SUPREME COURT OF NOVA SCOTIA

Citation: *Whyte v. Halifax Regional Municipality*, 2019 NSSC 238

Date: 20190726
Docket: 482054
Registry: Halifax

Between:

John Whyte, Dana MacKenzie, Bernie Power,
Valerie Wentzell and Faye Lee

Applicants

v.

Halifax Regional Municipality-North West Community Council,
Jesse Risser and Jenalee Risser

Respondents

DECISION

Judge:	The Honourable Justice Jamieson
Heard:	May 6, 2019, in Halifax, Nova Scotia
Final Written	July 26, 2019
Counsel:	David Wallbridge, for the Applicants Roxanne MacLaurin, for the Respondent (HRM) Peter Rumscheidt, for the Respondent (Rissers)

By the Court:

Introduction

[1] This is an Application for Judicial Review filed by the Applicants, John Whyte, Dana MacKenzie, Bernie Power, Valerie Wentzell and Faye Lee ("the Applicants"). The Applicants own properties that are either neighbouring or in close proximity to the subject property. The subject property, located on St. Margaret's Bay Road, is owned by Jesse and Jenalee Risser. They wish to build a single-family dwelling on the property.

[2] The Applicants filed a Notice for Judicial Review on November 5, 2018 and an Amended Notice for Judicial Review on January 31, 2019. The Applicants seek review of the decision of the Northwest Community Council-Halifax Regional Municipality ("Community Council") dated October 1, 2018 denying the appeals of a variance relaxing the minimum front-yard setback issued by the Halifax Regional Municipality Development Office ("Development Office"). The Community Council is a sub-council of Halifax Regional Council.

[3] The Applicants originally listed 12 grounds for review in the Notice for Judicial Review. The grounds for review were narrowed. Those set out in the Applicants' written and oral submissions fall under the following three assertions:

- They say under s. 250(3)(b) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c.39, as amended *("HRM Charter")* the small lot size, short distance to the road, and proximity to the water are all "difficulties" that the Record shows are common to the area. They say because the difficulties are common to the area, the variance appeals should have been granted.
- They say contrary to s. 250(3)(a), the variance violates the intent of the Land Use By-law for Planning Districts 1 and 3 (St. Margaret's Bay) ("LUB"). They say Community Council misinterpreted s. 4.19(3) of the LUB which created a watercourse buffer rather than reducing it, with an ultimate setback that was not attainable under the former LUB. In addition, they say Community Council was focused on the size of the lot but the wording in subsection 3 is focused on lot "configuration".
- They say Community Council granted the variance when there was no proof that the threshold conditions required by s. 4.5(a) of the LUB had been met.

[4] Halifax Regional Municipality ("HRM") filed a Notice of Participation on November 15, 2018. The Record was filed on February 11, 2019. A related judicial review was filed on December 13, 2018, concerning the Development Permit issued by the Development Office subsequent to the Community Council decision. That judicial review was heard immediately following this matter.

Background

[5] The Record filed by the Respondent HRM sets out the background to the October 1, 2018 decision of the Community Council dismissing the appeal of the variance, which had been issued on January 9, 2018 by the Development Officer, granting a reduction in the front-yard setback.

[6] The staff report prepared for the Community Council is dated August 17, 2017. The background section indicates a variance request was submitted to relax the minimum 20-foot, front-yard setback to eight feet to enable construction of a single-unit dwelling on an undeveloped waterfront property on St. Margaret's Bay Road (PID 40304198). The report indicates the lot does not meet current standards for lot size but states:

> … the Planning District's 1 and 3 Land Use By-Law (LUB) allows development permits to be issued for lots not meeting the current standard if they existed prior to the effective date of the LUB. The subject lot meets this requirement and is eligible for consideration of a development permit.
>
> The By-law also allows for reduction of required watercourse buffers on existing undersize lots to provide a practical building envelope while maintaining the other setbacks and yards required by the applicable zone in the LUB. The Development Officer has applied the watercourse buffer reduction to the greatest degree possible. However, practical building envelope cannot be achieved without further relaxation of the water course setback or reduction of the standard 20 foot front yard requirement. The applicant has requested consideration of a reduction to that minimum front yard requirement.

[7] The staff report notes that, in accordance with the *HRM Charter* all assessed property owners within 100 metres (being the Notification Area) were notified and three appeals were received.

