**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Oakland/Indian Point Residents Association v. Seaview Properties Limited, 2008 NSSC 209

**Date:** 2008/06/27
**Docket:** S. Bw. No. 292852
**Registry:** Halifax

**Between:**

**OAKLAND/INDIAN POINT RESIDENTS ASSOCIATION**

Applicant

and

**SEAVIEW PROPERTIES LIMITED and MUNICIPALITY OF THE DISTRICT OF LUNENBURG**

Defendants

| | |
|---|---|
| **Judge:** | Justice N. M. Scaravelli |
| **Heard:** | June 4, 2008, in Liverpool, Nova Scotia |
| **Written Decision:** | June 27, 2008 |
| **Counsel:** | Peter M. Rogers, for Oakland<br>J.C. Reddy, for The District of Lunenburg<br>Kevin Latimer, Q.C./ Andrew Taillon, for Seaview Properties Limited |

**By the Court**:

[1] The Applicant on the main application Oakland/Indian Point Residents Association (the Association) seeks an Order in the nature of Certiorari to quash a final plan of subdivision and 7 development permits granted to Seaview Properties Limited (Seaview) in respect of its property located on Oakland Road, Lunenburg County. The Association also seeks an Order in the nature of a declaration in respect of the same property declaring that:

> (a) for a lot of less than 9,000 square meters in area, intended by a proposed subdivider to be eligible for residential, commercial, institutional or industrial development in the present or future, a developer seeking to subdivide must either have approval of the lot for an on-site septic system from the Nova Scotia Department of Environment and Labour, or must have approval from the Municipality to connect with the municipal sewer system (which in turn has been approved by the Department), or approval for a specific alternate system which has been reviewed and assessed by the Nova Scotia Department of Environment and Labour for its suitability for the site;
>
> (b) where a certificate is given by a developer pursuant to provincial or municipal subdivision legislation certifying that the purpose of subdividing a lot of less and 9000 square meters in area is for a use that does not require an on-site septic system, the Development Officer shall not accept the certificate as compliant if she reasonably believes it to be false or if the certified usage is one involving present or future residential, commercial, institutional or industrial use unless the developer has the approvals described in paragraph 2 (a) above;

> (c) where a subdivision has been approved subject to a qualification that it has been approved for a purpose that does not require an on-site sewage disposal system, no development permit shall be issued for a residential, commercial, institutional or industrial or other sewage-generating use by the Development Officer until and unless the developer has the approvals described in paragraph 2 (a) above; and
>
> (d) where a subdivision is sought for a development using a single access driveway into the Oakland Road for a series of lots intended for residential use, and using a single sewage treatment system for such lots, that approval to subdivide must be withheld unless the Nova Scotia Department of Transportation and Pubic Works has approved a commercial grade driveway access into the Oakland Road, and unless the Nova Scotia Department of Environment and Labour has approved the central sewer system, with the driveway and sewage treatment facility both being shown on the Subdivision Plan for which the approval is sought.

[2] The matters before me result from an Interlocutory Application on behalf of the Respondent, the Municipality of the District of Lunenburg (Municipality) seeking, inter alia, an Order:

(i) Dismissing the Applicant's Originating Notice (Application) for lack of Standing;

(ii) To convert the Originating Notice (Application) to an Originating Notice (Action);

(iii) For Security for Costs.

[3] Further, Seaview has made an Interlocutory Application to be removed as a party to the main Application on the basis that the originating Application discloses no cause of action against Seaview.

**Background**

[4] Initially, Seaview submitted a Development Agreement Application dated August 2006, seeking approval to construct a condominium complex. Pursuant to the Oakland Secondary Planning Strategy and Land Use By-Law, a process is set out for considering Development Agreements in line with the *Municipal Government Act,* but also provides input from other parties including the developer, municipal council and the Oakland Advisory Committee. Local residents and other aggrieved persons also have the right to make representations at public hearings.

[5] Sometime during the Development Agreement process, Seaview decided to make an “as-of-right” application for subdivision, thereby abandoning the

Development Agreement process. The Applicant Association claims that Seaview engaged in a false certification (proposing vacant wood lot) on the application to obtain the approvals and that their conduct was an attempt to avoid the proper planning process for a development agreement. Further that the Development Officer was aware or should have been aware of the false certification application process.

**Residents Association Standing**

[6] The Applicant Area Association is a body corporate created under the *Nova Scotia Societies Act*. It has been in existence for more than 20 years. The objectives of the Association are as follows:

> to maintain and provide a semi-rural area; to keep a watching brief on any development proposals which may appear undesirable; to provide from time to time opportunities for social interaction and fellowship among the residents; and to do other things that the residents consider appropriate for the betterment of the two communities.

