NOVA SCOTIA COURT OF APPEAL
Citation: ***Myers v. Windsor (Town)***, 2003 NSCA 64

Date: 20030612
Docket: CA 186392
Registry: Halifax

Between:

Laura and Graeme Myers, Penny and Brian Watling,
and Edward Poirier

Appellants/Respondents
by Cross-Appeal

- and -

Gary Mannette and John Proude, and Windsor Town Council

Respondents/Appellants
by Cross-Appeal

- and -

Windsor Hockey Heritage Society

Respondent

Judges: Bateman, Cromwell & Hamilton, JJ.A.

Appeal Heard: May 14, 2003, in Halifax, Nova Scotia

Written Judgment: June 12, 2003

Held: Decision of the Board set aside and appeal remitted for rehearing before the Board differently constituted, as per reasons of Hamilton, J.A.; Bateman & Cromwell, JJ.A. concurring.

Counsel: Sean Foreman, for the appellants, Myers, Watling and Poirier
G. Bernard Conway for the respondents, Mannette & Proude
Barry J. Alexander, for the respondent, Windsor Town Council
Richard Melanson, for NSURB

Reasons for judgment:

[1] This is an appeal and cross-appeal from a decision of the Nova Scotia Utility and Review Board dated August 22, 2002. The decision appealed to the Board was that of the Windsor Town Council dated April 23, 2002, amending its land-use by-law by re-zoning four parcels of land from two-unit residential to multiple residential. The decision of Council implemented an application by two of the respondents/appellants by cross-appeal, Gary Mannette and John Proude, to re-zone all four parcels of land. Referring to the remedial powers in s. 251(1)(c) of the **Municipal Government Act**, S.N.S. 1998, c. 18, s. 1. the Board allowed the appeal and amended the land-use by-law by re-zoning only one of the four parcels of land to multiple residential, leaving the other three parcels zoned two unit residential.

Facts

[2] The former Windsor elementary school building, now vacant, is located on a parcel of land known as 233 Gray Street in the Town of Windsor. This parcel of land and three adjacent parcels of land were conveyed by the Town to the Windsor Hockey Heritage Society, another respondent, to be used as a hockey heritage museum. When the money could not be raised to proceed with the museum, the Society entered into an agreement of purchase and sale with Messrs. Mannette and Proude to sell the four parcels of land to them. It was a condition of the agreement that all parcels be re-zoned from R2, two-unit residential, to RM, multiple residential. In accordance with the agreement and with the consent of the Society, Messrs. Mannette and Proude applied to the Town for re-zoning.

[3] The application for re-zoning indicated Messrs. Mannette and Proude were going to renovate the existing school building located wholly on the parcel of land known as 233 Gray Street into 16 two-bedroom apartments. This would be Phase I. It further indicated that when occupancy levels warranted, they planned to construct an addition containing “the maximum amount of units allowed on the property”, which according to the Director of Planning was 17 units. This would be Phase II. Although it was only the building of the addition which would involve the other three vacant parcels, two of which are land-locked, the application was for all four parcels.

[4] The application also stated, “Upon re-zoning approval and closing on property, all parcels of land to be consolidated as one parcel.” There is nothing in the record indicating that the consolidation of the parcels was also a condition of the agreement of purchase and sale.

[5] The application makes no mention of the possibility of re-zoning one or more of the parcels and not the others.

[6] Once the application for re-zoning the four parcels of land was submitted to the Town, the Town’s Director of Planning, Lynn Davis, considered the application and prepared a report for consideration by the Town’s Planning Advisory Committee (“PAC”). In preparing her report she obtained input from the Town’s Director of Public Works and the Town’s traffic authority and reviewed various policies contained in the Municipal Planning Strategy (MPS) governing the Town. Her report supported the re-zoning of the four parcels as applied for.

[7] Her report deals with the re-zoning of all four parcels and does not consider the possibility of re-zoning one or more of the parcels and not the others.

[8] The PAC considered the application. There is no indication in the record that the submissions made to the PAC related to anything but the re-zoning of all four parcels. The PAC passed a motion recommending that Council approve the re-zoning of all four parcels.

[9] A public meeting was held to facilitate community input. Council considered the application immediately following the public meeting. Mr. Mannette and Ms. Davis spoke in favour of the re-zoning of the four parcels at the meeting. Ms. Davis’ report was considered. The appellants/respondents by cross-appeal, residents of Windsor who live adjacent to the four lots, and other residents, made representations against re-zoning the four parcels. Council approved the re-zoning application for the four parcels of land.