[8] The report sets out the provisions of s. 250(3) of the *HRM Charter* and provides staff's responses in relation to each of the circumstances where a variance may not be granted. The report further includes a chart containing various of the Applicants' appeal comments and staff's response to each of the comments. The

staff report attaches map #1, which illustrates the Notification Area and map #2, illustrating the site plan for the subject property. It further attaches building elevations (North, East and 3D), the Variance Approval Notice, and the letters of appeal.

[9] The Minutes of the September 10, 2018 Community Council meeting, being the date the appeal was originally set to be heard, are included in the Record. At the request of the Applicants, who were seeking additional information, the matter was deferred to October 1, 2018.

[10] At the October 1, 2018 Community Council meeting, the Development Officer used a PowerPoint presentation to provide an overview of the variance under appeal. The PowerPoint presentation included topics for discussion, the site plan, photos of the site and a grading plan.

[11] The Record also includes the PowerPoint presentation utilized by the Applicants during their submissions at the appeal before the Community Council. The presentation includes slides relating to procedural paths and grounds for appeal. It also provides a number of photographs of the site, sets out comparators for required versus current site lot size, watercourse buffer and road setback. It includes the Applicants' position concerning s. 4.19A relating to datum, s. 4.19(3) relating to waterfront setback, and argues the difficulty experienced by this site is "general to the area."

[12] The Minutes of the Community Council meeting of October 1, 2018 are included in the Record and indicate Mr. Sean Audas, Development Officer, conducted the staff presentation. The Applicants, Ms. MacKenzie, Mr. Whyte and Mr. Power and the property owner, Mr. Risser, all spoke at the appeal. The Minutes indicate that the motion for Community Council to allow the appeal was "put and defeated."

[13] The Record also includes a transcription of the variance appeal hearing before the Community Council. Consistent with the process for judicial review, I have considered the briefs, authorities, oral argument and the Record.

Statutory Scheme

[14] In this judicial review the relevant legislation is the *HRM Charter*. Also of relevance are several sections of the LUB for Planning Districts 1 and 3. The relevant sections are set out below:

HRM Charter

Variance

250 (1) A Development Officer may grant a variance in one or more of the following terms in a development agreement, if provided for by the development agreement, or in land-use by-law requirements:

(a) percentage of land that may be built upon;
(b) size or other requirements relating to yards;
(c) lot frontage or lot area, or both, if

(i) the lot existed on the effective date of the bylaw,

or

(ii) a variance was granted for the lot at the time of subdivision approval.

…

(3) A variance may not be granted if

(a) the variance violates the intent of the development agreement or land-use by-law;
(b) the difficulty experienced is general to properties in the area; or
(c) the difficulty experienced results from an intentional disregard for the requirements of the development agreement or land use by-law.

Variance appeals and costs
252 (1) Where the Council hears an appeal from the granting or refusal of a variance, the Council may make any decision that the development officer could have made.

Planning Districts 1 and 3 Land Use By-law

4.5 EXISTING UNDERSIZED LOTS
(a) Except within the Tantallon Crossroads Coastal Village Designation as shown in Schedule L, and (RC-Jul 22/14;E-Oct 4/14) notwithstanding anything else in this By-law, a vacant lot held in separate ownership from adjoining parcels on the effective date of this By-law, having less than the minimum frontage, depth or area required by this By-law, may be used for any purpose permitted in the zone in which the lot is located and a building may be erected on the lot, provided that all other applicable provisions in this By-law are satisfied.

…

4.19 WATERCOURSE SETBACKS AND BUFFERS

(1) (a) No development permit shall be issued for any development within 20m of the ordinary highwater mark of any watercourse.

…

(c) Within the required buffer pursuant to clauses (a) and (b), no excavation, infilling, tree, stump and other vegetation removal or any alteration of any kind shall be permitted in relation to a development.

…

(3) Where the configuration of any existing lot, including lots approved as a result of completed tentative and final subdivisions applications on file prior to August 26, 2006, is such that no main building could be located on the lot, the buffer distance shall be reduced in a manner which would provide the greatest possible separation from a watercourse having regard to other yard requirements.

…

(6) Every application for a development permit for a building or structure to be erected pursuant to this section, shall be accompanied by plans drawn to an appropriate scale showing the required buffers, existing vegetation limits and contours and other information including professional opinions, as the Development Officer may require, to determine that the proposed building or structure will meet the requirements of this section.

