IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Weilgart v. Halifax (Regional Municipality)
2008 NSSC 130

Date: 20080501
Docket: SH 285361
Registry: Halifax

Between:

Linda Susan Weilgart and Henry Paine Whitehead of the Community of Herring Cove, in Halifax Regional Municipality, Province of Nova Scotia

Applicants

and

The Halifax Regional Municipality, a body corporate pursuant to the *Municipal Government Act* of 1998 and Mr. Andrew Faulkner, Development Officer in the Halifax Regional Municipality and the Western Region Community Council of Halifax Regional Municipality and Thomas Claire Dempsey and Corrine Dempsey, of the Community of Herring Cove, in Halifax Regional Municipality, Province of Nova Scotia;

Respondents

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	April 9, 2008, in Halifax, Nova Scotia
Counsel:	Peter A. McInroy for the applicants Karen Lynn Brown for the HRM respondents J. Walter Thompson, Q.C. and Adele England A/C, for the Dempsey respondents

By the Court:

[1] The applicants on this judicial review application seek orders in the nature of certiorari to quash a development permit and a building permit obtained by their next door neighbours, who are respondents on the application; a declaration that s. 4.8 of the Planning District 5 (Chebucto Peninsula) Land-use By-law is a nullity or, in the alternative, that s. 4.8 does not permit a structure to be rebuilt without using some or all of the "footprint" of the previous structure; a mandatory injunction requiring the Dempsey respondents to tear down the offending structure; and costs.

[2] Thomas Claire Dempsey and Corrine Dempsey own property at1594 John Brackett Drive, Herring Cove. On June 25, 2007 Mr. Dempsey applied for a development permit. On September 7, 2007 a development officer issued a development permit for a single family dwelling. A building inspector issued a building permit on October 10, 2007 and the Dempseys commenced construction of their new house.

[3] Ms. Weilgart and Mr. Whitehead, the applicants, reside at 1596 John Brackett Drive in Herring Cove. Their property abuts the property that is the subject of this application. They oppose the construction of the dwelling by the Dempseys.

Relief Sought

[4] The applicants originally sought the following relief:

1. An Order, pursuant to C.P. Rule 56, in the nature of Certiorari to quash a decision made on approximately the 12th day of July, 2007 by the Respondent Mr. Andrew Faulkner to approve a minor variance of the normally required side yard widths of both sides of a proposed building project by the Respondents Thomas C. and Corrine Dempsey at property referenced in HRM application for variance file #13942 and known as 1594 John Brackett Drive, Herring Cove, in Halifax Regional Municipality, Nova Scotia - to a 4.5 foot sideyard;

2. A further Order, pursuant to C.P. Rule 56, in the nature of Certiorari to quash a decision made on the 4th day of September, 2007 by the Respondent Western Region Community Council of Halifax Regional

Municipality, to dismiss an appeal, launched by the Applicants, of the above-mentioned decision of Mr. Andrew Faulkner;

3. A further Order, pursuant to C.P. Rule 56, in the nature of Certiorari to quash a decision by the Respondent Mr. Andrew Faulkner to issue a Development Permit in relation to the current construction project proposal by the Respondent Dempseys at 1594 John Brackett Drive, Herring Cove, in Halifax Regional Municipality, Nova Scotia;

4. A further Order, pursuant to C.P. Rule 56, in the nature of Certiorari to quash a decision by a Building Inspector for the Respondent Halifax Regional Municipality to issue a Building Permit in relation to the current construction project proposal by the Respondent Dempeys at 1594 John Brackett Drive, Herring Cove, in Halifax Regional Municipality, Nova Scotia;

5. A further Order, pursuant to the Judicature Act, sec. 41(c) and C.P. Rule 25, in the nature of a Declaration directing that the entire clause regarding "Existing Buildings" in the General Provisions section of the Chebucto Peninsula Land Use Bylaw is not validly enacted and is therefore void and of no force and effect;

6. In the alternative, a further Order, pursuant to the Judicature Act, sec. 41(c) and C.P. Rule 25, in the nature of a Declaration which directs that the wording of the clause regarding "Existing Buildings" in the General Provisions section of the Chebucto Peninsula Land Use Bylaw does not allow for said structure to be rebuilt without incorporating all, or a portion, of the existing building footprint;

7. A Further Order, in the nature of a Prohibitive Injunction directing that the Respondents Thomas C. and Corrine Dempsey shall not commence or carry out construction pursuant to those permits, and, in the event that said construction has already started, an Order in the nature of a Mandatory Injunction directing that the Respondents Thomas C. and Corrine Dempsey shall immediately cease such construction and, in addition, shall demolish and remove and construction that has already taken place, such to be completed within sixty (60) days of the date of the issuance of the Order;

8. An award of costs to the Applicants; and

9. Such further and other relief as this Honourable Court deems just.

[5] At an appearance on March 5, 2008 the applicants withdrew the application for a prohibitive injunction and indicated they would proceed on the application for a mandatory injunction only. By counsel's correspondence of March 7, 2008 directed to the court, counsel for the applicants withdrew paras. 1 and 2 which sought orders in the nature of certiorari against the development officer and the Western Region Community Council with respect to the variance granted by the development officer and upheld by the Community Council.

