NOVA SCOTIA COURT OF APPEAL

Citation: ***Sand, Surf and Sea Ltd. v. Nova Scotia (Transportation and Public Works)***, 2006 NSCA 90

Date: 20060721
Docket: CA 254811
Registry: Halifax

Between:

Sand, Surf & Sea Limited

Appellant

v.

The Minister of the Department of Transportation and Public Works for the Province of Nova Scotia

Respondent

Judge(s): J. Michael MacDonald, C.J.N.S.; Saunders & Hamilton, JJ.A.

Appeal Heard: June 14, 2006, in Halifax, Nova Scotia

Held: Appeal dismissed with costs as per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. & Saunders, J.A. concurring

Counsel: Charles Ford &
James MacDuff, Articled Clerk, for the appellant
Catherine Lunn, for the respondent

<u>Reasons for judgment</u>:

Introduction

[1] This appeal concerns Sand, Surf and Sea Limited's (SSSL), the appellant's, attempt to rebuild after its building, located at the intersection of two public highways, was destroyed by fire on May 23, 2003. Following the fire SSSL attempted to obtain approvals from various government agencies to allow it to rebuild. The respondent, the Minister of the Department of Transportation and Public Works for the Province of Nova Scotia, did not provide the consent sought by SSSL that would have allowed it to rebuild in approximately the same location.

[2] SSSL applied to the Nova Scotia Supreme Court for a mandamus order directing the Minister to consent or, in the alternative, for a declaration that it was unlawful for the Minister to refuse to consent. The judge, Justice John D. Murphy, in an August 18, 2005 decision reported at (2005) 236 N.S.R. (2d) 210; [2005] N.S.J. No. 340, refused to issue either order. SSSL appealed. For the following reasons I would dismiss the appeal.

Facts

[3] The facts are well summarized in the judge's reasons:

> **INTRODUCTION**
>
> [1] Sand, Surf and Sea Limited ("SSSL") has applied for a *mandamus* order directing that the Minister responsible for the Department of Transportation and Public Works ("DOTPW") provide consent to construction of a building within 100 metres of the center line of a public highway on land the Applicant owns at Queensland, Nova Scotia. In the alternative, SSSL requests a declaration that it is unlawful for the Respondent to refuse to provide that consent.
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> **SUMMARY OF EVENTS**
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> [2] The extensive affidavit evidence filed by both parties established the principal events leading to this application.

[3] In 1994, SSSL acquired land and building (the “Property”) located at the intersection of Trunk #3 Highway and Conrad's Road, which are public highways within the purview of the **Public Highways Act**, R.S.N.S. 1989 c. 371 (“PHA”). Between 1995 and 2000, the Applicant reconstructed the building.

[4] The Property is zoned for mixed residential and commercial use. From May until October each year beginning in 1995 until 2003, SSSL operated a restaurant and bar in the building, which was known as Moore's Landing, and starting in 2000 the owner of SSSL and his family used the second floor as a summer residence.

[5] Between 1995 and 1998, the Applicant encountered difficulties with regulatory authorities, including with the Respondent, and with neighbours, as it developed its business at the Property. Problems involved parking, intersection safety, removal of debris, location of well and water supply, and encroachment of disability access ramp and propane tanks on the Respondent's property. These issues, particularly those involving vehicle and pedestrian traffic, were contributing factors to the Applicant's failure during 1997-98 to have its liquor license designation varied from "eating establishment" to “lounge.”

[6] The building was completely destroyed by fire on May 23rd, 2003, and since that time the Applicant has sought permission to rebuild Moore's Landing on the Property.

[7] Soon after the fire SSSL began discussions with municipal and provincial agencies, including the Respondent, to obtain approvals necessary to rebuild. Issues which developed included vehicle/pedestrian safety, access management, off-street parking, well decommissioning and location of the proposed building, including any encroachment upon the Respondent's public highway right-of-way.

[8] On September 17th, 2003, SSSL submitted a written application on DOTPW form seeking the Minister's consent to building construction and highway access. PHA Section 42 requires ministerial consent before a building may be erected within 100 metres of a highway center line.

[9] The Respondent advised that it would not recommend approval because SSSL had not submitted plans providing for off-street parking and building access, and the proposal did not meet its requirement that there be no encroachment on the public right-of-way. DOTPW staff also indicated they would be recommending a five-metre minimum highway set-back.

