SUPREME COURT OF NOVA SCOTIA
Citation: *Kiann v HRM*, 2024 NSSC 305

Date: 2024107
Docket: No. 528475
Registry: Halifax

Between:

Kiann Management Limited

Applicant

v.

Halifax Regional Municipality

Respondent

DECISION

Judge:	The Honourable Justice Darlene Jamieson
Heard:	April 22, 2024, in Halifax, Nova Scotia
Written Decision:	October 17, 2024
Counsel:	Dennis James, K.C. and Anna-Marie Manley, for the Applicant Randolph Kinghorne, for the Respondent

By the Court:

Introduction

[1] This is an Application for Judicial Review filed by Kiann Management Limited ("Kiann"). Kiann is the owner of a 14.7 acre piece of land located along Highway No. 7, Porters Lake, in Halifax Regional Municipality, which is a portion of PID 40740276 ("Property"). The larger piece of property is approximately 38 acres in total. Kiann wishes to develop the Property into a Construction and Demolition Materials Processing Facility, which is known as a "CD-2" or "C&D"facility. At a CD-2 facility, construction and demolition materials, such as used building materials, are processed for recycling or disposal.

[2] Kiann applied to Halifax Regional Municipality ("HRM") for approval of its site plan ("Site Plan") in relation to the proposed CD-2 facility. HRM Staff approved the Site Plan. The owners of four neighbouring properties appealed Staff's approval of the Site Plan to HRM's Harbour East Marine Drive Community Council ("Community Council"). At the appeal hearing on October 30, 2023, Community Council allowed the appeals and overturned Staff's decision approving the Site Plan. Kiann seeks judicial review of this decision dated October 30, 2023 (the "Decision").

Grounds for review

[3] The Notice for Judicial Review, filed on November 14, 2023, lists six grounds for review. In summary, they are as follows:

1. Community Council's decision to allow the appeal and deny Site Plan approval was an unreasonable contravention of the *Halifax Regional Municipality Charter*. The Site Plan application complied with all applicable requirements, including those set out in section 10 of the Halifax Regional Municipality By-law L-200, C & D Materials Recycling and Disposal License By-law (21 July 2001) and section 22A .5 of the Land Use By-law for Planning Districts 8 & 9 ("LUB");
2. The decision was also unreasonable as it was made with no justifiable basis for rejecting Staff's findings in approving the Site Plan. Rather, Community Council based its Decision on improper and/or irrelevant considerations;
3. The decision was also unreasonable as it improperly attempted to revisit rezoning considerations in a manner inconsistent with the decision of the Nova Scotia

Utility and Review Board in *Kiann Management Limited (Re)*, 2020 NSUARB 41;

4. Community Council acted outside of the scope of its jurisdiction by purporting to exercise discretion to deny approval to a compliant Site Plan, which is contrary to section 247(4) of the *Halifax Regional Municipality Charter*;
5. There is a reasonable apprehension that one or more members of the Community Council were biased in their review (sic) the Site Plan; and
6. Community Council acted in bad faith by failing to carry out the Site Plan approval appeal process according to its purpose under *Halifax Regional Municipality Charter* and by assessing the Site Plan with the improper intent to stymie development that is expressly permitted under the LUB and the property zoning, as affirmed by the Nova Scotia Utility and Review Board.

[4] HRM filed a Notice of Participation on November 24, 2023. HRM says the court should not disturb Council's decision for the reasons set out in the overview of the parties' positions below.

[5] The Record was filed with the court on December 13, 2023. Further to Kiann's motion of January 30, 2024 to supplement the Record before Justice Denise Boudreau, relating to its procedural fairness arguments, four additional documents were filed on February 14, 2024 (the "Supplemental Record"). They were not before Community Council. The Supplemental Record includes a copy of the April 4, 2019 Community Council Minutes; the HRM Staff Report dated December 12, 2018; the NSUARB's order and written decision, both dated March 23, 2020.

Background

[6] The Property was previously zoned RE (Rural Enterprise) but was later re-zoned to CD-2 zone in 2020. In March 2015, Kiann applied to HRM to re-zone the Property to allow for the first new C&D materials processing facility in HRM. The landscape of the Property is relatively flat and barren due to a forest fire in the summer of 2008 which burned much of the Property. The Property was at the time designated Mixed Use. In 2019, HRM Planning Staff recommended against allowing the re-zoning. Kiann then pursued its application for re-zoning with Community Council. On April 4, 2019, Community Council rejected Kiann's application for re-zoning.