Background

[6] Two affidavits have been filed by the applicant, Linda Susan Weilgart, as well as single affidavits by the development officer, Andrew Faulkner; the respondent, Thomas Dempsey; and an affidavit by the Dempseys' counsel, Walter Thompson, Q.C. The applicants objected to the Thompson affidavit which contained pictures of the Dempsey property taken by the Dempseys and annexed to the affidavit of Mr. Thompson. I have indicated to the parties that the Thompson affidavit was not relevant to the proceeding and that I would disregard it when considering the evidentiary record.

[7] HRM has filed a three volume record and a supplementary record.

[8] The background facts do not appear to be substantially in dispute. The subject lands contained an old building that had been used as a dwelling by relatives of Thomas Dempsey. The occupation of the property was described at para. 6 of the Dempsey affidavit as follows:

> The land contained an old building which was occupied by my great-great uncle Leonard Power, a son of Catherine, until his death and then for a time by a woman named Annie Jollimore who had lived with him and with her own husband. The home had a well but never had a toilet. People used a privy and later a chemical toilet. Annie Jollimore's husband predeceased my uncle Leonard. Annie Jollimore continued to live in the property after uncle Leonard died. By the time Annie Jollimore died, the house was old. It could not be made suitable to a young modern family. More recently, it had also become run down and dilapidated. I have now torn it down.

[9] Ms. Weilgart makes the following observations as to occupation of the property at para. 4 of her September 10, 2007 affidavit:

> THAT to the best of our knowledge that structure has not been occupied for some 10 years now, but was once occupied by an old person who lived in squalor. The occupant used a chemical toilet. The building has no water supply there.

[10] The property is within Planning District 5 (Chebucto Peninsula) and is subject to the District 5 by-law. It is zoned Herring Cove residential. The land-use by-law was approved by Halifax County Municipal Council on December 5, 1994 and approved with amendments by the Minister of Municipal Affairs on February 9, 1994. The existing building clause s. 4.8 came into effect at that time.

[11] The Dempseys had initially applied for a two-unit building but the development officer refused this application. According to the development officer, while the Herring Cove residential zone would permit a two-unit dwelling, the existing building clause, s. 4.8, would only permit the replacement of the existing single-unit dwelling. To construct a larger two-unit dwelling would be considered a new use, and the property had insufficient lot area to permit that type of construction.

[12] The Dempseys provided revised plans and applied for a development permit to replace the existing single-unit dwelling with a new single-unit house, to be located in a different location on the property.

[13] According to Mr. Faulkner, the development officer, the proposed new dwelling complied with s. 4.8 of the land-use by-law with the exception of the right side yard setback. Because Mr. Dempsey wished to build the new dwelling closer to the right side yard line than the existing six feet, five inches, he applied for a variance on June 26, 2007 seeking to vary the right side yard setback from six feet, five inches to four feet, six inches. The development officer approved the variance.

[14] According to HRM, the development officer determined that the application for a variance did not violate s. 235(3) of the *Municipal Government Act*, which provides that a variance may not be granted where it violates the intent of the land-use by-law or where "the difficulty experienced is general to the properties in the area" (ss. 235(3)(a) and (b)). Pursuant to s. 236(1) of the *Act* assessed owners whose properties are within thirty metres of the Dempsey lands were advised of the approval of the variance. This notification led to an appeal of the variance by Mr. Whitehead and Ms. Weilgart. On September 4, 2007 the Western Region

Community Council denied the appeal and upheld the development officer's decision to approve the variance. As noted above, the applicants have withdrawn their challenge to the decisions of the development officer and the Western Region Community Council with respect to the variance.

[15] The applicants filed an originating notice (application inter partes) on September 10, 2007 and an amended originating notice (application inter partes) on January 9, 2008 seeking the remedies outlined earlier.

[16] The applicants are generally opposed to the development undertaken by the Dempsey respondents. According to Ms. Weilgart this construction has a serious impact on the value of their home and it will diminish the character of the village centre area of Herring Cove. The applicants have voiced concerns regarding fire safety because of the variance granted in the side yard setback. In general, Ms. Weilgart and Mr. Whitehead oppose the construction because, in their view, it would a have serious negative impact on their privacy and views.

[17] The Dempseys take exception to some of the comments made by the applicants. The Dempseys say they pursued their right to a building permit, in good faith, in accordance with the appropriate municipal and provincial laws following the proper steps and obtaining the necessary permits before they began construction.

The Legislation

[18] There are two legislative provisions that would arguably allow the construction that has been undertaken by the Dempseys on the subject property:

1. Section 4.8 of the District 5 land-use by-law.

2. Section 239(1) of the *Municipal Government Act*.

[19] The applicants argue that neither of these provisions provides authority for HRM to issue development and building permits to the Dempseys.

[20] The Court of Appeal considered the proper approach to municipal legislation in *Halifax (Regional Municipality) v. DeWolfe (E.) Trucking Ltd. et al.* (2007), 257

N.S.R. (2d) 276. In that case, the municipality successfully appealed an order holding a by-law invalid on the basis that it exceeded the municipality's powers under the *Municipal Government Act.* Cromwell, JA. described the analytical approach as follows:

> 47 When, as in this case, a by-law is challenged as being beyond a municipality's powers, two matters must be considered: the scope and purpose of the provision and the power given to the municipality to adopt it: Montréal (City) v. 2952-1366 Québec Inc., [2005] 3 S.C.R. 141; 2005 SCC 62; [2005] S.C.J. No. 63 (Q.L.) at para. 7.
>
> 48 The focus of the first step will vary according to the nature of the challenge. When the debate is about the scope of the by-law -- that is, about what conduct it regulates -- the focus will be on the interpretation of its provisions. This was the case in the Montréal decision I have just cited. Alternatively, when the debate is about whether the by-law is enacted for a valid municipal purpose, the by-law's purpose will be the focus of the analysis at step one. That was the case in Shell, supra.
>
> 49 The second step requires of interpretation the statute(s) granting municipal powers in order to determine the ambit of those powers intended by the Legislature. This is a matter of applying the principles of statutory interpretation to the relevant provisions.