[10] There is nothing in the record indicating that anything other than re-zoning all four parcels was considered at the public meeting or by Council.

[11] The appellants/respondents by cross-appeal appealed Council’s decision to the Board. Their argument to the Board was that Council erred in approving the re-zoning of the four parcels because the re-zoning did not reasonably carry out the

intent of the MPS. They presented no evidence and made no argument as to the pros and cons of re-zoning other than all four parcels. The respondents/appellants by cross-appeal argued that Council's decision to re-zone the four parcels did reasonably carry out the intent of the MPS. Again they offered no evidence and made no argument with respect to the pros and cons of re-zoning less than all four parcels. The Board did not accept the position of any party. Instead its decision directed the re-zoning of only one parcel, 233 Gray Street, and left the other three parcels that were also part of the original application, zoned R2. This was a result no party advanced.

[12] During the Board hearing the chair asked questions of Mr. Mannette and Ms. Davis as to why all four lots were included in one application. The following exchange took place between the chair and Mr. Mannette:

> THE CHAIR: Okay. So for phase 1, you didn't need the other two lots to be rezoned, is that correct?
>
> MR. MANNETTE: That's correct.
>
> THE CHAIR: Okay. And then there may be the little bit in the front that you need.
>
> MR. MANNETTE: Right.
>
> THE CHAIR: With respect to the phase 2, you've produced no plans or anything on that. Is there a possibility at this point that that's fairly up in the air ...
>
> MR. MANNETTE: Yes.
>
> THE CHAIR: ...as to whether phase 2 would ever go ahead?
>
> MR. MANNETTE: That's correct. Depending on demand.
>
> THE CHAIR Okay. Why was it necessary to rezone that part at this point?
>
> MR. MANNETTE: Well ...
>
> THE CHAIR: Is that just a business decision that you...

MR. MANNETTE: It's a business decision that you maximize the real estate that's there.

[13] The following exchange took place between the chair and Ms. Davis:

THE CHAIR: ... So if you could just work me through how that can be all coupled, and is it a situation that perhaps it could have been broken down to council? You could have approved part of the thing or approved the whole, or did you see it as only a total package? And maybe that will help me understand it.

MS. DAVIS: Well, the application came in for the total package in terms of ...

THE CHAIR: I know. But you don't have to recommend approval of the total package, do you?

MS. DAVIS: No. No.

THE CHAIR: Okay.

MS. DAVIS: Well, and I guess in discussions with the applicant, and – which was also something that they did at Planning Advisory Committee, the applicant indicated that the intention was that this phase 2 would actually be an addition to the existing building, an L (sic) to the building.

THE CHAIR: Um-hum.

MS. DAVIS: And so that being the case, it would be on the consolidated parcel. They could not do it on one of the individual parcels. It would be part of the existing building or – yeah, part of the existing building. The existing lot A is not large enough to accommodate an addition and so ...

THE CHAIR: No, I understand that.

MS. DAVIS: ... therefore, the property would be consolidated into one.

[14] Other than the above exchanges initiated by the Board there was nothing raised at that hearing about the possibility of one parcel being treated differently from the others.

Issues

[15] While a number of grounds of appeal were raised by the parties, the main issues in both the appeal and cross-appeal are:

> 1. Did the Board err in law when it interpreted s. 251(1)(c) of the **Act** as authorizing it to direct the Council to amend the land-use by-law in the manner prescribed by the Board, on an appeal from a decision of Council granting an amendment to the land-use by-law?
>
> 2. If the Board has this authority, did the Board err in this case in the manner in which it exercised its power, i.e. did it deny the parties the right to a fair hearing?

Standard of Review

[16] The standard of review on appeal of a Board decision to this Court on questions of law and jurisdiction is one of correctness. **Heritage Trust of Nova Scotia et al v. Nova Scotia (Utility and Review Board)**, [1994] N.S.J. No. 50 (C.A.). The Board's interpretation of the legislation that confers jurisdiction on the Board is afforded no deference.

Analysis

[17] A significant issue before us is the interpretation of s. 251 (1)(c) of the **Act**. Section 251 provides:

> 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 and order the council to approve or amend the development agreement in the manner prescribed by the Board;
>
> (d) allow the appeal and order that the development permit be granted;

> (e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan.
>
> (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. 1998, c. 18, s. 251; 2001, c. 35, s. 12.

