SUPREME COURT OF NOVA SCOTIA
Citation: Peterson v. Kentville (Town), 2008 NSSC 254

Date: 20080903
Docket: S.H. 290467
Registry: Halifax

Between:

Floyd H. Peterson

Applicant

v.

Town of Kentville

Respondent

D E C I S I O N

Judge:	The Honourable Justice Gerald R P Moir
Heard:	March 10 and 11 and June 10 to 12, 2008 at Kentville
Final Written Submissions:	July 11, 2008
Counsel:	Mr. Peter Rogers, Mr. David Demirkan, Mr. Michael Forse and Ms. Jessica Chan, for the applicant Mr. Geoff Muttart and Mr. Thomas MacEwan, for the respondent

Moir, J:

Introduction

[1] The applicant opposes the Town of Kentville building a small playground and creating a park on land behind his residence.

[2] The land in question is the remainder of a residential subdivision containing about ninety lots near the western boundary of Kentville. The subdivision, which is called Bonavista Estates, was developed in phases during the late 1980s, the 1990s, and the first half of this decade. The land in question was deeded to the Town in 2006 with the intention that the deed discharges the developer's obligation, under s. 271 of the *Municipal Government Act*, SNS 1998, c. 18 and Part 9 of the Town of Kentville Subdivision By-law, to provide land for "trails, parks, playground and similar public purposes".

[3] The land is about one and a quarter acres in area. It occupies the interior of a large block. It is landlocked by abutters, except for three trails that lead out to streets.

[4] There are fifteen abutting lots. When public meetings were held to discuss what was to be done with the interior lot, the abutting residents all opposed any development "that would include a playground". They signed a petition that the interior "remain in its natural state ... and be considered a wildlife habitat". In his affidavit, Mr. Peterson explains the opposition to a park or playground in these terms "lack of visibility into the LIQ from the street, lack of security, fire hazard, vandalism and loss of privacy".

[5] Some of the other residents of Bonavista Estates subdivision wanted the benefits of a recreational facility. A proposal was made for "a recreational centre with tennis or basketball courts and a school-like playground".

[6] In the end, a decision was made for a pocket park with a modest play area and some walking trails.

[7] Mr. Peterson brought an application for judicial review of the decision to create a pocket park and other related decisions.

Issues

[8] I will deal firstly with the question of Mr. Peterson's entitlement to, and the Town's affording, procedural fairness in the course of acquiring, and determining how to develop, the interior lot. The discussion of that first issue will include the determination of a jurisdictional question raised lately by Mr. Peterson. He argues that the decision to develop the interior lot as a recreational facility, as an undisturbed habitat, or as a pocket park had to be made by the Kentville Town Council. It is his position that council made no decision and left the question entirely to the Kentville Parks and Recreation Advisory Committee, sometimes called the Parks and Recreation Committee.

[9] Next, there is an issue about whether the town had to obtain a development permit before proceeding with the pocket park and an issue about whether the park conforms with the Town of Kentville 2001 Land Use By-law. This is slightly complicated by the development officer's primary position that a permit is unnecessary and her subsequent decision, after this proceeding was commenced, to issue a permit on the town's application although she thought it unnecessary.

[10] The next to last issue depends on whether a development permit was required. If so, was Mr. Peterson entitled to procedural fairness on the determination of whether to issue a permit and is the permit to be set aside for bias?

[11] The applicant also seeks a declaration that trails into and inside the park have to conform with minimum widths for walkways in the town's subdivision bylaw.

Procedural Fairness and the Decision to Create a Pocket Park

[12] *Reservation of Park Area: 1987 to 2006.* The facts of this case begin with a law. Clause 273(3)(h) of the *Municipal Government Act* allows municipal subdivision by-laws to include provisions for "the transfer to the municipality of useable land ... for trails, parks, playground and similar public purposes". The by-law cannot require the developer to convey more than "five percent of the area of the lots shown to be approved on the final plan of subdivision". The municipal development officer must "accept any land offered by an applicant that meets the

definition of useable land contained in the subdivision by-law": s. 273(9). The land must be used for "parks, playgrounds and similar public purposes": s. 273(12).

[13] Part 9 of the 2002 Town of Kentville Subdivision By-law is titled "Parkland Transfers". It does not appear to provide an express definition of useable land. Clause 9.1(a) reads:

> At the time of endorsement of approval on the final plan of subdivision by the Development Officer, the subdivider shall reserve and convey to the Town free of encumbrances, for park, playground, or similar public purposes, an area of usable land to the Town equal to 5% of the area of land shown of the final plan of subdivision, exclusive of streets, walkways, and any remainder lot.

I presume that the by-law was similarly framed before 2002.

