

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Colchester Containers Limited v. Colchester County (Municipality)*,  
2020 NSSC 203

**Date:** 20200715

**Docket:** Tru 492638 and 492639

**Registry:** Truro

**Between:**

Colchester Containers Limited

Applicant

v.

Municipality of the County of Colchester

Respondent

**DECISION**

**Judge:** The Honourable Justice Jamie Campbell

**Heard:** July 8, 2020, in Truro, Nova Scotia

**Counsel:** Richard Norman, for the Applicant  
Dennis James, Q.C., for the Respondent

[1] Colchester Containers Limited has made an application in court under the *Municipal Government Act* to quash a by-law and policy made by the Municipality of the County of Colchester. The company has also filed for judicial review challenging a decision made by the municipality under the by-law. If the by-law itself is quashed, the decision made under authority granted by the by-law would not be valid.

[2] The situation is related to the company's plan to construct an asbestos waste disposal cell at its existing facility. The municipality passed a by-law that says that hazardous substances can only be deposited at sites for which the municipality has issued a permit. The by-law says that permits will only be granted at sites located in geographic areas set out in the municipal policy. The municipality says that it has the authority under the *Municipal Government Act* to prevent the disposal of hazardous substances at solid waste disposal sites and generally to manage solid waste. The company says that the form of regulation used by the municipality was not the regulation of solid waste disposal but land-use regulation. That can only be done if the procedures set out in the *Municipal Government Act* governing planning and development are followed.

## **Summary**

[3] The Municipality of the County of Colchester did not have the authority under the *Municipal Government Act* to designate the location of hazardous waste disposal sites by a by-law made under Part XIII of the Act. Limiting the use that can be made of land is a planning and development matter. In effect, the municipality by the combination of the by-law and policy has created a single zone within which hazardous waste may be deposited in the municipality. That zone consists of one property which happens to be the property on which the municipality's own facility is located. Planning and development can only be done under the provisions of Part VIII of the Act which set out special procedural requirements that must be followed to regulate land-use. Because the Disposal of Hazardous Waste By-law and the Disposal of Hazardous Waste Policy passed under the authority of that by-law are "illegal", as that term is used in s. 189 of the *Municipal Government Act*, they are quashed. The decisions made by the municipality under the by-law and policy are of no effect.

## **Facts**

[4] Colchester Containers runs a construction and demolition waste disposal site in Middle Stewiacke. It has had a licence to operate that facility from Nova Scotia Environment since 1997. In 2017 the company started to make plans to build an asbestos waste cell at that facility. In order to do that they were required by the *Environment Act* to have a Class 1 environmental assessment conducted. That is because asbestos is a dangerous good governed by the *Asbestos Waste Management Regulations*. The cell to deal with asbestos was intended to deal only with asbestos waste delivered to the facility in accordance with those regulations.

[5] There is already a disposal site in Colchester County that deals with asbestos waste. It is owned by the municipality itself. It is in Kemptown. It is operated by GroundFix Remediation Services under contract with the municipality. It deals with other things as well as asbestos.

[6] In 2019 the municipality became aware of the company's plans for an asbestos waste cell in Middle Stewiacke. It was approached by a group of residents who were concerned about the operation of an asbestos disposal facility in the area. The issue was discussed at the municipal council meeting on May 28, 2019. Council asked for further information about the transportation of asbestos through the communities of Middle Stewiacke and Brookfield and about the disposal of asbestos. Municipal staff were asked to conduct research and provide an update to the council.

[7] On June 5, 2019, the municipality wrote to the Minister of Nova Scotia Environment requesting that the department's decision on the company's environmental assessment application be held until the municipality could put "more stringent regulations" into effect. The next day, the municipality's Chief Administrative Officer wrote an email to the mayor, councillors and other staff to say that the municipality was determining whether a by-law could be established or amended "to require the disposal of asbestos laden C&D be brought exclusively to our own Kemptown facility". C&D is shorthand for construction and demolition waste.

[8] The mayor's executive assistant wrote on June 17, 2019 to various members of the municipal staff that the municipality was working on "very tight timelines" to get the proposed amendments to the Construction and Demolition Disposal By-law and a new proposed Disposal of Hazardous Waste Substances By-law completed. The next day, municipal council heard the first reading of the proposed amendment to the Construction and Demolition Disposal By-law and the new

Disposal of Hazardous Waste Substances By-law. Council approved the proposed amendments and by-law.