> [10] Between October 2003 and June 2004, SSSL made some progress toward satisfying provincial sewage disposal and municipal construction permit requirements.
>
> [11] The Applicant also considered selling the Property, but rejected purchase offers of $20,000 and $150,000 from the Respondent. DOTPW indicated expropriation was contemplated, but that was not pursued.
>
> [12] A stalemate developed as DOTPW insisted that SSSL was not fulfilling prerequisite requirements for Ministerial consent, while the Applicant maintained that DOTPW would not clarify its requests for information and was refusing to disclose documentation showing location of its right-of-way. This application was filed June 14, 2004.

Judge's Decision

[4] After summarizing the background the judge made the following findings of fact:

> [13] Based upon the affidavits filed and cross examination at the hearing, I find that the following facts have been established:
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> 1. The location of Moore's Landing prior to the fire, and the proposed location for redevelopment as set out in SSSL's application to DOTPW, are both within 100 metres of the center line of a public highway.
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> 2. After 1998 until the May 2003 fire, SSSL operated Moore's Landing Restaurant and Bar without significant interaction with regulatory authorities.
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> 3. The proposed building reconstruction encroaches on the public highway right-of-way. The Applicant acknowledges that footings would extend approximately nine inches onto the right-of-way, buried below ground (Philip Collins' affidavit sworn June 11, 2004, para. 17). I accept the Respondent's evidence that the proposed locations for the Moore's Landing building and deck encroach on the public rights-of-way for both Conrad's Road and Trunk Highway #3 (affidavit of Terrance R. Doogue sworn December 1, 2004 and Exhibit C thereto, survey plan by Servant,

Dunbrack, McKenzie and MacDonald dated November 22, 2004). It is also apparent from Mr. Doogue's affidavit and accompanying Exhibit C as well as the affidavit of Paul O'Brien, previous DOTPW Area Manager, (paragraphs 32, 33, 35 and 42), that the proposed location of the new structure is set back less than five metres from the highway right-of-way, as was the former building.

4. The Respondent's concerns, which resulted in the Minister's not providing the consents which SSSL sought, included public safety issues, and SSSL was so informed (O'Brien affidavit, para. 23, 24, 25, 27, 33, 35, 37, Exhibits I, J, N and P).

5. Representatives of the Halifax Regional Municipality took the position in September 2003 that Moore's Landing, if rebuilt located on the same foundation as the building destroyed by fire, would fall under the definition of non-conforming use set out in the **Municipal Government Act** 1988 c. 18 (“**MGA**”) s.1, provided the extent of non-conformity not increase.

[5] The judge further found that SSSL’s written application on the DOTPW’s form seeking the Minister’s consent under s.42(1) of the **PHA**, the text of which is set out in the attached Schedule A, sought consent to rebuild in a slightly different location than the building that burned down. The judge’s finding on this point is not challenged on appeal. It appears the new location proposed by SSSL was an attempt by it to accommodate the DOTPW and construct the new building further away from the centre line of the Trunk #3 highway and hence outside the 33 foot right-of-way deemed by s.15 of the **PHA** to exist on either side of a highway’s centre line.

[6] The judge further agreed that there was merit to the Minister’s argument that SSSL’s application for mandamus was premature because it had not provided all of the information sought by the Minister in connection with its application. Despite this he proceeded to consider the application on its merits on the basis advanced by SSSL; namely, that SSSL had submitted all of the information it wished to provide in its September 17, 2003 application and the Minister had not provided his consent under s.42(1) to allow it to rebuild.

[7] When the judge reviewed the Minister’s decision with respect to the three issues that are raised on appeal, he correctly observed that he would apply different

standards of review depending on the issue. He applied the standard of correctness to the first issue before us, the question of whether the Minister had the right to exercise his discretion under s.42(1) in light of the position taken by the representatives of the Halifax Regional Municipality (HRM) in September 2003, that rebuilding on the same foundation would fall under the definition of non conforming structure/use in the **MGA**. With respect to the second and third issues before us, whether the Minister had abused his authority and breached the rules of natural justice by fettering his discretion by blindly applying departmental policy and by acting in bad faith, the judge stated:

> [52] . . . For the reasons which follow, I have concluded that the decision in this case meets the reasonableness *simpliciter* standard, and therefore by implication the more deferential patently unreasonable test.