[7] Membership in the Association is open to:

> Any person, 19 (nineteen) years of age or older, who owns a dwelling in either the community of Oakland or Indian Point and who pays taxes on such dwelling,

> and shall include any children of such person provide such children are 19 years of age or older, the spouse of such person and the parents of either spouse, provided only that all such persons above live for some part of the year in the above mentioned dwelling, and who subscribes to the objectives of the Association and pays the annual fee.

[8] Some of the members of the Association own and reside in properties adjacent to the subject lands of Seaview while others own properties in the general vicinity. Over the years the Association has been involved with Municipality. The Association initiated the preparation of the Oakland - Indian Point Municipal Planning Strategy and Land Use By-Law. The Association requested the Municipality establish an Area Advisory Committee and later provided nominees to the Committee who were accepted by the Municipality.

[9] It is the position of Municipality that the Association has the burden of establishing it has standing to bring the Certiorari application. Municipality asserts the Association must establish that it has a direct interest in the administrative acts of Municipality in granting the final plan for subdivision approval and the development permits.

[10] Essentially Municipality submits that although several members of the Association own land in the area including an adjacent land owner, they are not a

party to the application, and, as the Applicant is an incorporated society that does not own or have an interest in land anywhere in the area or otherwise, it does not have a direct interest in this matter and, therefore, lacks standing to bring this Application.

[11] Both counsel for Municipality and the Association agree the analysis set out in two cases namely: *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 125 N.S.R. (2d) 241 (NSCA) and *Mountain Ash Court Property Owners Assn. v. Dartmouth (City)* (1993), 127 N.S.R. (2d) 139 (S.C.) remains the accepted approach to determining the issue of standing.

[12] The Chambers Judge in the *Mountain Ash* case set out the following test drawn from the *Coalition* case where the Court of Appeal reviewed the leading decisions on standing by the Supreme Court of Canada:

(a) The justiciability of the cause of action.

(b) Is there a serious question raised as to the invalidity of the legislation or administrative actions?

(c) Has it been established that the applicant is directly affected by the legislation or administrative acts, or, if not, does the applicant have a genuine interest in the validity of the legislation or administrative acts.

(d) Is there another reasonable and effective way to bring the issue before the Court?

[13] In the *Mountain Ash* case the applicants were the Property Owners Association as well as individual residents. Counsel for Municipality submits the Chambers Judge in the *Mountain Ash* case found the individual Applicants to have standing on the basis that they had a direct interest and they were actually persons who held land, not the mere society, that is unsecured and holds no land or any interest in the subject matter of this dispute. Similarly Municipality interprets the *Coalition* case as a denial of standing on the basis that the Court did not believe the coalition had a direct interest to bring forth the application.

[14] In applying the test set out in the *Coalition* and *Mountain Ash* cases I find as follows:

(a) The matter is justiciable. The Application challenges the legality of the approval of the subdivision and issuance of the Development

Permits. The matter is “ripe” for determination as the main Application is in the nature of Certiorari whereby *Civil Procedure Rule 56.06* imposes a six month time period for filing the Notice of Application.

(b) There is a serious issue raised as to the validity of the Administrative Action that surrounded the Application and Certification process which led to the granting of the Application. Certainly the issues raised are not frivolous.

(c) The Applicant has if not a direct interest, certainly a genuine interest in the statutory decisions under review. The Association is long standing. It is made up of individuals who reside in the area of the proposed development. The Association has demonstrated its interest in land development in the past by participating directly with the Municipality in the development of land use strategy. In this regard I disagree with the submissions of counsel for Municipality that the *Coalition* and *Mountain Ash* cases support its position that the Association has no standing as it has no direct interest. The test only

requires that the Applicant be “directly affected” **or** to have a “genuine interest”. The decision of the Court of Appeal in the *Coalition* case turned on the lack of justiciable issue. In the *Mountain Ash* case, the Court determined that the individual Applicants were directly affected. The Court, did not, however, determine that the Association did not have a genuine interest in the proceeding.