[9] Colchester Containers Limited was in the process of setting up a facility to deal with asbestos waste. There was no planning strategy and associated land-use by-law that could prevent that from happening. The area was not zoned. As a short term measure the municipality considered a by-law that dealt with the disposal of construction and demolition waste and a policy that would limit where such facilities could be located. The existing facility in Kemptown was recognized as an existing business.

[10] The company was granted environmental approval by Nova Scotia Environment in early July 2019. Time was clearly of the essence.

[11] Also, in early July 2019 the municipality amended its Construction and Demolition By-law to prohibit the disposal of hazardous substances at construction and demolition disposal sites. A licensing regime was set up for hazardous substances under a new Disposal of Hazardous Waste Substances By-law and a new Disposal of Hazardous Waste Policy made under the authority of that by-law. The by-laws received second reading and the policy was adopted on July 4, 2019. Notice of the passing of the by-law was published on July 6, 2019.

### **The By-Laws and Policy**

[12] The Construction and Demolition By-law was amended to say at s. 5 that no hazardous substances shall be delivered to a “C&D Disposal Site” other than those that are incidental to and inadvertently delivered with construction and demolition materials. That would have the effect of preventing asbestos from being delivered to a site that was designated as a Construction and Demolition Disposal Site.

[13] The new Disposal of Hazardous Waste Substances By-law at s. 3, provides that no hazardous substance may be received for disposal in the municipality without a permit issued by the municipality and without confirmation that the proponent has received approval from the Department of Environment. It also says that the municipality will only issue permits “for sites located in those geographic areas that are set out in the Municipal policy and on terms set out in Municipal policy or otherwise consented to by the Municipality”.

[14] That section of the by-law does not purport to regulate the way that hazardous waste is disposed of at a permitted site. It does not purport to set

conditions that would have to be met for a site to be approved as the location of a permitted site. It does regulate where such a site may be allowed to operate. Permits will be issued only for sites located in geographic areas set out in the policy.

[15] The Disposal of Hazardous Waste Substances Policy is quite brief. It is four sections long. The first section says that the policy supplements the Disposal of Hazardous Waste Substances By-law. The second section deals with the purpose of the policy which is to ensure that appropriate sites are used for the disposal of hazardous substances, “due to the potential for harm to human health and the environment during the transportation and disposal of such substances”. The third section defines hazardous substances, the word “permit” and the term “permitted site”. Permit, under the policy means “a permit for a particular physical site to accept hazardous and dangerous substances pursuant to the Disposal of Hazardous Substances By-law”. A permitted site means a physical site for which a permit has been issued.

[16] The fourth section is concise and significant.

4. Permitted Sites: For the purpose of section 3 of the Disposal of Hazardous Substances By-law, the following are designated as Permitted Sites: PID # 202869902, Kemptown, Colchester County, Nova Scotia.

[17] The only site designated by the policy as a permitted site is the site of the Kemptown facility, owned by the municipality. The by-law says that the municipality will only issue permits for sites located in geographic areas set out in the policy. One might have assumed that the use of the term “geographic areas” would mean broadly defined areas within the municipality. That way, potentially, several sites could be approved within a geographic area. The policy however sets out one very precisely defined location. And it is one single property identification number, which is the location of its site in Kemptown.

[18] The company applied for a permit by letter dated August 23, 2019. The municipal council considered the application on September 4, 2019.

[19] The only two ways that the company could have been successful would have been to have convinced council that its proposal facility was within the property identification number listed in the policy, which it most clearly was not, being after all in Middle Stewiacke and not in Kemptown, or that the municipality should amend its policy to include their site in Middle Stewiacke.

[20] The wording of the Disposal of Hazardous Waste By-law could be argued to allow for a third route. Section 3.2 says that the municipality will only issue permits for sites located in the geographic areas set out in the policy and “on those terms set out in the Municipal policy or otherwise consented to by the Municipality”. The consent may relate to the terms, so that a site may be approved on the terms set out in the policy or on other terms. The consent may relate to the geographic areas so that the municipality can consent to sites located in geographic areas other than those set out in the policy. There are no criteria set out that would guide any applicant in setting forth what might convince the council to otherwise consent to a facility that was not their own Kempton facility.

[21] In any event the municipality did not approve the application.

