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2001NSSC163
S.BW. No: 5516

IN THE SUPREME COURT OF NOVA SCOTIA

[Cite as: Patriarche v. Lunenburg (Town) , 2001 NSSC 163]

BETWEEN:

JOHN PATRIARCHE and GAIL PATRIARCHE

PLAINTIFFS

- and -

TOWN OF LUNENBURG, a municipal body incorporated under the laws of the Province of Nova Scotia

DEFENDANT

D E C I S I O N

HEARD: At Bridgewater, Nova Scotia on September 27, 2001

BEFORE: The Honourable Justice Charles E. Haliburton

SUBJECT: Application for a Variance of a Development Permit

DECISION: The 14th day of November, A.D. 2001

ATTENDING: David Hirtle, for the Plaintiffs

Patrick A. Burke, for the Defendant

[1] This matter comes before the court by way of Originating Notice (Application Inter Partes) for an order in the nature of Certiorari, or for mandamus and a declaration that a variance of a development permit be made so as to allow a deck to remain as presently constructed attached to the residence of the Plaintiffs.

[2] By this application John and Gail Patriarche seek to have the court over-rule a determination made by the Town Council which would require the removal or alteration of a deck which they have constructed at their residence. The deck as constructed does not comply with the "building bylaw" of the Town of Lunenburg inasmuch as it is constructed to within 3' 2" of the property line of the neighbouring property occupied by a Mr. Schmeisser. The by-law requires an 8' separation.

[3] Under the Land-Use By-law of the Town of Lunenburg a development permit LT00011 was issued on June 30, 2000. The development permit authorized:

> 1) the replacement and enlargement of the existing sunroom
>
> 2) a replacement of the window on the south side of the front facade with a door, and
>
> 3) construction of a new front deck and railing

"all as shown on the attached application and drawings".

[4] Attached to the permit is a floor plan of the front or street-facing side of the Patriarche residence showing existing floor space as well as that to be added; the floor plan of a proposed deck, and front steps for access to both the deck and the front door

of the house. For the purpose of clarity I assume the front of the house faces south and the abutting landowner to the west is Schmeisser. The deck as proposed would extend the west line of the residence southward toward the street, that is to say, the deck would be a projection of the west line of the existing house maintaining the same separation from the neighbouring property.

[5] The south or front elevation as drawn for the permit shows a combination of decks on two levels, the higher of which appears to require stairways with a total of nine risers to attain the upper level, that is, the level of the front entrance. Adjacent to the east side of the proposed deck is the driveway into the residence and the garage door at ground level. The photographs and sketches forming part of the record make it clear that the property slopes upwards from the street toward the house so that as the deck is projected forward its elevation from ground level increases.

[6] The essence of the problem is that when the deck was constructed the Plaintiffs decided, for both practical and esthetic reasons, to extend it westward toward the Schmeisser property by some six feet and to install a set of steps leading down from the deck and toward the rear of the house constructed to that full width. When the neighbours complained to Bill Plaskett, the Planner/Development Officer for the town, he advised the Patriarches that they were not in compliance with their development permit and/or with the Side Yard Requirement. The Patriarches then applied for a variance to approve the deck “as built”. This was refused by Mr.

Plaskett with extensive reasons. The Plaintiffs then appealed this decision to the Town Council which upheld the Planner/Development Officer's refusal and denied the Appeal on February 8, 2001. These are the essentials of the background to this Application.

[7] The procedural history leading to this application is as follows.

[8] The Planning Advisory Committee considered the matter on November 9, 2000. The Committee minutes record:

> "the Town Planner /Development Officer advised that the Patriarches have built a side deck which violates the 8' side yard requirement because it is actually 4' from the property line. He reviewed the letter he sent to the Patriarches, (Schedule "C"), stating that they are in violation of the LUB, and he cannot retroactively issue a minor variance under the *Municipal Government Act* where there has been a deliberate violation. The Patriarches have not yet responded with additional information requests to reduce the size of the deck. The Town Planner/Development Officer will write a report and recommendation to Council."