4.19A COASTAL AREAS

(1) No development permit shall be issued for any dwelling on a lot abutting the coast of the Atlantic Ocean, including its inlets, bays and harbours, within a 3.8 metre elevation above Canadian Geodetic Vertical Datum (CGVD 28).

(2) Subsection (1) does not apply to any residential accessory structures, marine dependant uses, open space uses, parking lots and temporary uses permitted in accordance with this by-law.

(3) Notwithstanding subsection (1), any existing dwelling situated less than the required elevation may expand provided that such expansion does not further reduce the existing elevation.

(4) Every application for a development permit for a building or structure to be erected pursuant to this section, shall be accompanied by plans drawn to an appropriate scale showing the required elevations, contours and lot grading

> information to determine that the proposed building or structure will meet the requirements of this section.

The Issue

[15] There is only one issue for determination in this judicial review: should the decision of Community Council upholding the Development Officer's decision to grant a front-yard setback variance from 20 feet to eight feet be quashed?

[16] The Applicants submit that Community Council's decision to adopt the reasoning of the Development Officer in applying s. 250(3)(a) and (b) of the *HRM Charter* is unreasonable. I have set out their position below.

Standard of Review

[17] The standard of review to be applied when assessing the decision of Community Council is reasonableness. This is a deferential standard. Our Court of Appeal in ***Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd***., 2017 NSCA 72, held that the standard for reviewing a decision of Community Council on variance appeals is reasonableness. The question for the Court is not whether it agrees with the decision of the Community Council to uphold the issuing of the variance; rather, it is whether the decision falls within a range of possible outcomes which are defensible with regard to the facts and law. In assessing reasonableness, one must consider both the process of reasoning and the outcome in the context of the entire Record. Counsel for the Applicants and the Respondent agreed the standard is reasonableness.

[18] A majority of the Supreme Court of Canada defined "reasonableness" in ***Dunsmuir v. New Brunswick***, 2008 SCC 9:

> 47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals Development Office not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a

> range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The majority decision continued at para. 49:

> 49. Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "*Establishing the Standard of Review: The Struggle for Complexity*?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[19] In ***Casino Nova Scotia v. Nova Scotia (Labour Board)***, 2009 NSCA 4, the Court of Appeal provided insight into the ***Dunsmuir, supra,*** wording that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." Fichaud J.A. said:

> Several of the Casinos submissions apparently assume that the "intelligibility" and "justification" attributed by ***Dunsmuir*** to the first step allow the reviewing court to analyse whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process ***(Dunsmuir).*** They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons for the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes.
>
> [Emphasis added]

Position of the Parties

[20] The Applicants say the lot in question, at 4,395 ft², is more than 15,000 ft² smaller than the minimum lot area required by the LUB to obtain a Development Permit. It is situated on a steep slope, on a 70 kilometres-per-hour turn. The proposed structure is planned 12 feet from the water, rather than the required 66

feet, and eight feet from the highway rather than the required 20 feet. They say the variance should have been prohibited because "the difficulty experienced is general to properties in the area" (s. 250(3)). They say the Notification Area indicates four of the lots are smaller than the subject lot and all share the same common challenge of being sloped and sandwiched between the water and the road. They say this represents 30% of the properties in the Notification Area. The Applicants say the analysis in the staff report is devoid of any explanatory passages that would reveal a logical reasoning path and that the Development Officer's presentation on this point at the hearing also revealed serious inconsistencies which were unintelligible and internally inconsistent.

[21] The Applicants claim the Development Officer maintained contradictory positions regarding whether the issues were general to the area. They say that, in the transcript from the appeal hearing, the Development Officer first describes the property's proximity to the road and ocean, noting the property to be steeply-sloped and as being common. He subsequently states the exact opposite when specifically addressing the s. 250(3) requirement that the challenge sought to be overcome cannot be "general to the area." They say at no time did Community Council attempt to reconcile the contradictions. They also say Community Council ignored the evidence presented by the Applicants that the area is dense with small lots, sitting on the oceanside, with steep slopes in close proximity to a road.

