SUPREME COURT OF NOVA SCOTIA
Citation: *Rehberg v. Halifax Regional Municipality*, 2018 NSSC 142

Date: 2018-06-15
Docket: Hfx. No. 449688
Registry: Halifax

Between:

Roger Glengary Rehberg

Applicant

v.

Halifax Regional Municipality

Respondent

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	June 5, 2018, in Halifax, Nova Scotia
Counsel:	Matthew Moir, for the Applicant Randolph Kinghorne for the Respondent

By the Court:

Introduction

[1] When is a residential building sufficiently "*dangerous* unsightly or *unhealthy*", as defined in the HRM Charter, [1] to permit a court to conclude that the decision of the HRM Appeals Standing Committee to demolish it, is justifiable in law and fact? Much depends on the risks created by the premises being in that condition, to persons anticipated to be present thereon.

[2] It is not disputed that Mr. Rehberg's property at 3 Mercury Avenue, Harrietsfield, Nova Scotia, in the Halifax Regional Municipality, was "*dangerous* or unsightly" on or about March 12, 2015 when the Demolition Order was initially issued. [2] Mr. Rehberg says that by November 2, 2015, he had done sufficient work to make the premises no longer "*dangerous* or unsightly". He asked for, and received a reconsideration hearing by the HRM Appeals Standing Committee on February 18, 2016. The Committee reconsidered the March 12, 2015 order, but a motion to extend the time for Mr. Rehberg to comply with the Demolition Order was not passed. Therefore, the March 12, 2015 order to demolish the property could have been carried out at any time after February 18, 2016.

[3] Mr. Rehberg filed a Notice for Judicial Review on March 30, 2016. Absent material changes in circumstances, HRM agreed to not to move forward with the demolition until such time as the Judicial Review has been finally determined.

[4] Mr. Rehberg asks this court to "[set] aside the Orders to Remedy Dangerous or Unsightly Premises by Demolition".

[5] When on February 18, 2016, the Committee made its decision not to grant any further extension to Mr. Rehberg to remedy the "*dangerous* or unsightly" premises, arising from its March 12, 2015 Order, it had to turn its mind to whether, at that time, the premises remained "*dangerous* or unsightly".

[6] Mr. Rehberg's lawyer at the time, explained at the February 18, 2016 Committee meeting that the case should be re-opened because extensive work had been done on the property. He also confirmed that his client did not have the funds

[1] c.39, SNS 2008, as amended
[2] HRM did not act within the four months' deadline it had set to allow Mr. R to remediate the property.

available at that time, to complete the electrical work, but that once that work was completed, for which he gave no deadline, all subsequent remaining work to be done could also be completed.

[7] That the Committee refused to grant any further extension, suggests that it was satisfied the premises remained "*dangerous* or unsightly". It also suggests that the Committee was not satisfied that Mr. Rehberg was in a position to remedy in a timely manner those matters that needed to be addressed to bring the property out of the state of being "*dangerous* or unsightly" ("DOU").

[8] I am satisfied that the Committee's decision to conclude the premises remained DOU, was not reasonable, and even if I am wrong about that, alternatively their decision not to grant at least, a four-month extension to complete the required work, was unreasonable, given the progress that had been made, and expenses incurred by Mr. Rehberg.

[9] Therefore, I quash the February 18, 2016 decision taken by the Committee, and remit the matter back to the Committee for reconsideration – i.e. whether *at present* the premises are "dangerous or unsightly" as per ss. 3(q) and 356 of the Halifax Charter, and if so, to consider the appropriate remedy.

Overview

[10] Mr. Rehberg is the owner of property at 3 Mercury Avenue, Harrietsfield, in the Halifax Regional Municipality. HRM Bylaw Compliance officers concluded that those premises were un-inhabitable, being in an "unsafe condition", which posed an "immediate danger to public safety". As a result, on January 17, 2013, an Order to Vacate Unsafe Premises was issued to the owner and tenant living there. At that time, the premises had no electricity, non-watertight plumbing, and an unsafe source of heating.

[11] Since that time, Mr. Rehberg repeatedly advised HRM staff that he would bring the building up to a standard such that it would not be DOU. [3] For unknown reasons, he was not able to diligently do so.

[12] On April 15, 2014, Mr. Rehberg obtained the building permit valid for two years. On November 21, 2014, both a Building Official, [4] and a Bylaw Compliance

[3] Further particulars are summarized in HRM's brief at paras. 10 – 36

Officer, attended at the premises. The Building Official completed a report of habitability and structural integrity, and recommended that "the building in its current condition poses a potential hazard to anyone intending to enter it as it is *structurally unsound* and will continue to deteriorate further. From a cost standpoint, the repair/renovation of the building from its present state of deterioration would not be financially feasible, demolition is recommended".

