IN THE 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

REASONS FOR JUDGMENT

Judge:	The Honourable Justice John D. Murphy
Heard:	February 9 and 10, 2005, in Halifax, Nova Scotia
Oral Decision:	June 27, 2005
Written Decision:	August 18, 2005
Counsel:	Charles J. Ford, for the Applicant Catherine Jean Lunn, for the Respondent

By the Court:

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.

SUMMARY OF EVENTS

[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.

FINDINGS OF FACT

[13] Based upon the affidavits filed and cross examination at the hearing, I find that the following facts have been established:

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.

2. After 1998 until the May 2003 fire, SSSL operated Moore's Landing Restaurant and Bar without significant interaction with regulatory authorities.

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 Terance 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.

PRELIMINARY DETERMINATIONS

A. <u>Alternative Applications</u>

(i) Location

[14] In its Originating Notice, the Applicant seeks a *mandamus* order or declaration in relation to the redevelopment of Moore's Landing in two slightly different locations - the same place where the building was previously located, or alternatively in the position set out in its written application to DOTPW of September 17th, 2003. The Respondent emphasized during argument, in my view correctly, that the only request for consent which was made to the Minister sought permission to construct at the "new" location identified on the form filed September 17th, 2003. I have accordingly addressed the Application on the basis that SSSL seeks consent to build at that proposed new location, and not at the exact location of the building which was destroyed. As will be apparent from the reasons which follow, my decision would not differ if the Application were considered for the destroyed building's location. The evidence establishes that the building which was burned encroached on Highway #3 right-of-way (O'Brien affidavit sworn November 5th, 2004, paragraph 6, 15 and 18), and the same principles of law would apply respecting consent to rebuild at either place.

(ii) Delegation of Authority

[15] The Applicant's request for *mandamus* with respect to reconstruction in the previous location asks that the Minister be compelled to exercise discretion to waive set-back requirements, while the alternative application relating to the proposed location seeks *mandamus* directing DOTPW to exercise discretion to provide the consent. No substantial distinction arises from different descriptions of the Respondent. The Minister has authority to delegate his powers and duties (**Civil Service Act,** R.S.N.S., c. 70, s. 10), and the making of a decision pursuant to Section 42 (1) of the PHA remains an exercise of ministerial discretion regardless whether it is carried out personally by the Minister or delegated to an employee of the Government department.

B. *Mandamus*: Nature and Timing of Application - Ripeness of Issue

[16] The Respondent maintains that the Application is premature. DOTPW claims that the Minister should not yet be required to determine whether to provide consent under PHA Section 42(1), because SSSL has not submitted all necessary documentation. The Respondent says it has not received plans requested to address building access, and claims that SSSL's submission concerning parking was

inadequate, as it consisted only of a letter from a neighbour advising that space would be available, without information concerning capacity, location, or highway access, and without formal commitment. (Moore affidavit sworn June 10th, 2004, Exhibit X; O'Brien affidavit sworn November 5th, 2004, Exhibit AA, p.2.)

[17] DOTPW says the additional information/documentation is required to complete the application and enable the Minister to exercise his discretion to make an informed decision; SSSL claims the Respondent was given a complete application containing all information necessary to give consent to build, and that the Court can make any findings of fact necessary to determine whether *mandamus* or a declaration should issue.

[18] A brief review of the principles governing *mandamus* will assist in determining whether SSSL's Application should be decided at this time, and it will also provide background for consideration of other issues raised by the parties.

[19] *Mandamus* is a prerogative remedy that issues to "compel the performance of a public legal duty": (Brown and Evans, ***Judicial Review of Administrative Action in Canada***, vol. I (looseleaf) at §1:3100). While *mandamus* does not lie against the Crown, it is available where a Crown servant is designated to perform a duty by statute, by the *persona designata* exception: (P. W. Hogg and P. J. Monahan, ***Liability of the Crown*** (3d ed., 2000) at pp. 41-42).