[7] Kiann appealed Community Council's re-zoning decision to the Nova Scotia Utility and Review Board ("NSUARB"). By Order dated March 23, 2020, the NSUARB allowed Kiann's appeal. The NSUARB found that the decision of

Community Council to deny the re-zoning did not reasonably carry out the intent of the District 8 & 9 Municipal Planning Strategy ("MPS") and ordered the Property zoned CD-2.

[8] Subsequent to the NSUARB decision, Kiann applied to HRM for approval of its Site Plan, as required under the MPS and the Land Use By-Law for Planning for Districts 8 & 9 ("LUB"). Staff approved the Site Plan. As noted above, owners of four neighbouring properties appealed Staff's approval of Kiann's Site Plan to Community Council. The Staff report to Council, contained in the Record and dated September 19, 2023, included Staff's LUB Policy Evaluation which resulted in the approval. Staff recommended that Community Council deny the appeal.

[9] Community Council held an appeal hearing on October 30, 2023 as part of a broader meeting. Community Council consisted of four councillors: Councillor/Chair Purdy, Councillor Kent, Councillor Mancini and Councillor Hendsbee. When the appeal was called at the meeting, the Chair of the appeal hearing, Councillor Purdy, explained that a staff member would go over the process and address questions of clarification. She said they would then open the public hearing and that anyone who had signed up, including interested parties, would each have a maximum of five minutes to speak.

[10] The appeal hearing began with HRM Principal Planner Development Officer, Ashlee Bevis, providing an overview of the Site Plan approval which included some background with respect to the zoning; an overview of each of the Site Plan approval criteria and Staff's comments relating to each; Site Plan approval drawings; s. 247 of the *HRM Charter*; the points of appeal that were received; the motion to be placed on the floor and Staff's recommendation that Community Council deny the appeal. After this presentation, Councillor Mancini asked Ms. Bevis to revisit the criteria they needed to be looking at to approve or deny the appeal. The criteria were reviewed a second time from the Staff PowerPoint presentation. There was also a discussion about the recourse for Kiann if the appeal was allowed and HRM's legal counsel identified judicial review as a possibility.

[11] Oral and written submissions from the appellants and other residents / interested persons raised concerns related primarily to wetlands that were allegedly unaccounted for or unmapped; potential offsite ground water contamination / downstream impacts; potential contamination impacts reaching Porter's Lake; and alleged inadequacies of the proposed vegetative buffering to mitigate the impacts of noise and dust pollution. Other concerns raised included separation distances from

other properties; impact from lights; impact on property values; lack of environmental consideration and mitigation. The appellants also argued that there was a need for changes to municipal policy and by-laws relating to C&D facilities.

[12] Residents presented both photographs and oral evidence that the Site Plan was inaccurate. They submitted that the Site Plan failed to disclose wetland areas that were visible from off the site and from aerial photographs. One speaker, utilizing plans of the wetlands and presumptive wetlands, gave his opinion that a wetland existed in the proposed processing area, that another would be altered by driveway construction, and that another appeared to be located within the footprint for the stormwater management pond. In response to questions, he indicated that, to his knowledge, there was no biophysical assessment done of the area. One interested party referred to the Harrietfield C&D site and said ground water contamination from the site rendered the water in nearby private wells undrinkable.

[13] Residents also raised concerns with the proposed vegetation buffering stressing very little regeneration of the existing vegetation had actually occurred since the 2008 forest fire. They provided photographs in this regard. One of the submissions questioned why all locations on the Site Plan were noted as being "approximate". Reference was made to the Site Plan's accuracy disclaimer, which reads:

