SUPREME COURT OF NOVA SCOTIA
Citation: *Rudderham v. Scotian Materials Ltd.*, 2017 NSSC 330

Date: 20171211
Docket: Hfx No. 466276
Registry: Halifax

Between:

Stacey Lee Rudderham and Dwight Ira Isenor

Applicants

v.

Scotian Materials Limited and Halifax Regional Municipality

Respondents

D E C I S I O N
Motion for Dismissal Based on Lack of Standing

Judge:	The Honourable Justice Christa M. Brothers
Heard:	November 9, 2017, in Halifax, Nova Scotia
Written Release:	December 22, 2017 (Decision rendered with reasons to follow: December 11, 2017)
Counsel:	Paul B. Miller, for the applicants, Stacey Lee Rudderham and Dwight Ira Isenor
	Peter Rogers, QC, and Ryan Baxter, for the respondents, Scotian Materials Limited
	E. Roxanne MacLaurin, for the respondents, Halifax Regional Municipality (watching brief)

Brothers, J.:

[1] The applicants seek judicial review of a Development Officer's ("DO") decision approving a mobile asphalt and concrete plant ("ACP") to be situated at Goff's, Nova Scotia, on lands owned by Scotian Materials Limited ("Scotian Materials").

[2] A judicial review of the DO's approval of the ACP is scheduled to be heard on January 30, 2018. Scotian Materials has sought a pre-hearing determination concerning the applicants standing to maintain the judicial review.

[3] Northern Construction Enterprises Inc. ("NCE") was the predecessor company to Scotian Materials.

[4] The applicants were formerly involved in a resident group challenging the attempts of NCE to obtain a development permit to operate a quarry on the same property that the ACP has been approved for. The use of lands owned by Scotia Materials have been the subject matter of many earlier proceedings at various levels of court.

[5] In order to determine standing, a review of the DO's decision, the statutory rights of appeal from that decision and a consideration of private interest and public interest standing is necessary.

Background

[6] On January 30, 2017, Scotian Materials submitted a permit application to construct a commercial building and operate a mobile ACP. Scotian Materials did so subsequent to receiving approval to operate a quarry on the same parcel of land.

[7] Scotian Materials sought the permit to operate a mobile ACP with the intention of using the aggregate materials from the approved quarry.

[8] The 298-acre parcel of land, which is the subject of the permit application, ("Subject Lands") is located in the AE-4 (Aerotech Business Zone) and is within Planning Districts 14 and 17. The zoning for the Subject Lands permits "manufacturing uses." The land-use by-law does not define the term manufacturing. The DO determined that "manufacturing" included ACPs. The upcoming judicial review concerns the proper application of the land-use by-laws.

[9] In addition to Scotian Materials obtaining a permit from the DO to construct and operate a mobile ACP, on July 25, 2017, Scotian Materials received approval from the Nova Scotia Environment to construct and operate a mobile ACP on the Subject Lands.

Ground of Review

[10] The applicants' Notice of Judicial Review raises one ground of review.

> Grounds for review
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> The applicant seeks review on the following grounds:
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> 1. The decision maker erred in determining that the proposed development was consistent with the Land Use By-law for Planning Districts 14 and 17 and the Municipal Planning Strategy for Districts 14 and 17.

[11] The applicants seek the following relief:

> Order Proposed
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> The applicant requests an order cancelling the development permit and declaring that the proposed development is not consistent with the *Land Use By-law for Planning Districts 14 and 17* and the *Municipal Planning Strategy for Districts 14 and 17*.

[12] No amendment has been sought to the single ground of review. The applicants received the Record by, at least, September 21, 2017, when filed with the court.

[13] The applicants have not raised a lack of jurisdiction of the DO, corruption, fraud in the process, bad faith or malice. The only ground raised is error in the application of the land-use by-law.

[14] On March 9, 2017, the DO approved Scotian Materials' application granting the development permit allowing Scotian Materials to place a mobile ACP on the Subject Lands. In rendering his decision, the DO reviewed:

- The HRM Charter;
- HRM's Land Use By-Law Planning Districts 14/17; and
- HRM's Municipal Planning Strategy for Planning Districts 14/17.

Issues

[15] There are two issues to be addressed:

1. The admissibility of affidavit evidence.

2. Do the applicants have standing to seek an order setting aside the DO's decision issuing a development permit for a mobile ACP?

    (a) Do the applicants meet the test for private interest standing?

    (b) Do the applicants meet the test for public interest standing?