[21] Of particular significance in *DeWolfe Trucking*, *supra*, is the "broad and purposive" approach it sets out for the interpretation of municipal legislation:

> 83 The Supreme Court of Canada has embraced a "broad and purposive" approach to the interpretation of statutes empowering municipalities: United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485; [2004] S.C.J. No. 19 (Q.L.); 2004 SCC 19. Following the approach to the interpretation of statutes generally, provisions conferring municipal powers must be read "... in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of [the Legislature].": E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto and Vancouver, Butterworths & Co. (Canada) Ltd., 1983) at 87; Bell ExpressVu Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42. As was said in Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476 at para. 20, this is the "... starting point for statutory interpretation in Canada ...".
>
> 84 Municipalities, of course, must act only within their statutory powers. This is the fundamental requirement of legality: a statutory delegate is limited to acting

within the scope of its delegated authority. Applying this principle is the rule of law in action. But this is not the same thing as narrowly interpreting the statutes which confer authority. That approach is no longer accepted in relation to interpreting municipal powers in Canada, particularly where those powers are conferred in broad and generous terms as they are under the M.G.A.

85 The distinction between the principle of legality and the principle of interpretation was succinctly described by Major J. in Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342; [2000] S.C.J. No. 14; 2000 SCC 13 at paras. 18-19:

> 18 The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.
>
> 19 While R. v. Greenbaum, [1993] 1 S.C.R. 674 favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are. ...

86 In other words, while municipalities, in common with all other statutory delegates, must operate strictly within the limits of their delegated powers, the statutes which confer those powers must be interpreted according to Driedger's principle.

87 The first task, therefore, is to read the words of the enactment in their entire context and in their grammatical and ordinary sense harmoniously with its scheme and objective. If that approach does not provide a clear answer to the meaning of the text, principles calling for "strict construction" or "express authority" may be resorted to. But the Supreme Court has said that these sorts of principles should be applied only when the interpretation according to Driedger's principle leads the interpreter to an ambiguity in the legislation, that is, to the conclusion that the text is reasonably capable of more than one interpretation: Bell ExpressVu at para. 29. As Iacobucci J. put in Bell ExpressVu at para. 28: "Other principles of interpretation -- such as the strict construction of penal statutes ... -- only receive application where there is ambiguity as to the meaning of a provision."

88 Acceptance of this "broad and purposive" approach to interpretation has coincided with adoption of a new approach to drafting municipal legislation. The new approach to drafting is evident in Nova Scotia's M.G.A. Unlike the older style of drafting that defined municipal powers narrowly and specifically, the

> M.G.A. confers authority in broader and more general terms: see generally United Taxi, supra at para. 6. As Bastarache J. noted in United Taxi, these developments in the interpretative approach and in legislative drafting reflect the evolution of the modern municipality which requires greater flexibility in carrying out its statutory responsibilities: at para. 6.

Section 4.8

[22] The applicants seek a declaration that s. 4.8 of the District 5 land-use by-law is a nullity. Section 4.8 states:

> Existing Buildings
>
> Where a building has been erected on or before the effective date of this by-law, on a lot having less than the minimum frontage, area, or depth, or having less than the minimum setback or side yard or rear yard required by this By-law, the building may be enlarged, reconstructed, repaired, replaced, rebuilt, or renovated provided that:
>
> (a) the enlargement, reconstruction, repair or renovation does not further reduce the front yard or side yard that does not conform to this By-law; and
>
> (b) all other applicable provisions of this By-law are satisfied.

[23] The applicants say this clause is not validly enacted and is, therefore, void and of no force and effect. They argue that this clause is *ultra vires* the HRM.

[24] HRM says the applicants are actually seeking to have the by-law quashed. The procedure for quashing a by-law is set out in the *Municipal Government Act* at s. 189, which provides, in part:

> 189 (1) A person may, by notice of motion which shall be served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or a resolution of the council of a municipality, in whole or in part, for illegality.

[25] The court's powers are set out at s. 189(3):

> 189 (3) The judge may quash the by-law, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the municipality and determine the scale of the costs.

[26] There is a three month limitation period imposed by s. 189(4):

> 189 (4) No application shall be entertained pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, unless the application is made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be.

Limitations/Laches

[27] On the basis of the limitation period in s. 189(4), the municipality says the applicants are statute-barred from bringing an application to quash s. 4.8.

[28] The District 5 land-use by-law was approved by Halifax County Municipality on December 5, 1994 and approved, with amendments by the Minister of Municipal Affairs, on February 9, 1995. Section 4.8 took effect at that time and, according to HRM, any challenge should have been brought within three months of the coming into force of that by-law on February 9, 1995.