[9] There is attached to this minute a copy of a letter forwarded 19 October, 2000 to John Patriarche from Bill Plaskett which notes that the development permit LT00011 showed a deck

> "no closer to the property line than the house...the deck proposed in your application complied with this requirement... however...it would appear that the deck has been extended about 6' over from the side of the house...

There are two issues here:

> 1) the deck has not been built in accordance with the permit,

> no application was made for an amendment to the permit
> 2) the deck as built violates land-use by-laws."

[10] Mr. Plaskett's letter goes on to make the following gratuitous comment,

> "had you applied...for a variance...I most probably would have done so subject to the statutory requirement to notify neighbouring property owners within 100'...(however) "the *Municipal Government Act* states clearly in section 235 (3) (c) that a variance may not be granted "where the difficulty experienced results from **an intentional disregard** to the requirements of the Land Use Bylaw." This makes it difficult for me to consider granting a variance after the fact".

[11] A further meeting of the Planning Advisory Committee was held on December 6, 2000. The relevant minute of that meeting reads as follows:

> d) Gail and John Patriarche, Tannery Road Deck
> The town Planner/Development Officer advised in response to a question from Councillor Parks that:
> - the Patriarches are commissioning a survey to determine if they are in violation of the LUB by building less than 4' from the adjacent property line. The Town Planner/Development Officer will wait to receive this information before taking further action.
> - Mr. Patriarche claims they inquired about the side yard rules in the summer 2000 with LCDPC staff and were told it would be acceptable to build their deck as is. The Town Planner/Development Officer believes they may have only asked about accessory buildings, not the deck, and it was done anonymously as LCDPC do not have a record of such a call. He also supposedly made inquiries of Arnold Rafuse, former Building/Fire Inspector who is no longer employed by the Town.
> - In any event, the Patriarches do not have a Development Permit for the side deck.
> - He discussed whether there was a deliberate violation on the Patriarches' part or did they reasonably believe they could build a deck in this dimension, albeit without permits and this would enable him to issue a minor variance, and give notice to neighbours within 100' of same. He has to make this determination upon receipt of additional information from the Patriarches, e.g., a survey plan.

[12] Following that meeting the matter appears to have moved on to the Town Council. The minutes of a meeting of the "Committee of the Whole" January 11, 2001 contained the following notation:

> d) John and Gail Patriarche, 136 Tannery Road, Possible Side Yard Encroachment of a Deck.
> The Town Planner/Development Officer was asked to report to Council on this matter to determine if any legal action is required by Council, e.g. minor variance and/or violation of the *Municipal Government Act*. A general update will also be provided at the January 18 Planning Advisory Committee.

[13] On January 17, 2001 Mr. Plaskett, the Planning/Development Officer, formally refused the Patriarches' application for a variance. He did so in a three page letter in which he enumerates fourteen points which were considered in reaching that decision. He anticipated that there would be an appeal so he sent a copy of that letter to the Town Solicitor, the town councillors and the Town Manager and, on the same day, wrote a letter to the Council as such, outlining the options available to the Council if Mr. Patriarche should appeal. He said:

> "Council's options in this regard appear to be:
> 1. Take a hard line, uphold my decision and require Mr. Patriarche to remove the non-conforming section of the deck, i.e., return the deck to the design shown on the development permit.
> 2. Take a very soft line, agree to grant the variance as he has requested, and instruct me to amend his permit to include the as-built deck.
> 3. Take a middle path by refusing a variance for the 5' 8" wide structure but approve a lesser variance to allow the deck and steps to be 3 or 4 feet wide with the edge of the deck kept at least 5 or 6 feet away from the Schmeisser property line...I still think this would be a good compromise, if Mr. Patriarche and Mr. Schmeisser

could possibly agree to it, with Council as arbitrator".