[20] The requirements for *mandamus* were set out in **Karavos v. Toronto and Gillies**, [1948] 3 D.L.R. 294 (Ont. C.A.) at 297:

> It is well to refer at the outset to certain fundamental and well-understood rules and principles relating to the remedy by mandamus. It is properly called and recognized as an extraordinary one, and it is not granted by the Court if an applicant for it has any other adequate remedy. The object and purpose of it is to supply the want of other legal remedies. It is appropriate to overcome the inaction or misconduct of persons charged with the performance of duties of a public nature. The complaining party must, however, clearly establish the right which it is sought to protect, and an order is never granted in doubtful cases: High's Extraordinary Legal Remedies, 3rd ed., p. 12, art. 9. I do not attempt an exhaustive summary of the principles upon which the Court proceeds on an application for mandamus, but I shall briefly state certain of them bearing particularly on the case presently under consideration. Before

> the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced": High *op. cit.*, p. 13, art. 9: p. 15, art 10. (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform"; *ibid., supra*, p. 44, art. 36 (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers" : *ibid., supra*, p. 92. art. 80 (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy: *ibid., supra*, p. 18, art. 13.

[21] The Federal Court of Appeal provided a detailed consideration of the principles governing *mandamus* in **Apotex Inc. v. Canada (Attorney General)**, [1994] 1 F.C. 742 (affirmed at [1994] 3 S.C.R. 1100) at pp. 766-769:

> Several principal requirements must be satisfied before *mandamus* will issue. The following general framework finds support in the extant jurisprudence of this Court (see generally *O'Grady v. Whyte*, [1983] 1 F.C. 719 (C.A.), at pages 722-723, citing *Karavos v. Toronto & Gillies*, [1948] 3 D.L.R. 294 (Ont. C.A.), at page 297; and *Mensinger v. Canada (Minister of Employment and Immigration)*, [1987] 1 F.C. 59 (T.D.), at page 66.

1. There must be a public legal duty to act:

2. The duty must be owed to the applicant:

3. There is a clear right to performance of that duty, in particular:

   (a) the applicant has satisfied all conditions precedent giving rise to the duty;

   (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

4. Where the duty sought to be enforced is discretionary, the following rules apply:

> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>
> (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
>
> (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
>
> (e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
>
> 5. No other adequate remedy is available to the applicant.
>
> 6. The order sought will be of some practical value or effect.
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought.
>
> 8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.
> [emphasis and citations omitted in sub-paragraphs.]

[22] The Nova Scotia Court of Appeal in **Smith's Field Manor Development Ltd. v. Halifax**, [1988] N.S.J. No. 56, and in **Armoyan Group Ltd. v. Halifax**, [1994] N.S.J. No. 68, adopted the summary of the elements required to issue a *mandamus* order which was set out as follows in **Rawdon Realities Limited v. Rent Review Commission** (1983), 56 N.S.R. (2d) 403 (N.S.S.C.):

> In order for *mandamus* to lie, or an order in the nature of *mandamus* to lie, there must be, first of all, standing, a sufficient legal interest in the parties making the application. There must also be no other legal remedy, equally convenient, beneficial and appropriate. Thirdly, there must be a duty to the applicant by the parties sought to be coerced to do the act requested. Fourthly, the duty owed must not be one of a discretionary nature, but may be established either at common law, or by statute. Fifthly, the act requested to be done must be required at the time of the application, not at some future date. Sixthly, there must be a request to do the act and that request must have been refused.

[23] The requirements for *mandamus* to issue may be summarized as: (1) a clear legal right at the time of the application; (2) a corresponding duty that is public and specific; (3) there must be no discretion open to the official; and (4) there must have been demand and refusal: see Brown and Evans, *supra*, at §§1:3210-3240.

[24] Where a tribunal refuses to exercise its discretion, a Court may order it to do so by *mandamus*, but will not direct which way to decide (**Ridge v. Assn. of Architects (Sask.)** (1979), 108 D.L.R. (3d) 441 at 445 (Sask. C.A.); **Ramsay v. Metro. Toronto Chief of Police** (1988), 29 O.A.C. 61 at 77 (Div. Ct.); see also Blake, Sara, ***Administrative Law In Canada***, 3d ed., p.202).