Admissibility of Affidavit Evidence

[16] Scotian Materials filed two affidavits on October 6, 2017, in support of their motion challenging the applicants' standing. Mr. Robert MacPherson, the President of Scotian Materials, and Tessa Williams, an employee of RMP Development Consulting Limited ("RMP Consulting"), swore affidavits.

[17] Ms. Williams' evidence is ostensibly offered to demonstrate that there are several ACPs throughout the Halifax Regional Municipality (HRM), that are situated within 2 kms of residential areas. Scotian Materials argues that the applicants are not within the 2 km radius and the lack of proximity evidences the applicants inadequate private interest to maintain this judicial review.

[18] The applicants argue that Ms. Williams' affidavit should be struck for two reasons.

Alleged Deceit in the Affidavit

[19] The applicants argued Ms. Williams' affidavit is deceitful because neither Ms. Williams nor Mr. MacPherson disclose that Mr. MacPherson is the President of RMP Consulting, Ms. Williams' employer. The applicants argue that by failing to be transparent Scotian Materials was giving the impression Ms. Williams was independent and at arms length from Scotian Materials, when really she was employed by the President of Scotian Materials.

[20] Scotian Materials refutes the notion that there is any deception. Scotian Materials says Mr. MacPherson's role at RMP Consulting is a matter of public record at the Registry of Joint Stocks (Exhibit 4).

[21] Having considered the arguments, there is no evidence that either Ms. Williams' or Scotian Materials attempted to deceive the applicants or the court. This is a serious allegation requiring much more.

Ability to Give Opinion Evidence as a Non-Expert

[22] The applicants argue that Ms. Williams' affidavit should be struck in its entirety because she, as a lay person, attempts to provide expert opinion without being qualified as an expert. The applicants argued that Ms. Williams neither has the technical background to provide the opinion she offers in her affidavit nor does she have the knowledge of the ACP to give an opinion. The applicants argued that Ms. Williams is a pseudo expert who cannot be qualified to give opinion evidence.

[23] On cross-examination, Ms. Williams testified that she neither offered an expert report in this matter, nor has she been qualified, on any prior occasion, to give expert evidence in court.

[24] On cross-examination, Ms. Williams agreed that she could not provide information about the underlying character of the ACP proposed by Scotian Materials, or the other ACPs depicted in Tab A of her affidavit, which are offered as examples of ACPs being located within 2 kms of residential areas.

[25] Scotian Materials agreed that Ms. Williams is not an expert, but argued that as a lay person she is able to offer the factual evidence contained in her affidavit.

[26] Ms. Williams provides factual information about the distances between ACPs and residences throughout the HRM. Ms. Williams simply aggregates data from GIS and Google Maps, which are both publicly accessible tools to show areas where ACPs are located close to residences in the HRM.

[27] The applicants agree that a lay person can testify to distances and also agree to the characterization of GIS and Google Maps as computerized measuring tapes.

[28] The evidence of Ms. Williams is properly admissible. If any opinion is contained in the affidavit, it is proper lay opinion evidence.

[29] The applicants accepted Ms. Williams' methodology, but do not accept her conclusions and in particular, the following conclusions:

> 8. The intent was to provide a reasonable representation of the proximity of residences to other plants of similar character. [Emphasis added]

[30] Ms. Williams' statements characterizing the ACPs, referenced in Tab A, as being of similar character to the proposed mobile ACP, are not accepted. On cross-examination, Ms. Williams admitted she could not testify to the character of any of the ACPs referenced in her Affidavit. Ms. Williams admitted on cross-examination that she has no knowledge of the character of the proposed mobile ACP.

Overview of Standing

[31] The law of *locus standi* or standing provides who may apply to the court for relief. The applicants have asserted standing based on both private and public interest standing.

[32] Bryson, J.A., in *Canadian Elevator Industry Education Program (Trustees of) v. Nova Scotia (Elevators and Lifts Act)*, 2016 NSCA 80, made the following comments concerning private and public interest standing:

> [13] The rules and application of standing differ depending on whether one is seeking private or public interest standing, because the interests engaged differ. Vindicating private rights is the interest of the former. The latter is a matter of maintaining the rule of law as a general principle, regardless of whether a private right or interest is involved. As Chief Justice Laskin, speaking for the majority, said in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 145:
>
> > [. . .] it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

[33] Access to the court can be sought in either two ways as reviewed in *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2017 at 4:1000):

> (a) private interest standing: as a right to those who allege that they have sustained some legal wrong or a discrete injury as a result of the impugned administrative action; or,

> public interest standing: it is within the discretion of the courts to permit a private individual who has suffered no personal harm to challenge the validity of administrative action when no one else is likely to do so.

