<u>**SUPREME COURT OF NOVA SCOTIA**</u>

Citation: *Hardman v. West Hants (Municipality)*, 2023 NSSC 211

Date: 20230629
Docket: *Kentville*, No. 522430
Registry: Kentville

Between:

Andrew Hardman, Debbie Innes, Mark Kehoe and Seamus Marriott

Applicants

v.

West Hants Regional Municipality and Pisiquid Canoe Club

Respondents

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	June 14, 2023, in Kentville, Nova Scotia
Final Written Submissions:	June 26, 2023
Counsel:	Richard W. Norman, for the Applicants John T. Shanks, for the Respondent Municipality R. Michael MacKenzie, for the Respondent Pisiquid Canoe Club

By the Court:

Introduction

[1] This is a motion to supplement the record in a judicial review proceeding, where the decision under review is a development permit issued by a municipality, there are no reasons for the decision to issue the permit, and the supplemental record refers to past practices or past decisions of the municipality.

[2] The Applicants are Andrew Hardman, Debbie Innes, Mark Kehoe and Seamus Marriott. They own properties on Zwicker Lake. They want the court to quash a development permit that the West Hants Regional Municipality gave to the Pisiquid Canoe Club that allows the Club to operate a day camp on the Club's property on Zwicker Lake. The Municipality's Development Officer, Doug MacInnis, made the decision to grant the permit to the Club. The position of the Applicants is, in part, that the decision was unreasonable or incorrect because the Club's activities on the property are not permitted by the applicable land use by-law.

[3] The Municipality filed a 308-page record consisting of documents from Mr. MacInnis' file. The Municipality wishes to supplement the record with an affidavit

from Mr. MacInnis. In the affidavit, Mr. MacInnis says that, besides the material from his file, also relevant to his decision to issue the permit was his knowledge that the Municipality and its predecessors have always allowed community centres to operate day camps on land zoned "General Resource." He says that "General Resource" zoning permits the operation of "churches, community centres and fire halls." He says that the Club's property is also zoned "General Resource."

[4] Under Civil Procedure Rule 7.10, the court has the discretion to decide what should be in the record in a judicial review proceeding. There is no definition of "record" in the Rules.

[5] In order to determine whether to allow the Municipality to supplement the record with Mr. MacInnis' affidavit, I will consider: (a) the relevance of a decision-maker's past practice and past decisions in assessing the reasonableness of the decision and (b) the concern of the Applicants that Mr. MacInnis is providing *ex post facto* justification for his decision.

Relevance of Past Practice and Past Decisions

[6] The Respondent relies on *Canada v. Vavilov*, 2019 SCC 65, where the majority states that, when a decision-maker is not required to give reasons (such as in this case), the reviewing court examines the decision in light of the relevant

factual and legal constraints: at para. 138. Those constraints include past practices and past decisions of the decision-maker: at para.106.

[7] The Applicants say that such past practices and past decisions, to be a relevant constraint in the context of judicial review, should be publicly available. There appears to be support for that proposition in the majority's decision in *Vavilov* when they discuss decisions that are accompanied by reasons:

> ... [T]he exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it ... It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

Concerns about *Ex Post Facto* Justification

[8] The Applicants rely on *Canada Life Assurance Co. v. Nova Scotia*, 1996 NSCA 127, where Hallett J.A., writing for the Court, held that, as a general rule, decision-makers should not be permitted to supplement their reasons after judicial review proceedings have been started because otherwise there is too much opportunity for abuse by the decision maker to either bolster the reasons already given or give different reasons: at para.57.

[9] Later in his reasons, Hallett J.A. stated that the supplemental reasons of the decision maker in that case, the Minister of Municipal Affairs, should not be before

the court *unless* confirmed by an affidavit of the Minister who would have to be available for cross-examination *if* the affidavit were to be admitted by the judge hearing the application: at para.65.

Conclusion

[10] In the particular circumstances of this case, I have decided to exercise my discretion to allow the Municipality to supplement the record with Mr. MacInnis' affidavit.

[11] First, the information in Mr. MacInnis' affidavit is relevant: it tends to support the position of the Municipality that its decision to grant the permit was consistent with past practice or past decisions and is therefore reasonable.

[12] Second, Mr. MacInnis will be subject to cross-examination on his affidavit. This will allow the Applicants to explore the extent to which the past decisions are similar or different from the decision at issue in this proceeding, as well as concerns the Applicants might have that Mr. MacInnis is offering supplemental reasons simply to bolster his original decision.

[13] Third, it is open to the Applicants to seek the court's permission to rely on an affidavit that is responsive to Mr. MacInnis' affidavit, including to address the

extent to which the Applicants had access, if any, to the past practice or decisions referred to in the affidavit. It is also open to the Applicants to seek production of the records relating to the past practice or decisions referred to by Mr. MacInnis.

[14] The parties are encouraged to come to an agreement on the costs of this motion. If they cannot agree, I will receive submissions from them within two weeks of this decision.

Gatchalian, J.