[14] The Bonavista Estates development was laid out in 1987. Like many developments of that size, lots were subdivided and sold in phases.

[15] Ms. Beverly Gentleman was the development officer for the Town of Kentville until very recently, when she was appointed Director of Planning and Development. She swore, in her affidavit, that town records show that the developer of Bonavista Estates identified the interior lot in 1987 for conveyance to the town. Mr. Mark Phillips, the Director of Parks and Recreation, testified that the interior lot had been earmarked for use as a park since 1987. These statements are borne out by documents. For example, a drawing introduced when Mr. Peterson was cross-examined is based on a June 15, 1987 tentative subdivision plan and it shows a "Proposed Park Area" where the interior lot now is, including its three entry trails.

[16] Ms. Gentleman also said that there were no substantial changes in the location of the proposed park area after 1987. Of course, the exact boundaries would not be known until every abutting lot was finally surveyed and finally approved for subdivision. However, it is clear that the boundaries did not change substantially. Indeed, every abutting lot on the 1987 tentative plan is identifiable in later plans or drawings, except that the developer was only able to get four lots to the immediate west of the proposed park area although the 1987 plan provided for five in that location.

[17] Another example of a document that supports the statements of Mr. Phillips and Ms. Gentleman that the interior lot was earmarked since 1987 as a park is Mr. Vernon Green's deed. He opposes the park. He is an owner of a lot that abuts the interior lot both at the rear and at one side where one of the trails appears on the 1987 plan. His deed, which was executed in 1990, expressly refers to the trail. He was aware, when he purchased his lot, of the intended use and possible future conveyance of the proposed park area.

[18] A term in abutters' deeds also supports the statements. Mr. Peterson and his wife bought their home in 1993 from the first purchasers of that lot, who were relatives of the owner of the developer. A schedule of covenants attached to Mr. Peterson's deed, Mr. Green's deed, and probably every other deed conveying an abutting lot recognizes that the developer may convey lands to the Town "for park, recreational or similar purposes."

[19] Recorded subdivision plans also support the statements. Lots 85 and 86, which abut the interior lot at the northeast corner, received subdivision approval in 1996. Mr. J. Richard Muise opposes the park. He bought his home, lot 85, in 2001. Mr. Patrick Dupuis opposes the park. He bought his home, lot 86, about a year after the Muise purchase. The subdivision plan, which is on public record and is inspected when title is being investigated, describes the interior lot as "PROPOSED PARK".

[20] I heard testimony from Mr. Peterson and several other abutters who told of their understanding of the intended future use of the interior lot, or their lack of knowledge that it could be conveyed to the town and turned into a park. No abutter gave evidence of any inquiries made of the town or investigations of recorded subdivision plans or town records.

[21] I heard testimony from Mr. Phillips that the town always intended, during his recent tenure as Director of Parks and Recreation, to take a conveyance of the interior lot under Part 9 of the subdivision by-law and use it as a park or for another recreational purpose.

[22] The record shows that, since 1987, the developer of Bonavista Estates reserved the interior lot, with its entry trails, to discharge the developer's obligations under Part 9 of the subdivision by-law, as authorized by section 273 of

the *Municipal Government Act*. I find that the town was aware of the reservation, and the proposal to convey the interior lot under Part 9, when each subdivision of lots in Bonavista Estates was given final approval. I find that information about the proposal was publically available when Mr. Peterson purchased his home. I also find that both the developer and, through subdivision approvals if nothing else, the town have acted as though the proposal was accepted.

[23] *Procedural Fairness Before the Public Consultations.* For the applicant, Mr. Rogers argues:

> In the present circumstances, a decision taken by the Town to develop a playground in the LIQ in the context of opposition by numerous residents whose property rights will be affected is analogous to the situation found in *Homex.*

The reference is to *Homex Realty and Development Co. Ltd.* v. *Village of Wyoming*, [1980] 2 S.C.R. 1011 (SCC).

[24] Homex owned a subdivision in a town in Ontario. An approved subdivision plan had been registered, but the infrastructure for municipal services had not yet been installed. Despite a development agreement under which Homex's predecessor was obligated to install the infrastructure, Homex took the position that the municipality had to do so. The municipality retaliated by passing a by-law that purported to deregister the subdivision plan.

[25] Homex took proceedings for judicial review and, with an ingenuity that proved too much for a majority of the Supreme Court of Canada judges, it engaged in a scheme called "checkerboarding". At that time and in that province, this scheme could arguably shift the expense of installing municipal service despite the development agreement. Again, the municipality retaliated. It passed a by-law preventing the subdivision from being hooked to the municipal water system.