[18] With respect to the first issue, the Board in this appeal interpreted s. 251(1)(c) of the **Act** as authorizing it to allow an appeal and order an amendment to the land-use by-law where the decision appealed from amended the land-use by-law. This is similar to the authority the Board exercises under s. 251(1)(b) of the **Act** when the decision appealed from refused to amend the land-use by-law.

[19] Both the appellants/respondents by cross-appeal and Messrs. Mannette and Proude submit that this is not the correct interpretation of the Board's power under s. 251(1)(c). They say that the interpretation given to s.251(1)(c) by the Board in the cases of **Re Lutz,** [2000] N.S.U.R.B. No. 104 and **Re Timmons,** [2001] N.S.U.R.B, No. 84 was correct. In these cases the Board held that it could only order an amendment to the by-law or development agreement where Council had refused to do so; for clarity, that it could not amend where Council had approved the amendment. The Council, another respondent/appellant by cross-appeal, on the other hand argued the Board's interpretation of s. 251(1)(c) was correct.

[20] The Board's interpretation of s.251(1)(c) in this appeal is contrary to its previous decisions in **Re Lutz**, supra and **Re Timmons**, supra. The Board however is not bound by its prior decisions. **Re Board of Directors of Lethbridge Northern Irrigation District and Canadien Union of Public Employees, Local 70** (1973), 38 D.L.R. (3rd) 121 (Alta. S.C.T.D.), p. 125. See also **Practice And Procedure Before Administrative Tribunals (1997), Robert W. MacAulay, Q.C. and James J. H. Sprague,** at page 6-6.

[21] Since this Court has not considered the remedial scope of s. 251(1)(c) of the **Act**, there is no binding precedent in relation to this sub-section. We are told that the statutory scheme of planning legislation in other provinces is not similar to that

of Nova Scotia, therefore no help can be gained from the case law of other provinces. Consequently, the correct interpretation must be determined by applying general statutory interpretation principles.

[22] The appeal provisions set out in the **Act** are as follows:

> **Appeals to the Board**
>
> **247** (1) The approval or refusal by a council to amend a land-use by-law may be appealed to the Board by
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> (c) an adjacent municipality;
>
> (d) a village in which an affected property is situated;
>
> (e) the Director.
>
> (2) The approval, or refusal to approve, and the amendment, or refusal to amend, a development agreement may be appealed to the Board by
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> (c) an adjacent municipality;
>
> (d) a village in which an affected property is situated;
>
> (e) the Director.
>
> (3) The refusal by a development officer to
>
> (a) issue a development permit;
>
> (b) approve a tentative or final plan of subdivision or a concept plan, may be appealed by the applicant to the Board. 1998, c. 18, s. 247; 2000, c. 9, s. 44.

No appeal permitted

248 The following are not subject to an appeal:

(a) an amendment to a land-use by-law to make the by-law consistent with a statement of provincial interest;

(b) an amendment to a land-use by-law or a development agreement to implement a decision of the Board;

(c) a development agreement approved, as ordered by the Board;

(d) an amendment to a land-use by-law that is required to carry out a concurrent amendment to a municipal planning strategy. 1998, c. 18, s. 248.

Restrictions on appeals

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;

(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;

(c) the refusal 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 and the intent of the development agreement.

(2) An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land-use by-law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area.

(3) An applicant may only appeal a refusal to approve a concept plan or a tentative or final plan of subdivision on the grounds that the decision of the development officer does not comply with the subdivision by-law.

(4) The Director may only appeal on the grounds that the decision of the council is not reasonably consistent with a statement of provincial interest, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area. 1998, c. 18, s. 250.

Powers of Board on appeal

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 and order the council to approve or amend the development agreement in the manner prescribed by the Board;

(d) allow the appeal and order that the development permit be granted;

(e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan.