[29] In the alternative, HRM submits that if the time runs from the in-force date of the *Halifax Regional Municipality Act* or the *Municipal Government Act*, the applicants are still beyond the time frame; the *HRM Act* came into effect on April 1, 1996 and the *MGA* on April 1, 1999.

[30] In the further alternative, HRM submits that the doctrine of laches bars the applicants from bringing an application for a declaration. HRM submits that s. 4.8 has been in existence for approximately fourteen years and that the granting of relief as sought by the applicants would have an unjust result.

[31] The applicants submit that where a challenge to a by-law is premised on the claim that the by-law is *ultra vires* its enabling legislation, limitation periods, such as found in s. 189(4) of the *MGA*, do not apply. They have provided a number of decisions to support this position. For example, in *Urban Development Institute v. Municipal District of Rocky View No. 44*, [2003] 321 A.R. 253, 2002 ABQB 651, the court stated:

> 18 The Applicant argues that irrespective of whether Rule 753.11(1) applies to a declaration, the motion in this case cannot be time barred because a bylaw that is ultra vires cannot, merely because the limitations period has expired, become intra vires. The Respondent argues that limitations periods must be observed in order to bring finality to events.
>
> ...
>
> 20 Further, [Babnik v. Calgary (City) (1992), 133 A.R. 21 (AB)]did not deal with an ultra vires bylaw. A bylaw that has been declared ultra vires is a nullity. Jones & de Villars, [Principles of Administrative, 2dedn.] at p.123. It follows that as the bylaw is seen never to have occurred or existed, no delay in challenging it can validate it.

[32] HRM says *Urban Development Institute, supra,* is distinguishable on the basis that it involved a limitation period imposed by a rule of court rather than a statute and that the legislation involved restricted challenges to procedural irregularities.

[33] The applicants also refer to *Tonks v. Reid,* [1967] S.C.R. 81, where the court held that where a municipality had no authority to pass a by-law, the by-law was void *ab initio* and was not protected by the expiry of the limitation period. As such, the applicants say a limitation clause that would otherwise bar an application to quash a by-law does not apply when the by-law is alleged to be *ultra vires*. HRM says *Tonks* is distinguishable on the basis that the court found fraud and bad faith and that the limitation period involved "appears to have been a court rule..."

[34] In the alternative, HRM submits that the applicants are laches-barred from making an application to quash s. 4.8, on the basis that a result of a successful application would be to call into question other structures built under that section during the years when it was in effect. The applicants say they acted promptly in raising their opposition to the Dempsey project and that laches does not apply.

[35] I am satisfied that the limitation period in s. 189(4) is not applicable, given that the applicants are seeking to quash s. 4.8 of the District 5 land-use by-law on the basis that it is (allegedly) *ultra vires.* Likewise I am satisfied that the applicants acted promptly in raising their opposition to the Dempsey project and that laches does not apply.

Was 4.8 validly enacted?

[36] At the hearing, HRM argued that s. 4.8 of the District land-use by-law is authorized by s. 220 of the *Municipal Government Act.* Section 220 states as follows:

> **Content of land-use by-law**
>
> 220 (1) a land use by-law shall include maps that divide the planning areas into zones
>
> (2) a land-use by-law shall
>
> (a) list permitted or prohibited uses for each zone; and
>
> (b) include provisions that are authorized pursuant to this Act and that are needed to implement the municipal planning strategy.
>
> (3) A land-use by-law may regulate or prohibit development, but development may not be totally prohibited, unless prohibition is permitted pursuant to this Part.
>
> (4) A land-use by-law may
>
> (a) regulate the minimum dimensions for frontage and lot area for any class of use and size of structure;
>
> (b) regulate the maximum floor area of each use to be placed upon a lot, where more than one use is permitted upon a lot;
>
> (c) regulate the maximum area of the ground that structure may cover;
>
> (ca) regulate the location of a structure on a lot;
>
> (d) regulate the height of structures;
>
> (e) regulate the percentage of land that may be built upon;

> (f) regulate the size, or other requirements, relating to yards;
>
> (g) regulate the maximum density of dwelling units;
>
> ...
>
> (k) prescribe the form of an application for a development permit, the content of a development permit, the period of time for which the permit is valid and any provisions for revoking or renewing the permit;

[37] The applicants argue that authority for s. 4.8 is not found in s. 220 but in s. 242 of the *Municipal Government Act* which permits the relaxation of restrictions in a municipal planning strategy respecting non-conforming structures. The relevant portions of s. 242 state as follows:

> **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;
>
> ...
>
> (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.

[38] The essence of s. 242 is to permit a municipality to include provisions in its land-use by-law that have the effect of relaxing the rules regarding non-conforming uses as set out in ss. 238 to 242 of the *Act*. In order to authorize a provision such as s.4.8 of the land-use by-law, s. 242 requires that there be policies in the municipal planning strategy to support it. The applicants say there are no authorizing policies to support s. 4.8, rendering it *ultra vires* the municipality.

[39] The parties agree that s. 242 of the *Municipal Government Act* allows a municipality to relax restrictions on non-conforming uses and structures. As I have said, this provision allows a municipality such as HRM, through its municipal planning strategy, to relax the requirements of the *Municipal Government Act* regarding non-conforming structures. This relaxation is carried out by providing policies in the municipal planning strategy to authorize or support provisions such as s. 4.8 of the District 5 land-use by-law.

