

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** Sand, Surf and Sea Ltd. v. Nova Scotia  
(Transportation and Public Works) 2005 NSSC 233

**Date:** 20050627  
**Docket:** SH 224279  
**Registry:** Halifax

**Between:**

Sand, Surf and Sea Limited

Applicant

v.

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

Respondent

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**LIBRARY HEADING**

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- Judge:** The Honourable Justice John D. Murphy
- Heard:** February 9 and 10, 2005, in Halifax, Nova Scotia
- Subject:** Application for *Mandamus* (or alternatively declaration) directing the Minister to consent to reconstruction of a building within 100 metres of highway center line.
- Summary:** When a commercial/residential building in Queensland was destroyed by fire, Applicant property owner sought the ministerial consent required under the *Public Highways Act* (“PHA”) Section 42 to allow rebuilding within 100 metres of highway center line. The Minister declined to provide consent based on concerns involving highway encroachment and public safety matters, including parking and access. Applicant claimed entitlement to re-construct building based on non-conforming use provisions in Part VIII of the *Municipal Government Act* (“MGA”).
- Issue:** Was application premature, because the Minister had not yet exercised discretion?
- Did non-conformance provisions in MGA apply and override PHA Section 42 so that Minister’s refusal to grant consent was an error of law or jurisdiction?
- Was Minister’s refusal to consent unfair, amounting to abuse of discretion?
- Was *mandamus* or declaration proper remedy?

**Result:** Application dismissed.

Although Respondent requested additional information before deciding whether to consent, Applicant chose to have its rights finally determined based on information submitted, and issues should be addressed on basis that Minister had elected not to consent.

Minister did not err in law. MGA Part VIII does not override PHA. The statutory provisions can stand together and Minister's refusal of consent was a proper exercise of his PHA mandate to protect public safety. Minister exercising authority under the PHA is not obliged to consider non-conforming issues under MGA, and he did not act unreasonably.

Minister's decision was not unfair amounting to an abuse of discretion. He did not create and apply an *ultra vires* standard of conduct, nor did he act arbitrarily or in bad faith.

Requirements for *mandamus* and standards of judicial review canvassed. *Mandamus* not available where ministerial duty involves exercise of discretion or where applicant seeks to compel a particular result.

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