[22] The Applicants say the variance violates the intent of the LUB and therefore cannot be allowed pursuant to s. 250(3)(a). The Applicants claim the staff report erroneously conflates the existing undersized lot rule (s. 4.5(a) of the LUB) with the watercourse buffer reduction (s. 4.19(3)). They say the direction found in s. 4.19(3) to reduce a watercourse buffer does not apply to "existing undersized lots" (s. 4.5(a)). They state, when applying the water course buffer, the staff report confirms that the decision-maker was applying a size analysis and ignores the requirement that it be the "configuration" of the lot that enables the accommodation. They say it is not possible for the Court to understand how the decision was reached because the analysis does not consider the requirements of the LUB. They further say that s. 4.19(3) requires the decision-maker to show regard for "other yard requirements" and that a 60% reduction is not regard for the yard requirement.

[23] The Applicants say Community Council ignored the requirements of s. 4.5(a) of the LUB because, in order to grant status as an Existing Undersized Lot ("EUL"), there had to be evidence that it otherwise met "… all other applicable provisions" of the LUB. It is their position that, because of its waterfront position,

it also had to meet the coastal protection rules set out in s. 4.19A before the variance was granted. They further say the staff report provided little to no detail about its analysis of whether the parcel in question even qualified for the EUL provision. They say the Development Officer's analysis rested solely on separate ownership of the two lots on the effective date of the By-Law, one lot being the oceanside lot at issue here and the other being a lot across the road. They say there was no discussion at any point by Community Council or the Development Office of the meaning of "adjoining" in the section. They say the Development Officer and Community Council failed to ensure the requirements of the rest of the LUB were satisfied before resting their footing on the EUL provision.

[24] The Applicants also assert that the staff report failed to provide a justification as to why a reduction of 12 feet was the "greatest possible separation from the water course" as required in s. 4.19(3). They say the Development Officer did not reduce a buffer but created one, and that the wording of the section cannot bear this approach.

[25] The Respondent, HRM, says that the Applicants in the Notice for Judicial Review are requesting review of a decision to deny an appeal of a variance **and** to issue a Development Permit by the Community Council. They say Community Council does not issue Development Permits. They are issued by Development Officers. They say a Development Officer -- not Council -- must issue a Development Permit if the development meets the requirements of the LUB (*HRM Charter*, s. 261(1)). They say variance applications are often made in conjunction with an application for a Development Permit and here the Rissers applied for both. HRM says that the only authority of Community Council was to hear an appeal from the granting of the variance (*HRM Charter*, s. 250).

[26] HRM takes the position that the only issue is whether the decision of Community Council, on the merits of the variance appeal, was reasonable. They say it was reasonable for Community Council to determine that none of the prohibitions in s. 250(3) applied to the Rissers' variance. In particular they say, with respect to s. 250(3)(b) of the *HRM Charter*, that the Development Officer identified various factors. These factors include the unusual lot configuration; the fact there was no uniform lot fabric (lots in the area were various sizes); some lots had water frontage (while others did not); lot size, in comparison to the surrounding lots; and proximity to the water. In addition, the Development Officer confirmed at the appeal hearing that the highway right-of-way plus the eight-foot setback meant the house would be almost 30 feet from the paved portion of St. Margaret's Bay Road. They further say Community Council was also made aware

of the Department of Transportation's (TIR) driveway approval for accessing the site.

[27] HRM states that the Development Officer can adjust a watercourse buffer under certain circumstances pursuant to s. 4.19(3) of the LUB. They say this decision cannot be appealed to Community Council and that, while the Development Officer provided some background information with respect to the eligibility of the lot for development and for watercourse reduction, Community Council's only task related to the front-yard variance under s. 250 of the *HRM Charter*. Ensuring the development met all the applicable LUB requirements rested solely with the Development Officer.

[28] HRM states that the Applicants' position, that the decision-maker misapplied LUB ss. 4.5(a), 4.19(3) and 4.19A, is without merit because the decision-maker was the Development Officer not Community Council. Community Council only has jurisdiction to deal with variance appeals under the *HRM Charter*.

[29] The Risser Respondents adopted the position of HRM.

Analysis

[30] The Notice for Judicial Review seeks judicial review of a decision dated October 1, 2018, of the North West Community Council under the variance appeal provisions of the *HRM Charter.* Section 250 provides:

> Where the Council hears an appeal from the granting or refusal of a variance, the Council may make any decision that the Development Officer could have made.

[31] Community Council, in its decision-making process, was not limited solely to review of the staff report that was prepared for the variance appeal. They were entitled to review all materials before them and consider all arguments presented. Under s. 250 they had authority to make any decision that the Development Officer could have made.