[26] The categorical approach to judicial review only being near its end, the municipality argued that passing a by-law is a legislative function immune from review. None of the seven judges who heard the appeal agreed with that. Since the proposed by-laws directly and adversely interfered with the private rights of only one person, the person was entitled to notice and a hearing. None was afforded. (Five judges were of the opinion that special circumstances existed requiring the court to refuse to exercise its discretion to provide a remedy.)

[27] For the Town of Kentville, Mr. Muttart submits that *Homex* offers little guidance for this case. I agree. Mr. Peterson had no legal right at stake in the decision to develop the proposed parklands.

[28] What, though, of the decisions leading up to the February, 2006 deed? Did a duty of fairness arise before the town decided to consult residents in April 2006?

[29] *Decision to Use as Park and Playground.* At para. 13 and para. 14 above, I refer to s. 273 of the *Municipal Government Act* and the Town of Kentville by-law made under it. For the applicant, Mr. Rogers argues that the interior lot is not within the section or the by-law. He gives two reasons.

[30] Firstly, the by-law requires the developer "to reserve and covey to the Town" an area of useable land "at the time of endorsement of approval of the final plan of subdivision". The deed was delivered long after plans of subdivision were given final approval.

[31] Secondly, the by-law requires that the land be five percent of the area shown on the final plan of subdivision, and it turns out that the interior lot is only 3.5 percent of Bonavista Estates.

[32] The *Municipal Government Act* allows for approval of a tentative plan of subdivision and approval of a final plan of subdivision. So, in a subdivision developed in phases, there may be many final plans of subdivision. For example, we have in evidence the final plan for Mr. Muise's lot 85. It includes only his lot, Mr. Dupuis' lot, and two others.

[33] If the park and playgrounds by-law required immediate conveyance when approval is endorsed on a final plan of subdivision, many conveyances would have to be made in a subdivision developed in phases. If each of those conveyances had to provide no more than five percent of the area shown on the final plan, there would, in a development like Bonavista Estates, have to be numerous conveyances of tiny pieces. The statute addresses this problem in subsection 273(11), which allows the developer "to provide a bond or other security acceptable to the council" securing conveyance "in a future phase of the subdivision".

[34] I do not think that s. 273(11) is properly interpreted as the only way a municipality can permit later conveyance. Rather, I interpret it as providing one way a developer can postpone conveyance in a subdivision developed in phases. Nothing in s. 273 suggests that a municipality cannot consent to immediate reservation and later conveyance without security.

[35] In my assessment, the interpretation advanced by Mr. Rogers fails to give meaning to the word "reserve" in the by-law. A developer of a large subdivision that receives numerous final subdivision approvals, in phases, must "reserve" usable land when each subdivision plan receives final approval. I interpret clause 9.1(a) as permitting later conveyance so long as an acceptable reservation is made.

[36] In any case, I do not interpret the statute or the by-law to suggest that imperfect compliance with the by-law removes land reserved under it from the operation of the by-law or section 273. In particular, I do not see how imperfect compliance could relieve the Town of Kentville from the obligation under s. 273(12) of the *Municipal Government Act* to use the reserved land for "parks, playgrounds and similar public purposes".

[37] So, I see the decision to use this land as a park or playground, or for similar public purposes, as having been made by the legislature and the developer, as much as the town. And, in any case, it was made before the applicant bought his home.

[38] In my view, the deed of February 2006 was a mere executory act implementing obligations that arose long ago.

[39] *2006 Public Meetings and Input.* As I said, Mr. Peterson bought his home in Bonavista Estates subdivision in 1993. He heard nothing of plans for the interior lot until 2001. In that year, the town organized a meeting of residents to discuss gaining access to a walking trail along a former rail line, constructing a playground, and uses for the interior lot. According to Mr. Peterson's affidavit "there was a large majority opposition to locating a playground in the LIQ".

[40] Another meeting was organized by the town about five years later. It was held at the Kentville Fire Hall on April 13, 2006, but Mr. Peterson was away. He understood that Richard Lloyd, a proponent of the playground, was allowed to make a presentation, but "members of our group were not given an opportunity to

speak in opposition to the [playground] development." By "our group" Mr. Peterson means the abutters who oppose a playground; so he said during cross-examination.

[41] Mr. Ronald Hobbs is a member of the group and he did attend the April 2006 meeting. He provided a statement and oral evidence on behalf of Mr. Peterson, and he was cross-examined at length.

[42] Mr. Hobbs and his wife bought a home in Bonavista Estates subdivision in 2001. Their lot abuts the proposed park.

[43] Mr. Hobbs is quite critical of how the Fire Hall meeting was organized. He says that some of his neighbours did not receive the flyer announcing the meeting. He was concerned about timing. The meeting was to be held on Holy Thursday evening, when many residents would be leaving for the Easter weekend.