[25] As with all prerogative remedies, *mandamus* may be denied in the exercise of the Court's discretion (**Devinat v. Canada (Immigration and Refugee Board),** [2000] 2 F.C. 212 (FCA)**; Sussex Cheese & Butter (1974) Ltd. v. New Brunswick Milk Marketing Board** (1977), 26 A.P.R. 686 (N.B.Q.B.)).

[26] The Respondent's position that this case is not "ripe" to determine whether *mandamus* declaration should issue is not without merit. The affidavit evidence, including the correspondence attached as exhibits, shows DOTPW's request for additional information have not been frivolous, or intended only to postpone unreasonably the making of a decision.

[27] Although the Respondent's outstanding requests could support a finding that SSSL has not satisfied all conditions precedent giving rise to a duty to decide, I have concluded that the Court should address the merits of the application now. The Applicant has chosen to have its rights finally determined based upon the information it has submitted – SSSL asks the Court to construe the Minister's declining to decide without additional information as a refusal to provide consent under PHA Section 42. The affidavit evidence and arguments made by the Applicant demonstrate its clear position that everything it chooses to provide and wants the Minister to consider has been put before him. I will therefore consider this application on the basis advanced by SSSL that the Minister has decided not to provide consent under Section 42 in response to SSSL's September 17th request, and I will determine whether he should now be ordered to do so.

C. Standard of Review

[28] Judicial review comprises the inherent power of Superior Courts to require administrators to legally exercise delegated statutory authority. Unlike *certiorari* and prohibition, which prevent statutory delegates from exercising power unlawfully, *mandamus* compels performance of a statutory duty owed to an Applicant when the delegate refuses to exercise power it is compelled to use. The remedy is not confined to judicial or quasi-judicial functions, but addresses all types of administrative action. (Jones and deVillars, ***Principles of Administrative Law***, 4th ed., p.585)

[29] Although the issue may involve invoking the duty to decide or act, and not determining whether the decision made or action taken was proper, a *mandamus* application triggers examination of a decision-maker's performance, and requires consideration of judicial review principles. (See **Mount Sinai Hospital Centre v. Quebec**, [2001] 2 S.C.R. 281)

[30] In **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982, the Supreme Court of Canada prescribed a four-step pragmatic and functional analysis to determine the standard which should be employed in reviewing administrative decisions. Subsequent Supreme Court decisions, including **Q. v. College of Physicians and Surgeons (British Columbia)**, [2003] 1 S.C.R. 226, and **Ryan v. Law Society of New Brunswick**, [2003] 1 S.C.R. 247, have established that standard of review must be addressed at the outset of every application for judicial review, and the appropriate standard will be correctness, reasonableness *simpliciter*, or patent unreasonableness.

[31] Different standards of review may apply to individual issues involved in a particular decision, and care must be taken to address each issue separately so that the standard applicable to one issue is not simply applied to all others (Jones and deVillars, *supra*, p.514); see also **Barrie Public Utilities v. Canadian Cable Television Assn.**, 2003 SCC 28 (per Bastarache J.) in dissent at paragraph 125).

[32] Accordingly, the applicable standard of review will be identified as the principal issues raised by this application are considered.

IDENTIFICATION OF ISSUES

[33] The issues to be addressed are:

A. <u>Ministerial Error</u>

Was the Minister's refusal to grant SSSL's application for consent to build and to obtain highway access an error of law or jurisdiction on the basis that:

(i) The Property meets the definition of a "non-conforming structure/use" pursuant to the MGA, and the Minister acted unreasonably by failing to consider that legislation; or

(ii) It was unfair to the Applicant, amounting to an abuse of discretion.

B. <u>Remedy</u>

If the Minister erred, is a *mandamus* order or a declaratory judgment an available remedy?

ANALYSIS

Legislative Background

[34] A review of the Minister's conduct requires consideration of Sections 4 and 42(1) of the PHA, and determination of the extent, if any, to which the non-conforming use provisions in the MGA apply.