[40] The applicants assert that there are no policies in the District 5 Municipal Planning Strategy that would permit a relaxation of the *Municipal Government Act* restrictions on rebuilding a non-conforming structure.

[41] HRM relies on policies IM-16 and IM-19 of the District 5 Municipal Planning Strategy to provide support for the enactment of s. 4.8 of the land-use by-law:

> IM - 16
>
> It shall be the intention of council to consider that uses permitted as existing uses are conforming uses and unless otherwise limited by the land-use by-law, can expand subject to requirements of the land-use by-law.
>
> IM - 19
>
> It shall be the intention of council to provide, through the land-use by-law, for the expansion or structural alteration of nonconforming uses, provided that the expansion or alteration does not result in an increase in the space devoted to the nonconforming use.

[42] The applicants say that the provisions in the *Municipal Government Act* dealing with non-conforming uses cover three categories: non-conforming structures, non-conforming uses of land and non-conforming uses in structures.

[43] The applicants argue that policy IM-16 refers to “permitted uses”, which they say is the opposite of non-conforming uses. In other words, these would be categories of uses that are designated in a land-use by-law as being permitted in a particular zone. The applicants say that policy IM-19 refers to a non-conforming use of land and non-conforming use in a structure, but does not refer to the third category of non-conforming structure into which they say the Dempsey project

falls. I am satisfied that policy IM-16 refers to permitted uses and not to non-conforming structures and is, therefore, of no assistance to HRM.

[44] As to policy IM-19, I note the reference is to "the expansion or structural alteration of non-conforming uses". There is no reference to non-conforming structures, non-conforming uses of land or non-conforming uses in a structure, although the applicants argue that the use of the words "non-conforming use" at the end of policy IM-19 would exclude a non-conforming structure.

[45] HRM says that when policies IM-16 and IM-19 refer to "conforming uses and non-conforming uses" the reference also includes "non-conforming structures". According to HRM, the use of the phrase "non-conforming uses" mirrors the language of the former *Planning Act* which used that phrase in s. 38(2)(1) and would include a non-conforming structure. HRM says s. 38(2)(1) authorized s. 4.8 of the District 5 land-use by-law. This land-use by-law was approved by Halifax County Municipality on December 5, 1994. At the time, the *Planning Act*, 1983, c. 9, s. 1 provided the following:

> **Applicable provincial policies**
>
> 38 (1) A municipal planning strategy or an inter-municipal planning strategy may include any policies necessary to carry out the intent of applicable provincial land-use policies.
>
> **Statements of policy**
>
> (2) A municipal planning strategy or an inter-municipal planning strategy may include statements of policy with respect to any or all of the following:
>
> ...
>
> (I) the continuance or discontinuance of non-conforming uses in accordance with Section 94;

[46] Section 94 of the *Planning Act* stated:

> **Variation in Section 92 or 93 restrictions**

> 94 (1) A municipal planning strategy may provide for the variation of the provisions of Section 92 or 93, but no variation shall increase the restrictions in Sections 92 and 93.
>
> **Policies**
>
> (2) The polices adopted pursuant to subsection (1) may provide for
>
> (a) the extension, enlargement or alteration of non-conforming structures or structures containing non-conforming uses;
>
> ...
>
> **Implementation**
>
> (3) The policies adopted pursuant to this Section may be carried out through the land-use by-law, or by development agreement, and where the council has provided for the latter, Sections 73 to 80 apply *mutatis mutandis* to an agreement entered into pursuant to this Section.

[47] According to HRM, because s. 38(2)(l) expressly incorporated s. 94, and s. 94 included the reference to non-conforming structures, the reference in s. 4.8 to non-conforming uses includes non-conforming structures and, therefore, s. 4.8 is authorized by policy IM-19.

[48] Further, HRM says the Municipal Planning Strategy and land-use by-law for District 5 continue by operation of the *Municipal Government Act* which states:

> **Former Planning Act**
>
> **262** A municipal development plan and zoning by-law or municipal planning strategy and land-use by-law adopted pursuant to a former *Planning Act* are a municipal planning strategy and land-use by-law within the meaning of this Act, to the extent they are consistent with this Act.

[49] In summary, HRM argues that policies IM-16 and IM-19 viewed in the context of the above legislation, and read together with s. 4.8 of the land-use by-law, make it clear that the intention was to allow non-conforming structures to be

rebuilt. As such, it is argued the existing building clause is *intra vires* the municipality.

[50] While I agree with the applicants that IM-16 is of no assistance to HRM and does not refer to, nor support, s. 4.8 of the land-use by-law, I am satisfied that policy IM-19, viewed in the context of s. 38 and s. 94 of the former *Planning Act, supra*, authorizes the enactment of s. 4.8. I find that s. 4.8 is validly enacted pursuant to the former *Planning Act* and continued under s. 262 of the *Municipal Government Act* and is, therefore, *intra vires* HRM. Having so determined, it is not necessary to consider whether there is authority under s. 239 of the *Municipal Government Act* for HRM to issue the permits to Mr. Dempsey. However, in the event that I am wrong as to the validity of s. 4.8, I will go on to discuss whether s. 239 provides such authority to HRM.

Section 239 of the MGA.

[51] Section 239 of the *Municipal Government Act* provides statutory authority to enlarge, reconstruct, repair or renovate a non-conforming structure. Section 239 provides in part:

> **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
>
> ...
>
> (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.