[44] Mr. Hobbs sent an email to the Chief Administrative Officer of the Town of Kentville requesting permission to make a presentation. The chairman of the town's Parks and Recreation Committee responded. He said that staff of the Parks and Recreation Department organized the meeting and their intention was that it should be informal. It is "a time and place to express ideas" without formal presentations. Subdivision residents were to have an opportunity "to talk to some staff, committee members and others".

[45] The closing lines of Mr. Hobbs' email and the chairman's response tell of the conflict between the abutters and others as to the issue to be decided in 2006. After stating his concerns about inadequate notice, poor timing, and absence of an agenda, Mr. Hobbs says: "Finally it appears that the meeting is to discuss how not if a project should go ahead." The reply confirms that: "The comments given by residents at the meeting will be used by Parks and Rec Committee to help them determine how the parkland will be used."

[46] Mr. Hobbs and others were affronted when they appeared at the informal gathering and discovered that a proponent of a recreational facility for the interior lot was to make a presentation by PowerPoint. Mr. Hobbs' complaint in this regard is diminished by the fact that, despite the chairman's advice, the abutters distributed a handout opposing any development.

[47] Mr. Mark Phillips, Director of Parks and Recreation, explained the predicament in which he and the chairman found themselves. The interior lot had been formally conveyed to the town in February. He was interested in obtaining resident's views about development of it. He conceived an informal gathering at which people would visit staff or committee members at different tables, each devoted to a separate subject. Views could be expressed, and they would be noted for later discussion.

[48] Mr. Hobbs approached the town about making a presentation. He was told as noted above. Mr. Lloyd called. He was told that he is not part of the agenda. Despite the advice, both showed up with presentations. One with a handout, the other a laptop and PowerPoint presentation. So, both were allowed to do as each insisted, but Mr. Phillis made it clear to the meeting that both were independent of the town's effort to gather information and views.

[49] Mr. Hobbs distributed all of his handouts. He did not otherwise participate in the meeting. He was distrustful of the town's intentions, felt that the issue should be whether, not how, to develop the proposed park, and thought the gathering should have been more "businesslike".

[50] After Mr. Peterson returned, he wrote a letter opposing the playground and proposing the interior lot be left in its natural state.

[51] The letter is dated May 17, 2006; it is addressed to the chairman of the Parks and Recreation Advisory Committee, and; it is signed by Mr. Patterson and Gwen Patterson. It says: "We oppose the proposal to build a children's playground and recreational facility". They give as reasons the loss of privacy of abutters, the lack of visibility from a street, the usefulness of leaving the proposed park in its natural state, and the cost. They also claim that they were not advised of the possibility of a playground when they bought their home.

[52] The letter was received by the committee at a meeting held that same day. Mr. Peterson attended the meeting. He did not speak because he prefers to provide a letter. Mr. Hobbs did make a presentation, which appears to have been on behalf of "the group".

[53] Mr. Hobbs presented ten pages of text. He also provided three photographs of the places for the entry trails, at least one of which shows a cut for an entry trail

created when curbs and gutters were installed. After stating many objections made by him and others, Mr. Hobbs recommended rezoning the property so it cannot be used for a park or playground, limiting use to passive recreational activities such as bird watching, or finding an alternate site for a park.

[54] Others made presentations. Mr. Phillips delivered a report summarizing the information provided, and views expressed, at the April Fire Hall meeting.

[55] At the conclusion of the meeting the chairman thanked the various presenters and assured them that the committee would take their information and views under consideration. The committee passed a motion that Chairman Honey and Mr. Phillips provide a report and recommendation for consideration at its next meeting.

[56] The committee met again on June 22, 2006. At that meeting, the committee received a petition signed by Mr. Patterson and the other abutters opposing "any development ... that would include a playground" and requesting that the proposed park "remain in its natural state ... and [be] considered a wildlife habitat".

[57] The committee also received the report it had requested from Chairman Honey and Mr. Phillips. The main recommendation was for a pocket park with trails, a play space, and a picnic or sitting area. They also proposed formation of a community group to help with design.

[58] There is an apparent contradiction in the minutes of the June 22, 2008 meeting. An email from the chairman five days later clears this up. The report was received by the committee for consideration. It was considered at the meeting, with many members contributing to the discussion, and residents present to hear it. Then a motion was carried to accept the report. As the email says, "The Recreation Director and staff will implement the recommendations within their existing budget and labour constraints."