[35] PHA Section 4 empowers the Minister to supervise, manage, and control public highways and all related matters. Section 42 of the PHA requires consent of the Minister prior to construction of a building within 100 metres of the center line of a public highway:

> **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.

DOTPW maintains that the Minister properly exercised his authority under the PHA in refusing to provide the consents SSSL requested.

[36] The Applicant submits that the Minister erred by failing to consider the non-conforming use provisions of the MGA, which SSSL maintains override PHA Section 42. Part VIII of the MGA is headed "Planning and Development" and includes the following sections:

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 239, 240 and 241 provide:

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 b y-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

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. 1998, c.18, s.241

Conflict

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

A. <u>Ministerial Error</u>

(i) Was refusal to consent an error of law or jurisdiction, because the Property met the definition of "non-conforming structure/use" pursuant to the MGA, and did the Minister act unreasonably by not considering that statute?

[37] SSSL claims that the Minister should be ordered to give consent to rebuild because MGA Part VIII trumps Section 42 of the PHA, and its Property meets all MGA requirements to continue legal nonconforming structure and use. DOTPW says that the two statutory provisions can stand together, and that the Minister's refusal of consent was a proper exercise of his PHA mandate to protect public safety.

Standard of Review

[38] The Respondent does not dispute the Applicant's position that interpretation of legislation such as the PHA and MGA is a pure legal function, so that the Court should apply a standard of "correctness" in determining whether the Minister ought to have given consent based upon compliance with the non-conforming structure/use provisions of the MGA.

Analysis

[39] Applying "correctness", the least deferential review standard, I have concluded that the Minister committed no error of law in the interpretation or application of the PHA or the MGA, or respecting the relationship between provisions in those two statutes.

[40] SSSL suggests that the non-conforming use provisions of the MGA should be interpreted to preclude the Respondent from refusing consent to build within 100 metres of a public highway when a property meets the criteria for non-conforming use outlined in the MGA. The Applicant maintains that the MGA is the "premiere authority" on issues of planning and development, and that the protection of individual property rights afforded under its non-conforming use provisions should prevail over any prohibition in Section 42 of the PHA. SSSL argues that it was the intention of the legislature, expressed in the overriding provision in Section 263 of the MGA, that the provisions regarding non-conforming structures and use in Part VIII of the MGA take preference over any other statute.

[41] The conclusion which follows from the Applicant's argument is that the "non-conforming" provisions of the MGA provide grandfather rights which supercede the Minister's duty to manage and control highways, notwithstanding public safety concerns. I do not accept that result.

[42] In determining the legislature's intention, there is a presumption of coherence between related statutes, and provisions should only be deemed inconsistent when they cannot stand together (see **Murphy** v. **Welsh**, [1993] S.C.J. No. 83).

[43] PHA and MGA have different purposes. PHA Section 4 gives the Minister the "supervision, management and control of the highways and all matters relating thereto", and Section 42(1), under the heading "Obstructions On or Near a Highway" specifically restricts building on or close to highways. The limitation contained in Section 42 addresses a public safety issue within the ambit of the Minister's authority under PHA Section 4.

[44] The "non-conforming" provisions contained in Sections 238 through 242 of the MGA preserve individual property rights by providing statutory exemption for continued non-conformance. However, those rights must be considered in the context of the purposes of MGA Part VIII, set out in Section 190, which include land development through adoption of Municipal planning strategies, and enabling the Province to identify and protect its interest in the use and development of land. The comments in Rogers, ***Canadian Law of Planning and Zoning***, 2d § 6.2.1 are also relevant:

> The general intention of planning legislation is eventually to eliminate non-conforming uses and replace them with permitted uses; thus the council may be said to zone out such uses. This is based on the premise that such a use is undesirable because it is incompatible with the existing permitted uses but is to be tolerated because it was a lawful use prior to its prohibition by-law. It has been said that gradual elevation of a district is an end towards which progress should always be made.