[52] According to HRM, the Dempseys exercised their statutory right under s. 239 and applied to reconstruct and enlarge a non-conforming structure. Because the proposed building would further reduce the minimum side yards, it could not be rebuilt under s. 239, as all applicable provisions of the land-use by-law were not satisfied. To make the proposed building conform, the Dempseys exercised their right under s. 235(1) of the *Municipal Government Act* and applied for a variance. That subsection provides:

> **Variance**
>
> 235 (1) A development officer may grant a variance in one or more of the following terms in a development agreement, if provided for in the development agreement, or land-use by-law requirements:
>
> ...
>
> (b) size or other requirements relating to yards;

[53] The applicants agree that s. 239 of the *Municipal Government Act* grants a statutory right to rebuild a non-conforming structure but claim that s. 239 does not apply to the Dempsey structure because, in their view, the existing building was not being used "primarily for residential purposes" at the time the development application was made. While they agree that s. 239 provides a right to "rebuild", they say this depends on the actual use of the existing building at the time of the development application. The applicants suggest that, contrary to the Dempsey respondents' claim that the existing building was a residence, it lacked running water and was served by a chemical toilet and was, therefore, "not a normal residence". They also claim that it had not been occupied as residence for some ten years at the time the Dempseys made the development application, but rather was being used as a "storage shed" at that time and "presumably" for many years before 2007. According to the affidavit filed by the respondent, Mr. Dempsey, the property had been occupied for many years as a residential dwelling.

[54] The question is whether, on the facts, this non-conforming structure was used primarily for residential purposes so that it would fit within the provisions of s. 239 of the *Municipal Government Act.*

[55] Until ten years ago the property was used for residential purposes. There does not appear to be a dispute that this was the case. There is no evidence before me to suggest any change in use to the property during the last ten years. The evidence from Mr. Dempsey is that he and Mrs. Dempsey had planned to build a home on the property. The following paragraphs from the affidavit of Thomas Dempsey, filed February 28, 2008 are relevant:

> 3. My wife Corrinne and I are the owners of a lot of land located at civic number 1594 John Brackett Drive, Herring Cover (hereinafter "the land"). I had lived out west for a number of years and there met my wife Corrinne. We dreamed of having a home on the land. I acquired the land from my father Reginald Dempsey by a deed dated May 19, 1999. We could have sold it, but I had the title quieted and obtained a Certificate of Title from the Supreme Court of Nova Scotia dated June 15, 2005. We had planned to go ahead and build on the lot with an engineered septic system. We had one designed and approved, but then decided we should wait until municipal services were provided.
>
> ...
>
> 9. Corrinne and I have already done work on the land to bring municipal services to the home. We dug a trench and laid pipe in conjunction with our neighbours on the other side Dr. Lief Sigurdson. Dr. Sigurdson said to me, and I do verily believe, that he intended to dig a trench for a sewer lateral as soon as services came to John Brackett Drive. It made sense for us to share the cost, and I have had to go ahead and provide the lateral for the new home in its planned location in conjunction with him. It would have been more expensive for me to wait. I would have run the added risk of damaging his if I did waited (sic) and then excavated separately.

[56] Under s. 3(bi) of the *Municipal Government Act* "residential property" is defined as follows:

> **Interpretation**
>
> 3 In this Act,
>
> (bi) "residential property" has the same meaning as in the *Assessment Act*.

[57] Under the *Assessment Act*, R.S.N.S. 1989, c.23,"residential property" is defined as follows:

> **Interpretation**
>
> 2 [(1)] In this Act,
>
> (r) "Residential property" means property or part thereof used or intended to be used for residential purposes, ...

[58] The applicant says that the specific wording used in s. 239(1) is "residential purposes" and not "residential property" which is defined under the *Municipal Government Act* and the *Assessment Act*. With respect, the definition of "residential property" in the *Assessment Act* refers to "property or part thereof used or intended to be used for **residential purposes**". [Emphasis added]

[59] On the whole of the evidence before me, I am satisfied that the property was used and was intended to be used for residential purposes and, therefore, falls within s. 239 of the *Municipal Government Act.*

[60] The applicants urge that the legislation be read to mean that the reference to residential use is at the time of the application for a development permit. With respect, this would require reading words into the legislation that are not there and are implied. Moreover, the applicants have not provided any case law or argument to support this interpretation.

[61] There is nothing in the evidence to suggest any other use of the property but for residential purposes.

[62] I am satisfied that HRM had authority under s. 239(1) of the *Municipal Government Act* to authorize the Dempsey development and building permits.

The Permits

[63] The next two issues concern the judicial review of the decision of Mr. Faulkner to issue a development permit and the decision of a building inspector to issue a building permit. I must first determine the appropriate standard of review.