[59] *Procedural Fairness and the Parks and Recreation Committee's Decision.* For the town, Mr. Muttart and Mr. MacEwan concede that, once town officials decided to consult with the residents, the town "had a duty to be fair in that consultation process." They refer me also to Justice Hood in *Heritage Trust of Nova Scotia* v. *Halifax,* [2007] N.S.J. 79 at para. 96: "a high degree of deference is

accorded to a municipality having set its own procedural rules as long as they provide for procedural fairness."

[60] The procedures set by the Parks and Recreation Committee gave the applicant every opportunity to present his arguments. He received notice of three meetings. He was given the opportunity to make submissions before any decision was made. When a decision was finally made, it was for neither extreme. Those who favoured a recreational facility were disappointed, and those who favoured doing nothing were also disappointed, but all were treated fairly.

[61] *Whether the Decision Had To Be Made By Council?* Mr. Rogers argues that s. 50(3) of the *Municipal Government Act* means "that Council, and only Council, can manage and control municipal property". Thus, the decision to develop the interior lot as a pocket park could not be made, as it was, by the Parks and Recreation Committee.

[62] Subsection 50(3) reads:

> The property vested in a municipality, absolutely or in trust, is under the exclusive management and control of the council, unless an Act of the Legislature provides otherwise.

[63] Mr. Rogers emphasizes s. 2 of the *Municipal Government Act*, which is a statement of the statute's purposes. These include to "give broad authority to councils", "to respect [council's] right to govern municipalities in whatever way councils consider appropriate", and to "recognize that the functions of the municipality". Those functions include: "provide services, facilities and other things that, in the opinion of the council, are necessary or desireable for all or part of the municipality..." .

[64] Mr. Rogers also makes reference to subsection 14(1): "The powers of a municipality are exercised by the council." And, he argues that sections 51, 51A, and 52 confirm "exclusive decision making authority of Council in relation to matters of real property".

[65] The argument concludes:

> The decision relating to whether to leave the LIQ as passive, undeveloped woodland, or whether to actively develop the site as a play area with play infrastructure and trails is a fundamental decision in relation to the "management and control" of the property. Council ought to have accepted its obligation to be the decision-maker in relation to the property, and to have afforded the adjacent property owners an opportunity to be heard before the decision was made. Its obligation to do so was particularly compelling when the decision was the subject of great public controversy and attention and the public was asking for Council's ear.

[66] Since *Rizzo & Rizzo Shoes Ltd*., [1998] S.C.J. 2, the Supreme Court of Canada has affirmed many times that the approach to be taken to statutory interpretation is Professor Driedger's "the words of the Act are to 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 Parliament."

[67] I do not think that the emphasis, in the statement of purposes in s. 2 of the *Municipal Government Act*, on the autonomy of council should be taken as an expression of intent that councils cannot delegate management decisions to committees and the administration. The present Act replaced legislation (see s. 544 to 583) that, in some respects, allowed the provincial government to control municipal decision-making. For example, the authority to make some by-laws was subject to ministerial approval. Section 185 of the present statute abolishes ministerial approvals. I think the references to autonomy generally in the purpose section, and particularly in "broad authority to pass by-laws", must be understood in light of that change. Of course, the statute does not expect councils to be micromanagers of large or busy municipalities.

[68] Section 2 also provides that the purpose of the statute is "to ... recognize that the functions of the municipality are to ... provide good government". An examination of the scheme of the statute shows that it allows for modern management through the exercise of authority by committees and the administration.

[69] The Act is divided into twenty-three parts after the interpretation sections.

[70] Part I concerns municipal organizations. Subsection 10(1) provides that a "municipality is governed by a council..." and 14(1) provides: "The powers of a municipality are exercised by the council." However, subsection 24(1) permits

council to establish “standing, special and advisory committees” and subsection 24(2) require each committee to “perform the duties conferred on it by this Act, and any other Act of the Legislature or the by-laws or policies of the municipality.”

[71] Part II provides for the administration of a municipality. “The chief administrative officer is the head of the administrative branch of the government of the municipality...”: s. 30(1). Under the chief administrative officer, there are various departments who report to him or her, and not directly to council. The administration is also made up of various municipal officials, such as the municipal solicitor, a Clerk, a Treasurer, an Engineer, and the municipal auditor.

[72] Part III is about the powers of a municipality. Subsection 47(1) provides: “The council shall make decisions in the exercise of its powers and duties by resolution, by policy or by by-law.” Section 50 is concerned with municipal land and here we find subsection 50(3) as quoted above.

[73] Part VIII is “Planning and Development”, and Part IX is “Subdivision”. Section 190 in Part VIII provides further statements of purposes. It reads:

> The purpose of this Part is to
>
> (a) enable the Province to identify and protect its interests 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.