[13] On January 8, 2015, Mr. Rehberg attended a meeting of the HRM Regional Council Appeals Standing Committee ("the Committee") to which all cases of recommended demolition *must* be forwarded for approval [5]. The matter of the November 21, 2014 staff's recommendation for demolition of 3 Mercury Avenue was deferred for two months. Mr. Rehberg was advised in writing "that the Committee deferred the matter for two months *with conditions that during that time you secure the property, commence with extensive renovations and repairs to the building and submit a renovation plan to the Committee. Further, that you provide the Committee with a signed letter by a certified engineer indicating that the building is structurally sound*."

[14] In the two month interim, two site inspections confirmed, as one put it, that "the property remains vacant and secure, a site inspection did not reveal any change to the condition of the house".

[15] On February 20, 2015, By-Law Compliance Officer Michael Morgan issued an order under the Building Code, [6] requiring Mr. Rehberg to *provide* by March 9, 2015:

1. *An engineer's Structural Analysis Report*, detailing "all aspects" of structural deficiencies, including analysis of the roof, beams, columns, walls, floor assembly, beams, columns and wall supporting the floor assembly, the foundations and the footings, and also to provide a detailed cost/benefit analysis report, detailing the costs and benefits associated with the recommendations of the structural report, as well as repairs to "plumbing, electrical and mechanical systems, swimming pool, exterior decks, all water damaged areas, remediation of black

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[4] As requested by the attending Bylaw compliance officer – p. 52 record – i.e. requested "pursuant to part 15, HRM Charter"
[5] See ss. 354 – 356, *HRM Charter*
[6] P., 55 Record

growth on the interior of the building and control of animal infestation"; and

2. A detailed cost-benefit analysis report… associated to, repairs and recommendations contained in the structural analysis report… [and] with, repairs regarding the plumbing, electrical and mechanical systems, swimming pool, exterior decks, all water damaged areas, remediation of black growth on the interior of the building and control of animal infestation".

[16] On March 12, 2015, the Committee considered HRM staff's request for the issuance of a Demolition Order.

[17] Mr. Rehberg attended that Committee meeting. He had not provided any of the reports required by the February 20, 2015 "Order to Comply". He advised the Committee that "he needs about a year to continue to make repairs and renovations", and "that he would replace the bad insulation, replace flooring, have an electrician install a new electrical panel, and install heat pumps and gyproc… it would cost him approximately $50,000 to bring the house up to standard". The Committee issued the Demolition Order which required Mr. Rehberg to comply within 120 days (i.e. by July 12, 2015).

[18] On October 13, 2015, a Building Official's Report concluded that, *inter alia*:[7]

> Proper support and alignment for front columns has been provided; repair for rot on rear deckboards is underway. Approximately 50% complete.; four 6" x 6" columns in the basement were installed as required by Griggs Engineering; there is presently no operational heating system; minor patches were made to main roof; no changes were made to pool roof. Areas were leaking during site visit in a few locations; new hot water heater was installed [except electrical connection] and water distribution lines reinstated; electrical not yet connected to utility; new electrical panel rough-in appears 85% complete [waiting on an inspection by Nova Scotia Power]; drainage and venting for kitchen sink and clothes washer has been completed; some plumbing lines are not capped, allowing possible ingress of sewer gas into the building; there is visible black growth on a significant amount of the painted white trim, including casing, baseboards and door slabs; most signs of animal infestation have been remedied, although there remain some window openings in which they could enter; the interior finishes of the pool area were being removed at time of inspection; approximately six new

[7] P. 14, Record

> windows have recently been installed. Many of the existing windows remaining have one of their two panes broken.

[19] The report concluded under "Public Safety Considerations": "rear deck is under repair (to replace rotted wood) but not complete, and may pose a risk to anyone walking on the surface".

[20] Under "Building Official's Overall Recommendation Regarding Demolish Request":

> The building is undergoing renovation, repairs and structural upgrades as listed above. Work previously required by the structural engineer has been completed. Recommend verification of work by structural engineer of record.

[21] On November 3, 2015, Mr. Rehberg provided HRM with a copy of a report from Griggs Engineering Limited, which HRM staff characterized as "indicating changes to the house and pool indicate that the building is now structurally sound". On November 27, 2015, through his counsel's letter, Mr. Rehberg asked the Committee to review and reconsider the Demolition Order: [8]

> … We hereby ask that the Appeals Standing Committee review and reconsider its Order in light of his efforts over the past several months (in conjunction with staff at the Bylaw Enforcement, Planning and Zoning) to remedy conditions at the property. In this regard, we attach herewith a letter dated November 2, 2015, from Griggs Engineering Limited indicating "the structure has been upgraded as recommended and therefore our opinion is that this building is structurally sound.

[22] On February 18, 2016, the Committee heard Mr. Rehberg's request for reconsideration.

[23] Mr. Rehberg's legal counsel made submissions. The only new evidence were the updates of Mr. Rehberg's efforts and the property's condition between March 12, 2015 [9] and February 18, 2016, in addition to the Griggs' Engineering report dated November 2, 2015, indicating the premises were now structurally sound. HRM staff provided an updated (October 13, 2015) Building Official's Report relative to habitability and structural integrity and recent photographs of the

[8] Letter from counsel Leon Tovey; p. 17, Record
[9] Photos taken March 9, 2015 seen at pp. 57-67, Record

premises. [10] A motion to extend the time for compliance with the Demolition Order was not passed. [11]

[24] On March 30, 2016, an application for judicial review of the February 18, 2016 decision of the Committee was filed with the court. Since then HRM has suspended efforts to have the demolition take place, pending outcome of the review.