[14] The letter goes on to note that it is a delicate issue and how Council might proceed with a discussion and concludes "but I think the compromise would be a good thing to aim for and I would recommend that Council look for this opportunity."

[15] In the meantime, the minutes of a Planning Advisory Committee of January 18, 2001 indicates that the matter was still on the minds of this Committee:

> "the Town Planner/Development Officer's report was discussed **Councillor Parks circulated an article respecting a similar incident in Sydney**. It was agreed to leave this item on the agenda for further information updates only as any legal action, appeal hearings, etc. is within Council's jurisdiction."

[16] The Patriarches' appeal did come before Council on January 25, 2001 when Council was advised of the appeal and asked to set a date for the hearing. The date was accordingly set for February 8th and arrangements were made to notify rate payers within 100' of the property in accordance with the *Municipal Government Act* (MGA). Donald Schmeisser addressed the Council expressing concerns about "the process followed and communication to him during this process". He further "raised concern about the Patriarches' Building Permit process". The minute indicates that there were discussions and explanations surrounding the application process and the remedies available where there is construction without permit authorization and that the Town Solicitor will be asked to address these matters.

[17] Finally the appeal was held Thursday, February 8, 2001 at 7:00 p.m. in the Lunenburg and District fire hall. Seven councillors were present including the Mayor and Deputy as well as town officials including Bill Plaskett, the Town Planner/ Development Officer and Pat Burke, the Town Solicitor.

[18] Item (b) on the Agenda was the Patriarche "Appeal of Minor Variance Denial". The following quotations I find relevant:

> The Town Planner (noted discussions leading to the June 30th building permit) resolved in compliance with the MPS/LUB... it was not until a mid-October, 2000 on-site inspection in response to a concern raised by the Schmeissers that the Building/Fire Inspector determined the Patriache's front deck was inconsistent with their Development Permit.
>
> John Patriarche (said that when applying) the deck was considered by him to be a minor item and the final details of it had not been determined...the area in question is very small with not a lot of monetary value...(and) will look much nicer once the landscaping is completed. He added that because he can put a fence right on the property line the deck in question is a very small issue and the variance should be granted.
>
> (He) confirmed that the original plans showed the deck going to the edge of the house and what has now been built is 5.8 feet out from the house...the distance between Schmeisser's property line and his house is 9'.
>
> (He) explained the choice to use 5.8 feet...seemed to be a sensible width for a stairway given the purpose of the deck for lawn furniture, on and off deck, etc.

[19] Donnie Schmeisser said that "the issue" is the law and that

> the Town's By-laws must be upheld. He said that there were permits issued and that the deck was not built in accordance with the permits...if there are changes made after the fact it will

> allow others to do the same. He commented that Mr. Patriarche's fence is partially on his property and that the deck is built too close to the property line. He stated that when he first purchased his house **he was not allowed to have a carport there because of the setback requirements.**
>
> Mr. Patriarche commented further that he felt the deck is not a part of the house and, therefore, there should not be an 8 foot setback requirement dealing with this; but rather a 4 foot setback as required for accessory buildings.
>
> ...The Town Planner/Development Officer stated that under the LUB, the deck being attached to the house, is a part of the building. (accessory versus principal building rules)... Mr. Patriarche (said other) places have been built close to property lines and (he) speculated that variances were issued.

[20] Councillor Parks moved "that a variance not be granted to the Patriarches pending any agreement between the Schmeissers and Patriarches. If no agreement is reached, then the deck will need to be removed". After some discussion the motion was declared out of order because it failed to comply with the requirements of the *Municipal Government Act*. There was further input from the affected parties. Mrs. Patriarche saying "that there should not be any concern about the deck as it is possible for them to put a fence up on the property line." The other party, Marilyn Schmeisser, "passed out photos of the area and commented that their privacy has been invaded because the deck is too close to them and that a fence would actually provide them with more privacy."