## **Issues**

[22] The issue in the application in court is whether the amendments to the Construction and Demolition By-law, the new Disposal of Hazardous Waste By-law and the Disposal of Hazardous Waste Policy should be quashed. More specifically, the question is whether the Municipality of the County of Colchester in passing the by-law and policy was engaged in the exercise of the municipality’s authority to regulate solid waste disposal or were engaged in the regulation of land-use. If the by-law and policy were land-use regulation, they were not passed following the procedural requirements in Part VIII of the *Municipal Government Act*.

## **Quashing a By-Law**

[23] Section 189 of the *Municipal Government Act* sets out the procedure for quashing a by-law or policy. A person may, by notice of motion, apply to a judge of the Supreme Court to quash a by-law, order, policy or resolution of council, in whole or in part, “for illegality”. There is one ground set out and that is “illegality”. The legislation does not provide further guidance or any definition of illegality. Illegality may involve bad faith, discrimination, failure to follow a statutory requirement, or the creation of a by-law that is beyond the jurisdiction of the municipality. *Dawgfather PHD v. Halifax (Regional Municipality)* 2016 NSSC 104. There is no onus on the party seeking to quash a by-law to prove bad faith on the part of the municipality. A municipality cannot expand the authority delegated to it by the *Municipal Government Act* by showing that it did so in the absence of bad faith.

[24] The motion in this case was properly brought within the three-month timeframe required.

### **Standard of Review**

[25] The standard of review for most decisions made by municipal councils is reasonableness. That does not mean that councils are entitled to expand their powers beyond those granted by the legislature. The governing statutory regime, in this case the *Municipal Government Act*, is a constraint on their authority. When the reasonableness standard is applied in reviewing the council's interpretation of its authority, "precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker – perhaps limiting it [to] one" *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, para. 68.

[26] Contextual constraints dictate the space within which a decision maker may properly operate. The contextual constraint that is most relevant in this case is the *Municipal Government Act*, which grants municipal governments their authority to act. That constraint must be interpreted having regard to the fact that it is a grant of authority within which the council must act, and having regard to the fact that it should be interpreted broadly in order to give effect to its purposes.

### ***Municipal Government Act***

[27] The *Municipal Government Act* says at s. 14A that the powers conferred on a municipality "must be interpreted broadly" in accordance with the purpose of the legislation. Those purposes, as set out in s. 2, include giving broad authority to councils to pass by-laws and to enhance the ability of municipal councils to respond to present and future issues. One specific purpose is to recognize the purposes of a municipality. Those are set out in s. 9. They include the provision of good government, the provision of services, facilities and other things that in the opinion of the council are necessary or desirable for all or part of the municipality and the development and maintenance of "safe and viable communities".

[28] These are part of a legislative trend toward the recognition of more empowered and autonomous local governments. The *Municipal Government Act* should be interpreted in a way that recognizes the broad powers granted to municipalities within their jurisdictions.

[29] The *Municipal Government Act* does not act as a general grant of legislative power within the geographical boundaries of the municipal unit. Municipalities can only do what they are permitted to do by the legislation, interpreted broadly, and can only do those things in the ways authorized by the legislation, interpreted broadly. Municipalities must operate within the scope of their delegated powers, but those powers should be interpreted according to the principles that govern statutory interpretation.

[30] The words of the *Municipal Government Act* must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and objective of the legislation. Strict interpretation should be applied only when that approach does not provide a clear answer. The *Municipal Government Act* is a comprehensive piece of legislation. It sets out the way municipal governments are required to exercise the authority delegated to them from the province. They are given a broad scope of authority to act within their legislative jurisdiction but there are some detailed provisions about how that is to be done.

[31] The legislation is divided into parts. Two of those are particularly relevant here. Part XIII deals with the authority to make by-laws regarding solid waste. Within that part, s. 325 provides that councils can make by-laws that prohibit anyone from depositing solid waste except at a solid waste management facility, that regulate the disposal, collection and removal of solid waste and generally that deal with solid waste management. Those involve regulating the use of containers for solid waste, licensing people engaged in the business of solid waste removal, prescribing materials that may or may not be deposited at a solid waste management facility, setting fees and charges, requiring the separation of solid waste prior to collection, requiring compliance with a solid waste diversion strategy and implementation of an integrated solid waste resource management strategy.

[32] The regulation of the disposal, collection and removal of solid waste is broad in its scope. As noted by the Court of Appeal in *Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd.* 2007 NSCA 89, the *Municipal Government Act* empowers municipalities to make by-laws regulating and prohibiting the disposal, collection and removal of solid waste and matters incidental or conducive to the exercise of that power.