[32] This is a judicial review of a decision by Community Council to deny the appeal of a variance decision. It is not a judicial review of other decisions of the Development Office nor of its Development Officers. A Development Officer under the *HRM Charter* means a person(s) appointed by the Council "to administer its land-use and subdivision by-law" (s.258(1)). The Development Officer's decisions in relation to the LUB are not subject to appeal to Community Council.

[33] In the circumstances of this property, the LUB called for a 20-foot, front-yard setback. However, the Rissers sought a variance to allow them an eight-foot setback. The authority for a Development Officer to allow a variance is found in s. 250(1) of the *HRM Charter* and subsection 3 sets out the circumstances where a variance may not be granted.

> **250 (1)** A Development Officer may grant a variance in one or more of the following terms in a development agreement, if provided for by the development agreement, or in land-use by-law requirements:
> (b) size or other requirements relating to yards;
>
> **(3)** A variance may not be granted if
>
> (a) the variance violates the intent of the development agreement or land-use by-law;
>
> (b) the difficulty experienced is general to properties in the area; or
>
> (c) the difficulty experienced results from an intentional disregard for the requirements of the development agreement or land use by-law.
>
> [Emphasis added]

[34] The Applicants' argument is focused primarily on subsection 3(b), as they say the difficulty experienced by this property is general to the properties in the area. They also say the variance violates the intent of the LUB (subsection 3(a)).

[35] As indicated above, when Community Council made its decision, it had before it the staff report containing an analysis of s. 250(3) accompanied by various attachments. Also before it were the oral and PowerPoint presentations from the Development Officer (Mr. Sean Audas) and written appeal submissions from the Applicants. There were also oral presentations given by several of the Applicants at the appeal hearing and a slide presentation delivered by one of the Applicants, Mr. Whyte.

[36] With reference to s. 250(3)(b) there are various references in the Record to whether the difficulty experienced is general to the properties in the area. For example, the staff report addresses the question, "is the difficulty experienced general to the properties in the area" and states:

> Application of standard bylaw requirements in the specific instance results in difficulty that is not general to the properties in the area. The subject lot has a

> relatively unusual configuration and, at 4395 square feet is significantly smaller than most of the surrounding properties. Map one shows the subject property and the lots within the Notification Area for the proposed variance. Lot sizes, configuration and proximity to water vary significantly in the area. Most of properties are not subject to the same difficulties as the subject lot. Under the circumstances, it was felt that the difficulty experienced is not general to properties in the area.

[37] The transcript of the appeal hearing indicates Development Officer Audas said the following:

> This is, essentially, where the entrance to the driveway will be for the proposed dwelling, just before the guardrail and this is on the backside of that. So, roughly in the section that will enter the property from St. Margaret's Bay Road. These pictures for council are just to-- because the variance request is for a steeply, steeply sloped lot, front yard setback on the ocean. I just wanted to show council that this is not unusual in this area. The house on the right is built on quite a steep slope, very close to the road and this is only less than a kilometre from the subject property. That is a dwelling that's close to the ocean on the left side. These are three examples probably within 5 km of the subject property, all three dwellings that are close to the road. There are slopes and access issues with all of these. But just to reinforce the Council, the reason I approved it was I had the Department of Transportation approval for the access to the site and I'm not seeing anything that's unusual in this area. (The Record, tab 10, pp. 194-195)
>
> [Emphasis added]

[38] The Applicants argue that this excerpt represents evidence that the "difficulty experienced" is common to the area which means the variance cannot be granted. I disagree. The excerpt, when read in context, as it would have been presented to Council at the hearing, is addressing the proposed driveway entrance for the property. It is merely indicating that there are other properties in the area with driveway access issues. Development Officer Audas stated "there are slopes and access issues with all of these." He concludes by saying he was able to approve the variance when Department of Transportation approved access to the site.

[39] The above excerpt from the transcript is followed by Development Officer Audas moving to a consideration of when variances may not be granted. He commences an overview of the three circumstances from s. 250(3) where a variance may not be granted saying:

> So, there is no intentional disregard. There's no construction on site. The difficulties experienced is general to the properties in the area. It is not felt in the Notification Area that it was general to properties in the area. There are three or four lots that are smaller in size. Where-- as you can see from this sketch here, there is no uniform lot fabric. Lots are various sizes. Some are on the ocean, some aren't. So, it wasn't felt that this was a general issue. There are issues with the three or four lots on the bottom but it's a general-- I didn't feel that there was an issue overall. (the Record, tab 10, pp.195-196)

[40] The Applicants argue this section of the transcript is unintelligible and contradictory in relation to prior comments. They say, at para. 27 of their brief:

> . . . In a confusing statement, wherein he seems to say the difficulty *is* general to area, he then states that only the "Notification Area" for the issuance of the appeal and hearing notice is relevant for the determination."