> NOTES:
>
> 1. TOTAL SIZE OF PROPERTY IS 19.4 HA (48 ACRES). THE CD-2 ZONED PORTION OF THE PROPERTY IS 30% OF THE TOTAL AREAR AT 5.89HA (14.7 ACRES).
> 2. **ALL LOCATIONS SHOWN ARE APPROXIMATE**. THIS DRAWING IS INTENDED FOT SITE APPROVAL PURPOSES ONLY.
> 3. IMPROVEMENT TO NATUREAL VEGETATIVE BUFFER AND REGENERATING FOREST AREAS TO INCLUDE:
>
> 3.1 REMOVE HAZARD AND UNSIGHTLY TREES AND DEADWOOD
>
> 3.2 RETAIN SECLECTED DEED TREES FOR WILDLIFE HABITAT
>
> 3.3 SELECTIVE THINNING AND CHIPPING OF EXISTING TREES AND UNDERGROWTH TO PROMOTE HEALTHTY WOODLAND REGENERATION.
>
> 4. **STOCKPILE LOCATIONS ARE APPROXIMATE**. THE SIZE AND LOCATION MAY VARY BASED ON THE AMOUNT O MATERIAL. ALL STOCKPILES WILL MEET BY-LAW L-200
>
> [Emphasis Added]

[14] During the residents' submissions, various Council members asked questions of the appellants and interested persons. For example, Councillor Mancini asked questions of the speaker who argued about the existence of unmapped wetlands in

the area of the Site Plan. Councillor Mancini asked whether HRM staff had looked at this issue. Councillor Hendsbee queried the downstream impacts from the C&D facility. Councillor Kent asked two joint presenters to provide detailed descriptions of the photographs they had taken on the subject property, including photographs of the alleged lack of vegetation. She asked for the photographs to be situated in relation to the driveway location.

[15] Jennifer Tsang of Sunrose Land Use Consulting provided Kiann's response to the residents' submissions. She reminded those at the meeting that the rezoning issue had already been decided, and that the decision under appeal was limited to the details of the Site Plan. She said the respondent was very thorough in addressing all the aspects that were raised by the Planning Staff during the rezoning process. She said they had the benefit of a multitude of traffic studies and engineering reports. She noted that the rezoning itself was situated between the two watercourses. She indicated that they had surveyors and engineers and had environmental reports as well as erosion sedimentation control. She said they did all the environmental studies and any suggestion that studies were not done was inaccurate. The studies were done and carefully considered by the Board. Ms. Tsang said there are a series of rules for rezoning and a series of rules for Site Plan approval and also a licensing bylaw. She said the operator will be required to obtain a license every single year from HRM. She indicated that in 2002, Council adopted an Integrated Waste Resource Management Strategy requiring that all C&D materials generated in HRM must stay in HRM. She further indicated that the respondent would still have to go through the grade alteration process and the building permit process. She indicated that the landscaping plan did in fact talk about the height of trees and the height of berms, and that it was all in the documentation.

[16] With respect to watercourses, Ms. Tsang indicated that the site was specifically located away from watercourses. She said it met and exceeded all of the setback and buffering requirements and requested that Council support the Staff recommendation to dismiss the appeal and allow the Site Plan.

[17] Ms. Tsang was asked several questions. Councillor Kent noted that the information presented suggested there were larger components of wetlands within the area and asked whether she could speak to what they were seeing in the pictures. Councillor Kent asked whether the wetlands had changed in the last eight or 10 years. Ms. Tsang advised that as part of the rezoning process, the respondent assigned engineers to identify wetlands, watercourses and the general grade and terrain of the site. She said that surveyors took measurements to confirm that all

watercourse setback distance requirements were exceeded. She confirmed that although the respondent did not anticipate that anything had changed since the Board hearing in 2020, the grade alteration permit process required that the respondent go in with the engineers again and show where grading was proposed to be before and after stormwater plans. Ms. Tsang said that one of the speakers had said something about presumptive wetland areas but the respondent had engineers on site for confirmation of wetlands. In response to a question from Councillor Kent about dumping that was alleged to have occurred in the past, Ms. Tsang confirmed that at one point, before the rezoning, some inert materials such as concrete were put there, but she added that illegal dumping is happening everywhere. She indicated that Nova Scotia Environment investigated the incident, declared that the materials were inert and they were cleaned up.

[18] A vote was called at the end of the hearing. The four members of Community Council voted in favour of allowing the appeal, thereby refusing approval of the Site Plan.

[19] The landowners who appealed Staff's decision to Community Council were provided with notice of this judicial review.