[33] Part XIII then provides the municipality with broad authority to deal with solid waste management. There are no special procedural requirements that apply



to the passage of by-laws regulating solid waste management. Part XIII contains two sections, 325 and 326.

[34] Part VIII of the *Municipal Government Act* is headed Planning and Development. It is a lengthy and complicated part running from sections 190 to 267. It sets out the way in which municipal governments are required to deal with land-use planning and decisions related to land-use. That part makes it clear that the Municipal Planning Strategy is an important document. The Municipal Planning Strategy, along with the land-use by-law which gives it legal effect are the documents that deal comprehensively with land-use issues.

[35] The land-use by-law must include maps that divide the planning area into zones. The land-use by-law is required to list permitted and prohibited uses for each zone and include provisions that are “authorized pursuant to this Act and that are needed to implement the municipal planning strategy”. Planning and land-use are centred around the implementation of the planning strategy.

[36] The *Municipal Government Act* allows municipalities to regulate solid waste management and allows municipalities to regulate land-use. When the regulation involves a restriction on the location of a solid waste management facility the question is whether that is a Part XIII matter dealing with solid waste management or a Part VIII matter dealing with land-use, to which the procedural requirements for land-use planning regulation apply.

### **Land-use or Solid Waste?**

[37] If the municipality has the jurisdiction to regulate where a solid waste facility may be located one might ask what difference it makes if it does so under Part XIII rather than under Part VIII. It might be characterized as being a bit of municipal inside baseball. It is not so much a question of jurisdiction as how they exercise that jurisdiction.

[38] It actually makes quite a bit of difference. Zoning decisions are made under Part VIII (Planning and Development) of the *Municipal Government Act*. Part VIII as Justice Moir, in what might have been the guarded language of appropriate judicial understatement described it, “prescribes a somewhat complex procedure, with an emphasis on public participation”, *Colchester (County) v. Spencer* 2004 NSSC 156, para. 28. Justice Moir went on to say in *Spencer* that if the part of the Act that dealt with unsightly premises were to authorize the regulation of land-uses then the control of land-uses would be “*ad hoc*, without public participation,

without planning strategy and without the protections for past non-conforming uses”, *Spencer* at para. 29. The provisions dealing with dangerous and unsightly premises would be in conflict with the provisions for planning and development.

[39] Control of land-use is dealt with in considerable detail in Part VIII. The part dealing with unsightly premises in that case, or solid waste management in this case, do not control land-use. Justice Moir concluded that to the extent the municipality chooses to restrict unsightly or dangerous but lawful uses, it must follow the procedures and respect the protections for property rights in Part VIII.

[40] When Part VIII and Part XIII are compared, Part VIII provides a comprehensive set of rules that relate to land-use planning and provides the kinds of substantive and procedural protections for landowners to which Justice Moir referred. Section 220(5)(f) says that where the municipal planning strategy provides for it, a land-use by-law may “regulate the location of disposal sites for any waste material”. The location of disposal sites is specifically provided for in Part VIII.

[41] Part XIII sets out that wide range of powers that a municipality has to regulate solid waste disposal. The location of the site however is not one of them. The *Municipal Government Act* should be read to give the powers granted to municipalities a wide range to enable them to accomplish their purposes. That broad reading must also be undertaken with a view to the procedural and other protections that are granted to landowners and residents in issues related to land-use.

[42] If a municipality wants to regulate the geographical areas within which a material can be disposed of, that must be done through a land-use by-law. Doing that through a solid waste management by-law would effectively do an end run around the land-use planning regime mandated by the *Municipal Government Act*. A municipality can regulate the site requirements for a solid waste disposal location under its authority to deal with the management of solid waste but if it limits the available sites to certain geographic areas it has engaged in land-use regulation.

[43] The amendments to the Construction and Demolition Disposal By-law are not geographical in their application. They define hazardous substances and prohibit the receipt of hazardous substances at existing construction and demolition facilities. The subject matter of that by-law is solid waste management and not land-use.

**Conclusion**

[44] The Disposal of Hazardous Substances By-law and the Disposal of Hazardous Substances Policy passed by the Municipality of the County of Colchester regulated land-use and were not passed using the process required to have been used by the *Municipal Government Act*. They were then “illegal” as that term is used in s. 189 of the Act. The by-law and policy are quashed, and the decision made under them is set aside.

[45] There is no requirement to address the other grounds put forward by Colchester Containers Limited.

[46] Costs are awarded to the company under Tariff C in the amount of \$1,750.

Campbell, J.