[8] With respect to the first issue the judge found the Minister had not erred in determining he was entitled to exercise his discretion under s. 42(1) despite the position taken by the representatives of HRM. He considered the general purposes of the **PHA** and Part VIII of the **MGA**, the planning sections, and the specific wording of the non-conforming structure/use provisions in s.238 to 242 of the **MGA**. With respect to the specific wording of the non conforming structure/use provisions of Part VIII of the **MGA** he stated:

> [46] SSSL has not provided evidence which establishes that the location restriction in PHA Section 42(1) conflicts with a specific non-conforming structure/use allowed to continue for the Property by MGA Sections 239-242. This case is distinguishable from decisions referenced by the Applicant which allowed continuing non-conformance, such as **Tsimiklis v. Halifax (Regional Municipality)**, [2003] N.S.J. No. 64 (C.A.) where the specific residential use provision of MGA Section 239(1) applied, and **St. Romault (City) v. Olivier**, [2001] 2 S.C.R. 898, which considered prohibition of non-conforming use within a structure, not eligibility to rebuild a non-conforming structure.

[9] With respect to the second issue, the judge found that the Minister did not err by fettering his discretion and blindly applying the departmental policies set out on the DOTPW application form with respect to the five metre set back:

> [56] In this case, the policies were published, and the Applicant has not established that they were treated as mandatory or followed blindly without exercise of discretion. DOTPW's October 13, 2003 letter to the Applicant

(O'Brien affidavit, Exhibit N) shows the Respondent considered SSSL's representations, and made the set-back recommendation in that context:

> Staff did review the information you provided and are recommending that the Provincial minimum set-back be applied at this site. The minimum set-back is 5 metres.

The reference in the note to parking and access is very general, and within the Minister's mandate under PHA Sections 4 and 42, which he exercised in the context of public safety.

[57] The evidence does not establish a fettering of discretion by automatic application of unpublished or ultra vires mandatory policies without consideration of the Applicant's individual circumstances.

[10] The DOTPW policies referred to are identified in a ‘note’ on the application form for ministerial consent:

NOTE:

...

4. Commercial buildings must be at least 5 metres from the boundary. The Minister's consent may state conditions respecting entrance and parking.

[11] With respect to the third issue, whether the Minister breached the rules of natural justice by acting in bad faith when he refused his consent, the judge found the Minister had not acted in bad faith:

[60] The general requirement of good faith in performing a public duty was set out in **Roncarelli v. Duplessis**, [1959] S.C.R. 121 at p. 143 as follows:

‘Good faith’ in this context...means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

> [61] The phrase “bad faith” is used to describe an abuse of discretionary power which may be dishonest, malicious, fraudulent or *mala fides* (Jones and deVillars, supra, p. 176.
>
> [62] In ***Administrative Law in Canada***, *supra*, at page 91, Sara Blake summarizes the burden on a party which alleges bad faith as follows:
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>> Since it is a serious accusation to allege bad faith, the onus is on the accuser to establish that the decision maker acted in bad faith. It is insufficient to allege only that the decision is adverse, that reasons were not given or that there exists a different opinion as to what constitutes the public interest. Innuendo is not evidence. Bad faith must be proven expressly and unequivocally.
>
> [63] Based upon a review of the extensive affidavit evidence provided by the parties, including memoranda and correspondence exchanged, I am not satisfied that the Applicant has proven dishonesty, malicious or fraudulent behaviour, arbitrariness, or other conduct amounting to bad faith on the part of the Respondent. Neither party was always prompt providing information, and both changed positions and explored different solutions during discussions. Concerns raised by the Applicant involving traffic and parking issues in 1998 and prior years are historical and not relevant to the present application. The evidence does not demonstrate that the Respondent abused its authority.
>
> [64] The Respondent was not unfair to the Applicant in refusing to grant the consent requested. DOTPW did not apply standards or requirements which were *ultra vires*, nor did it act arbitrarily or in bad faith.

[12] The relevant legislation is set out in Schedule “A” attached hereto.

Issues

[13] Re-stated, the three issues on appeal are:

1. Did the judge err in finding that the Minister was not precluded from exercising his discretion under s.42(1) of the **PHA** in light of the position of the HRM representatives that the non conforming sections of the **MGA** permitted SSSL to rebuild in the original location?

2. Did the judge err in finding that the Minister did not unlawfully fetter his discretion by blindly following departmental policy with respect to building set back requirements which prevented SSSL from rebuilding in the location it applied for?