[21] The following motion was then presented, again by Councillor Parks, "that town council uphold the decision of the Town Planner/Development Officer that a

variance not be granted for the Patriarches for the portion of their deck that is in violation".

[22] This motion rejecting the Patriarche appeal was adopted. It is the reason for this application.

THE ISSUES

[23] Counsel for the Town of Lunenburg, identifies the issues as follows:

> **(1) What is the standard of review to be applied by the reviewing court to municipal decision-making?**
> **(2) What is the statutory framework within which Council must operate with regard to variance decisions?**
> **(3) Did council commit jurisdictional error, either by misinterpreting or misapplying its constituent statute or otherwise erring in a patently unreasonable manner, when it refused the Patriarches' appeal from the Development Officer's denial of the requested variance?**
> **(4) Remedies**

[24] Based on the arguments advanced by the Plaintiff I think additional points need to be addressed. Specifically, although they are perhaps inherent in the issues as formulated above:

> **1) has there been a denial of natural justice, specifically procedural fairness in the context of section 236 (4) and section 237 (1) of the *Municipal Government Act* on the basis that Council is political and not judicial in nature, thus not impartial.**
> **2) did Council err in law in interpretation of section 4.27 of the By-Law by failing to find that the deck was:**
> > **1) not a stand-alone structure, or**
> > **2) an accessory structure and therefore not subject to an 8 foot setback but subject only to a 4 foot setback. Did the Council err in law in failing to consider section 235 (3) of**

the *Municipal Government Act* and in failing to conclude that the requested variance did not offend this section.

THE VARIOUS STATUTES AND BYLAWS

[25] The *Municipal Government Act*, Nova Scotia Statutes 1998, Chapter 18, part VIII, provides as follows:

Section 190

> 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 bylaws 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;

Section 191

> d) "Development Officer" means the person or persons appointed by a council to administer a land-use or sub-division by-law;
> (h) "municipal planning strategy" means a municipal planning strategy, intermunicipal planning strategy or secondary planning strategy;
> n) "planning documents" means
>
> > (i) a municipal planning strategy and a land-use by-law adopted to carry out the municipal planning strategy;

Section 212

> A council may adopt a municipal planning strategy ...

Section 213

The purpose of a municipal planning strategy is to provide statements of policy to guide the development and management of the municipality and, to further this purpose, to establish
(b) policies to provide a framework for the environmental, social and economic development within a municipality;
(d) specify programs and actions necessary for implementing the municipal planning strategy

Section 217

(1) A municipality shall not act in a manner that is inconsistent with a municipal planning strategy

Section 219

(1) Where a council adopts a municipal planning strategy... the council shall, at the same time, adopt a land-use by-law... that shall enable the policies to be carried out.

Section 220

(4) A land-use by-law may (regulate the size of lots and buildings) and
(f) regulate the size, or other requirements, relating to yards;
(k) prescribe the form of an application for a development permit, the content of a development permit...

Section 231

(4) A site-plan approval may deal with
(a) the location of structures on the lot;
(d) the type, location and height of walls, fences, hedges, trees, shrubs, ground cover or other landscaping elements necessary to protect and minimize the land-use impact on adjoining lands;

Section 232

(1) A development officer shall approve an application for site-plan approval, unless the
(a) matters subject to site-plan approval do not meet

the criteria set out in the land-use by-law; or

(b) applicant fails to enter into an undertaking to carry out the terms of the site plan.

(2) Where a development officer approves or refuses to approve a site plan, the process and notification procedures and the rights of appeal are the same as those that apply when a development officer grants or refuses to grant a variance.

(3) The council, in hearing an appeal concerning a site-plan approval, may make any decision that the development officer could have made.

Section 235

(1) A development officer may grant a variance in one of more of the following land-use by-law requirements:

(b) size or other requirements relating to yards;

(3) A variance may not be granted where the

(a) variance violates the intent of the land-use by-law;

(b) difficulty experienced is general to properties in the area; or

(c) difficulty experienced results from an intentional disregard for the requirements of the land-use by-law.