Position of the parties

Mr. Rehberg

[25] Regarding the controversial issues, Mr. Rehberg says, that "this court is limited to a review of the February 18, 2016 decision", [12] and:

i. Standard of review – "the decision under review is the one which the Committee, having already determined that it would reconsider its earlier decision to order the house demolished, decided that demolition, insofar as it was ever warranted, remained warranted on February 18, 2016. In order to make that decision, the Committee was required to consider whether the premises were dangerous or unsightly. As we will see, that is a question to be reviewed on a standard of correctness"; [13] which standard of review also applies "to the question of whether demolition is the appropriate remedy when premises are found to be dangerous or unsightly". [14]

ii. The Committee's application of the law to the relevant facts was a legal error – the Committee, in considering whether to re-open or review their decision to demolish the building, should have determined *anew* whether the

[10] i.e. - pp. 21-29 Record, taken Feb 5, 2016
[11] Within a half hour of that decision Mr. Rehberg applied for a renewal of his building permit that was set to expire in April 15, 2016. He received a new building permit valid until April 15, 2018.
[12] Although the March 12, 2015 order is not under review, he acknowledges that the court can consider it as part of the factual circumstances preceding the February 18, 2016 decision.
[13] Citing, *Doucette v. HRM*, 2015 NSSC 151, per Moir J.
[14] Citing *Sydney Precision Machining Ltd. v. CBRM*, 2003 NSSC 222, per Edwards J.

premises as of February 18, 2016 were DOU, and if so, whether demolition as opposed to repair, was "necessary to remedy danger or unsightliness". The Committee however, effectively determined that Mr. Rehberg was purposefully taking too long in remediating the property, and thereby "stepped out of their role of enforcing dangerous and unsightly premises' legislation, and into the role of enforcing the *Building Code Act*. That was the role of the Building Official. Mr. Rehberg still had more than two years to complete the renovations. [15] He just needed to keep the building to the standard required under the dangerous and unsightly premises legislation while he finished them; [16]

iii. The Committee's February 18, 2016 decision, as a matter of fact, was unreasonable-given that the conditions they set out for Mr. Rehberg to achieve a non-DOU status for the property "were not set out in sufficiently clear terms for [Mr. Rehberg] reasonably to have known how [and when] to comply with those conditions, and insofar as they were discernible, [they] were unreasonable". Moreover, given that Mr. Rehberg was in the process of remediating the premises, "the definition of 'dangerous or unsightly' must be applied by viewing the premises as 'premises under repair', and in ignoring or minimizing the ongoing attempts at remediation, the Committee rendered an unreasonable decision to let the demolition proceed.

HRM

[26] HRM says:

i. Standard of review – insofar as this court reviews the Committee's interpretation of the relevant *substantive*

[15] In his May 22, 2018 written submission, Mr. Rehberg concedes that strictly speaking this was incorrect: "In fact, Mr. Rehberg had applied for, and was issued, only a two-year building permit, which was still effective when the February 18, 2016 decision was made, and *which was renewable* for just over two years past that date." I note that immediately after the hearing, he did apply for, and receive, a further two-year renewal.

[16] See Ms. Phillips's raising of this issue with the Committee – March 12, 2015 record 58: 06 to 58: 47.

HRM Charter provisions, because these provisions are also considered in the first instance by the Provincial Court and this court, [17] the Committee will be held to a correctness standard; whereas, the court should defer to the Committee and use a standard of reasonableness regarding issues of procedure and discretionary decision-making, such as whether the Committee should have on February 18, 2016 reconsidered its position that the demolition should proceed. [18] Similarly, whether in fact the premises were DOU on or about February 18, 2016, and the appropriate remedy if they are found to be still DOU, is largely a question of fact and subject to review by this court on a standard of reasonableness;

ii. By re-opening their consideration of the matter on February 18, 2016, the Committee necessarily signaled that it was re-considering whether the premises were DOU. Mr. Rehberg was represented by legal counsel. No complaint was made on the record then, or now, about procedural unfairness. The Committee had the Griggs' Engineering report of November 2, 2015 and HRM staff had provided an updated Building Official Report relative to its habitability and structural integrity and recent photographs of the premises. Any work Mr. Rehberg had done to that point on the premises since its March 12, 2015, Demolition Order was known to the Committee. At the time of the decision, it should be inferred that the Committee reasonably found that the premises remained DOU. The Committee never formally ordered Mr. Rehberg to effect remedial work to the standards required by the *Building Code Act*. Its

[17] See ss. 369, 354 and 357 *HRM Charter - Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, at paras. 13 – 15, regarding interpretation of their "home-statute"; and *Doucette* at paras. 41-3