3. Did the judge err in finding that the Minister did not act in bad faith in refusing to consent to a building set back that would allow SSSL to rebuild in the location it applied for?

Standard of Review

[14] There are two standards of review that arise with respect to the issues before us. The first is whether the judge applied the correct standard of review to the questions that were before him concerning the Minister's decision. The second is what standard this court ought to apply in considering this appeal of the judge's decision.

[15] As indicated previously the judge indicated in his reasons that he applied the correctness standard to the first question of whether the Minister was entitled to exercise his discretion under s.42(1) and the reasonableness simpliciter standard, and by implication the patently unreasonable standard, to the second and third issues of whether the Minister fettered his discretion or acted in bad faith.

[16] Both parties agreed before us, as they did before the judge, that the standard of review with respect to the first issue, the interpretation of s.42(1) of the **PHA** in light of the position of HRM's representatives, is correctness. Because standard of review is a question of law, we must apply the pragmatic and functional test set out in **Pushpanathan v. Canada (Minister of Citizenship and Immigration**, [1998] 1 S.C.R. 982 to determine if this is the correct standard; **Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)**, [2004] S.C.R. 152 at ¶ 6.

[17] This pragmatic and functional approach applies to ministerial decisions; **Canadian Union of Public Employees (CUPE) v. Ontario (Minister of Labour)**, [2003] 1 S.C.R. 539 at ¶ 150.

[18] The four contextual factors that must be evaluated under the pragmatic and functional approach were set out in **Creager v. Provincial Dental Board of Nova Scotia** (2005), 230 N.S.R. (2d) 48 at ¶15:

> [15] Judicial review of an administrative tribunal's decision involves different standards of review than those stated by **Housen** for an appeal from a court's decision. Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal: **Dr. Q., Re,** [2003] 1 S.C.R. 226; 302 N.R. 34; 179 B.C.A.C. 170; 295 W.A.C. 170, at paras. 17, 21-25, 33; **Ryan v. Law Society of New Brunswick**, [2003] 1 S.C.R. 247; 302 N.R. 1; 257 N.B.R. (2d) 207; 674 A.P.R. 207, at para. 21. The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review: **Ryan** at paras. 21, 41, 42; **Dr. Q.** at paras. 17, 21-26, 28-30, 33-34.

[19] The first factor, whether there is a privative clause or a statutory right of appeal, does not offer much guidance here. There is no privative clause that provides that the Minister's decision is final and binding. "The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard." **Pushpanathan**, supra, ¶ 30. There is no right of appeal from a decision under s.42(1), whereas decisions of the Minister under other sections of the **PHA** provide for appeal; eg. s.15(3) dealing with the deemed width of highway rights of way and s.13(4) dealing with the reservation of land for highways. This may suggest more deference to the Minister's decision under s.42(1).

[20] The second factor, the purpose of the **PHA** generally and the specific provision in particular may suggest deference. The purpose of the **PHA** is the supervision, management and control of the highways. An important element of this purpose is pedestrian and vehicular safety in relation to buildings and their use near highways, which s.42(1) is directed to.

[21] I will deal with the third and fourth factors together - the nature of the problem and the relative expertise of the Minister and the court in relation to the problem. Here the problem is a legal one: does the interpretation given to the non-conforming provisions of the **MGA** by HRM's representatives oust the Minister's discretion under s.42(1)? This a matter of statutory interpretation, a question of law. The required interpretation does not involve any specialized, economic, broad, technical or policy considerations. It is not an issue at the core of the Minister's expertise. With respect to relative expertise, the Minister generally has expertise with respect to the application of the provisions of the **PHA** with respect to issues relating to highways and their use, specifically safety, but has little expertise in determining how the sections of the **PHA** interact with other legislation such as the **MGA** and interpretations given to that legislation. Statutory interpretation is an exercise in which the courts are well equipped to engage, but the Minister is not, suggesting a searching review.

[22] In this case the nature of the question and the relative expertise of the Minister and the court with respect to statutory interpretation satisfy me a searching standard of review for the court is suggested, that is, correctness. Accordingly, I am satisfied the judge did not err in applying the standard of correctness to the first issue when it was before him.

[23] The other two issues before the judge related to an alleged abuse of power or a breach of natural justice. Did he fetter his discretion by blindly following department guidelines? Did he act in bad faith?