Section 191 defines “development officer” to mean “the person or persons appointed by a council to administer a land-use or subdivision by-law”. It is in Part IX that we find clause 273(3)(h) discussed above, which allows for a by-law

requiring a developer to transfer to the municipality land “for trails, park, playground and similar public purposes”. As noted above, subsection 273(9) requires the development officer to accept land offered by the developer that meets the by-law definition of “useable land”, and subsection 273(12) requires the municipality to use the land “for parks, playgrounds and similar public purposes.”

[74] The scheme of the legislation, so far as it is applicable to this case, involves an elected council with the broad authority to govern the municipality, a power to create committees that must carry out the duties assigned to them, requirements for the administration of the municipality through appointed officials and established departments, and a special role for a development officer.

[75] Further, lands from developers for parks, playgrounds, and similar public purposes are a special case. The legislation does not give the choice of land to council. Rather, the development officer must accept the land on behalf of the municipality and the municipality must use it for a park, playground, or similar public purpose.

[76] The statement contained in subsection 50(3) cannot mean that council, and only council, manages municipal lands. The scheme of the legislation is not one in which the council acts as a municipal manager. Rather, it has the management of the municipality’s land in the same way a board of directors has the management of the corporation. The management, though, is carried out by committees and employees under council’s by-laws, resolutions, and policies.

[77] If s. 50(3) meant that a municipality’s lands could only be managed by council, and not committees and employees, then s. 273 would have to be read as an exception. However, in the context of the purposes and scheme of the *Municipal Government Act*, I interpret s. 50(3) as a broad statement of council’s power to manage the municipality’s land to the exclusion of other persons, such as other governments. It does not restrict council’s ability to carry out management through committees and the administration.

[78] Part 3 of Chapter VI of the Town of Kentville Municipal Development Strategy (2001) provides that the Kentville Parks and Recreation Advisory Committee “has jurisdiction over the operation and maintenance of ... playgrounds” and it “is responsible for the development and operation of ... green areas throughout the Town”. This is followed by council’s statement of policy “to

support the Kentville Parks and Recreation Advisory Committee in the provision of facilities and programs for the citizens of Kentville". In my opinion, the committee had ample authority to make the decision under review.

[79] *Subsequent Actions of Council*. Council subsequently refused to override the committee's decision. Indeed, council decided that it fully supported the decision.

[80] In 2006 and 2007, council approved budgets for the Parks and Recreation Department that included funds earmarked for the small playground and park.

[81] Council appointed two proponents of the park to the Parks and Recreation Committee.

[82] The plan for a residents group to help with design of the park was implemented, then disbanded. Mr. Peterson and another abutter were appointed to the group, but they only wanted to discuss whether there should be a park and not design.

[83] Evidence of these matters is before me to show a foundation for a suspicion held by Mr. Peterson's group that the public consultation process was a sham to mask a decision that had already been made. I do not share that suspicion. (I think it is influenced by a failure to recognize the policy of s. 273 of the *Municipal Government Act* and a failure to see that, in compliance with the Act, the interior lot was earmarked for a park or playground use long before the group chose to buy homes abutting the earmarked lands.)

[84] I find that the director of the Parks and Recreation Department and the chairman of the Parks and Recreation Advisory Committee acted properly throughout.

DEVELOPMENT PERMIT

[85] The town went ahead with park construction without obtaining a development permit. Was one required?

[86] The development officer's opinion that no development permit was required is influenced largely by clause 268(2)(e) of the *Municipal Government Act*, which

provides that subdivision approval is not required for a subdivision "resulting from an acquisition of land by a municipality for municipal purposes". She also considered that building a small playground was too insignificant to attract the requirement for a permit.

[87] I agree with Mr. Roger's submission that the development officer made no decision that a permit was unnecessary. That was her opinion and she issued a permit only because it was requested on behalf of the town as a precaution in light of the argument Mr. Rogers advanced. However, there is no point conducting a review of the decision to issue the permit if it was unnecessary.

[88] *Standard of Review*. The decision of the Court of Appeal in *Grove* v. *Chester*, [2003] N.S.J. 6 (CA)concerned review of a decision to grant a development permit. The standard of review was determined at the trial level, [2002] N.S.J. 145 (SC), and the conclusion was not questioned on appeal. With one refinement, these appear to be decisions of the kind referred to in *Dunsmuir* v. *New Brunswick*, [2008] S.C.J. 9 at para. 57, and the analysis in *Grove* v. *Chester* "need not be repeated".

[89] *Grove* v. *Chester* involved a review at the outmoded "patent unreasonableness" standard. *Dunsmuir* requires a review for reasonableness or correctness. So, the analysis needs to be refined: the decision to issue a development permit is reviewable for its reasonableness, not correctness.

[90] *Whether the Development Permit Was Required*? Subsection 244(1) of the *Municipal Government Act* provides: "Before any development is commenced, a development permit shall be obtained if the council has adopted a land use by-law."