[18] See *Alberta (Information and Privacy Commissioner) v. Alberta Teachers Association*, 2011 SCC 61 at para 34 – HRM points out that there is no express provision contained in the HRM Charter for an appeal or review of the Demolition Order, however if the order is no longer warranted by the circumstances, then it is implicit that HRM has the authority to review the situation and vary or withdraw the order as it deems appropriate- viz. use of the statutory language, "may order"; see *Homburg Canada Inc. v HRM*, 2003 NSCA 61, at para. 18 -moreover, the Committee was not *functus officio- St. George's Lawn Tennis Club v HRM*, 2007 NSCA 26

paramount concern remained whether the premises were DOU, and in this case, some of the Building Code violations were relevant to that consideration. The Committee was open to Mr. Rehberg presenting detailed plans showing when he would have achieved *Building Code Act* standards [19] and other remediation of the premises, such that they were no longer DOU. Mr. Rehberg did not present such a plan;

iii. Moreover, the simple issuance of a building permit, is of no legal effect in relation to premises that have been declared DOU and ordered demolished. Notwithstanding the issuance of the building permit, the decision of the Committee to issue and continue a Demolition Order was reasonable. As to the reasonableness of the remedy decision, it should be borne in mind that, *on March 12, 2015 when the Demolition Order was issued, Mr. Rehberg had advised HRM that he could complete the repairs within a year*. The purpose of the writ of *certiorari*, and therefore judicial review in the present case, is to provide persons with *timely* relief from the unfair exercise of governmental powers. Whether there is an unfair exercise of governmental power has to be seen in context. That context includes the facts that: on or about, January 17, 2013, Mr. Rehberg received notice that the property was an "immediate danger to public safety", HRM Bylaw Compliance issued an Order to Vacate Unsafe Premises, which order remains in effect; [20] on January 8, 2015, Mr. Rehberg attended a Committee meeting convened to consider an Order for Demolition, and at that time was advised that, by March 9, 2015, he would need to obtain an engineering inspection of the

[19] Which are seen to be "designed to ensure that buildings are structurally sound, safe from fire, free of health hazards, and accessible. Health and safety are the National Building Code's primary objectives… The minimum standards set out by the National Building Code and, consequently, the Nova Scotia Building Code, are said to concern matters of health and safety… Arguably, then, non-compliance with the Building Code does impact health and safety. It would follow that the inspections for Code compliance conducted by the Municipality are intended to address matters of health and safety, broadly interpreted." – *Flynn v. HRM*, 2005 NSCA 81, at paras. 17 and 30

[20] A succinct summary of events is found at paras. 9 – 36 of HRM's brief

> house; on March 12, 2015 another meeting was held to consider the issuance of a Demolition Order. The minutes indicate Mr. Rehberg stated: "he needs about a year to continue to make repairs and renovations… that it would cost him approximately $50,000 to bring the house up to standard". The Committee issued the Demolition Order, to be enforced within 120 days (i.e. July 12, 2015). As late as June 15, 2015 there were no changes to the dwelling. On or about November 3, 2015, a copy of the Griggs Engineering Limited report had been filed "indicating changes to the house and pool indicate the building is now structurally sound"; on November 27, 2015, Mr. Rehberg requested that the Committee review and reconsider the Demolition Order.

My Conclusions

1. The standard of review

[27] I am persuaded that the proper standard of review regarding the Committee's decision whether the premises remained "dangerous or unsightly" is one of correctness, insofar as its citation and interpretation of the law is concerned.

[28] In relation to the Committee's application of the law to the facts it finds, and its exercise of discretion insofar as the remedy it imposes after finding premises "dangerous or unsightly", these are both subject to a reasonableness standard of review.

2. Did the Committee rely on, and properly interpret, the applicable law?

[29] Only the Committee has the power to issue Orders for Demolition. On February 18, 2016, also in attendance were the following staff: Mr. Rehbergandolph Kinghorne, Senior Solicitor; Ms. Tanya Phillips, Manager, Bylaw Standards; Ms. Cathy Collett, Legislative Assistant. I infer that the Committee was well positioned to appreciate the relevant law (particularly the Halifax Charter), and had its own experience, as well as the assistance of Mr. Kinghorne upon which to base its interpretation of that law.

[30] Mr. Rehberg suggests that the audio recordings of the Committee members and staff/counsels' exchanges at the February 18, 2016 meeting [21] strongly suggest that the focus was on Mr. Rehberg's lack of diligence in addressing the concerns raised in the March 12, 2015 meeting, which centred on making the building "habitable", and consequently it is open to Mr. Rehberg to argue that the Committee focused on Building Code violations that did not however amount to DOU premises.

[31] One must infer their reasoning, because only the motion whether to defer the demolition for another four months was put to the Committee, and defeated. They were not expressly asked to determine whether they collectively concluded the premises remained DOU. [22]

[32] I infer that the Committee was well aware that it had to remain satisfied that the premises were DOU, and did so conclude, relying on the proper law and interpretations thereof, before it considered the motion "that a four-month extension be granted to complete the required work".