[24] While the judge's decision suggests he was applying the pragmatic and functional approach when he determined that the reasonable simpliciter standard applied, his reasons on these two issues satisfy me he approached these issues as if they were before him *de novo*:

> [57] The evidence does not establish a fettering of discretion by automatic application of unpublished or *ultra vires* mandatory policies without consideration of the Applicant's individual circumstances.
>
> . . .
>
> [64] . . . DOTPW did not apply standards or requirements which were *ultra vires*, nor did it act arbitrarily or in bad faith.

[25] An analysis of the pragmatic and functional approach with respect to the second and third issues is not particularly helpful. Whether or not there is a privative clause or a right of appeal does not provide guidance on how the court should deal with a decision made without a full consideration of the particular facts or in bad faith. Nor does the purpose of the legislation. The expertise of the Minister is not relevant if he has acted in bad faith or fettered his discretion.

[26] The pragmatic and functional approach arose as an exercise to determine how much deference should be given to a decision made by an administrative body. The three standards applied following the pragmatic and functional analysis are hard to apply in the context of the second and third issues which do not go to the decision itself, but to alleged breaches of natural justice, to the manner in which the discretion was exercised. If the Minister fettered his decision or acted in bad faith, no deference is owed to it; it should be overturned.

[27] This issue is dealt with in **Creager v. Provincial Dental Board (N.S.)**, supra:

> [24] Issues of procedural fairness do not involve any deferential standard of review: **Conseil de la magistrature (N.-B.) v. Moreau-Bérubé**, [2002] 1 S.C.R. 249, 281 N.R. 201; 245 N.B.R. (2d) 201; 636 A.P.R. 201, at para. 74 per Arbour, J.; **Canadian Union of Public Employees et al v. Ontario (Minister of Labour)**, [2003] 1 S.C.R. 539, 304 N.R. 76; 173 O.A.C. 386, at paras. 100-103 per Binnie, J., for the majority and at para. 5, per Bastarache, J., dissenting. As stated by Justice Binnie in **C.U.P.E.** at para. 102:
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> > "The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations."
>
> This point is also clear from **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817; Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

> [25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. **Bell Canada v. Canadian Telephone Employees Association et al.**, [2003] 1 S.C.R. 884; 306 N.R. 34, at paras. 21-31; **Compagnie pétrolière Impériale ltée v. Québec (Minister de l'Environement)**, [2003] 2 S.C.R. 624; 310 N.R. 343, at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

[28] I am satisfied this is the basis on which the judge dealt with the second and third issues and that he did not err in this approach.

[29] The second standard of review issue, what standard is the court to apply to this appeal of the judge's decision, is answered in **Dr. Q. v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226:

> ¶ 43 . . . The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen, supra*, apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge. The Court of Appeal erred by affording deference where none was due.

[30] Thus on findings of fact and inferences the judge's findings and inferences are not to be disturbed unless they are the result of palpable and overriding error. On questions of law, the standard of review is one of correctness. On questions of mixed fact and law, the standard of review is one of palpable and overriding error unless the error arose from an error of law, in which case the correctness standard applies; **Housen v. Nikolaisen,** [2002] 2 S.C.R. 235.

Analysis

[31] First Issue - Did the judge err in finding that the Minister was not precluded from exercising his discretion under s.42(1) of the **PHA** in light of the position of

HRM's representatives that the non conforming sections of the **MGA** permitted SSSL to rebuild in the original location?

[32] SSSL focussed its arguments dealing with this first issue on there being a conflict between the provisions of s.42(1) of the **PHA** and the non conforming structure/use sections of the **MGA**, so that s.263 of the **MGA** would apply and oust the Minister's discretion under s.42(1). Section 263 provides that where there is a conflict between the provisions of Part VIII of the **MGA** and any other part of the **MGA** or any other statute, the provisions of Part VIII of the **MGA** prevail. SSSL referred to the general purpose of the **PHA**, supervision, management and control of highways, and characterized s.42(1) as being directed to planning, development and construction near highways. It highlighted the purposes of Part VIII of the **MGA**, each municipality regulating its land use and development, developing municipal planning strategies and land-use by-laws with public input and administering same. It directed us to the fact that there are specific sections in the **MGA** regulating non conforming structures and uses, including the ability to continue non conforming uses until abandoned, the ability to maintain and repair non conforming structures and the ability to rebuild non conforming structures following a fire in some cases. It indicated that the predecessor planning legislation also provided for non conforming use and structures, although the specific provisions have changed over time.