Standard of Review

[64] Until recently, a reviewing court would apply the so-called "pragmatic and functional approach" to determine which of three standards of review were appropriate to use in the review of the decisions of the development officer and building inspector. However, in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) the Supreme Court of Canada has revised the previous system of judicial review and set out a redesigned "standard of review analysis". There are now only two standards of review, "correctness" and "reasonableness". The majority defined "reasonableness" in the following terms:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[65] This was not, the majority said, a license for more intrusive review. In order to grasp the meaning of "reasonableness" it was necessary to discuss the meaning of "deference":

> 48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact

> imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, at p. 596, per L'Heureux-Dube J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, per L'Heureux-Dube J.: *Ryan*, at para.49).
>
> 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P*. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[66] As to the correctness standard, the majority said:

> 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[67] The court noted that, generally speaking, questions of fact, discretion and policy and questions, where legal and factual issues cannot be easily separated from one another, would attract a standard of reasonableness. Examples of

questions requiring review for correctness would include constitutional issues and determination of jurisdiction or *vires.*

[68] As to determining the appropriate standard of review the court provided the following guidance:

> 51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.
>
> 52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard ... This does not mean, however, that the presence of a privative clause is determinative .....
>
> 53 Where the question is one of fact, discretion or policy, deference will usually apply automatically *(Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (S.C.C.), [1993] 1 S.C.R. 554, at pp. 599-600: *Dr. Q*, at para.29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
>
> 54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, 1995 CanLII 148 (S.C.C.), [1995] 1 S.C.R. 157, at para. 48: *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (S.C.C.), [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para.72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, 1974 CanLII 12 (S.C.C.), [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the... specialized area of expertise" of the administrative decision maker will always attract a correctness standard *(Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
>
> 56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[69] The majority went on to comment that the process of judicial review involves a two-step standard of review process:

1. First, the court ascertains whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.

2. Where this inquiry proves unfruitful, the court proceeds to an analysis of the factors making it possible to identify the proper standard of review. The majority described this analysis at para. 64:

> 64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to

> consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

The Development Permit

[70] The respondent HRM submits that following the decision in *Grove v. Chester (District)* (2003), 211 N.S.R. (2d) 249 (C.A.), and *Dunsmuir, supra* the appropriate standard of review of the development officer is reasonableness. The respondent Dempseys agree. The applicants say that the standard of review is reasonableness but with a "moderate" degree of deference.

[71] *Grove, supra*, involved an appeal by Mr. Grove from a decision of the court dismissing an application for an order in the nature of certiorari to quash a building permit. Mr. Grove had objected to aspects of the design of his neighbour's home. The Chambers judge determined that the applicable standard of review was patent unreasonableness and the Court of Appeal agreed. At paras. 8, 9 , 18 and 20, the Court of Appeal stated:

> 8 It should be noted that there is no provision in the governing legislation, the Municipal Government Act, S.N.S. 1998, c. 18, s. 1, as amended, for an appeal of a decision of a development officer to issue a development permit pursuant to s. 244. The only possibility for challenging the permit is by means of an application for certiorari.
>
> 9 In the decision under appeal, Justice Moir considered the relevant definitions, and the reasons and explanations provided by the development officers in support of their decisions for granting the permit and concluded that those decisions were not patently unreasonable.
>
> ...
>
> 18 As noted above, it is agreed that Justice Moir was required to defer to the decisions of the development officers unless it was demonstrated that the decisions were patently unreasonable. ...
>
> 20 I agree with the Chambers judge that the decisions of the development officers could not be said to be patently unreasonable, or that there were obvious defects in their reasoning. The approval of the plans based on their interpretation of the by-law, a matter the Legislature intended to leave entirely within the control of the development officers since no appeal is allowed, cannot, in my opinion, be found to be clearly irrational. In his able submission, Mr. Grant,

> counsel for the appellants, proposed other rational or reasonable interpretations of the by-law.... However, that is not an adequate justification for interference with the decisions. Even if the interpretations presented by the appellants were thought to be preferable or more acceptable, that would not satisfy the necessary threshold for interference. The development officers' decisions are to be accorded the highest level of deference, and so are not reviewable on a standard of correctness. As observed by the Supreme Court of Canada in *Ivanhoe Inc. et al. v. United Food and Commercial Workers, Local 500 et al.,* [2001] 2 S.C.R. 565; 272 N.R. 201, at ¶ 116, the fact that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if there were only one acceptable solution.

[72] I am satisfied after applying the principles in *Dunsmuir, supra,* and in considering the comments of the court in *Grove, supra,* that the appropriate standard of review of the decision of the development officer is reasonableness. There is no privative clause or right of appeal. The granting or refusal of a development permit would be a matter squarely within the development officer's jurisdiction and squarely within his statutory authority. The *Municipal Government Act* defines a "development officer" as "the person or persons appointed by council to administer a land-use or a subdivision by-law". It is a field in which he might be expected to have greater expertise than the court given his day-to-day involvement in processing applications for development permits. It is also clear that the approval of the plans submitted by the Dempseys and interpreting these plans in accordance with the by-law is a matter that the legislature intended to leave within the control of the development officer, since no appeal is allowed, and the *Municipal Government Act* is specific that a development officer is the person appointed by council to administer a land-use by-law.

[73] I am satisfied that both the pre-*Dunsmuir* case law, (i.e. *Grove*) and the considerations outlined in *Dunsmuir* itself support deference to a development officer's decision to approve an application for a development permit.

Was the decision of the development officer reasonable?

[74] The *Municipal Government Act* provides, at s. 244(1):

Development Permit

244 (1) Before any development is commenced, a development permit shall be obtained if the council has adopted a land-use by-law.

[75] A development officer is required to issue a development permit if the applicants have met the requirements of s. 246(1):

Limitations on granting development permit

246 (1) A development permit shall be used for a proposed development if the development meets the requirements of the land-use by-law, the terms of a development agreement or an approved site plan.