3. Was the Committee's finding reasonable, that the premises remained "dangerous or unsightly" on February 18, 2016, and if so, was its decision not to extend for 4 months the opportunity for Mr. Rehberg to remediate the premises reasonable?

[33] The Committee was satisfied on March 12, 2015 that the premises were "dangerous or unsightly". [23] The basis for that conclusion is relevant to the February 18, 2016 decision, because it sets a baseline reference point, from which the reasonableness of the decision under review can be assessed.

[34] Submitted at that time by Mr. Rehberg, were photos; a December 16, 2014, Demolition Report [24] recommended demolition of the buildings; [25] and a

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[21] Of which there is no transcription; as a matter of civil procedure, in my opinion, while the best evidence are the audio discs, in all cases hereafter, on judicial reviews these *must* be transcribed by a certified transcription service/person at the expense of the party preparing the Record.
[22] As had been concluded at the March 12, 2015 meeting, after a motion to that effect was put and passed – see p. 37 Record.
[23] See the Record, pp. 33 – 38.
[24] Authored by Bob Bjerke, Chief Planner and Dir., Planning and Development – p. 79, Record, which notably was prepared pursuant to the DOU provisions of the Halifax Charter- ss. 3(q) and 356.
[25] See also associated Building Official's Report November 21, 2014 – p. 52 Record; which under the heading "public safety considerations" recommended demolition.

Supplementary staff report dated February 23, 2015, [26] which is identical to the original November 21, 2014 report except that it includes in the chronology the activities between dates of January 5 – 26, 2015, though it maintains "the state of the property suggests no viable alternative to the recommendation by Staff [to demolish the building]".

[35] The November 21, 2014 report [27] reads in part:

> Structure – Condition relative to habitability and structural integrity: wood-frame single unit dwelling with masonry and stucco cladding. The support columns for the front door overhang have been compromised and are at risk of collapse. The rear deck contains significant rot.
>
> Foundation – Condition relative to habitability and structural integrity: concrete foundation (fair condition).
>
> Heating services – Condition relative to habitability and structural integrity: forced-air furnace with electric baseboard.
>
> Chimney – Condition relative to habitability and structural integrity: masonry (fair condition).
>
> Roof – Condition relative to habitability and structural integrity: the asphalt shingles are in extremely poor condition causing water damage throughout the building.
>
> Services – Condition relative to habitability and structural integrity: well water with septic system; the plumbing and electrical systems have been compromised due to the theft of copper tubing and wire; electricity has been disconnected.
>
> Other – Condition relative to habitability and structural integrity: there is substantial water damage and subsequent black growth throughout the building; there are multiple signs of animal infestation.

[36] Under Public Safety Considerations:

> The plumbing and electrical systems have been compromised due to the theft of copper tubing and wire; anyone attempting to use/repair these systems could be at serious risk of injury; the support columns for the front door overhang have been compromised and are at risk of collapse; the empty swimming (pool indoor) is not protected from unauthorized access and could pose a danger to anyone in or around it; the rear deck contains significant rot; anyone intending to stand on it could be at risk of injury; there is substantial water damage and substantial black growth throughout the buildings; anyone intending to enter should take

[26] P. 315, Record.
[27] P. 52 Record

> precautions against airborne contaminants; there are multiple signs of animal infestation (rodent); anyone intending to enter could be at risk of injury; the building is susceptible to criminal activity due to its secluded location.

[37] Under Building Official's Overall Recommendation Regarding Demolish Request:

> The building in its current condition poses a potential hazard to anyone intending to enter as *it is structurally unsound* and will continue to deteriorate further. From a cost stand-point the repair/renovation of the building from its present state of deterioration would not be financially feasible, demolition is recommended.
>
> [my italicization added]

[38] On February 20, 2015, Michael Morgan, Building Official, issued an Order to Comply with the Building Code and Regulations: [28]

> The building at above noted property is *not in compliance with the Code and is deemed an 'unsafe' building*… [and] In accordance with the *Nova Scotia Building Code Act*… and Articles 2.5.1.2 and 2.5.1.3 of the Nova Scotia Building Code Regulations, the above-noted property shall, effective immediately, cease any occupancy in the building due to the 'unsafe' conditions of the building.
>
> The 'unsafe' conditions are *structural in nature*, and as the owner you shall complete the following:
>
> 1-Provide a structural analysis report conducted by a professional engineer licensed in the Province of Nova Scotia…4-as the owner you shall provide a detailed cost benefit analysis report…5-as the owner, you shall comply with requirements of this Order by March 9, 2015.
>
> [my italicization added]

[39] A motion was put and passed:

> Moved by Councillor Adams, seconded by Councillor Walker, that the Appeals Standing Committee finds the property to be dangerous or unsightly as per section 3(q) of the Charter and as per section 356 of the Charter, orders demolition of the dwelling, including but not limited to, the removal of all demolition debris, backfilling of any foundation or crawlspace, and disconnecting any and all utility connections to the standards set by each respective utility service provider, so as to leave the property in a neat, tidy, environmentally compliant and safe condition within 120 days after the order is posted in a conspicuous place upon the property or personally served upon the owner.