[45] Section 42(1) does not conflict with the general, broad purpose of MGA Part VIII by prohibiting the right to rebuild; the provision identifies and addresses a public safety aspect of highway management by conferring ministerial discretion in setting a restriction on the set-back distance of a structure. The co-existence of Section 42(1) and Part VIII does not lead to absurd or manifestly unreasonable results, such as those which warranted quashing of decisions in **Associated Picture Houses Limited** v. **Wednesbury Limited**, [1948] 1 K.B. 223 and **Nova Scotia Forest Industries** v. **Nova Scotia Pulpwood Marketing Board**, [1975] N.S.R. No. 368 (C.A.)

[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. 26 (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.

[47] Because Section 42(1) does not conflict with either the "non-conforming" provisions contained in the MGA or with the general purpose of planning legislation, MGA Section 263 does not give the Applicant a right to re-build without considering the Respondent's authority under the PHA.

[48] SSSL maintains that the Respondent's failure to consider the relevant sections of the MGA, while pursuing its own interest in the Property, amounts to unreasonable and unjustifiable conduct, which constitutes a denial of natural justice. The Respondent takes the position that the Minister was not required to make interpretations / conclusions / determinations about whether the Property was a "non-conforming structure" or "non-conforming use", because Part VIII of the MGA is not a relevant consideration in the exercise of the Minister's discretion under Section 42(1) of the PHA when deciding whether to waive the 100 metre set-back. In my view, the Respondent is correct.

[49] The Minister has no mandate or authority under the MGA to determine if a structure is non-conforming in reference to land use by-laws of a particular municipality, or to grant a development permit under the MGA. The Respondent informed the Applicant concerning the issues DOTPW was addressing and the reasons why consent was not forthcoming (affidavit of Paul O'Brien, exhibits N, P, AA, letters from DOTPW). The communications identified right-of-way encroachment, parking and access as major concerns in determining whether to provide PHA Section 42 consent.

[50] Even if the Minister had considered MGA "non-conforming" issues, which he was not obliged to do, there is no basis to conclude that, acting reasonably in exercising his authority under the PHA, he should have reached any different conclusion.

(ii) Was the Minister's refusal to consent unfair to the Applicant, amounting to an abuse of discretion?

Standard of Review

[51] The Minister's decision whether to provide consent under PHA Section 42(1) constitutes an exercise of discretionary power within the mandate prescribed by Section 4. With the exception of SSSL's submission that ministerial consent under PHA Section 42 is subject to application of "non-conforming" provisions in MGA Part VIII, which I have rejected, neither party suggests that the Respondent's decision whether to provide consent is not discretionary.

[52] Decisions of Ministers of the Crown in the exercise of discretionary powers generally receive a high level of deference (**Baker** v. **Canada (Minister of Citizenship and Immigration)** [1999] S.C.J. No. 39, para. 53; **Mount Sinai**, *supra)*. The Applicant acknowledges in para. 76 of its written submission that the Minister's broad authority under the PHA includes statutory discretion to provide consent to build a structure within 100 metres of a public highway. Canadian Courts often apply the patent reasonableness standard when reviewing discretionary ministerial decisions (**Mount Sinai**, *supra*, **Ontario (Minister of Health)** v. **Apotex Inc.**, *supra*), and SSSL suggests that standard applies to examination of the Minister's decision under the PHA. The Supreme Court in **Baker**, *supra*, and this Court in **Brighton** v. **Nova Scotia (Minister of Agriculture and Fisheries)**, [2002] N.S.J. No. 298, recognized that the level of deference afforded on judicial review of ministerial discretionary decisions may in some cases be reasonableness *simpliciter*. 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.

[53] The Applicant claims that the Minister's refusal to consent was unfair, amounting to an abuse of discretion, on two principal bases:

(A) That the Respondent created and applied a mandatory standard of conduct *ultra vires* the Minister; and

(B) That the Respondent acted arbitrarily and with bad faith.