Private Interest Standing

[34] The Supreme Court of Canada in *Findlay v. Canada (Minister of Finance),* [1986] 2 S.C.R. 607, set forth the requirements to meet to be granted standing. A party must demonstrate that they are "exceptionally prejudiced by the wrongful act" or have "a special interest in the subject matter of the action" or that they are somehow "more particularly affected than other people."

[35] In order to establish private interest standing, the burden is upon the applicants to show some special interest, private interest or sufficient interest, which is greater than the general public. In *Robichaud v. College of Registered Nurses (Nova Scotia),* 2011 NSSC 379, the court stated:

> [10] In establishing standing, the burden is on the Applicants in the case at hand to show that they have "some special interest, private interest or sufficient interest" in the decision or proceeding. [*Pieters v Ontario College of Teachers,* [2008] O.J. No. 527 (S.C.J.), at para 4, quoting *Cowan v. Canadian Broadcasting Corp.* [1966] 2 O.R. 309; *Emerman, supra,* at para 19.]
>
> [11] The Applicants can discharge that burden by demonstrating that the College has infringed a legal right of theirs, or that they have a legal right which will "cause or threaten to cause [them] some special damage over and above that suffered by the general public". They must be more than "interested observers". [*Behr v College of Pharmacists of British Columbia,* 2005 BCSC 879, paras 15, 18 and 28.] They can discharge the burden by showing the decision affected their "personal or economic rights or obligations". [*Friends of the Old Man River Society v. Ass'n of Professional Engineers, Geologists and Geophysicists of Alberta,* 2001 ABCA 107, at paras 32 & 41; *Metropolitan Centre Inc. v Abugov Kaspar Architecture, Engineering, Interior Design,* 2007 ABQB 419, at paras 25 and 28.]

[36] A subjective interest in a matter is not enough.

[37] The cases speak of persons aggrieved when considering the question of private interest standing. A person aggrieved has been considered a person whose legal rights have been impacted. (*L & R Equities Ltd. v. Courtyard Green Devs. Ltd.*, 1985 CarswellNS 230).

[38] The following statements by Laskin C.J.C. in *Borowski v. Canada (Minister of Justice)*, [1981] 2 SCR 575, are apt:

> 4. I start with the proposition that, as a general rule, it is not open to a person, simply because he is a citizen and a taxpayer or is either the one or the other, to invoke the jurisdiction of a competent court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a court. Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society. …

[39] In considering private interest standing, I must apply a contextual approach and not just confine my analysis to legal rights and obligations.

[40] The applicants need not prove the strength of their case, as stated in *Canadian Elevator Industry Education Program (Trustees of)*, *supra*:

> [37] As a matter of principle, the merits should not matter when considering private interest standing for the simple reason that a party who has an interest in the proceeding should not need to demonstrate the strength of his case to obtain the standing to make it. This is quite different from public interest standing where the strength or importance of the case may increase in analytical significance while the interest of the applicant may recede. The success of a strong argument challenging the legality of judicially reviewed government behaviour should not simply depend on the personal effect of that illegality on she who advances the argument. This is addressed further under "Public Interest Standing" below.

[41] In approaching the issue of private interest standing, I am guided by the courts' listed factors:

1. Statutory purpose;
2. Subject matter of the proceeding;
3. Interest in the subject; and
4. The effect the decision may have on their interest.

Statutory Purpose - Relation between the Applicant and the Impugned Decision

[42] First, it is necessary to review the appeal process set by the legislation. As instructed in *Canadian Elevator Industry Education Program, supra*:

> [45] The Province adds that the Act authorizes appeals from decisions of the Chief Inspector regarding certificates of competency, but not for parties such as the Trustees. The Trustees acknowledge that they have no standing under the Act to make any such appeal because they are not "directly aggrieved" by the Chief Inspector's decision. This is one reason why they have proceeded by judicial review. While a statutory right of appeal does not preclude judicial review, it certainly is a factor the Court can take into account when deciding whether standing should be accorded to someone who wishes to judicially review a decision that could otherwise be appealed by another with a stronger connection to the impugned decision.

[43] Scotian Materials argues that the legislature has specifically barred the applicants and anyone other than developers from appealing a DO's decision regarding development permits. Only if a DO has denied a permit, can an appeal be commenced.

[44] The process to challenge a DO's decision concerning the approval or refusal of a development permit is set up as a bi-lateral process.