[28] P. 55, Record

> Otherwise, the Municipality will exercise its rights as set forth under part 15 of the Charter.

[40] The Order to Remedy Dangerous or Unsightly Premises by Demolition read in part: [29]

> And further take notice that your failure to comply with the requirements of this order within 120 days after service, the Administrator, or any person authorized by the Administrator may enter upon the property without warrant or other legal process and carry out the work specified in this order;

[41] The evidence before the Committee included that:

> On or about February 20 and 26, 2015, respectively Mr. Rehberg had been given copies of an "Order to Comply" [30] with the *Nova Scotia Building Code Act and Regulations*, by March 9, 2015; *and*
>
> -a "Notice to Appear" on March 12, 2015 in HRM Council chambers regarding the alleged "dangerous or unsightly" premises and the seeking by HRM of a Demolition Order to be carried out within 30 days of the date of the order. [31]

[42] Mr. Rehberg was thereby required to do *two* things by the Committee – comply with the Building Code, and work towards avoiding a continued DOU premises situation at 3 Mercury Avenue.

[43] I bear in mind that, depending on the circumstances in each individual case, some, but not necessarily all, Building Code and Regulations violations associated with specific premises *may* materially contribute to one concluding that premises are also DOU.

[44] In the lead-up to the March 12, 2015 Committee meeting, it does appear that the overwhelming focus was on the Building Code and Regulations violations, and making the premises "suitable for human habitation".

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[29] P. 150, Record

[30] Which stated: "the building… is not in compliance with the Code and is deemed an "unsafe" building…" –p. 55 Record

[31] Pp. 54 – 56 Record; by registered mail January 9, 2015 Mr. Rehberg was advised that "the Committee deferred the matter for two months to March 12, 2015) with conditions that during that time you secure the property, commence with the extensive renovations and repairs to the building and submit a renovation plan to the Committee. Further that you provide the Committee with a signed letter by a certified structural engineer indicating that the building is structurally sound."

[45] It was therefore, not precisely clear what the Committee expected Mr. Rehberg to do, beyond remedying the Building Code/Regulations violations cited, to make the premises no longer DOU by July 12, 2015.

[46] Section 356 of the Halifax Charter gives Council its authority to impose DOU orders:

> (1) Where a property is dangerous or unsightly, the Council *may order* the owner to remedy the condition by removal, demolition or repair, *specifying in the order what is required to be done.*

[47] The subsection is permissive in that "Council may order…". In my opinion, if they do order that an owner remedy the condition "by removal, demolition, or repair", in each of those respective situations they *must specify*, in an intelligible manner that can be understood by the owner, what must be done to remedy the condition. Otherwise, an owner is left uncertain as to precisely what needs to be done to avoid further consequences.

[48] In March 2015, the Committee appears to have been primarily concerned with the structural deficiencies regarding the premises.

[49] The March 12, 2015, Minutes record that Mr. Rehberg:

> Commented that the exterior of the house is secure, and all lower-level windows have been boarded. He indicated that the roof has been fixed and the column on the front of the house has also been secured, although there has been much done inside because of difficulties accessing the house due to the weather. Mr. Rehberg indicated he has plans for the property and several hundred thousand dollars invested in the house, and he needs about a year to continue to make repairs and renovations… Mr. Rehberg clarified that he needs to have the structural engineer assess the property before he can submit a renovation plans… Advised that Griggs Engineering in Enfield is the structural engineering firm [he] has hired… Mr. Rehberg indicated that it would cost him approximately $50,000 to bring the house up to standard, and he and his employees would do most of the work themselves… [Councillor Adams inquired of Mr. Rehberg what his plans would be if the case were deferred to July] Mr. Rehberg advised that he would have a structural engineer attend the property and complete a renovation plan. He advised he would replace the bad insulation, replace flooring, have an electrician install a new electrical panel, and install heat pumps and your product… indicated he would rather have six months to complete the work, but will try his best.

[50] By February 18, 2016, material changes in circumstances had occurred. [32]

[51] Notably in the Minutes, it is apparent that Mr. Mark Prosser, [33] "informed the Committee that August 24, 2015, was the last time he was *inside* the property and that no visible exterior changes had been made, except for several replaced deck boards". [34]

[52] Similarly, from the Building Code perspective:

> Mr. Brian Murray, HRM Building Official, in response to questions of clarification from Committee members regarding the original scope of the required work, informed the Committee that the structural repairs have been completed and the broken windows have been covered over. In response to a question from Councillor Adams regarding whether the specific work outlined in the motion for March 12, 2015 had been completed, Mr. Murray explained that, while there is a new [electrical] panel on-site and some progress has been made, he has not seen evidence of heat pumps being installed or a renovation plan… Mr. Murray explained that drywall was installed throughout the main floor, two new footings have been installed for the columns, and that structural repairs were done the building has been approved as structurally sound. [35]

[53] By February 18, 2016, material changes in circumstances had occurred. [36]

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[32] See for example the October 13, 2015, Building Official's Report (p. 14 Record) which concluded with its Overall Recommendation Regarding Demolish Request: "The building is undergoing renovation, repairs and structural upgrades as listed above. *Work previously required by the structural engineer has been completed*. Recommended verification of work by structural engineer of record."