***Ultra Vires* Standard**

[54] SSSL argues that the set-back, access, and off-highway parking requirements which the Respondent considered while determining whether to waive the 100 metre set-back under Section 42(1) of the PHA created a mandatory standard of conduct, the application of which constituted improper fettering of ministerial discretion. The Applicant submits that mandatory standards or codes of conduct can only be imposed by statutory instrument, and that the parking, access and 5 metre minimum highway set-back considerations impose obligations outside the scope of the Minister's mandate under Section 42, and interfere with proper exercise of discretion. Those issues are identified in a 'note' on the form of application for ministerial consent which DOTPW provided and SSSL completed and submitted. The note states as follows:

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

[55] In my view, the note communicates issues the Minister may address while exercising his discretion, without imposing mandatory *ultra vires* requirements. The 5 metre boundary set-back is consistent with and not in conflict with the purpose of Section 42(1), and is a less onerous requirement than the *prima facie* 100 metre distance from the highway center line. The conditions referenced in the note do not impose obligations outside the scope of the primary mandate contained in the PHA. The 5 metre set-back guideline is made known to persons likely to be affected by publication on the application form, and also was brought to the Applicant's attention in correspondence from the Respondent. The adoption of guidelines and policies to assist with the exercise of delegated authority is not *per se* unlawful (**Dassonville-Trudel (Guardian Ad Litem of)** v. **Halifax Regional School Board**, [2004] N.S.J. No. 241 (C.A.) at para. 40).

[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.

Arbitrariness and 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.

[59] The Respondent contests the affidavit evidence advanced by the Applicant in support of bad faith allegations, and maintains there is no bad faith basis to grant any remedy to the Applicant.

[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:

> 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.

B. Remedy

[65] SSSL is not entitled to any remedy, as it has not established that the Respondent committed any error by declining to grant highway access and consent to rebuild Moore’s Landing within 100 metres of the center of a public highway.

[66] *Mandamus* would have been a potential remedy only if the Applicant had succeeded based upon its submission that MGA Part VIII conflicts with and overrides PHA Section 42, so that the Minister could not withhold consent if MGA conditions for non-conforming structure/use were met. When that argument did not succeed, this

Court's task was to review the manner in which the Minister exercised his discretion pursuant to PHA Section 42(1). The principles governing *mandamus* and requirements for invoking the relief (summarized in paragraphs 20 through 25 of these reasons) show that the remedy is not available unless all of the conditions precedent to performance of a public legal duty to act are satisfied (**Herzig** v. **Canada (Industry)** (2002), 287 N.R. 105 (F.C.A.), **Windsor Homes Ltd.** v. **St. John's Municipal Council** (1978), 53 A.P.R. 361 (Nfld. C.A.).

[67] In this case, the Applicant seeks *mandamus* to compel the Minister to exercise his discretion to waive the statutory 100 metre set-back. *Mandamus* can issue to require the performance of a public duty, but where the duty involves exercise of discretion, it cannot be used to compel a particular result. (**Distribution Canada Inc. v. Minister of National Revenue** (1990), 46 Admin. L.R. 34 (F.C.C.); **Re Greenhorn and Law Society of Saskatchewan** (1991), 81 D.L.R. (4th) 712 (Q.B.))

[68] PHA Section 42(1) confers broad discretion on the Minister to address waiver of set-back distances - *mandamus* is not available to compel the Minister to consent because the section does not impose a duty to waive requirements, and it does not qualify or fetter the decision-maker's discretion. Even if the Minister's discretion under Section 42 were restricted, *mandamus* would not issue to an Applicant seeking an order directing that the discretion be exercised in a particular way. The principles enumerated in **Karavos**, *supra*, **Apotex**, *supra*, **Rawdon Realties Limited**, *supra*, preclude the availability of *Mandamus* in this case.

[69] The Applicant is not entitled to the declaratory judgment requested, as it has not established illegal or unlawful action by the Respondent.

[70] SSSL's application is dismissed.

[71] The parties have requested an opportunity to address costs. If agreement is not reached, representations may be submitted in writing within 20 days from the date of these reasons.

J.