The Decision

[20] The Decision is an oral decision of Community Council given on October 30, 2023. There is a video of the appeal hearing and resulting decision of the four Community Council members. The video of the appeal hearing is approximately 90 minutes in length. There is no transcript. The only written record of the Decision is found in the meeting minutes, which state:

> Members of Community Council raised concerns on the inadequacies of the site plans proposed vegetation buffer in addressing the impact of the C&D facility on the surrounding properties, including the quality of life for residents and environmental externalities. Concerns were also expressed that a rural residential area was not an appropriate location for a C&D facility, that there was a need for HRM to reevaluate and update the criteria of its Solid Waste Strategy and Municipal Planning Strategy, and that the information provided from the public supported the possibility of unidentified wetlands which were not shown on the plan.
>
> Josh Judah, solicitor responded to questions of clarification from Community Council regarding options that could be explored to receive further information on potential wetlands on the property. Judah advised the Community Council could

request a supplemental report from staff and pause the hearing until it was provided, or proceed with the hearing with the ability of the property owner to bring a future revised application dealing with the concerns of the appeal was allowed.

MOTION PUT AND PASSED

Decision of the Development Officer overturned.

The Statutory Scheme

[21] In this judicial review, the relevant legislation is the *Halifax Regional Municipality Charter*, SNS 2008, c 39 ("*HRM Charter"*), as well as HRM By-Law L-200 *Respecting the Licensing of Construction and Demolition Materials and Disposal Operations* ("By-Law L-200"), the MPS and the LUB.

[22] The purpose of the *HRM Charter* is set out in s. 2 of the legislation:

> 2 The purpose of this Act is to
>
> (a) give broad authority to the Council, including broad authority to pass by-laws, and respect its right to govern the Municipality in whatever ways the Council considers appropriate within the jurisdiction given to it;
>
> (b) enhance the ability of the Council to respond to present and future issues in the Municipality; and
>
> (c) recognize the purposes of the Municipality set out in Section 7A.

[23] "Council" is defined at s. 2(o) as meaning "the Council of the Municipality." "Municipality" is defined at s. 2(at) as "the Halifax Regional Municipality."

[24] The purposes of the Municipality are outlined in s. 7A:

> 7A The purposes of the Municipality are to
>
> (a) provide good government;
>
> (b) provide services, facilities and other things that, in the opinion of the Council, are necessary or desirable for all or part of the Municipality; and
>
> (c) develop and maintain safe and viable communities.

[25] Section 24 of the *HRM Charter* authorizes HRM Council to establish community councils:

> **Community councils**
>
> 24(1) The Council may, by policy, establish a community council for an area.

(2) A policy establishing a community council must define the boundaries of the community and the community must include the whole, or part of, at least three polling districts.

(3) The number of electors in a community must be at least twice the average number of electors per polling district in the Municipality.

(4) The community council for each community consists of the councillors elected from the polling districts included, in whole or in part, in the community.

[26] The powers, duties and procedures of community councils are set out in ss. 25 and 26:

Powers and duties of community council

25 The powers and duties of a community council include

(a) monitoring the provision of services to the community and recommending the appropriate level of services, areas where additional services are required and ways in which the provision of services can be improved;

(b) the establishment of one or more advisory committees;

(c) recommending to the Council appropriate by-laws, regulations, controls and development standards for the community;

(d) recommending to the Council appropriate user charges for the different parts of the community;

(e) making recommendations to the Council respecting any matter intended to improve conditions in the community including, but not limited to recommendations respecting

(i) inadequacies in existing services provided to the community and the manner in which they might be resolved, additional services that might be required and the manner in which the costs of funding these services might be raised, and

(ii) the adoption of policies that would allow the people of the community to participate more effectively in the governance of the community; and

(f) making recommendations to the Council on any matter referred to it by the Council.

Election of chair and rules

26(1) A community council shall annually elect its chair from among its members.

(2) The chair shall be elected at the first meeting of the community council after the members are elected.

(3) Subject to any policy adopted by the Council, a community council may make rules governing its procedures, the appointment of committees and the number and frequency of its meetings.
(4) Any rules passed by a community council must be filed with the secretary of the community council and the Clerk.

[27] Pursuant to s. 30(4) of the *HRM Charter*, a community council stands in the place of Council with regard to site-plan approvals:

Community planning advisory committee and land-use by-law

30(1) This Section applies to a community council if the Council so provides in the policy establishing the community council.

[…]

(4) A community council stands in the place and stead of the Council with respect to variances and site-plan approvals and Part VIII applies with all necessary changes.