Section 236

(4) Where a variance is refused, the applicant may appeal the refusal to council within seven days after receiving notice of the refusal, by giving written notice to the clerk who shall notify the development officer.

(5) Where an applicant appeals the refusal to grant a variance, the clerk or development officer shall give seven days written notice of the hearing to every assessed owner whose property is within thirty metres of the applicant’s property.

(6) The notice shall

(a) describe the variance applied for and the reasons for its refusal;

(b) identify the property where the variance is applied for; and

(c) state the date, time and place when council will hear the appeal. 1998, c. 18, s. 236.

Section 237

> (1) Where a council hears an appeal from the granting or refusal of a variance, the council may make any decision that the development officer could have made.

DISCUSSION

[26] In accordance with the provisions of the *Municipal Government Act* the Town of Lunenburg did adopt a municipal planning strategy. I am indebted to Counsel for the Plaintiff for providing an extract from that document. Under the heading "Residential Development and Land Use" the document discusses the nature of the existing housing in the town and possibilities for growth. It refers to the impact of such growth and hence the need to "protect" residential areas. The following paragraph I deem significant:

> "Old town has marked differences in development form and architectural character from the reminder of Lunenburg. In establishing by-law requirements for residential uses and in setting standards and criteria for new multi-unit housing or large-scale conversions **the unique characteristics of residential areas will be recognized to ensure that standards are realistic and the new development will complement the neighbourhood in which it is located".**
> (my emphasis)

[27] While this paragraph deals with the prospect of multi-unit conversions it nonetheless suggests that the draftsman was very much aware of the "unique characteristics" of the town. I think it not too much of a leap to suggest that the preservation of the heritage status of the town of Lunenburg and the "old town" is integral to the planning strategy.

[28] A copy of the land-use by-law has not been provided to the court in connection with this application either by counsel or in form of the "record". However, the particular standards contained in that by-law are not in dispute. There is in the record an excerpt from a zoning map identifying the location of the Patriarche home as zone "R" or a residential zone, together with an extract from the land-use by-law 7.2 confirming that the minimum sideyard clearance is to be 2.4 meters or 8 feet.

[29] The correspondence between the parties and their representations by counsel make it clear that the by-law distinguishes between "principal buildings" and "accessory building and structures". It is the common understanding of the parties that a "principal" building with its "attachments" cannot be constructed within 8 feet of the property line unless a variance has been granted and "an accessory building" may be constructed not closer than 4' from the property line.

[30] Patriarche, in his efforts to obtain a variance, has argued throughout that his deck should be treated as an accessory structure or a stand-alone structure. With that characterization it would offend the by-law by only 9 or 10 inches, not 4 feet plus 10 inches. As I perceive it the real issue, in Mr. Patriarche's mind, is that a legal technicality is being used to prevent him from **using his own property in the manner he wishes**. If I were in his position, I might very well feel the same way. The Development Officer himself expressed some sympathy for that position when

he suggested the possibility of a compromise. The reality is that zoning rules are technical, and while individuals and neighbours are governed by them, one real objective of such rules is the promotion of a community developed in accordance with the municipal strategy. It is the obligation of the Town Council representing the community to maintain the integrity of that strategy.

[31] It will follow that in spite of my sympathy toward the position of the Plaintiffs I am obliged to follow the rule even though it may appear to be technical. **The final authority with respect to planning matters is the community, as represented**, in this case, **by the Council**. If the Council had failed to afford the Plaintiff an opportunity to appeal the decision of the Development Officer in accordance with the *Municipal Government Act;* or if they had been motivated by some improper consideration; then they would have lost jurisdiction and it might have been appropriate to order them to reconsider the application for variance and to follow the law in so doing. **There is no question that the required procedure was followed. I find no error in their conduct of the appeal and I have no authority to interfere in the decision which they reached.**

[32] While, as has been pointed out, the Council are not "experts in planning", I am not authorized to interfere with their discretion except if their determination was "patently unreasonable". It was not.