There are various cases involving the Heritage Trust of Nova Scotia, while not precisely analogous to the present situation, are instructive as to scope of the terms “directly affective” and “having a genuine interest”. The comments of Hood, J. in *Heritage Trust of Nova Scotia v. Halifax (Regional Municipality)* (2007), 252 N.S.R. (2d) 114; 2007 Carswell NS 91, are of some assistance:

> 32 Heritage Trust representatives and Howard Epstein spoke as members of the public during the public hearing. As such, they are "directly affected" by the way the hearing was conducted. Furthermore, they have a "genuine interest" in planning matters as is evidenced by their frequent appearances as parties or counsel in planning matters. As such, they have a genuine interest in ensuring Halifax Regional Council conducts its public hearings in such a way that they can make meaningful representations.
>
> 33 The intervenor submits that I should consider the applicants' relationship to the lands which were the subject of the public hearing. In my view, this is a misconception of the issue before this court. The issue is

only indirectly the lands; they are the issue at the planning appeal. However, on this application, the issue is the proper conduct of the public hearing itself. The *Municipal Government Act* places no residential requirement on those who can speak as members of the public at a public hearing. Nor does the Administrative Order. The latter does set out limitations on the length of presentations, how to get on the speakers' list, etc., but does not require anyone wishing to speak to have a required "connection" to the subject lands. It might be argued that those who have standing might be restricted to residents or taxpayers of Halifax Regional Municipality but that is not the issue before me.

34 Cowan, C.J.T.D. concluded in *Heritage Trust of Nova Scotia v. Nova Scotia (Provincial Planning Appeal Board)*, 50 N.S.R. (2d) 352, 1981 CarswellNS 282 (N.S. T.D.) that any citizen of Halifax had standing in a matter relating to the Citadel. He said in paras. 49-50:

> 49 However, it seems to me that the preservation of an amenity in the City of Halifax, such as the Citadel, is a matter which concerns and affects not only owners of adjacent properties, or owners of properties in the immediate neighbourhood or only residents of the immediate neighbourhood. In my opinion, it is a matter which affects the citizens of Halifax generally and it is my view that the individual plaintiffs have standing to bring the action for a declaration with respect to the validity of the council's decision of February 28, 1980.
>
> 50 While the corporate plaintiffs are not technically resident, as individuals are, in the city, their interests are such that I am of the opinion that they also have standing to bring such an action.'

I note that Section 191 of the *Municipal Government Act* provides standing to corporate organizations where members reside in the area and whose objects are the protection of the quality of life in the community.

(d) As to the final part of the test set out in *Coalition* and *Mountain Ash*, there is no other reasonable and effective way to bring this matter before the Courts other than judicial review as there is no appeal to the Utility and Review Board from the granting of subdivision approval or granting of the development permits.

[15] Accordingly, I find the Association has Standing to bring this Application.

**Application or Action**

[16] The Municipality submits that, as the Association is alleging false certification of a plan of subdivision and/or an application of subdivision, as well as vicarious liability on the part of the Municipality, these are issues which "will ultimately lead to a dispute of fact". As a result the matter should be converted to an action to allow for discoveries and *viva voce* evidence. The Municipality filed an Affidavit on this Application to the effect that there will be a dispute of the facts set out in the Affidavit filed by the Association with its originating application.

[17] *Civil Procedure Rule 9.02* provides:

> A proceeding, other than a proceeding under rule 57 and rules 59 to 61,
>
> (a) in which the sole or principal question at issue is, or is likely to be, a question of law, or one of construction of an enactment, will, contract, or other document;
>
> (b) in which there is unlikely to be any substantial dispute of fact;
>
> (c) which may be commenced by an originating application, originating motion, originating summons, petition, or otherwise under an enactment;
>
> shall be commenced by filing an originating notice (application inter partes) in Form 9.02A in a proceeding between parties, and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding.

[18] *Civil Procedure Rule 37.10 (e)* provides*:*

> On a hearing of an application, the court may on such terms as it thinks just,
>
> (e) notwithstanding rule 9.02, order the application to be continued in court as if the proceeding had begun by an originating notice (action) and order the notice and affidavits to stand as pleadings, with liberty to any party to amend or add thereto or apply for particulars thereof, and to give any other direction as is applicable;

[19] The onus is on the Municipality to demonstrate the Originating Notice Application does not meet the requirements of *Rule 9.02* and that there is a

"substantial" dispute of facts. Mere disagreement of facts is not sufficient. In *Renaud v. Nova Scotia (Attorney General)* (2005) 236 N.S.R. (2d) the Court states:

> 26 Even where there is a dispute of fact, that, in and of itself, does not render the application route objectionable, because it may involve a dispute of facts in the construction of interpretation of an enactment.
>
> 27 The fact that factual material, even factual material of some complexity, will be placed before the Chambers Judge does not rise to the level of "substantial dispute of fact".