[28] Section 246 sets out what is to be identified in land-use by-laws and what the site plan approval is to deal with:

Site-plan approval

246(1) Where a municipal planning strategy so provides, a land-use by-law shall identify

(a) the use that is subject to site-plan approval;

(b) the area where site-plan approval applies;

(c) the matters that are subject to site-plan approval;

(d) those provisions of the land-use by-law that may be varied by a site-plan approval;

(e) the criteria the development officer must consider prior to granting site-plan approval;

(f) the notification area;

(g) the form and content of an application for site-plan approval; and

(h) with respect to the HRM by Design Downtown Plan Area and the Centre Plan Area, the requirements for public consultation that must take place prior to an application for site plan approval being submitted to the Municipality.

(2) No development permit may be issued for a development in a site-plan approval area unless

(a) the class of use is exempt from site-plan approval as set out in the land-use by-law and the development is otherwise consistent with the requirements of the land-use by-law; or

(b) the development officer has approved an application for site-plan approval and the development is otherwise consistent with the requirements of the land-use by-law.

(3) A site-plan approval may deal with

(a) the location of structures on the lot;

(b) the location of off-street loading and parking facilities;

(c) the location, number and width of driveway accesses to streets;

(d) the type, location and height of walls, fences, hedges, trees, shrubs, ground cover or other landscaping elements necessary to protect and minimize the land-use impact on adjoining lands;

(e) the retention of existing vegetation;

(f) the location of walkways, including the type of surfacing material, and all other means of pedestrian access;

(g) the type and location of outdoor lighting;

(h) the location of facilities for the storage of solid waste;

(i) the location of easements;

(j) the grading or alteration in elevation or contour of the land and provision for the management of storm and surface water;

(k) the type, location, number and size of signs or sign structures;

(l) the external appearance of structures in the HRM by Design Downtown Plan Area and the Centre Plan Area;

(la) security or performance bonding;

(m) provisions for the maintenance of any of the items referred to in this subsection.

[29] Section 247(1) of the *HRM Charter* sets out a development officer's authority in relation to site plan approval:

Site-plan approval

247(1) A development officer shall approve an application for site plan approval unless

> (a) the matters subject to site-plan approval do not meet the criteria set out in the land-use by-law; or
>
> (b) the applicant fails to enter into an undertaking to carry out the terms of the site plan.
>
> [Emphasis added]

[30] Section 247(2) provides that a development officer's decision on whether to approve a site plan can be appealed to Community Council:

> (2) Where a development officer approves or refuses to approve a site plan, the process and notification procedures and the rights of appeal are the same as those that apply when a development officer grants or refuses to grant a variance.

[31] Section 247(4) of the *HRM Charter* states that in hearing an appeal, Community Council may make any decision a development officer could have made:

> **Site-plan approval**
>
> […]
>
> (4) The Council, in hearing an appeal concerning a site-plan approval, may make any decision that the development officer could have made.

[32] As noted in s. 247(2), the process and notification procedures and the rights of appeal with respect to site plans are the same as those that apply when a development officer grants or refuses to grant a variance. Variance procedures are set out at s. 251:

> **Variance procedures**
>
> 251
>
> …
>
> (4) Where a variance is refused, the applicant may appeal the refusal to the Council within seven days after receiving notice of the refusal, by giving written notice to the Clerk who shall notify the development officer.
>
> (5) Where an applicant appeals the refusal to grant a variance, the Clerk or development officer shall give seven days written notice of the hearing to every assessed owner whose property is within thirty metres of the applicant's property.
>
> (5A) Where the Council has increased the distance for notice under subsection (5), the Clerk or development officer shall

(a) give at least seven days written notice of the hearing only to every assessed owner whose property is within the distance specified in the policy of the applicant's property; or

(b) post notice of the hearing, including the date the notice is posted, on the Municipality's website at least seven days prior to the hearing date and keep the notice posted until the completion of the hearing.

(6) The notice must

(a) describe the variance applied for and the reasons for its refusal;

(b) identify the property where the variance is applied for; and

(c) state the date, time and place when the Council will hear the appeal.