[45] The *HRM Charter* provides a statutory right of appeal from decisions of many decision makers including a DO's decision:

> Appeals to the Board
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> 262 (1) The approval or refusal by the Council to amend a land-use by-law may be appealed to the Board by
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> (a) an aggrieved person;
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> (b) the applicant;
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> (c) an adjacent municipality;
>
> (d) the Director.
>
> (2) The approval, or refusal to approve, and the amendment, or refusal to amend, a development agreement may be appealed to the Board by
>
> (a) an aggrieved person;
>
> (b) the applicant;

> (c) an adjacent municipality;
>
> (d) the Director.
>
> (3) The refusal by a development officer to
>
> (a) issue a development permit; or
>
> (b) approve a tentative or final plan of subdivision or a concept plan,
> may be appealed by the applicant to the Board.

[46] Section 262 provides who can appeal what decisions and classifies the appeals based on the statutory decision maker and the type of decision being made.

[47] First, an appeal lies from an approval or refusal of Council to amend a land-use by-law. There are four categories of persons who can appeal these decisions: an aggrieved person, an applicant, an adjacent municipality, and a Director.

[48] The second listed appeal is from an approval or refusal to approve and the amendment or refusal to amend a development agreement. Again, there are four categories of persons who can appeal such decisions: an aggrieved person, an applicant, an adjacent municipality, or a Director.

[49] The third decision that may be appealed is the refusal of a DO to grant a development permit or a refusal to approve a tentative or final plan for subdivision or a concept plan. Such refusals are appealable by an applicant only. There is no statutory appeal from a DO's approval. Any refusal by a DO is not appealable by an "aggrieved person." The legislature has limited who can appeal a DO's decision relating to development permits.

[50] The reason why appeals are restricted can be understood on a review of the authority of a DO. In *Peterson v. Kentville (Town)*, 2008 NSSC 254, the court reviewed the timing for public input in land use and municipal development strategies, as well as the authority of a DO:

> [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.

. . .

[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.

[51] Further limitations on appeal are set forth in s. 263 as follows:

No appeal permitted

263 The following are not subject to an appeal:

(a) an amendment to a land-use by-law to make the by-law consistent with a statement of provincial interest;

(b) an amendment to a land-use by-law or a development agreement to implement a decision of the Board;

(c) a development agreement approved, as ordered by the Board;

(d) an amendment to a land-use by-law that is required to carry out a concurrent amendment to a municipal planning strategy;

(e) the adoption or amendment of an incentive or bonus zoning agreement.

[52] An aggrieved person is limited in their right of appeal in s. 265:

Restrictions on appeals

265 (1) An aggrieved person or an applicant may only appeal

(a) an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy;

(b) the approval or refusal of a development agreement or the approval of an amendment to a development agreement, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy;

(c) the refusal of an amendment to a development agreement, on the grounds that the decision of the Council does not reasonably carry out the

> intent of the municipal planning strategy and the intent of the development agreement.

[53] Furthermore, the definition of "aggrieved person" at s. 209(aa), in the *HRM Charter* is also confined to those who challenge a decision of HRM Council and does not include those who challenge a decision of a DO.

[54] When all the above sections are read together, it is clear that the legislature did not intend an aggrieved person to have a right of appeal from an approval of a DO.

[55] There is no statutory right of appeal for the applicants from the DO's approval of the ACP.

[56] When determining standing, the legislature's clear intention that the applicants not have a right of appeal to the Nova Scotia Utility and Review Board ("NSUARB") – the specialized administrative tribunal dealing with development and planning issues – should be taken into consideration by this court.

[57] Furthermore, the legislation does not provide the applicants with notice of a decision. Both the regulatory purpose and the lack of notice weakens their claim for standing (*Locus Standi*, *Thomas A. Cromwell* (Toronto: Carswell, 1986, p. 108)).

[58] The parties referenced the *Municipal Government Act* S.N.S. 1998, c. 18 and I note ss. 247 and 248 of the *Municipal Government Act* are very similar to ss. 262 and 263 of the *HRM Charter*.

[59] The statutory scheme does not support or strengthen the applicants case for standing. It, in all respects, weakens their case. The time for public consultation and input is not at the stage when the development permit is applied for, but at the development of a Municipal Planning Strategy, land-use by-law or development agreement (*HRM Charter*, ss. 220, 221, 245).

[60] Where the legislation itself does not provide a right of appeal for these applicants, they have the burden of showing some special interest in the matter in order to meet the test of private interest standing.

Subject Matter of the Proceedings

[61] Scotian Materials admitted that this court has the jurisdiction to judicially review a DO's approval of a development permit, but only in the following circumstances:

1. An unconstitutional act by the DO;
2. Corruption or fraud in the decision making process; and
3. Bad faith or malice in the decision making.