[20] In *Goodman Rosen Inc. v. Sobeys* (2002), N.S.S.C. 264, the Court stated:

> 13 Strictly speaking, the presence of a substantial dispute of fact is not preclusive of an application under 9.02 (a). This proceeding is one in which the principal question at issue is of constructive of a contract. It is squarely within 9.02(a) and I must decide whether the proceeding is likely to involve significant factual disputes, such that I should order a trial. I must approach this question by examining the extent of factual dispute, which, if sufficiently substantial would necessitate a trial but which, if insubstantial, would favour an application.

[21] The Municipality has yet to file an Affidavit in response to the originating Affidavit. As a result, I am unable to examine the extent of the factual dispute in order to make a determination of this issue at this stage of the proceeding. A mere blanket assertion of a substantial dispute of fact is insufficient.

**Security for Costs**

[22] The relevant rule is *Rule 42.01*; the Municipality relies specifically upon *Rules 42.01(1)(e)* and *(f)*, which provide:

> (1) The court may order security for costs to be given in a proceeding whenever it deems it just, and without limiting the generality of the foregoing, it may order security to be given where,
>
> ...
>
> (e) a proceeding is brought by a nominal plaintiff;
>
> (f) upon the examination of a plaintiff it appears that there is good reason to believe that the proceeding is frivolous and vexatious, and that the plaintiff is not possessed of sufficient property within the jurisdiction to pay costs....

[23] Discussing the discretionary nature of *Rule 42.01* in *Wall v. Horn Abbott Ltd.*, 1999 CarswellNS 120, the Court of Appeal said:

> 52 Unlike jurisdictions in which Rules of Court restrict the court's authority to order security to defined circumstances, it is clear that the Nova Scotia Rules give a broad discretion to make such an order. The situations set out in 42.01(1)(a)-(I) do not detract from the generality of the authority to order security whenever the Court deems it just; the specific situations set out in (a)-(I) are examples.... It follows, therefore, that there is no automatic entitlement to security, even if the case falls within one of the examples and, conversely, security may be ordered whenever it is just to do so even if the case does not fall within one of the examples set out in the Rule.

> 53 The examples given in Rule 42.01(1)(a)-(I) are instructive; while they do not limit the discretion to order security, they illustrate some of the sorts of factors relevant to its exercise.

That being said, the Municipality has specifically relies upon only *sub-rules (e)* and *(f)*.

**R. 42.01(e): "nominal applicant"**

[24] The Municipality insists that the residents' association is a "nominal applicant," lacking sufficient property to pay costs. The Association, it submits, is "comprised of and driven by several members of the community who are in a financial position to raise security for costs". The Municipality does not offer any definition or standard for determining when a litigant is a "nominal" one. The Association responds that it has a long-standing interest in planning and development bylaws and controls in the area, and that it has not been created simply to advance litigation on behalf of other people. That the Association does not become a nominal applicant merely because it advances litigation that will benefit its individual members as well as pursuing its own purposes and objectives.

[25] In the *Coalition* case (supra) which was reversed by the Court of Appeal on the standing issue, the trial judge said:

> [91] Nominal plaintiff has been defined as "a man who is plaintiff in name but who in truth sues for the benefit of another ..." (*Semler v. Murphy* [1968] 1 Ch.D. 183 at p. 191). An examination of the English case law reveals that "nominal plaintiff" means the plaintiff neither has an interest in nor stands to benefit from the action. With deference, the Coalition has an interest in this action. If successful, the action would result in a benefit to those represented by the Coalition as well as being a benefit to the public generally.
>
> [92] Referring to the statement of claim, the applicant points out that the plaintiff is just a vehicle for certain individuals to object to incineration of municipal waste and sets out those individuals who will suffer harm because of incineration or whose rights to fundamental justice in the procedure have been denied. The applicant submits that this makes it clear that the action is brought for the benefit of those wishing to oppose incineration and those allegedly adversely affected by incineration and that because the plaintiff is a corporation, it has no right to the Charter benefits. This point has already been dealt with under the issue of standing. With deference, I do not agree with the Authority's position.
>
> ...
>
> [94] The Coalition says the plaintiff is not nominal because it has a real interest which is substantially affected by the results of the litigation, not necessary directly, but based on the welfare of others on whose behalf the litigation is brought and with that general view. I agree.
>
> [95] There is apparently no case law supporting the position that a public interest group is a "nominal plaintiff" and therefore should provide security for costs. To order security for costs where a public interest action arises would, as was argued on behalf of the Coalition, have "serious and chilling results". It would affectively end any such actions. It would be anomalous to grant standing and then effectively bar the action by ordering security for costs at this time.