…

[33] Section 10 of By-Law L-200 states that an application for a C&D Processing Facility must include a site plan approval:

OPERATIONAL PROCEDURES

10. (1) A Site Plan showing location of all buildings, storage areas, access roads, weigh scales, sorting pads, processing areas, and stockpiles shall be submitted to the Administrator for approval. Such Site Plan shall be amended and submitted for approval before any substantial changes are undertaken and in any event submitted for approval each calendar year upon application for a license renewal.

[34] The Property at issue falls within HRM Planning Districts 8 & 9 (Lake Echo/Porters Lake). The MPS for Districts 8 & 9 sets out, at Policy P-46I, the requirement for C&D operations to go through the site plan approval process:

Site Plan Approval

In order to minimize associated land use concerns all C&D operations shall proceed through the Site Plan Approval process.

P-46I Further to Policies P-46F to P-46H, inclusive, operations shall be regulated under a Site Plan Approval Process in order to minimize land use impacts. Siting standards shall be set out in the Land Use By-law to address such items as, but not limited to, screening, access, outdoor storage, maintenance, stormwater management, lighting, signage, and landscaping measures.

[35] The LUB requires site plan approval for a CD-2 Facility under s. 22B.6:

22B.6 GENERAL REQUIREMENTS: SITE PLAN APPROVAL

> C&D Materials Operations are subject to approval of a site plan. The Development Officer shall approve a site plan for each use which deals with those matters outlined in Section 22A.5

[36] Section 22A.5 of the LUB identifies the criteria for site plan approval for all C&D operations:

> 22A.5 GENERAL REQUIREMENTS: SITE PLAN APPROVAL
>
> All C&D operations are subject to approval of a site plan. The Development Officer shall approve a site plan where the following matters have been addressed:
>
> a) driveway access to the site shall be located in such a manner to minimize land use impacts on adjacent land uses;
>
> b) separation distances shall be provided from any structure on the site and abutting residential or community facility properties to ensure the development does not negatively impact upon surrounding properties;
>
> c) all off-street loading and unloading areas, stockpiles, processing areas, and parking facilities shall be located on the site such that no aspect impacts upon adjacent uses or streets and screening can be in the form of fencing, berms, vegetation, or a combination of elements; Planning Districts 8 and 9 Land Use By-law Page 80
>
> d) a landscaping plan shall be prepared that protects and minimize land use impacts on adjoining lands and the plan shall indicate the type, size, and location of all landscaping elements including the landscaping along the front of the property, to achieve the objective of the plan;
>
> e) within any designated side and rear yards, existing vegetation shall be retained unless it does not provide for adequate screening measures;
>
> f) all outdoor lighting shall be oriented such that it is directed away from adjacent properties;
>
> g) all solid waste storage containers shall be screened from view from adjacent properties and streets;
>
> h) impact of the location, number and size of signs;
>
> i) measures, including but not limited to lot grading, berms, shall be required to adequately address the management of stormwater and surface water; and
>
> j) provisions are established to ensure the operation and any required site improvements are maintained to a high standard.

Parties' Positions

Kiann's Position

[37] Kiann says Community Council's powers on appeal were restricted by s. 247(1) of the *HRM Charter* and that Council was required to approve Kiann's Site Plan unless (i) it did not meet the requisite criteria; or (ii) Kiann did not undertake to comply with the terms of its plan. Community Council did not have inherent discretion to consider or apply different or additional criteria in deciding the appeal than those the development officer could have considered or applied. It says the factors cited in s. 22A.5 of the LUB, and referenced more generally in Policy P-46I of the MPS, do not relate to the inherent characteristics of the land itself, but rather on the particular design of the facilities being constructed on that land.

[38] Kiann says despite the above, at no time during the debate portion of the meeting did any councillor refer to the LUB criteria in s. 22A.5, nor were the councillors' comments relevant to the LUB criteria. Kiann says the councillors were engaged in an improper referendum on the existence of a CD-2 Facility at that location rather than assessing whether the relevant criteria were met. Kiann argues that to allow a decision to stand where Community Council chose to consider completely different factors, without any statutory authority to do so, would introduce unfairness and arbitrariness into the planning process.

[39] In relation to its ground of review regarding natural justice, Kiann raises several arguments under two headings: first, that there was improper relitigation in bad faith or abuse of process, and, second, that there was a reasonable apprehension of bias on the part of the participating Community Council decision makers.