[33] SSSL argued that if the discretion under s.42(1) were allowed to operate with respect to non-conforming structures, it would take away private property interests and as such should be strictly construed. Further, that it is unfair not to allow rebuilding because the Minister had no authority to require the removal of the building from its original location, short of expropriation which would provide compensation. The appellant asks why the Minister should be allowed to prevent the rebuilding when the fire was beyond the appellant's control. Finally, the appellant says the **MGA** creates statutorily protected property rights in it's non-conforming structure/use provisions. Taking these considerations into account, it argued the Legislature could not have intended that the rights granted by the nonconforming provisions could be defeated by the exercise of ministerial discretion under s.42(1).

[34] It stated in its factum:

> 76. The Appellant argues that the provisions of the *MGA* that grant a property owner the right to rebuild or repair a structure otherwise destroyed by fire is fundamentally inconsistent with the existence of an additional, discretionary hurdle as contained in section 42(1).

[35] It also argued that since s.220(5)(a) of the **MGA** specifically makes its provisions subject to the **PHA**, that the absence of such a provision in the nonconforming sections of the **MGA** suggests s.42(1) of the **PHA** is not to apply.

[36] There was nothing in the record indicating that HRM had implemented a municipal planning strategy relaxing the non conforming provisions of Part VIII of the **MGA** pursuant to s.242.

[37] I do not find the appellants arguments persuasive. They are predicated on there being a conflict between the provisions of two statutes, the non conforming use/structure sections of Part VIII of the **MGA** and s.42(1) of the **PHA**. That is not the case here. SSSL was not able to point us to any section of the **MGA** that specifically permitted rebuilding based on the evidence in the record before us. The conflict here, if any, is between a section in a statute, s.42(1) of the **PHA**, and the interpretation given by HRM's representatives to the non conforming sections of the **MGA**. As pointed out by the judge in ¶ 46 of his decision quoted in ¶ 8 above, this difference in the facts distinguishes this case from **Tsimiklis,** supra, where the rebuilding was specifically permitted by s.239(1).

[38] Section 263 of the **MGA**, the text of which is set out in Schedule A, does not provide that the **MGA** prevails when a government department's interpretation of its non conforming use provisions conflicts with the provisions of another statute, so as to oust the Minister's discretion. It only applies in the event of a conflict between Part VIII of the MGA and another part of the MGA or another statute.

[39] The appellant has not satisfied me that the judge erred. I would dismiss this ground of appeal.

[40] Issue 2 - Did the judge err in finding that the Minister did not unlawfully fetter his discretion by blindly following departmental policy with respect to

building set back requirements which prevented SSSL from rebuilding in the location it applied for?

[41] SSSL argued that the Minister blindly followed the 5 metre set back policy set out on the application form; that he made his decision not to consent under s.42(1) to the rebuilding in the location SSSL applied for without regard to the particular facts of its application. It says in this case requiring the five metre set back in relation to Trunk #3 highway “would place a portion of Moore’s Landing into the Atlantic Ocean.”

[42] As evidence of the Minister’s blindly applying the five metre set back policy, SSSL pointed to the fact the Minister would have known that his decision would make the rebuilding “impractical.”

[43] In ¶ 56 of his decision set out in ¶ 9 above the judge points to correspondence from the Minister indicating he reviewed the information SSSL provided in reaching his decision to require a 5 metre set back.

[44] The judge was entitled to draw an inference from the evidence before him that the Minister did not treat as mandatory or follow blindly without the exercise of discretion the 5 metre set back policy. While any of us may have arrived at a different inference, we are not to overturn his inference unless he made a palpable and overriding error. The appellant has not satisfied me that the judge made such an error. I would dismiss this ground of appeal.

[45] Issue 3 - Did the judge err in finding that the Minister did not act in bad faith in refusing to consent to a building set back that would allow SSSL to rebuild in the location it applied for?

[46] SSSL argued that the concept of bad faith extends beyond corruption, improper motive or malice. It argued that if the Minister acted for an improper purpose without regard to relevant considerations, his decision may be regarded as one made in bad faith.

[47] It argued the term “bad faith” may encompass the concept of “arbitrariness.” It pointed to the change in the DOTPW’s position following the September 15, 2003 meeting where no mention was made of the need to have the building set back

five metres from the highway boundary, to its subsequent position set out in its October 14, 2003, letter that the five metre set back was required, without an explanation of the change, as an indication of bad faith.