(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. 1998, c. 18, s. 251; 2001, c. 35, s. 12.
>
> **Restrictions on powers of Board**
>
> **252** (1) The Board shall not order the granting of a development permit, the approval of a plan of subdivision, a land-use by-law amendment, a development agreement or an amendment to a development agreement that
>
> (a) is not reasonably consistent with a statement of provincial interest;
>
> (b) conflicts with an order made by the Minister establishing an interim planning area or regulating or prohibiting development in an interim planning area.
>
> (2) The Board shall not make any decision that commits the council to make any expenditures with respect to a development. (emphasis added)

[23] It is not completely clear from a single reading of these sections of the **Act** what the remedial powers of the Board are in a case such as this where the decision on appeal to the Board is one approving an amendment to the land-use by-law, as opposed to one refusing such an amendment. As set out in ¶ 19, the appellants/respondents by cross-appeal and Messrs. Mannette and Proude submit that the structure and statutory language of s. 251 limit the Board's authority when considering a decision that approved an amendment.

[24] A starting point for interpreting this legislation is found in **Bishop-Beckwith Marsh Body et al v. Wolfville (Town) (1996),** 151 N.S.R. (2d) 333 (C.A.). At page 336 the court states:

> [13] In the forward to Driedger on the **Construction of Statutes** (3rd Ed., 1994), by Ruth Sullivan, the author states:

> "I share Driedger's conviction that statutory interpretation is not a rule-governed activity, but rather an activity in which rules are used either effectively or ineffectively."

[14] At p. 131 Professor Sullivan sets out the modern rule of interpretation which, in my opinion, is applicable as it implicitly recognizes the ordinary meaning rule as well as the purposive approach to statutory interpretation. She states at p. 131:

> "There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

[25] One admissible external aid is legislative evolution. **Gravel v. City of St-Léonard,** [1978] 1 S.C.R. 660, p. 667. The appeal provisions of the **Act** essentially replace the appeal provisions found in the former **Planning Act,** R.S.N.S. 1989, c.346, as amended (repealed).

[26] The former **Planning Act** set out the remedial powers of the Board relating to development agreements and land-use by-laws in separate statutory provisions, unlike the present **Act** that combines both in the same section. The relevant sections of the former **Planning Act** are as follows:

> **Appeal**
>
> 70 (1) The amendment or refusal by a council to amend the land-use by-law pursuant to subsection (2) of Section 51 may be appealed by

(a) an aggrieved person;

(b) the applicant;

(c) the Director;

(d) the council of an adjoining municipality.

. . .

Determination by Board

(4) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.

Decision by Board

(5) The Board may

(a) confirm the decision of the council;

(b) allow the appeal by reversing the decision of the council amending the land-use by-law;

or

(c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.

Restriction on decision

(6) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.

Transitional restriction

(7) Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 124, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality.

Further restriction

(8) Notwithstanding subsections (6) and (7), the Board may allow an appeal by an applicant if, in the opinion of the Board,

(a) the applicant would suffer undue hardship; or

(b) extraordinary and compelling circumstances are present.

Exception

(9) Notwithstanding subsection (1), an amendment to a land-use by-law pursuant to clause (c) of subsection (5) is not subject to an appeal pursuant to this Section. R.S. c. 346, s. 70.

. . .

Appeal upon approval of agreement

78(1) Where a council has approved the entering into of an agreement pursuant to Section 55 or 56, or an amendment to such an agreement except respecting a

matter that pursuant to Section 73 the parties have identified as not substantial, the decision of the council may be appealed by

(a) an aggrieved person;

(b) the Director;

(c) the council of an adjoining municipality.

. . .

Determination by Board

(4) The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy.

Decision by Board

(5) The Board shall

(a) confirm the decision of the council;

(b) make any decision the council could have made; or

(c) refer the matter back to the council for further consideration.

Restriction on decision

(6) The Board shall not interfere with the decision of the council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy.

Further restriction

(7) The Board shall not make any decision pursuant to clause (b) of subsection (5) which commits the council to make any expenditures with respect to the development. R.S. c. 346, s. 78.

Appeal upon refusal

79 (1) Where a council has refused to enter into an agreement after application has been made to it pursuant to Section 55 or 56, the applicant may appeal the refusal to the Board.

. . .

Interference with council decision

(4) The Board shall not interfere with the decision of the council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall

(a) refer the matter back to the council; and

(b) instruct the council to hold a public hearing, if this had not been carried out prior to the appeal being made by the applicant, and the same requirements for notice and the holding of the hearing apply to a hearing under this Section as are required before the council enters into a development agreement.

Reasons

(5) A determination of the board pursuant to subsection (4) shall contain reasons for the determination.