[62] Scotian Materials argued there is no challenge on the basis of bad faith or illegality and therefore there is no standing for the applicants, as such was the case in *MacIlreith v. Hart*, (1908), 39 S.C.R. 657. See also *Remmers v. Lipinski*, 2001 ABCA 183, leave to appeal to S.C.C. dismissed (2001) SCCA 502.

[63] While Scotian Materials admits judicial review will lie to properly constrain statutory decision makers from gross abuses, including but not limited to: fraud, corruption, bad faith and malice (*Roncarelli v. Duplessis*, [1959] S.C.R. 121). However, the single ground of appeal advanced by the applicants relates to the statutory decision makers interpretation and application of land-use by-laws. Such an exercise does not give rise to a statutory right of an appeal. It would be antithetical to the legislative framework and creation of the NSUARB to have this court be asked to become the arbiter of appeals. However, the court must consider the private interest or the public interest in the applicants advancing this matter.

[64] The applicants argued that the history of the DO's review and decision making shows inconsistency, however, this is far from abuses such as fraud and corruption.

[65] The applicants stipulate this judicial review involves environmental protection matters. Mere interest in environmental matters is not enough to be granted private interest standing (*Shiell v. Amok Ltd.*, (1987), 27 Admin. L.R. 1). Such matters are more appropriate for a different venue and more appropriate for public input when land-use by-laws are developed.

Interest in the Subject

[66] Particularly apt comments, given the lack of statutory right of appeal for the applicants, are the comments in the *Minister of Justice (Can) v. Borowski*, [1981] 2 S.C.R. 575 at p. 578:

> . . . Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society. . . .

[67] Through their cross-examination of Ms. Rudderham and Mr. Isenor, as well as in argument, Scotian Materials raised the specter of a competitor advancing this judicial review through the applicants. There was a suggestion that a competitor was funding this judicial review and had funded prior challenges to NCE/Scotian Materials operations. Scotian Materials argued the applicants had no real interest but were a stand in for a competitor. This was denied by both applicants in cross-examination. No evidence was provided to support this theory which is based on conjecture and consequently, rejected.

[68] Ms. Stacey Lee Rudderham, a resident of Fall River, offered affidavit evidence and was cross-examined. Ms. Rudderham is a leading member of the Fall River Stop the Quarry Group and is a former executive member of the Lakeview – Fall River – Windsor Junction Ratepayers' Association. Ms. Rudderham has been actively involved in "environmental protection matters" in her Fall River community since 2011.

[69] Ms. Rudderham gave evidence concerning her interest in NCE's January 2002 proposal to operate a four hectare quarry. When NCE was denied a development permit to operate the extractive facilities at the proposed quarry, they appealed to the NSUARB. Both Ms. Rudderham and a number of residents applied to the NSUARB to intervene in the appeal. This request was denied by the NSUARB (see: *NCE, RE* 2012 NSUARB 149).

[70] The applicants appealed the NSUARB decision denying them intervenor status. NCE appealed the NSUARB decision denying their appeal seeking a development permit to operate a quarry. In addition, NCE filed an application with the Nova Scotia Supreme Court arguing that the regulation of extractive facilities was *ultra-vires* the land-use by-law.

[71] An agreement was reached and the applicants discontinued their appeal of the denial of intervenor status and NCE agreed not to object to the request for intervention in both the appeal of the NSUARB decision, and NCE's application to the Nova Scotia Supreme Court, concerning the vires of the land-use by-laws.

[72] The parties agreed that the Nova Scotia Supreme Court application would proceed first while the appeal would be held in abeyance. An application was brought by both Ms. Rudderham and Mr. Isenor to the Nova Scotia Supreme Court for intervenor status. There was no opposition to this request.

[73] Ms. Rudderham and Mr. Isenor have been involved since 2012 as intervenors with a goal of preventing Scotian Materials from obtaining a permit to operate a quarry. Now, the applicants wish to prevent Scotian Materials from obtaining approval to operate a mobile ACP.

[74] The residents have, twice before, been intervenors in appeals concerning Scotian Materials proposed developments. These include *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality),* 2014 NSSC 166; *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality),* 2014 NSCA 88; 2015 NSCA 43; and *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality),* 2015 NSCA 44. However, at no time, were they directly applicants in any of those proceedings. They were granted intervenor status after no parties opposed such request. The mere fact that a resident group, which the applicants were part of, were allowed to intervene in the face of no opposition does not end the matter.

[75] In her affidavit, Ms. Rudderham articulated her interest in being given standing to bring a judicial review of the DO's decision permitting Scotian Materials from running a mobile ACP.

[76] Ms. Rudderham states her belief that, along with a quarry, a mobile ACP will create a nuisance, affect her home value and affect her well water.