[48] The appellant referred to the DOTPW’s offers to buy its land, DOTPW’s indication that it may expropriate the land, its changing position on whether it would sell its land adjacent to the appellant’s, its changing position on whether it would decommission the well that supplied water to the appellant, its slowness in responding to issues raised by the appellant, particularly about the location of the rights of way, and argued these were indications of bad faith.

[49] The appellant basically re-argued the position it took before the judge. The judge specifically referred to many of these points in reaching his decision that the Minister had not acted in bad faith:

> [58] SSSL maintains that the Respondent acted in bad faith, or arbitrarily. The Applicant says such conduct is demonstrated by DOTPW's failure to provide sufficient and timely information to SSSL, and by the manner in which the Respondent conducted sale negotiations regarding the subject property and adjacent land owed by the Crown, including improperly altering the positions it adopted. The Applicant contends bad faith was also apparent by the Respondent's razing the foundation of Moore's Landing, threatening expropriation and threatening decommissioning of the well which served as a water source for Moore's Landing. SSSL also referred to dealings between the parties several years before the fire, when it claims less stringent positions were expressed respecting safety concerns.

[50] SSSL is asking us to substitute our decision for that of the judge. We are not a court of first instance. While any one of us may have come to a different decision on the evidence before the judge on this issue, it is not our function to replace our decision for his unless he erred. I am not satisfied he erred.

[51] SSSL also argued the judge erred by not taking into account the interactions between it and the Minister prior to its application for the Minister’s consent pursuant to s.42(1). It relies on the following sentence in the judge’s reasons to support this argument:

> [63] Based upon a review of the extensive affidavit evidence provided by the parties, including memoranda and correspondence exchanged, I am not satisfied

> that the Applicant has proven dishonesty, malicious or fraudulent behaviour, arbitrariness, or other conduct amounting to bad faith on the part of the Respondent. Neither party was always prompt providing information, and both changed positions and explored different solutions during discussions. **Concerns raised by the Applicant involving traffic and parking issues in 1998 and prior years are historical and not relevant to the present application.** The evidence does not demonstrate that the Respondent abused its authority.
> (Emphasis mine)

[52] Standing alone, this sentence could be taken as suggesting the judge did not consider the relationship between the parties before 1998 in deciding the question of bad faith. However, this sentence must be read in light of the whole decision and taking into account the first sentence of that paragraph where the judge indicated he had considered the substantial evidence before him, which evidence made significant reference to the relationship between SSSL and the Minister. SSSL has not satisfied me that the judge failed to consider the appropriate evidence in reaching his decision that the Minister did not act in bad faith.

[53] I would dismiss this ground of appeal.

[54] Accordingly, I would dismiss the appeal with costs in the amount of $1,600 plus disbursements as agreed or taxed payable by SSSL to the Minister.

Hamilton, J.A.

Concurred in:
MacDonald, C.J.N.S.
Saunders, J.A.

Schedule A

Legislation

Public Highways Act

4 The Minister has the supervision, management and control of the highways and of all matters relating thereto.

42 (1) Subject to subsection (1) of Section 22 and unless the consent in writing of the Minister has been first obtained, no person shall erect, construct or place or cause to be erected, constructed or placed, any building or other structure, or part thereof, or extension or addition thereto, upon any highway or within one hundred metres from the centre line of the travelled portion of any highway.

Municipal Government Act

190 The purpose of this Part is to

(a) enable the Province to identify and protect its interest in the use and development of land;

(b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character, through the adoption of municipal planning strategies and land-use by-laws consistent with interests and regulations of the Province;

(c) establish a consultative process to ensure the right of the public to have access to information and to participate in the formulation of planning strategies and by-laws, including the right to be notified and heard before decisions are made pursuant to this Part; and

(d) provide for the fair, reasonable and efficient administration of this Part. 1998, c. 18, s. 190

Section 191 contains, *inter alia*, the following definitions:

(i) “nonconforming structure” means a structure that does not meet the applicable requirements of a land-use by-law;

(j) “nonconforming use of land” means a use of land that is not permitted in the zone;

(k) “nonconforming use in a structure” means a use in a structure that is not permitted in the zone in which the structure is located;

Sections 238, 239, 240, 241 and 242 provide:

Nonconforming structure or use

238 (1) A nonconforming structure, nonconforming use of land or nonconforming use in a structure, may continue if it exists and is lawfully permitted at the date of the first publication of the notice of intention to adopt or amend a land-use by-law.