[33] Bylaw Compliance Officer, whose focus was the DOU nature of the Committee's concerns: he was responsible for, and had issued to Mr. Rehberg, the December 15, 2014 Notice to Appear for the January 8, 2015 Committee meeting which was to consider the "Application by Staff for an Order pursuant to section 356 of the Charter to require demolition of the building… within 30 days from the date of the Order"- p. 53 Record

[34] In that report at p. 39 Supplemental Record, Mr. Prosser commented on August 20, 2015: "call from [Mr. Rehberg] requesting more time. He states he has everything sunk into this house and we can't demolish it. Asked for more time. I advised I am not willing to provide more time, that in fact we have given more than what was provided for in the demolition order and we would expect the work to be done at this point to have 90 to 95% done. I consider his work to date at no more than 20%.". However, since his last visit, the structural concerns were all addressed, as noted in the October 13, 2015 report from the Building Official's Report at p. 14 Record, made "pursuant to part 15 (Dangerous or Unsightly Premises) of the HRM Charter as requested by the By- law Enforcement Officer [Mark Prosser]". Notably at Tab 8, p. 28 of the Supplementary Record it appears that the demolition was to proceed, but that Manager Tanya Phillips advised it is 'on hold' as of November 26, 2015."

[35] P.3, Record

[36] See for example the October 13, 2015, Building Official's Report (p. 14, Record) which concluded with its Overall Recommendation Regarding Demolish Request: "The building is undergoing renovation, repairs and structural upgrades as listed above. *Work previously required by the structural engineer has been completed*. Recommended verification of work by structural engineer of record."

[54] In these circumstances, was it reasonable for the Committee to effectively confirm the DOU status of the property, and refuse to provide any extension to Mr. Rehberg to continue remediating the interior of the buildings?

[55] Firstly, regarding the DOU status of the buildings/premises.

[56] Section 354 of the Halifax Charter puts a positive obligation on owners: "Every property in the Municipality must be maintained so as not to be dangerous or unsightly".

[57] Section 3(q) of the HRM Charter defines "dangerous or unsightly":

> "Dangerous or unsightly" *means* partly demolished, decayed, deteriorated or in a state of disrepair so as to be dangerous, unsightly or unhealthy, and includes property containing
> (i) ashes, junk, cleanings of yards or other rubbish or refuse or a derelict vehicle, vessel, item of equipment or machinery, or bodies of these or parts thereof,
> (ii) an accumulation of wood shavings, paper, sawdust, dry and inflammable grass or weeds or other combustible material,
> (iia) an accumulation or collection of materials or refuse that is stockpiled, hidden or stored away and is dangerous, unsightly, unhealthy or offensive to a person,
> or
> (iii) any other thing that is dangerous, unsightly, unhealthy or offensive to a person,
> and includes property or a building or structure with or without structural deficiencies
> (iv) that is in a ruinous or dilapidated condition,
> (v) the condition of which seriously depreciates the value of land or buildings in the vicinity,
> (vi) that is in such a state of non-repair as to be no longer suitable for human habitation or business purposes,
> (vii) that is an allurement to children who may play there to

> their danger,
>
> (viii) constituting a hazard to the health or safety of the public,
>
> (ix) that is unsightly in relation to neighbouring properties
>
> because the exterior finish of the building or structure or the landscaping
>
> is not maintained,
>
> (x) that is a fire hazard to itself or to surrounding lands or
>
> buildings,
>
> (xi) that has been excavated or had fill placed on it in a
>
> manner that results in a hazard,
>
> or
>
> (xii) that is in a poor state of hygiene or cleanliness;
>
> [my highlighting]

[58] The focus in this case is on the concerns that Mr. Rehberg's property is dangerous or unhealthy. Once its structural soundness was upgraded by November 2015, the remaining material concerns related to the interior of the building. HRM's position has focused on the premises being "no longer suitable for human habitation…".

[59] It is not seriously suggested that it is sufficiently "unsightly" to justify demolition. Moreover, the building was found to be "structurally sound".

[60] Mr. Rehberg's counsel relied on Justice Moir's decision in *Doucette v. HRM*, 2015, NSSC 151, particularly as follows:

> 55 The *Aloni* decisions recognize that a finding of unsightliness has to be objective, but it also has to be proportionate to lawful uses. This interpretation resolves the conflict between the unsightly premises legislation and the building permit legislation without doing any violence to the wording of either.
>
> 56 A property is not unsightly in the abstract. For the unsightly premises legislation to govern, the property must be unsightly in relation to its lawful uses. So, a junkyard in a place zoned for junkyards is not unsightly just because it is a junkyard. It has to be unsightly as junkyards go: *Colchester (County) v. Spencer*, 2004 NSSC 156 upheld on other grounds, 2005 NSCA 50.