Application to Board

> (6) If the council and the applicant have not approved the terms of an agreement within ninety days of the date of the determination of the Board, or within ninety days of the procedures being completed pursuant to subsection (4), either the council or the applicant may apply to the Board for an order fixing the terms of the agreement.
>
> **Decision by Board**
>
> (7) In an application pursuant to subsection (6), the Board may make any decision the council could have made, except that no order shall be made which commits the council to make any expenditures with respect to the development to be permitted pursuant to this Section.
>
> **Further appeal**
>
> (8) Where the council has approved the entering into of an agreement pursuant to this Section, the resolution may be appealed by the same persons and in the same manner as for the approval of an agreement under Section 55 or 56, except that the matters determined by the Board pursuant to subsection (4) shall not be reconsidered on the appeal. R.S., c. 346, s. 79. (emphasis added)

[27] The Board was invited by the Court to participate in this appeal with respect to this issue. It comments on the forgoing sections of the **Act** and the former **Planning Act** as follows in its factum:

> 31. It is suggested the most obvious changes to the structure of the remedial powers of the Board (referring to the provisions in the Act as compared to the former Planning Act) relates to the segregation of these powers under the former **Planning Act** into three separate provisions relating to land-use by-law amendments, approvals of development agreements and refusals relating to development agreements.
>
> 32. Under the former **Planning Act**, in the case of a land-use by-law amendment, subsection 70(5) spelled out that the Board could confirm the decision of council, reverse the approval of an amendment or allow the appeal

and prescribe terms relating to the amendment. This is similar to the language used in s.251(1)(c) of the **MGA**.

33. In the case of development agreements, in the case of an approval, the Board could confirm the decision, make any decision the council could have made or refer the matter back to council pursuant to Section 78(5) of the former **Planning Act**.

34. Where refusal of a development agreement was involved, if the refusal was not consistent with the intent of the M.P.S., the Board had to refer the matter back to council pursuant to Section 79(4). However, if the applicant and council could not arrive at satisfactory terms, the Board could then fix the terms of the agreement pursuant to Section 79(6).

35. Under the **MGA**, the grounds of appeal for land-use by-laws and development agreements are now found in two Sections rather than three. More significantly, the Boards remedial powers are now consolidated into one Section of the legislation.

36. It is clear that the most obvious substantive change between the **MGA** and the **Planning Act** insofar as remedial powers are concerned is the elimination of the Board's power to refer matters back to council with directions where a development agreement is involved. Pursuant to the **MGA**, it appears the Legislature intended the Board's remedial powers be substantively the same with respect to land-use by-laws and development agreements.

37. If the Appellant's argument were accepted in relation to Section 251(1)(c) of the **MGA**, where council approves an amendment to a by-law or approves a development agreement and the Board finds this not to be reasonably consistent with the M.P.S., the only recourse would be a fresh application starting from scratch, even if the concerns could be readily remedied based on the information before the Board. The issue remains whether this was the intent of the Legislature when they replaced the **Planning Act**..

. . .

42. It is submitted that in this case, the most plausible interpretation of subsection 251(1)(c) is that it was intended to consolidate the Board's remedial

> powers and allow the Board the discretion to prescribe the manner in which a by-law or development agreement is to be amended, regardless of whether the application to amend was initially approved or not by council. There appears to be no reason in principle why the Board's power to order the manner in which a by-law or development agreement should be amended should be dependant on whether or not it was approved by council in the first instance. In fact, the Board would arguably be undertaking the role of a council to a greater degree in a situation where the council had refused the application in the first instance.

[28] I agree with the Board's submission at ¶ 42 of its factum that the most plausible interpretation of the extent of the power given to the Board by s. 251 is that it was intended to consolidate the Board's remedial powers and allow the Board the discretion to prescribe the manner in which a by-law is to be amended, even if the application to amend was initially approved by Council, as was the case in this appeal.

[29] Accordingly I am satisfied the Board did not err in this case in interpreting s. 251(1)(c) of the **Act** as authorizing it to direct an amendment of the land-use by-law, notwithstanding Council's approval of the re-zoning.

[30] However, I am satisfied that the Board did err on the second issue (see ¶ 15 above). The manner in which the Board exercised its remedial power in this case denied the parties the right to a fair hearing.