[41] A closer look at the transcript indicates the quote appearing at para. 27 of the Applicants' brief does not include the following introductory lines: "so, there is no intentional disregard. There's no construction on site. The difficulties experienced is [*sic*] general to the properties in the area." These are two of the three circumstances from s. 250(3) where variances cannot be granted. They are the introduction to Development Officer Audas indicating he did not feel the difficulty with the subject lot was general to the area. The words are not contradictory.

[42] Development Officer Audas then went on to provide his opinion that the variance did not violate the intent of the LUB. Mr. Audas said he believed the watercourse buffer reduction met the LUB and explained that, after receiving the Department of Transportation approval, he felt the front-yard setback reduction to eight feet and the watercourse buffer reduction was a balancing act. He noted that, while there had been transportation approval, both the septic approval and the coastal elevation requirement would be addressed under the Development Permit process. He stated:

> This is a variance application, not a development permit application. There's a watercourse buffer that has been approved by me as the Development Officer and a permit for construction and a development permit have not been issued.

[43] The Applicants say Community Council did not attempt to reconcile the contradictions. The above comments of the Development Officer, taken in context, do not present contradictions and I find it was reasonable for Community Council to rely on the staff report and on the comments of Development Officer Audas in reaching their decision.

[44] The Applicants point out the map of the Notification Area reveals four lots that are smaller than the subject lot and all share the common challenge of being sloped and sandwiched between the water and the road. They say this pertains to 30% of the properties in the Notification Area. The figure of 30% of all properties being smaller does not equate to the difficulties being general to the properties in the area. The Development Officer refers to a number of other defining features of the subject property including its unusual configuration and lot fabric. He concludes that most of the properties in the area are not subject to the same difficulties.

[45] The staff report included the following comments concerning the property in question: "the subject lot has a relatively unusual configuration and … is significantly smaller than most of the surrounding properties… lot sizes, configuration and proximity to water vary significantly in the area" (Notification Area). "Most of the properties are not subject to the same difficulties as the subject lot." In addition, Development Officer Audas' oral presentation at the appeal hearing noted the severity of the slope of the property and that there was no uniform lot fabric. He also noted that lots in the area are of various sizes, with some being on the ocean and some are not. One of the applicants, Mr. Whyte, in his oral presentation at the appeal hearing indicated that the lot had a 35-degree slope and it was a very controversial, challenging lot. The other difficulty that bears mentioning, and will be discussed below, is that the required watercourse buffer of 20 metres meant the entire lot was subsumed by the buffer. All of the above, taken together, support the conclusion that the difficulty experienced by the lot was not general to the area.

[46] It is noteworthy that s. 250(3)(b) does not define the word "area" used in the phrase "the difficulty experienced is general to properties in the area." It is within Community Council's discretion as to how they choose to define "area". Reliance by Community Council on how the staff report and the staff presentation defined area was reasonable.

[47] The Applicants say the variance could not be issued unless, under s. 4.5(a) the lot met "all other applicable provisions" of the LUB. At para. 42 of their brief they say:

> Council ignored the requirements of s. 4.5(a) of the LUB. An entitlement to a variance in this case was predicated on the parcel even being eligible for consideration for a development permit, given its extremely small size. In order to grant the parcel status as an Existing Undersized Lot ("EUL"), there had to be evidence that it otherwise met "… all other applicable provisions" of the LUB.

> Given its waterfront position, it also had to meet the coastal protection rule set out in s. 4.19A. Council declined to consider this requirement, instead punting it to the "construction permit/building permit" stage. This runs afoul of the direction in the section itself that it be considered at the "development permit stage."