[91] Section 191 provides definitions of "development" and "structure" that are inclusive. That is, those words have their ordinary meanings as well as any expansion of those meanings resulting from the inclusion.

[92] "Development" is defined by s. 191(c) to include

> ... the erection, construction, alteration, placement, location, replacement or relocation of, or addition to, a structure and a change or alteration in the use made of land or structures

By s. 191(p): "'structure' includes a building".

[93] Both the ordinary meaning of "development" and its expanded meaning under s. 191 capture land being transformed from an unimproved state to a small park with a play area, a sitting or picnic area, and trails.

[94] The requirement under the *Municipal Government Act* for a development permit secures compliance with the municipal land use by-law. That is its purpose. The closing words of s. 244(1) clearly imply this purpose. So does the scheme of s. 244 to s. 246. Those sections require the permit to be issued unless the development does not conform with the land use by-law or, subject to express appeal provisions, a proposed land use by-law.

[95] Subdivision approval requirements do not enforce all aspects of a land use by-law. It is not reasonable to conclude from the absence of a requirement of subdivision approval that there is no requirement for a development permit.

[96] *Whether the Precautionary Permit Was Reasonable*? Was the precautionary development permit reasonably issued? Ms. Gentleman was required to issue a permit to the town if the development conformed with the land use by-law.

[97] Part 7 "Residential Single Unit Dwelling (R-1) Zone" of the Town of Kentville 2001 Land Use Bylaw applies in the area of the proposed park, homes of abutters, and those of nearby residents. Section 7-1 permits, in clause (c), "Public parks and playgrounds" and, in (g), "Uses accessory to any of the foregoing uses".

[98] Mr. Rogers argues that the permit could not be issued because the park does not front on or abut a street and it does not have the minimum footage.

[99] Section 4-14 of the by-law applies in all zones. It says

> No development permit shall be issued unless the lot or parcel of land intended to be used, or upon which the building or structure is to be erected, abuts and fronts upon a street.

This requirement says nothing about how much frontage is required. That is a subject dealt with in sections for specific zones.

[100] The proposed park abuts and fronts upon streets at the three locations for the entry trails.

[101] Section 7-2(a) provides minimum lot area, frontage, and front, rear, and side areas for fully serviced lots in R-1 zones. Section 7-2(b) provides the same for lots not hooked to a sanitary sewer or to the water system. All of these minimums are listed under the title "Detached Dwelling". "Dwelling" is defined in section 1.47 to mean a building occupied or capable of being occupied as a home. Clearly, a park is not included in "Detached Dwelling".

[102] Mr. Rogers says that the title is without grammatical connection to the rest of either section, and it just means that the minimum does not double for a single building that has two permitted uses, such as a single detached dwelling, use 7-1(a), that includes a day care centre, use 7-1(d).

[103] The title is more than a marginal note. It does not merely explain or introduce legislative text.

[104] The grammatical significance of the title is confirmed by section 8-2 of Part 8 "Residential Two Unit Dwellings (R-2) Zone". There, two titles appear and they distinguish different standards according to the kind of dwelling that is on the lot. In Part 8, the titles are used in such a way that parks and playgrounds are a permitted use to which the minimum areas and frontage have no application.

[105] It seems clear to me that Part 7 contains no minimum frontage applicable to a lot used as a park or playground.

[106] In my opinion, Ms. Gentleman reasonably concluded that a subdivision permit had to be issued to the town.

[107] *Whether Applicant Entitled to Procedural Fairness When Permit Was Requested*?

> [T]here is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.... : *Cardinal* v. *Kent Institution*, [1985] S.C.J. 78 at para. 14.

See also, *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. 39 at para. 20 and *N.N.M.* v. *Nova Scotia (Minister of Community Services)*, [2008] N.S.J. 323 (C.A.) at para. 41.

[108] As I said before, Mr. Peterson had no legal interest at stake when the development permit was issued. Of course, his enjoyment of his property may be affected just as any resident is affected by what a neighbour does to develop land next door. Is that a sufficient interest to give rise to a right of procedural fairness including, and this is the applicant's focus, freedom from bias?

[109] Mr. Rogers refers me to *Hutterian Brethren Church of Scotland* v. *Starland No. 47 (Municipal District)*, [1993] A.J. 165 (C.A.). That case was about a development permit issued by a municipal planning commission and the hearing of a statutory appeal to the Development Appeal Board. The issue was bias at the Development Appeal Board level.