[61] While that decision relates to "eyesore" concerns of the unsightliness of premises, and the exterior of a building, or the otherwise visible portions of the property, I agree that those considerations may also be applied with modification to the interior of a building claimed to be "dangerous" or "unhealthy".

[62] By that I mean, the Committee should have used an objective test in assessing whether the interior of the premises, or some implicated exterior aspect thereof, create demonstrable conditions of "dangerousness" or an "unhealthy" status regarding the property.

[63] Part of their consideration underlying a determination of whether there were conditions of "dangerousness" or an "unhealthy" status regarding the property, should have included a consideration of the existing use of the property and building at the material times.

[64] The building was secured against simple trespassers and was under remediation. Mr. Rehberg had expressed his intention to remediate the building, in an effort to bring it up to Building Code standards. The Committee knew that, by law, until those standards had been met, no Occupancy Permit would be issued in relation to the building.

[65] No unauthorized person was reasonably anticipated to be inside the building until it was remediated. No one would therefore have been reasonably anticipated to be unknowingly exposed to any dangerous or unhealthy conditions that existed therein even *if* those conditions were present.

[66] Thus, based on the facts before the Committee on February 18, 2016, was their decision to immediately allow the demolition to proceed reasonable?

[67] I find that it was not. It was not reasonable to conclude that the property had, objectively assessed, demonstrable conditions of "dangerousness" or "unhealthy" status, given its circumstances: that the property was not inhabited, nor intended to be inhabited in near future.

[68] On or about February 18, 2016, the arguably dangerous or unhealthy conditions in the building included: "*visible black growth on a significant amount of painted white trim, including: casings, baseboards and door slabs*". [37]

[69] A more complete comparison of the condition of the property by HRM staff before the February 18, 2016 Committee hearing follows:

> [November 21, 2014: "there is substantial water damage and subsequent black growth throughout the building; there are multiple signs of animal infestation"]

[37] Compare p.52 (November 21, 2014) and p.14 Record (Oct 13, 2015) Building Officials Report

versus

[October 13, 2015: "there is visible black growth on a significant amount of painted white trim, including: casing, baseboards and door slabs; most signs of animal infestation have been remedied, although there remain some window openings in which they could enter; the interior finishes of the pool area were being removed at time of inspection; approximately six new windows have recently been installed. Many of the existing windows remaining have one of their two panes broken"]

[70] Alternatively, for similar reasons, I conclude that the Committee decision not to grant a four-month extension was unreasonable.

Whether to exercise the court's discretion to order a reconsideration?

[71] HRM urges the court, in spite of the findings made, to decline to order the Committee to reconsider whether the conditions to support a demolition order still exist, and whether any extension should be given to Mr. Rehberg to remediate the property so that it is not, if found to be so, still DOU. It argues that the principles underlying this Court's "judicial review" are rooted in the prerogative writ of *certiorari*. [38]

[72] HRM says that ordering this matter for reconsideration effectively rewards Mr. Rehberg for past non-compliance. HRM urges the court to infer, in light of Mr. Rehberg's not remediating the property to the point of making it "suitable for human habitation", or even presenting a "renovation plan" since even before the court process was engaged in March 2016, that he has not had an ongoing *bona fide* intention to do so, and therefore he is unlikely to do so if this court remits the matter for reconsideration to the Committee. [39]

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[38] *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53, at para. 87: **"**In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief *(MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52). This would include the urgent need for a final answer."

[39] Supplemental Record, Tab 8, p. 26 – August 2, 2016 site inspection by Mark Prosser – "a site inspection of the dwelling at 3 Mercury… revealed no change to the condition. It continues to deteriorate, it also has multiple open access points, broken windows and kicked-in doors. I spoke with tenant Tom at 42 Brunt [Road, Harrietsfield, HRM], he stated he is still security for all the properties, I advised him of the open access, he stated he will call the property owner to secure"; and Tab 8, p. 26-August 4, 2016,case review by Mark Prosser – "met with property owner [Mr. Rehberg's] lawyer Matthew Moir at the Appeals Standing Committee, he was there for Case 245613, 80

[73] I observe here that both counsel agreed that the delay between the filing of the Notice of Judicial Review in March 2016, and having the matter heard June 5, 2018, was not attributable to bad faith or lack of diligence by Mr. Rehberg.

[74] I appreciate the frustration of HRM's staff regarding the reality that Mr. Rehberg has been able to put off at least until now, doing to the premises what he was ordered to do as far back as January 8, 2015. However, in the circumstances here, I find no sufficient reason to decline to exercise, what would otherwise be a proper exercise of, my discretion by remitting the matter back for reconsideration.

[75] Therefore, I will order a reconsideration of this case.

Relief

[76] The February 18, 2016 decision taken by the Committee is quashed; the matter is remitted to the Committee for reconsideration.

Costs

[77] Counsel agreed the cost of $500 should be awarded to the successful party. I am satisfied that it is just and appropriate to award $500 costs in favour of Mr. Rehberg.

Rosinski, J.

Brunt [Road]… I also explained open access found earlier in the week at 3 Mercury for Case 202675, he stated he would make sure Roger secures the property."