[77] In particular, Ms. Rudderham says the ACP will:

(a) Increase dust;
(b) Increase smoke;
(c) Increase soot;
(d) Increase noise;
(e) Increase traffic; and

(f) Increase runoff into streams and lakes.

[78] Ms. Rudderham believes that all of these issues will potentially affect her property and the property of other residents. However, Ms. Rudderham provides no basis for these bald assertions.

[79] Ms. Rudderham appealed her home assessment arguing the quarry operations would have an adverse impact on her property value. The appeal was successful and the assessment was reduced. However, this has no bearing on the ACP as this assessment appeal was completed years ago, before approval for an ACP was sought.

[80] Ms. Rudderham states she is advised by an appraiser, Mr. Larry Matthews of Hants Realty Limited, that the quarry operation and the mobile ACP could negatively impact her property value by between 10-25%.

[81] First, this is hearsay, and second, there is no expert report by an appraiser to support this statement. In reaching my conclusion on standing, I have placed no weight on this hearsay statement.

[82] Ms. Rudderham is concerned that a mobile ACP could result in increased blasting from the quarry, which could impact the water table and her well. Again, these statements are conjecture and fall short of providing evidence of a private interest.

[83] While Ms. Rudderham says these issues collectively raise concern because of the fact her home is located approximately 1800 metres from the proposed quarry and mobile ACP, she admits in her affidavit that she has no clear idea of where the facilities are going to be located on the Subject Lands. On cross-examination, Ms. Rudderham was shown Exhibit 4, a depiction of the proposed ACP. This document purports to show the 2 km radius from the proposed ACP. Ms. Rudderham was asked to mark the location of her home with a green marker. Her home is outside the 2 km radius of the ACP.

[84] Mr. Isenor's affidavit mirrors Ms. Rudderham's affidavit in reviewing the proceedings to date. In addition, para. 23, and paras. 25-31, of Mr. Isenor's affidavit are virtually identical to paras. 23-31 of Mr. Rudderham's affidavit. The only difference is the proximity of Mr. Isenor's home to the ACP. Mr. Isenor states that his home is approximately 1500 metres from the propose quarry and the ACP. He too has no clear idea and no information as to where the ACP is going to

be constructed. His evidence is conjecture and bald assertions. On cross-examination, Mr. Isenor was shown Exhibit 4, the satellite view of the ACP. He was asked to mark his home with a blue pen. In doing so, his home too is outside the 2 km radius of the ACP.

[85] The affidavits of Ms. Rudderham and Mr. Isenor are rife with conjecture and do not offer any clear, admissible evidence of detriment or impact to the applicants legal or property interests. They have not satisfied the burden of proving a private interest. There is no special or sufficient interest demonstrated.

[86] Given the evidence provided by the applicants, the principles articulated in the caselaw and even when applying a contextual, generous approach and not considering the merits or the strength of the case, the applicants fail to demonstrate or establish private interest standing.

[87] There is no evidence before me that the decision of the DO will have any impact on the applicants. The applicants rely on their alleged proximity to the proposed mobile ACP and their speculation that as a result of its operation their property and person will be affected. However, there is nothing provided for the court's consideration, aside from mere speculation and bald assertions. There is no expert evidence to show that a mobile ACP with the character of the one at issue will create any of the issues speculated by the applicants.

[88] In making these comments, I acknowledge the authorities and the trends of the courts to be more generous in finding private interest standing to those who challenge decisions of public authorities. However, a relationship between the applicants and the challenged action must have some nexus as opposed to be contingent worry or even less, conjecture.

[89] The applicants ask the court to find the potential for harm caused to them by the decision of the DO allowing the mobile ACP. However, there has been an absence of evidence to consider. The only evidence is in the form of the applicants' two affidavits. The applicants belief in increased dust, smoke, soot, noise, traffic, runoff in nearby streams and lakes have no noted basis. It is uncorroborated by any evidence.

[90] Also, there is unsubstantiated hearsay from a so-called appraisal about potential property value impacts; however, there has been no appraiser who has provided any evidence to the court, which can be considered.

[91] While the applicants may have an interest, in the general sense, about the speculative environmental concerns, this falls short of "interest" in the legal sense (*Shiell v. Amok Ltd.*, *supra*). There is no evidence before the court, short of bald assertions, that demonstrate any impact on the applicants use and enjoyment of their property. Mere proximity to the Subject Lands does not meet the test for standing (*Brison Re* 2006 NSUARB 113).