**R. 42.01(1)(f): frivolous, vexatious and impecunious**

[26] *Sub-rule (f)* permits the court to order security for costs where:

> upon the examination of a plaintiff it appears that there is good reason to believe that the proceeding is frivolous and vexatious, and that the plaintiff is not possessed of sufficient property within the jurisdiction to pay costs.

The Court of Appeal indicated in *Wall* that three clear principles are "consistently applied" when assessing the merits of a claim in the context of a security for costs application:

> 59 First, orders for security should not be used to keep persons of modest means out of court. Second, while the merits of the plaintiff's case are relevant and may be considered, they should only be considered on the basis of undisputed facts, the pleadings, etc. and not on the basis of seriously disputed facts or assessments of credibility. Third, consideration of the merits should only be decisive where they are clear and obvious. In short, the law relating to consideration of the merits on interlocutory applications for security for costs is in harmony with the general reluctance to assess the merits of a claim or defence, other than in obvious cases, before trial.

[27] In applying rules akin to *Rule 42.01(1)(f)*, the court said:

> 66 The standard for merits assessment is somewhat lower than a demonstration that the case is actually frivolous and vexatious. The standard has been equated with 'a very weak case bordering on the frivolous and vexatious' and it has been held that the authority to order security on this basis should be exercised only in the clearest of cases. The authorities also suggest that it may often not be

> reasonably possible to come to any conclusion concerning the merits on an interlocutory application, particularly where the case turns on the credibility of witnesses.

[28] In terms of *Rule 42.01 (e)* I find the Association is not a nominal Plaintiff. It is a long standing organization. It has been involved in the planning and development of by-laws. As an organization it as well as the members it represents has an interest in the matter before the Court.

[29] *Rule 42.01(f)* requires the Association's claim to be frivolous and vexatious. The Affidavit and documentation filed by the Association contains a basis for their claim. The Municipality have not produced any evidence to indicate the proceedings are totally without merit.

**Seaview as a Party**

[30] Seaview brings this Application pursuant to *Civil Procedure Rule 14.25* and the inherent jurisdiction of the Court to strike out the Application. *Haughn v. Halifax Police* (2001), 197 N.S.R. (2d) 60 (S.C.).

[31] Seaview submits the Originating Notice (Application Inter Partes) discloses no cause of action against Seaview. Further, a determination of this issue is restricted to the examination of pleadings only. The pleadings at issue being the Originating Notice setting out the relief sought against Seaview and relevant portions of the statement of particulars on file.

[32] Seaview acknowledges that *Rule 56.03* governing Certiorari requires Notice to be served upon anyone likely to be interested or affected by the proceedings. However, it submits the Rule does not create a cause of action or require joinder Seaview as a Respondent. Further there is no factual basis for declaratory relief relating to Seaview.

[33] The Association submits that Seaview, as the developer of the lands, is a necessary party to these proceedings as they will be directly affected by the

decision under review. Moreover, Seaview was directly involved in the Application process including the wrongful conduct alleged by the Association.

[34] *Civil Procedure Rule 5.04* dealing with misjoinder and nonjoinder of parties provides:

> (1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of any party or person, and the court may determine any question or issue in dispute in a proceeding so far as it affects the rights and interests of any party, saving the rights of any person who is not a party.
>
> (2) At any stage of a proceeding the court may, on such terms as it thinks just and either of its own motion or on application,
>
> > (a) order any party who is not, or has ceased to be, a proper or necessary party, to cease to be a party;
> >
> > (b) order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added as a party;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as the court may order.

[35] The Court has discretion to review affidavit evidence where an application is made on the basis the claim discloses no reasonable cause of action. This authority is found in *Rule 14.25(2)* and also in the Court's inherent jurisdiction. Under

circumstances such as in the present case where a false application or an abuse of process alleged, it is appropriate to consider the other documentation.

[36] The Court has broad discretion in dealing with parties. In reviewing the Application, Affidavit and documentation relating to the Application, I find that Seaview's participation in the proceedings is necessary for the Court to effectively adjudicate on issues raised in the pleadings. Certainly the interests of Seaview are directly affected in these proceedings.

[37] As a result, the Application of the Municipality is dismissed with costs in the amount of $1500.00. The Application of Seaview is dismissed with costs in the amount $750.00.

J.