[76] The development officer concluded that the development application, with the variance, met the requirements of the District 5 land-use by-law and that with all other requirements having been met he was required to issue the development permit. At paras. 21 and 22 of Andrew Faulkner's affidavit, filed February 26, 2008, he comments as follows:

> 21. THAT on September 5, 2007, the Dempsey's (sic) applied for a construction permit for a single unit dwelling on the Property. A copy of that permit application is found in the Record, Volume 1, Tab 1, page 6. I approved the development permit on September 7, 2007. On October 10, 2007 a construction permit was issued. A copy of the permit is found in the Supplementary Record, page 56.
>
> 22. THAT with the exception of the right side yard setback, for which a variance was granted, all other development including height requirements and lot coverage comply with the HCR zone and section 4.8 of the District 5 LUB

[77] As I have set out earlier, a development officer is required to issue a development permit if the development meets the requirements of the land-use by-law. Mr. Faulkner, the development officer, has indicated that the development met all of the necessary requirements and, as a result, he issued a development permit. I see nothing unreasonable in how Mr. Faulkner reached this conclusion.

[78] Counsel for the applicants, in argument, pointed to certain comments in e-mails by Mr. Faulkner that were circulated between the parties as suggesting the issuance of the development permit somehow did not "make sense" and was "illogical". Counsel for the applicants elected not to cross-examine Mr. Faulkner on any of these issues, nor was affidavit evidence provided to refute Mr. Faulkner's evidence that all of the requirements to allow him to issue a development permit were met in this instance. Given the evidence before me, I am satisfied that the decision of the development officer was reasonable under the circumstances.

ISSUE # 4 Building Permit

[79] The parties agree that the appropriate standard of review is reasonableness. The solicitor for the applicants agrees that if the development permit is not quashed then there is no basis upon which to find that the building inspector's decision was unreasonable. I am satisfied that there is nothing unreasonable in the decision of the building inspector.

[80] According to HRM the application was reviewed by building officials and found to be in compliance with the *Building Code Act*, R.S.N.S. 1989, c. 46 and a building permit was issued on October 10, 2008.

[81] Section 9 of the *Building Code Act*, R.S.N.S. 1989, c. 46, as amended provides:

> **Issues of permits**
>
> 9 (1) The inspector shall issue a permit pursuant to Section 8 except where
>
> (a) The proposed building or the proposed construction or demolition will not comply with an Act or a regulation or by-law made pursuant to this Act or Parts VIII or IX of the *Municipal Government Act;* or
>
> (b) the application therefor is incomplete or any fees due are unpaid.

[82] There is no evidence before me to suggest that the requirements of the *Building Code Act* have not been met. The affidavit evidence of Mr. Faulkner is that all development requirements in s. 4.8 of the District 5 land-use by-law have been met. Therefore, the building permit was issued pursuant to the mandatory provisions of 9(1) of the *Building Code Act*.

Costs

[83] The remaining issue to determine is costs.

[84] The applicants were unsuccessful.

[85] Costs for applications heard in Chambers are normally awarded under Tariff C to *Rule* 63.

[86] This matter was the subject of a full day hearing on April 9, 2008 and under Tariff C, $2000.00 per day is listed as the appropriate cost award. Other relevant provisions under Tariff C are as follows:

> For applications heard in Chambers the following guidelines shall apply:
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
>
> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3, or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties;
>
> (c) the amount of effort involved in preparing for and conducting the application.
>
> (Such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals

> and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

[87] This matter was complex. It involved an application to quash a by-law as being *ultra vires*, two judicial reviews, interpretation of the application of provincial legislation and a mandatory injunction. One of the remedies sought was to tear down the house the Dempseys had partially constructed on the property.

[88] The applicants filed four briefs. The respondent HRM, and the Dempsey respondents filed two briefs each.

[89] This decision determines the entire matters at issue in this proceeding.

[90] What is an appropriate award of costs? In its submission, the applicants suggest that the appropriate cost amount, should it have succeeded, was $23,000.00, with HRM paying the full award. Counsel for the applicants indicated that his bill for his clients would be approximately $40,000.00. The applicants submitted that if it was not successful, that costs be awarded in the amount of $1000.00 to the Dempsey respondents and nothing to HRM.

[91] Costs are in the discretion of this court, and this court can award costs that are just and appropriate in the circumstances.

[92] The parties agree the matter was complex involving several different challenges to HRM's decision to issue development and building permits. The applicants have indicated extensive time was spent in initiating and preparing for the hearing. The respondents, in replying to the numerous claims being made by the applicants, would likewise have expended a great deal of time and effort preparing for the hearing and in responding to the applicants' four briefs.

[93] Counsel for the Dempsey respondents acknowledged that HRM took the lead in responding to the claim of the applicants. The applicants suggested that HRM should not be entitled to its costs should the applicants be unsuccessful. This position appears to be based on the argument that HRM had in-house counsel and, therefore, should not be entitled to its costs. With respect, there is a cost to HRM having to employ legal counsel to provide advice and to respond to these type claims. I am not satisfied that HRM should be excluded from entitlement to costs, merely because it has elected to hire its own in-house counsel. Costs shall be

payable by the applicants to the respondent HRM in the amount of $3,000.00 and to the Dempsey respondents in the amount of $2,000.00, both amounts being payable forthwith.

Pickup, J.