[92] I also considered the following cases relied upon by the applicants:

1. *Oakland/Indian Point Residents Assn. v. Seaview Properties Ltd*., 2008 NSSC 209;
2. *Mountain Ash Court Property Owners Assn, v. Dartmouth (City)*, 1993 CarswellNS 84(NSSC); and
3. *Friends of Point Pleasant Park v. Canada (A.G.)*, 2000 CarswellNat 1902 (FCTD).

[93] All three cases are distinguishable based on some or all of the following:

1. Degree of geographic proximity;
2. False certification (abuses, and fraud);
3. Statutory regime.

[94] *Judicial Review of Administrative Action in Canada*., Vol 2 (Thompson Reuters, loose-leaf 2013), reviews the denial of standing in a similar matter.

> 4:3443 Environmental Interests
>
> Public interest groups and individual advocates have usually been denied standing to challenge administrative action that raises environmental concerns, for lack of an identifiable special interest of their own. Thus, standing was denied to: the Sierra Club when it sought to challenge the issuance of a tree-cutting permit, the Sea Shepherd Conservation Authority in relation to a wolf-kill program; Greenpeace Foundation when it sought to enjoin the importation of killer whales pursuant to a license; the Village Bay Preservation Society when it challenged the use of land as an airstrip; the Islands Preservation Society when it sought to judicially review the renewal of a tree farm license; the Friends of Toronto Parkland when it sought to challenge the issuance of a building permit for a community centre; Canadians for the Abolition of the Seal Hunt seeking *mandamus* against the minister for his alleged failure to enforce the law; the Manitoba Naturalists' Society in relation to the construction of an office complex without a permit; an organization known as Rural Dignity of Canada in relation to the closure of rural post office; and groups incorporated to preserve public

> gardens. As well, individuals acting either on their own initiative or as members of such groups have been denied standing on the same basis when seeking to challenge an approval under the *Environmental Assessment Act.*
>
> [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.

The comments above are equally applicable to this matter. Here, the applicants are merely interested observers.

Public Interest Standing

[95] Courts have recognized a party who cannot prove they are an aggrieved person may be granted public interest standing.

[96] In *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, the court reviewed the law of public interest standing

> [1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance),* [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed

> suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[97] In *Miner v. Kings (County),* 2017 NSCA 5, the court commented at para. 39:

> . . . Considerations of public interest standing have arisen most notably where constitutional issues are at play, or where there is a broad or significant impact to the challenged decision or action.

[98] Public interest standing is granted by the courts on a discretionary basis considering three different factors summarized in *Downtown Eastside, supra*:

1. a serious justiciable issue;
2. a real stake or genuine interest in the outcome; and
3. the proposed court challenge is a reasonable and effective means for the case to be heard.

[99] In reviewing the three factors, I note that my analysis should not address these factors separately, but that they should be assessed together and weighed cumulatively (*Downtown Eastside, supra*). In considering whether the applicants meet the test for public interest standing, I need to consider these factors purposely and flexibly.

Serious Justiciable Issue

[100] The first factor set forth in *Downtown Eastside, supra,* has been described as follows:

> 42 To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski,* at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). . . .

[101] In deciding whether the matter raises a serious justiciable issue, I have weighed judicial resolution as the appropriate mechanism as opposed to legislative

or executive action and I have weighed utilizing scarce judicial resources on marginal lawsuits.

[102] In *Downtown Eastside, supra*, the court reviewed the type of cases which meet the seriousness standard and categorized them as:

1. Constitutional issues;
2. Charter challenges; and
3. Other challenges to the validity of legislation.

[103] Clearly, the issue here is justiciable; however the question is whether it is also serious. The Supreme Court has noted that to be serious the question raised must be a "substantial constitutional issue" or "important." A case of note is *USW v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 496. The court there had no constitutional issue, no charter issue, and no challenge to legislation. The issue before the court was procedural fairness and the correctness or reasonableness of a decision.

[104] Similarly, in this matter, the challenge is to a DO's decision. This decision was made within the DO's own home statute and any challenge to that decision would be based on whether the decision was made within a range of reasonable outcomes *(New Brunswick) (Board of Management) v. Dunsmuir*, 2008 CarswellNB 124 (SCC). The question on judicial review does not rise to a level of seriousness as conceptualized in *Downtown Eastside, supra*.

[105] In this case, there is no challenge to the legislation or jurisdiction. There is instead a challenge to the application of a by-law in a single case. This is not a public interest challenge.

[106] There is no constitutional or charter issue raised and the *vires* of the legislation is not challenged. Despite my conclusion on this factor, I will go on to review the other two factors.