(2) A nonconforming structure is deemed to exist at the date of the first publication of the notice of intention to adopt or amend a land-use by-law, if the

(a) nonconforming structure was lawfully under construction and was completed within a reasonable time; or

(b) permit for its construction was in force and effect, the construction was commenced within twelve months after the date of the issuance of the permit and the construction was completed in conformity with the permit within a reasonable time.

(3) A nonconforming use in a structure is deemed to exist at the date of the first publication of the notice of intention to adopt or amend a land-use by-law if

(a) the structure containing the nonconforming use was lawfully under construction and was completed within a reasonable time; or

(b) the permit for its construction or use was in force and effect, the construction was commenced within twelve months after the date of the issuance of the permit and the construction was completed in conformity with the permit within a reasonable time; and

(c) the use was permitted when the permit for the structure was granted and the use was commenced upon the completion of construction.

(4) This Act does not preclude the repair or maintenance of a nonconforming structure or a structure containing a nonconforming use.

(5) A change of tenant, occupant or owner of any land or structure does not of itself affect the use of land or a structure.

Nonconforming structure for residential use

239(1) Where a nonconforming structure is located in a zone that permits the use made of it and the structure is used primarily for residential purposes, it may be

(a) rebuilt or repaired, if destroyed or damaged by fire or otherwise, if it is substantially the same as it was before the destruction or damage and it is occupied by the same use;

(b) enlarged, reconstructed, repaired or renovated where

> (i) the enlargement, reconstruction, repair or renovation does not further reduce the minimum required yards or separation distance that do not conform with the land-use by-law, and
>
> (ii) all other applicable provisions of the land-use by-law except minimum frontage and area are satisfied.

(2) A nonconforming structure, that is not located in a zone permitting residential uses and not used primarily for residential purposes, may not be rebuilt or repaired, if destroyed or damaged by fire or otherwise to the extent of more than seventy-five per cent of the market value of the building above its foundation, except in accordance with the land-use by-law, and after the repair or rebuilding it may only be occupied by a use permitted in the zone. 1998, c.18, s.239; 2004, c. 44, s. 240.

Nonconforming use of land

240 A nonconforming use of land may not be

(a) extended beyond the limits that the use legally occupies;

(b) changed to any other use except a use permitted in the zone; and

(c) recommenced, if discontinued for a continuous period of six months. 1998, c. 18, s. 240

Nonconforming use in a structure

241(1) Where there is a nonconforming use in a structure, the structure may not be

(a) expanded or altered so as to increase the volume of the structure capable of being occupied, except as required by another Act of the Legislature;

(b) repaired or rebuilt, if destroyed or damaged by fire or otherwise to the extent of more than seventy-five per cent of the market value of the building above its foundation, except in accordance with the land-use by-law and after the repair or rebuilding it may only be occupied by a use permitted in the zone.

(2) Where there is a nonconforming use in a structure, the nonconforming use

(a) may be extended throughout the structure;

(b) may not be changed to any other use except a use permitted in the zone;

(c) may not be recommenced, if discontinued for a continuous period of six months.

Relaxation of restrictions

242 (1) A municipal planning strategy may provide for a relaxation of the restrictions contained in this Part respecting nonconforming structures, nonconforming uses of land, and nonconforming uses in a structure and, in particular, may provide for

(a) the extension, enlargement, alteration or reconstruction of a nonconforming structure;

(b) the extension of a nonconforming use of land;

(c) the extension, enlargement or alteration of structures containing nonconforming uses, with or without permitting the expansion of the nonconforming use into an addition;

(d) the reconstruction of structures containing nonconforming uses, after destruction;

(e) the recommencement of a nonconforming use of land or a nonconforming use in a structure after it is discontinued for a continuous period in excess of six months;

(f) the change in use of a nonconforming use of land or a nonconforming use in a structure, to another nonconforming use.

(2) The policies adopted in accordance with this Section shall be carried out through the land-use by-law and may require a development agreement. 1998, c. 18, s. 242; 2003, c. 9, s. 65.

Conflict

263 In the event of a conflict between this Part and this Act or another Act of the Legislature, this Part prevails. 1998, c.18, s. 263.