[110] The legislative scheme in Alberta on development permits is quite different from ours. The *Municipal Government Act*, R.S.A. 2001, c. M-6 provides for land use regulations in s. 639 to 646. The land use by-law must prescribe uses that are permitted and uses that may be permitted "at the discretion of the development authority": s. 640(2)(b). The development authority has no discretion to refuse an application for a permit that conforms with a permitted use: s. 643(1). It has a discretion to issue or refuse a permit for a discretionary use: s. 643(2).

[111] The *Hutterian* case was about a discretionary use: para. 3.

[112] Mr. Rogers refers me to *Chernipeski* v. *Lacombe*, [1996] A.J. 1026 (Q.B.), which involved the issuance of a development permit for a funeral home opposed by adjacent homeowners. Para. 5 of *Chernipeski* reads:

> It is not disputed that a development permit is readily available for proposals which fall within the "permitted use" category and less-readily available for those falling within the "discretionary use" category. A permit is not available for [proposals] which fall within neither.

It appears that a development authority issued a development permit for a use that was neither permitted nor discretionary, and council later amended the by-law to make it a discretionary use.

[113] Neither *Hutterian Brethren Church of Scotland* v. *Starland No. 47* nor *Chernipeski* v. *Lacombe* involved a serious issue about whether adjacent landowners had a sufficient interest to be entitled to procedural fairness. A statutory authority either exercised a discretion affecting the enjoyment of adjacent land, or attempted to cure an unlawful permit by creating such a discretion. So there is no significant commentary in those cases about sufficiency of interest, rather the courts deal directly with the question of bias.

[114] Under the *Municipal Government Act* of this province, applications for subdivision approval, development permits, and building permits do not invoke any discretion. The Act contemplates swift and routine responses. The requirements for approvals or permits are a method, perhaps the most important method, of enforcing land use by-laws and related provincial legislation. Public input is required, and the applicant's interests are engaged, when the by-law and the municipal development strategy are considered originally or for amendment.

[115] The development officer has no choice but to issue a development permit for a proposal that meets the requirements of the land use by-law: s. 246(2), except the officer may delay issuing a permit for a development that is inconsistent with a proposed land use by-law or an amendment: s. 246(3). In either case, there are deadlines for the approval to be given or refused. The usual deadline is thirty days: s. 245(2). The officer's function is to administer the land use and subdivision by-laws: s. 191(d), not to exercise discretion about land use.

[116] It is no coincidence that the development permit sections are followed by provisions about appeals. Clause 247(1)(a) reads "The approval or refusal by a council to amend a land-use by-law may be appealed to the Board by ... an aggrieved person...". An "aggrieved person" includes "an individual who *bona fide* believes the decision of council will adversely affect the value, or reasonable enjoyment, of the person's property".

[117] In my opinion, the legitimate interests of abutters and other neighbours are engaged when a land use by-law, an amendment, or a minor variance is sought. Otherwise, the landowner must be permitted to do what the law allows even if the

abutter does not like what the law allows. Thus, an abutter does not have a sufficient interest to be entitled to notice, or a hearing, or a challenge for bias when a neighbour applies for a development permit to which the neighbour is entitled as a matter of right.

Walkway Width

[118] Section 8.2(b) of the 2002 town of Kentville Subdivision Bylaw sets the minimum width of a "walkway right-of-way" at fifteen feet, twenty if it involves the water or sewer systems. "Walkway" is defined as "land, other than land forming part of a street, to be conveyed to the Town to be used for public pedestrian traffic."

[119] Further context is supplied by Section 8.2(a), which sets out the walkway requirement for subdivision approval:

> A street, unbroken by an intersection, shall not exceed 365.76 metres (1,200 feet) in length unless a minimum of one walkway is constructed, in which case the block shall not exceed 518.16 metres (1,700) feet in length.

Presumably, a block that is more than seventeen hundred feet long must have sidewalks on both sides of the street.

[120] Further context is supplied by Part 7 "Walkway Specifications" and Part 8 "Sidewalk Specifications" in Appendix B, 2002 Municipal Services Standards and Specifications. However, the specifications appear to distinguish between a walkway and a sidewalk in a way that is different from the definition of walkway in the main part of the bylaw.

[121] It is submitted for the applicants that these provisions require that the entry trails into the park be at least fifteen feet wide. They seek a declaration to that effect.

[122] The *Municipal Government Act* itself provides for park trails. In my opinion, park trails are substantially different from sidewalks and similar rights-of-way conveyed to a municipality "for public pedestrian traffic".

[123] Further, the proposed park does not require subdivision approval. The requirements for pedestrian traffic ways are triggered by the subdivision sections.

[124] In my assessment, the walkway and sidewalk provisions in the subdivision bylaw have no application to the proposed park.

CONCLUSION

[125] I will dismiss the application. The parties may provide written submissions on costs.

J.