[40] Kiann submits that Community Council's conduct rises to the level of "marked inconsistency" or a "fundamental breakdown of the orderly exercise of authority" consistent with bad faith and abuse of power. It says Council acted outside the scope of its statutory authority in a manner amounting to bad faith. It cites three aspects of Council's conduct that indicate bad faith. Firstly, Community Council raised extraneous concerns and then further fundamentally failed to engage in a good faith consideration of those same concerns, in denying Kiann's site plan approval. Secondly, Community Council showed a marked disregard for the NSUARB's earlier decision by engaging in an improper relitigation of the re-zoning criteria. Thirdly, Community Council engaged in an abuse of power by purporting to mandate that Kiann should have to continue to reapply until Community Council was satisfied that its extraneous concerns be met, in a manner that offends the principles of *res judicata*.

[41] In relation to a reasonable apprehension of bias on the part of the participating Community Council decision makers, Kiann submits that this court should apply the "reasonable apprehension of bias" standard and not the "closed mind standard." It says this is not a case where Community Council was determining centralized planning or making a more "policy-like" decision. Rather, in hearing an appeal from their development officer's decision, Community Council was serving as an adjudicator.

[42] Kiann argues that where a decision-maker is found to have a reasonable apprehension of bias, the decision is void *ab initio*, regardless of whether the decision is otherwise reasonable.

[43] Kiann submits that there was an apprehension of bias on the part of Councillors Purdy, Hendsbee and Kent. Kiann says from the outset of the hearing, it was apparent that Community Council were focused on the prospect of litigation, rather than keeping an open mind to the merits of the site-plan approval process. It further says that during the debate, all four councillors opined that HRM's solid waste and other by-laws ought to be re-evaluated. Statements made during the debate all made it clear that the councillors had already made up their minds on the Site Plan approval, based not on the information presented by Staff and Kiann, but based instead on their views on whether the project should exist at all.

HRM's Position

[44] HRM says the court should not quash the Decision as it is a result of Community Council's reasonable interpretation and application of its governing legislation and related by-laws, and is based on evidence presented at the October 30, 2023 appeal hearing. Further, HRM denies Kiann's allegation of bias or other acts of bad faith on the part of Community Council or councillors, saying such allegations are not supported by the content of the Record or Supplemental Record.

[45] In relation to the reasonableness of the decision HRM says there was a unanimous vote by the councillors to allow the appeal of the objecting property owners and reverse the development officer's approval of Kiann's Site Plan. The hearing was conducted in the nature of a hearing *de novo* of the Site Plan application, with the Community Council essentially stepping into the shoes of the development officer.

[46] HRM submits the general thrust of the councillors' statements reveals a desire to have more accurate information, particularly addressing concerns of potential

offsite ground water contamination from the proposed development, and relating to the remediation effectiveness of the proposed vegetation buffer. HRM highlights that Kiann indicated that it had additional documentation addressing the issue of ground water contamination, that the wetlands had previously been mapped and that they didn't anticipate changes to the boundaries, but it did not produce that information at the hearing or request an adjournment to produce it. Instead, Kiann expected Community Council to rely on its assertion "that as part of the grade alteration permit process, they would be doing further detailed analyses."

[47] HRM points out that under the legislative scheme, there was no opportunity for the residents to provide input during the Site Plan review conducted by the Development Officer. Their first opportunity was at the appeal before Community Council. HRM further says that this appeal procedure provided a big advantage to Kiann, as the appealing residents, at their first opportunity to participate, had the legal burden to convince a majority of the councillors to substitute a different conclusion for that of the HRM Staff.

[48] HRM says Community Council reasonably interpreted the LUB criteria and in its application reasonably concluded that the Site Plan was not LUB compliant. It says it is reasonable for Community Council to adopt an interpretation of the LUB site plan approval criteria that furthers the related municipal objectives of minimizing the impact of C&D operations on surrounding land uses and watercourses, and, in particular, off site ground water contamination.

[49] HRM says Community Council received and reviewed, from all parties to the appeal, correspondence, oral and photographic evidence, and it heard submissions regarding the impact of surface water, groundwater contamination, noise, dust and light pollution, and of the viability of the proposed mitigations. These issues are all relevant to the LUB criteria. HRM argues that the councillors' statements indicated their belief in the need to have more accurate information, particularly addressing concerns of potential offsite ground water contamination from the proposed development, and relating to the remediation effectiveness of the proposed vegetation buffer. Most significantly, the councillors expressed concerns about offsite water contamination, and the ability of the measures on the plan to adequately address the management of stormwater and surface water.