Real Stake or Genuine Interest

[107] Neither the affidavits nor submissions provide any indication as to why the applicants have an interest beyond that of any other individual in the issues raised. While the applicants clearly have an interest, generally speaking, in this subject, what is their genuine interest in the justiciable issue?

[108] The applicants believe that many residents will be adversely affected by the ACP and the quarry operations. Ms. Rudderham stipulates that other residents in her subdivision, have an interest in protecting their properties, wells, and nearby water courses.

[109] The applicants say they have significant involvement and experience acting in this capacity.

[110] The applicants say they do not believe there is any other means of bringing this matter before the courts and notes that there is no statutory right of appeal available.

[111] While the applicants may have a real, personal interest in the subject, this does not equate to a genuine interest in the legal sense. The applicants do not meet this test as their interest is not similar or analogous to the interest required and demonstrated in *Downtown Eastside, supra,* or *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236.

Reasonable and Effective Means

[112] Whether the proposed litigation represents a reasonable and effective means to advance the matter was described in *Downtown Eastside*, *supra*:

> 50 The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

[113] The third factor, requires the court to consider whether there are other means for this matter to be advanced. Of course this matter could be advanced if there was a landowner who could show some evidence of an interest in a justiciable issue. For example, an individual could establish private-interest standing if there was evidence of nuisance to their land.

[114] In assessing whether or not this is a reasonable and effective means of advancing the matter, I am directed to consider the following:

- The applicants ability to bring forward this claim.
- It is a matter of public interest that transcends the interest of those who are most directly effective?
- Are there other realistic alternatives to bring this matter forward which would result in a more effective use of judicial resources? For example, are there others who have a more direct interest.
- Have those with a more direct interest refrained from bringing an action and if so, this would militate against granting standing.

[115] Based upon the bald assertions in the affidavits, I conclude it is not reasonable to grant standing, there are means of bringing this to court, such as through parties who are affected.

[116] This is not a challenge to legislation. This is a challenge based on unsupported environmental concerns. If there are demonstrable, environmental concerns, there are avenues for redress. With the greatest of respect, the applicants are "mere busybodies" (*Downtown Eastown, supra,* para. 1) and standing should not be granted.

[117] I do not accept that in refusing to grant standing to the applicants it leaves no remedy to challenge a DO's decision if allegations of bad faith, corruption or fraud are alleged. Furthermore, if an approval by a DO would cause some harm, those who suffer the harm could raise the issue. There are other ways for a possible resident of the area who has an interest to challenge the development, if a resident's property was affected.

[118] In this matter, there are other ways for governmental action to be challenged. In denying standing I have regard for the comments in *Vilardell v. Dunham,* 2014 SCC 59 (S.C.C.), where the court noted that the public should have access to courts to hold government accountable. This is an important component of the rule of law and constitutional values in Canada:

> . . . If people cannot challenge government actions in court, individuals cannot hold the state to account -- the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect.

> And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed:. . .

No Other Way to Bring the Question Before the Court

The applicants raise the point that if they are not granted standing in this case, no other person is reasonably situated to bring forth the issue to the court. The courts have granted standing to individuals and not insisted upon a particular interest where there is an interest to protect the rule of law. In *AXA General Insurance Ltd and others v. Lord Advocate and others*, [2011] UKSC 46, para. 170, the court commented upon the relaxing of the potential requirements where to do otherwise would result in the public being subject to excessive or misuse of power:

> . . . where the excess or misuse of power effects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. . . .

[119] This is not the case before me. There are no grounds of review which allege excess or misuse of power. In fact, the only ground of review is confined strictly to the decision-maker committing an error in finding the proposed development was consistent with the land-use by-laws and the Municipal Planning Strategy for Districts 14 and 17. Even when faced with the motion by Scotian Materials asking this court to deny the applicants standing, they did not make an amendment to their Notice of Judicial Review to expand the grounds raised.

[120] In referring to *Acts of General Insurance Limited, supra,* I am cautious of and cognizant that the UK jurisprudence has a different test for standing as contrasted to the Canadian distinction between private and public law standing.

[121] While, no doubt well-intentioned and interested, as commonly understood, the applicants lack a prescribed right of review, private or public interest standing (*Downtown Eastside, supra* at para 26).

[122] In *Canadian Council of Churches v. R.*, [1992] 1 SCR 236, the Court stated:

> 35 The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act*, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances

> does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

These words are equally applicable here.

[123] I have read and considered the extensive evidence, briefs and authorities submitted by both parties in this application. Despite approaching the question of standing liberally and purposively, I find it would stretch the bounds of legal authority to exercise my discretion and grant standing to the applicants.

Justice Christa M. Brothers