.*
>
> The Environmental Sensitivity Maps . . . identify portions of this site as being environmentally sensitive. Therefore there [sic] areas are to be protected. In determining what was contemplated by “protected”, Policy 7.5 is relevant.
>
> 7.5 *Environmentally sensitive areas in public ownership should be preserved in their natural state and utilized for limited park and recreation uses.*
>
> Policies 7.1 and 7.5 distinguish between environmentally sensitive areas under “public ownership” which “should be preserved in their natural state”, and environmentally sensitive areas in general which should be protected from “deleterious effects of urban development”. Therefore, it is reasonable to conclude that environmentally sensitive area[s] should be afforded some level of protection but are not subject to an absolute prohibition of development. The design of the proposed development, and the measures contained in the proposed development agreement afford sufficient protection of environmentally sensitive areas. (Emphasis added)

[41] The Community Council received many oral and written submissions opposing the proposed development which relied upon or raised Policy 7.3. The supplemental report which followed the public information hearing addressed the interpretation of that policy thus:

> F. Use of Word "shall" in Policy 7.3
>
> > Further to previous discussion on policy interpretation, Council has asked specifically for comment on use of the word "shall" in Policy 7.3.
>
> Policy 7.3 states:
>
> > Where development proposals are being considered through rezoning or development agreement, the City shall protect environmentally sensitive areas.
>
> The word "shall" means mandatory or compulsory. Policy 7.3 creates an obligation by HRM to protect environmentally sensitive areas. In arriving at the interpretation of Policy 7.3, it is the meaning of the word "protect" that gives the direction to this policy. In staff's view "protect" does not necessarily imply an absolute prohibition. Protection means integration of the development with the environmentally sensitive areas so that as much of the environmentally sensitive areas as possible are retained. (Emphasis added)

[42] As additional rationale for its interpretation, planning staff referred in the supplementary report to various provisions of the *Planning Act* in effect when Policy 7.3 was adopted, the *Municipal Government Act* which had replaced the *Planning Act*, the current zoning of the property, and Policy 7.5. Copies of extracts were attached to the report.

[43] Williams Lake submits that a further public information hearing must always be held whenever a supplementary report issues. Alternatively, it points out that Drs. Willison and Manuel did not agree with the staff interpretation and argues that the supplementary report raised new matters to which it was entitled to respond.

[44] I begin by observing that the interpretation that planning staff placed on Policy 7.3 did not change between the initial and the supplementary reports. It remained the same - the policy did not require an absolute prohibition of development and some development was possible.

[45] I will now review the evidence that Drs. Willison and Manuel gave by way of affidavit and under cross-examination that isare relevant to this ground of appeal. In his affidavit, Dr. Willison described his disagreement with the staff interpretation in the supplemental report as "a fairly complex matter relating to the scope of the meaning of the word "protect'" and his earlier presentations regarding the policy as having been "misrepresented". Under cross-examination he stated that while staff had not moved from their position as to what "shall protect" meant, he needed to address the changes in their statement of its meaning. He testified that disagreement as to the meaning of "protect" continued.

[46] In her affidavit, Dr. Manuel referred to her earlier presentations to the Community Council on the need to adhere to Policy 7.3. She too described her disagreement with the staff interpretation as "a fairly complex matter". Her affidavit details some concerns involving matters such as ground water hydrology and surface and ground water quality. In her view, references to land hazardous for development and to hazardous conditions that are contained in the legislation identified in the supplementary report constitute new information not found in the initial report.

[47] Under cross-examination Dr. Manuel acknowledged that in her written and oral presentations to the Community Council she had set out why she disagreed with the staff interpretation contained in the initial report. However she sought an opportunity to rebut the position that staff maintained in the supplementary report. She had dealt with the diversion of surface water from Colpitt Lake in earlier submissions but it did not appear to Dr. Manuel that her argument had been understood. She wanted a chance to elaborate.

[48] It is apparent that there is no agreement as to the import of Policy 7.3. However, in my view, none of the evidence of Drs. Willison and Manuel clearly identifies any information brought forward for the first time in the supplementary report. In particular, its inclusion of excerpts from legislation and by-laws does not constitute new evidence of the sort that would make an opportunity to respond mandatory. That material is available in the public domain and the members of the

Community Council could decide for themselves what it meant by reading the excerpts attached to the supplementary report. It appears that were a further public hearing held or another opportunity for response given, the opponents to the re-zoning application would only emphasize or elaborate upon their reasons for disagreeing with the staff interpretation of Policy 7.3 which they had already advanced orally and in writing.

[49] The Community Council has the responsibility of deciding which interpretation to follow. That there was no consensus as to the interpretation of Policy 7.3 and whatever interpretation it selected could be appealed were all set out in the supplementary report. The planning staff wrote:

> D. Interpretation of Specific MPS Policies
>
> > A number of the presenters provided a different opinion on the meaning of several of the relevant policies. Council has asked for clarification on such meanings.
>
> A municipal planning strategy provides statements of policy to guide the development and management of the municipality. . . .
>
> Policy statements are sometimes open to competing interpretations. It is therefore possible that other meanings or guidance could be understood by readers of these policies. One of the purposes of a public hearing is to provide an opportunity for alternate interpretation of policy to be presented to Council. Where differing interpretations of the same policy are presented to Council, as has happened in this case, Council must decide which interpretation is appropriate, based on the situation.
>
> Council's decision is subject to appeal. However, the Utility and Review Board, which would hear any appeal, cannot overturn Council's decision unless it does not *reasonably* carry out the intent of the municipal planning strategy. If Council accepts alternate interpretations of any policy relevant to this application as carrying out the intent of the MPS, then it can base its decision on such interpretations provided Council feels they are reasonable. (Emphasis added)

As indicated at the outset of this decision, Williams Lake has appealed the Community Council's approval of the re-zoning application to the Utility and Review Board.

[50] In summary, an opportunity to respond to material prepared by staff, and considered by the Community Council after the close of a public hearing is not required in every instance. Such an opportunity should be provided where the material contains new information relevant to the municipal planning strategy or was put forward by a proponent or opponent advocating for a particular result. This was not the situation in this case. In my view, the Chambers judge did not err in finding no breach of procedural fairness as a result of the consideration of the supplementary report by the Community Council. Nor am I persuaded that any patent injustice has resulted.

Costs

[51] The appellant has submitted that if unsuccessful, no costs should be awarded against it. It relied upon *British Columbia (Minister of Forests) v. Chanagon Indian Band,* 2003 S.C.C. 71 at para. 40 where McLachlin, C.J., for the majority identified the criteria necessary to justify interim costs in cases of public importance. It is not necessary that I decide whether this is such a case or whether those criteria are applicable to an appeal which does not involve interim costs. While its counsel is acting *pro bono* and it is a non-profit organization, there is no evidence by way of affidavit or otherwise before me that Williams Lake genuinely cannot afford this litigation. In exercising our discretion in awarding costs, I must weigh numerous factors including the principle that generally costs are awarded to the successful party and the position of private litigants who may be caught up in disputes between claimants and public authorities.

[52] I would order that Williams Lake pay costs on the appeal of $500. to each of the respondent, the Community Council and the interested party, Kimberly-Lloyd.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.