[33] There is no basis upon which I may interfere with the motion approved by the Council.

[34] The *Municipal Government Act*, under Part VIII, establishes the rules under which a Municipal Planning Strategy and the consequent Land-Use By-Laws will operate. It is clear that once the strategy and by-law are in place any building and development is to be consistent with the strategy. Elaborate provisions are made for public consultation at both the planning and enforcement stage. The scheme contemplated is of a political nature controlled by the will of the community but "consistent with interests and regulations of the Province."

[35] Every particular circumstance cannot be contemplated when the strategy is developed or when the by-law is drafted and, accordingly, Section 235 permits the Development Officer to grant a variance in particular cases. **This power is clearly permissive.** The granting of a variance is also prohibited in the specific instances described under Section 235 (3). The Statute provides for an appeal to Council from the decision of the Development Officer but again, the Council is limited to the same authority or discretion as that exercised by the Development Officer. It is, as it were, a trial de novo. Put another way, the entire Council is substituted in the role of Development Officer to exercise the same discretion and subject to the same limitations as the Development Officer. It is perhaps redundant to add that in

reaching, or perhaps better in exercising their discretion, they must do so objectively; without bias; according the parties the benefit of natural justice; and without ulterior motive (the Standard of Review).

[36] I accept the proposition advanced by the Town of Lunenburg that judicial review of municipal decision making is very limited in scope. If the municipality has exercised the decision-making power within the area of its jurisdiction then the court will have no authority to interfere unless that power was exercised in a "patently unreasonable manner". *Nanaimo (City) v. Rascal Trucking Ltd.* [2000] 1 SCR has been cited in connection with the standard of review. There, the court considered the fact that **political considerations may be a factor** in the making of such decisions.

[37] Paragraph 35:

> In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those *intra vires* municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the intra vires decision of municipalities be reviewed upon a **deferential standard**.

[38] Paragraph 36, (referring to *Kruse v. Johnson*):

> A by-law is not unreasonable merely because particular judges

> may think that it goes further than is prudent or necessary or convenient...it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges...barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold.

[39] Paragraph 37:

> The standard upon which courts may entertain a review of intra vires municipal actions should be one of **patent unreasonableness.**

THE STATUTORY FRAMEWORK

[40] The statutory framework within which the town council is required to operate has already been discussed in a general sense. The *Municipal Government Act* sets out the general statutory authority, pursuant to which a land-use strategy and development plan have been adopted. Those facts are unchallenged. The council was operating under that authority, was alive to the procedural requirements of notice and hearing; and when the meeting was convened to review the appeal lodged by the Plaintiffs, was properly constituted. There is no reason to believe that the council did not understand that they were authorized to review the decision made by the Development Officer and to make their own decision; and to exercise their own discretion with respect to whether the construction, which had already taken place, was or was not in accordance with the development plan; and whether to grant a variance. Indeed, they had before them the letter from the Development Officer

specifically outlining the "hard" choice, the "soft" choice and the "compromise". The case of *Crockett v. Vancouver (City)* [1985] BCJ No: 779 (SC) is useful in expressing the authority which was to be exercised by the town council in this circumstance.

[41] Paragraph 13:

> The real question is whether the proceedings before the Board of Variance in this case were "a full, fair and proper hearing de novo."...The Board of Variance is not bound to rely on the record below or even refer to it; it may accept any evidence, including new evidence; it is expressly empowered to consider the substantive merits of the decision appealed from on the evidence and arguments presented to it; it may refuse or grant the appeal in whole, or modify or alter the development proposal as it sees fit on the evidence before it.

[42] In other words, the council was entitled, if not obliged, to consider the merits of the Patriarche application afresh without regard to the previous decision. Council was obliged to hear from the interested parties, particularly those who had been given notice of the hearing. Council was obliged to hear from Mr. and Mrs. Patriarche. They were obliged to consider all these matters in the context of the planning strategy document and the integrity of the development process. Furthermore, they were entitled to exercise their discretion in the context of the political environment of the town, using that word in its best sense as representing the will of the community.