[31] The appellants/respondents by cross-appeal state in their factum:

> [39] In the present case, the Appellants and all other interested citizens who were involved in opposing these zoning changes at the site of the old elementary school were faced with "an Application". The application was not divided. The Application was reviewed and a report prepared by planning staff to the PAC based on the facts and characteristics of the entire Project.
>
> [40] The case that the Appellants and others had to meet, in opposing such changes, was based on their review and understanding of the nature, scope and substance of the entire application.

[41] The Appellants submit that to decide that the Board has the ability to not only make a decision in place of the Council, but to fundamentally change the scope of the application at the Board level by carving out pieces of an application that it feels may meet the requirements of the MPS, is to impose on the Appellants a moving target that may or may not be anticipated by them in preparing for and participating in the public hearing process. It denies to the Appellants the procedural safeguards of knowing what case they have to meet and how best they may utilize their resources to meet that case by way of evidence. Considering the substantial irregularities already noted by the Board with the appeal at that level, this would result in a fundamental denial of fairness to the Appellants.

[42] A specific example in the present case is the lack of any expert studies or other evidence by the Appellants at the Council or Board level [Appeal Book, p. 8] to counter the evidence of the applicants and conclusions of planning staff regarding traffic impacts and population density.

[43] The Board specifically mentions the lack of such evidence from the Appellants at paragraph 36 of its decision [Appeal Book, p. 25] Further, at paragraph 40 [Appeal Book, p. 26] the Board finds that the additional 17 units of Phase Two would be a further "substantial increase" in population density.

[44] It is conceivable that had the Appellants known and appreciated that they were having to argue only against the limited scope of development of 16 units on the main lot in Phase One, and that they could not rely on arguing against the greater scope of the entire development of 33 units to defeat the entire application, that the Appellants may have chosen to undertake such studies or provide further and better evidence, rather than rely on argument and analysis of the scope of the entire application which they believed could not meet the test.

[45] To have the Board at the end of the day pick and choose itself what elements of a whole application do and do not meet the intent of the MPS and carve them out to allow the development to proceed is to move beyond the proper questions before the Board and to intrude into areas that are the proper determination of applicants themselves, planning staff and elected officials.

[46] The Appellants respectfully submit that the Board's decision to apply s.251(1)(c) to split the Application that was the subject of Council's entire decision was in excess of jurisdiction and an error of law and must be reversed.

[32] Similar arguments apply to the position of Messrs. Mannette and Proude before the Board.

[33] In its decision the Board recognizes that there was only one application that dealt with all four parcels:

> [60] If Council had split the rezoning application in two and dealt with the main lot and the school on its own, the Board could look at each rezoning separately. Instead, there is one decision: one part of which could be considered to reasonably carry out the intent of the M.P.S.; and the other part which does not reasonably carry out the intent of the M.P.S.

[34] Despite this, the result of the Board's decision is to split the re-zoning application and the appeal in two, having given no notice to the parties that the Board was considering doing this, nor seeking their input.

[35] In this case neither the appellants/respondents by cross-appeal nor the respondents/appellants by cross-appeal had any notice, from the time the re-zoning application was first filed with the Town until the Board's decision was issued, that the application might be, in effect, treated as two separate applications with one or more of the parcels being zoned differently from the other parcels. All parties throughout were responding only to the original application which was to re-zone all four parcels together. They presented their evidence and arguments from beginning to end with only this in mind. No party advanced the argument that any of the parcels should be treated separately. This possibility was not raised by the Board during the hearing as a possibility that the parties should direct their mind to.

[36] It is well settled that an administrative tribunal such as the Board exercising appellate jurisdiction under the **Act** may commit error if it decides a case on a ground not advanced by the parties and which they have not been given an opportunity to address. **McNeil v. WCB (2001)**, 189 N.S.R. (2d) 310 (CA) at ¶ 17 and **McCarthy v WCB (2001),** N.S.R. (2d) 301, at ¶ 50.

[37] In my view, this occurred in the present case. The approach of the Board wholly transformed the issues which the parties thought were before it and the Board failed to give either notice of or any opportunity to address these new matters which ended up being of central significance to the proceeding. Of course, not every variation of an approved by-law and failure to hear submissions on the variation will necessarily attract this duty or result in a finding of a failure to provide a fair hearing. However, I am of the view that here, considering that the splitting of the application fundamentally changed the proceeding before the Board, neither party was afforded a fair hearing.

[38] I would therefore set aside the decision of the Board and remit the appeal for rehearing before the Board differently constituted.

Hamilton, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.