[48] In the staff report, the background section refers to the LUB allowing Development Permits to be issued for lots not meeting the current standard if they existed prior to the effective date of the LUB (s. 4.5). It says the subject lot meets this requirement and is eligible for consideration of a Development Permit. In addition, the staff report, in commenting on whether the variance violates the intent of the LUB, states that the LUB contains clauses (s. 4.19(3)) specifically intended to allow relaxations to standard watercourse buffers if those requirements are prohibitive to the development of existing lots. The report notes that, when applied to the subject lot, the watercourse buffer encompasses the entire property and under these circumstances the application of s. 4.19(3) is compliant with the LUB. The report goes on to say that the reduction of the front yard through the variance process is proposed in conjunction with the application of s. 4.19(3). The report indicates this is intended to strike a balance between reduction in the watercourse buffer and minimum front yard to allow the creation of a modest but developable building envelope.

[49] The above is background information provided to Community Council. It was reasonable for them to conclude, based on this information as well as the other information before them, that the proposed variance did not violate the intent of the LUB (s. 250(3)(a)). I disagree with the Applicants' argument that Community Council was focused on the size of the lot rather than its configuration, contrary to the language in s. 4.19(3). The various descriptions of the subject property contained throughout the Record illustrate that not only its size, but also its configuration were considerations. For example, in the staff report, when addressing s. 4.19(3), it states that when the watercourse buffer is applied to the subject lot, it encompasses the entire property. This connotes configuration. The staff report also notes that the lot has a relatively unusual configuration and, during his presentation at the appeal hearing, Development Officer Audas noted there was no uniform lot fabric. A review of map #1 attached to the staff report illustrates the unusual diamond-shaped configuration of the subject lot. It was reasonable for Community Council to accept the comments in the staff report and Development Officer Audas' presentation and conclude the variance did not violate the LUB. The variance at issue is a reduction in the front-yard setback from 20 feet to eight feet. It was reasonable for Community Council to conclude the variance, being a reduction to the front-yard setback, did not violate the intent of the LUB.

[50] Community Council was addressing a variance appeal under s. 250. There was no requirement under the *HRM Charter* that they ensure "all other applicable provisions" of the LUB were met. The LUB requirements were within the authority of the Development Officer, not Community Council. The Development Officer, pursuant to the *HRM Charter*, administers the LUB and any decisions in relation to the LUB are not appealable to Community Council. Whether the subject property met all of the applicable LUB requirements was a matter for the Development Officer, not Community Council.

[51] The transcript of the appeal hearing indicates Community Council discussed the fact that this property could be developed as of right, albeit likely meaning a smaller dwelling would have to be built on the property. This was confirmed by Development Officer Audas and was acknowledged by the Applicants. Community Council noted they were being asked to allow a variance to accommodate the particular size of the proposed home, which was noted to be under the requirement of 35% maximum coverage of the total lot area. They said they were not being asked to determine if a home could be built on the property but whether the variance should be allowed.

[52] The determination by Community Council to accept the Development Officer's reasoning that neither s. 250(3) (a) or (b) prohibited the variance was reasonable. The determination was made in the context of having had the benefit of the staff report and the Development Officer's presentations at the appeal hearing, including photographs of the property, site plans and so on. Community Council also heard from the Applicants and the owner, Mr. Risser. The transcript of the appeal hearing illustrates that Community Council, in arriving at its decision, for example under s. 250(3), was provided with a number of factors for consideration including the size and configuration of the lot, its steepness and its proximity to the ocean and so on. It was reasonable in the circumstances of the full Record for Community Council to agree with the conclusions in the staff report and the oral presentation by the Development Officer at the appeal hearing.

[53] I find that the Record provides a rational basis for Community Council to determine that the difficulty experienced by this property was not general to the area, that the variance did not violate the intent of the LUB and , therefore, the variance should be permitted to stand. Based on the record, this Court was easily able to understand why Community Council decided to dismiss the appeals. In my view, the decision falls within a range of reasonable, acceptable outcomes. This Court should defer to Community Council's conclusion.

Conclusion

[54] The Application for Judicial Review is dismissed. HRM is seeking costs in the amount of $2,500. The Applicants say any costs should be pursuant to the Tariff. Each of the two judicial review matters relating to the subject property were scheduled for a half day. Pursuant to Tariff C, I award costs in the amount of $1,000 plus reasonable disbursements to HRM.

[55] Costs are also awarded to the Rissers. Counsel for the Rissers did not speak to costs at the application. Any submissions on the quantum of costs to be awarded to the Rissers are to be directed to the Court within 14 days of the date of this decision.

Jamieson, J.