[43] The authority of the council to make a decision could be lost if made in "bad faith". If members of the council were motivated by irrelevant information, a motivation to punish or by adopting a view that no variance would be permitted in any

circumstance, then the decision might be set aside on judicial review. The concept of bad faith was discussed by Kroft, J. in *Stevenson v. Winnipeg et al* (1984), 32 Man.R. (2d) 15 (Man. Q.B.) at 25:

> If a tribunal acts in furtherance of an unauthorized purpose, without regard to relevant considerations or on the basis of irrelevant considerations, its decision may be regarded as one made in bad faith. The fact that "irrelevant considerations" may relate to genuine concerns for the "public interest" will not serve as an excuse...**the onus of establishing that bad faith existed falls squarely on the person alleging it.** Suppositions and suspicion are no substitute for evidence.

[44] The cases cited by the Plaintiff are to the same effect as those cited by Lunenburg. In *Surrey (City) v. Surrey (City) Board of Variance* the merits of the "Court" or the "administrative" body defining the relevant terms was discussed and the following observation appears to be approved at Paragraph 32:

> The legal meaning of **undue hardship** and **minor variance** are not so difficult to ascertain that in a functional and pragmatic context those meanings should be regarded as questions that a court must decide and not the Board (read Council)...

and at Paragraph 35 with respect to the burden on the Plaintiff:

> The burden is on the petitioners to show that the decision of the Board of Variance was patently unreasonable. The petitioners must demonstrate that there was no rational basis for concluding that the operation of the setback requirement caused undue hardship or for concluding the particular variance required to cure that hardship was minor.

[45] In *Frank Roncarelli v. The Honourable Maurice Duplessis* the Supreme Court of Canada describes the responsibility of an administrative body in exercising its

"discretion":

> ...there is no such thing as absolute and untrammeled "discretion",...(it is not) an unlimited arbitrary power exercisable for any for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute... "discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate;...

NATURAL JUSTICE

[46] The Plaintiff's counsel suggests that there is an issue of the deprivation of natural justice, one of the reasons being that Councillor Parks had in the course of one meeting circulated a newspaper article reflecting that a homeowner in New Waterford had been required to destroy a garage for which a building permit had not been granted. The municipal council in that case had dealt "firmly" with the offending property owner perhaps setting an example for the Lunenburg Council. I note also that an argument was presented by Mr. Schmeisser that "the law is the law" and that he had been prevented from building a carport on his property because it would have been too close to the Patriarche line. Another irrelevant item was the description of Mr. Patriarche of the manner in which he believed he had been led into offending the by-law and the mis-information he obtained. His description of that process, he says, was unfairly disregarded because of the detailed report from Mr. Plaskett with respect to his knowledge of these communications. Mr. Patriarche was able to identify other examples of construction or development within the town which did not comply with

the by-law, and with respect to which he speculated, variances had been granted. He believes he would have been granted a variance if he had applied before construction. He notes that Mr. Plaskett had indicated in correspondence, that if he had applied for the variance before construction proceeded, his application would have received more favour.

[47] The facts or assertions noted above would seem to be irrelevant to the determination which the Town Council was obliged to make. If irrelevant evidence or irrelevant considerations were relied upon as the basis or reasons for the council's decision then the cases suggest a loss of jurisdiction. The Plaintiff has cited *Dallinga v. Calgary (City)* in support of this proposition. In that case the decision of an administrative board was set aside by the Alberta Court of Appeal when it concluded (according to his note) that irrelevant evidence was admitted and taken into account. In that case one of the questions considered by the court at Paragraph 50 was:

> ...when the Board did not and was not required to give reasons for its decision and both relevant and irrelevant evidence was before it, can the Court go behind its decision to determine whether the irrelevant evidence was taken into account by it in reaching its decision.

[48] The Alberta Court concluded that it could review the circumstances and, in the particular circumstances of that case, concluded that the irrelevant evidence had informed the reasoning of the tribunal.

[49] Bearing in mind the onus on the Plaintiff as I understand it, and the other

circumstances as reflected in the record, I am not persuaded that it was those irrelevant pieces of information which dictated the result in the present case.

[50] The Council, in rejecting the appeal, did not give reasons and were not obliged to give reasons. Comments were recorded at the meeting which were irrelevant. Such irrelevancies were both favourable and unfavourable to the Patriarches' position. The rules of evidence obviously do not apply at a meeting of a town council. As Lunenburg suggests in its brief "the comments of the Alberta Court of Appeal in *Shideler v. Cardston (Town)* [1997] A.J. No. 690 are apposite:

> Participants at public hearings may often make comments that are inappropriate or that go beyond planning matters... the DAB, or indeed any other public decision-making body, cannot be held responsible for comments made by citizens at meetings, no matter how ill-informed or intolerant those comments may be, at least where it cannot be shown that the DAB was influenced by or took into account such comments...

[51] The presumption of regularity does apply to the proceedings before the Town Council. There is a significant onus on the Plaintiff to establish that some improper motive or reason was at work in the process.

[52] The contrary appears to be the case. Councillor Parks, who made the motion to uphold the earlier decision of the Development Officer and who is a member of the Planning Committee, is clearly in favour of a compromise solution. His first motion was that the variance not be granted "pending any agreement between the Schmeissers and the Patriarches". This would seem to represent the compromise which had been

suggested by the Development Officer that the Town Council attempt to mediate some resolution of the Schmeisser complaint without requiring the "total" removal of the offending deck.

DID COUNCIL ERR IN LAW?

[53] The setback requirement for an accessory structure is 4 feet. Section 4.27 of the by-law makes it clear that any structure attached to the principal building becomes part of the principal building. It is clear that the residence is the principal building on this property. The deck is supported "on the side of the house". It is clearly not a stand-alone structure. Whether this is a finding of fact or a question of law, the technical requirements of the by-law require an 8 foot setback and it was not an error of law for Development Officer and the Council to so determine.

[54] The Plaintiff further suggests an error of law (Section 235 (3) (c)) of the MGA which provides that **a variance may not be granted** where the difficulty experienced results **from an intentional disregard for the requirements of the by-law.** The Plaintiff has misinterpreted the impact of this section. It does not mandate consideration of a variance where the disregard is inadvertent; rather it **prohibits a variance where the disregard was intentional**. There is no suggestion in the record or any of the materials before me that either the Development Officer or the Council believed that this section operated to prevent them from granting a variance in this

case.

CONCLUSION

[55] Having decided that the Lunenburg Town Council acted "within its jurisdiction" in conducting the appeal and having concluded that there was not "patent error" evidenced in the determination that they made, it follows that the application of the Plaintiff for Certiorari, and/or an order in the nature of mandamus is dismissed. I accept the statement of the law as given by the Court of Appeal in *Bianco v. The Municipality of the County of Halifax et al* (1976), 16 N.S.R. (2d) 66 in a passage quoted from Administrative Law and Practice, Reid:

> A proper exercise of a discretion "within jurisdiction" is not subject to mandamus, but mandamus lies to correct an arbitrary exercise of discretion, and to ensure that a discretionary power is honestly exercised,...thus the court would not displace the opinion of a municipal council with its own... mandamus is not to be used as an appeal, or as a disguised appeal...

[56] If I were to quash the decision of the council by granting the application for Certiorari the appropriate remedy would have been to return the matter to the council directing them to exercise their discretion in accordance with the law (natural justice, ulterior motive) and to reconsider the appeal anew with appropriate representations from the various interested parties.

[57] The application is dismissed in the circumstances without costs to either parties.

Dated at Digby, November 14, 2001

J.