[50] HRM further says there is nothing unreasonable in the Councillors' conclusion that the Site Plan was not fully compliant with the LUB.

[51] HRM says that a recurring theme in the residents' presentations was that it was not appropriate to locate a C&D facility in proximity to residential areas. While the councillors were conducting a hearing on the specific Site Plan, they also extrapolated from the evidence and submissions presented that, as a generality, locating a C&D site in proximity to residential areas seemed like a bad idea. In the present situation, in the broader context of their role as municipal councillors, they voiced their reasonable opinion that the current MPS should be revisited by Staff and Council to consider this proximity concern.

[52] HRM argues that when the legislature assigns elected municipal councillors to make decisions, politics effectively becomes a factor in the equation. The usual practice at municipal council meetings is to let the public speak and vent their frustrations, often with some appeasing comments from the councillors. The councillors' willingness to engage with residents with respect to irrelevant considerations does not mean that those considerations form any part of the councillors' decision. HRM says the fact certain councillors merely referenced an irrelevant consideration, or even considered it, is not by itself determinative that the Decision is unreasonable, unless the consideration became material by being actually adopted into the decision outcome.

[53] With respect to Kiann's argument that Community Council engaged in a re-litigation of the NSUARB re-zoning decision, HRM says the gist of Kiann's submissions effectively is to say that there is really no point in conducting a site plan approval in this case because the NSUARB has already decided all conditions have been met. HRM says the purpose of a re-zoning application is different from a site plan approval, and, accordingly, that the relevant considerations for the two processes are different.

[54] With reference to alleged bias, HRM says it is not disputed that parties to a site plan approval appeal are entitled to be treated fairly by the Council. However, while the standard for the review is that there be "no reasonable apprehension of bias", its application is on a sliding scale relating as to what contextually creates a reasonable apprehension. In the context of elected councillors, courts have found that given the political nature of municipal councils, it is expected and acceptable that councillors may have publicly expressed opinions on various matters before those matters came before them for a decision. HRM says the standard for councillors must be that a councillor will not "be disqualified by reason of bias unless he or she had prejudged the matter to be decided to the extent of being no longer capable of persuasion."

[55] HRM notes that there is a heavy burden on the party alleging bias. It says that the four documents in the Supplemental Record relate to a different type of matter heard by a different configuration of the community council and do not indicate pre-hearing bias. For example, HRM says, the fact that Councillors Hendsbee and Mancini were involved in the rejection of the re-zoning application cannot be evidence of bias.

[56] HRM further says that the statements of Community Council during the appeal hearing do not demonstrate bias. It says the statements do not reflect a pre-judging of the appeal or a decision based on anything other than the evidence and arguments heard at the appeal. It submits that in the context of municipal decision makers (elected councillors) a reasonable apprehension of bias will only be found when there is strong evidence that a councillor's opinion is not open to change, regardless of what is put before them at the hearing. HRM says that threshold has not been met in respect of this site plan appeal.

Issues

[57] The parties agree that the issues for determination are as follows:

1. Was the Decision substantively unreasonable in light of the relevant legislative and factual framework?
2. Did Community Council's Decision violate natural justice considerations?
    a. Did Community Council engage in bad faith or abuse of power by engaging in improper re-litigation of the previous re-zoning proceedings?
    b. Was there a reasonable apprehension of bias on the part of any of the participating Community Council decision-makers?
3. If the Decision is unreasonable or the process unfair, what is the appropriate remedy?

The Law and Analysis

Standard of Review for Judicial Review

[58] The parties agree that the court should apply the reasonableness standard when reviewing the substantive Decision of Community Council to overturn Staff and deny Kiann's application for site plan approval.

[59] The Supreme Court of Canada set out a revised framework for judicial review of administrative decisions in the companion decisions of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66**.** The court said in *Vavilov* that the revised standard of review analysis begins with a presumption that reasonableness is the applicable standard of review in all cases. There are limited exceptions to this presumption and none apply to this judicial review. The standard of review to be applied in assessing Community Council's decision is reasonableness.

[60] In *Vavilov*, the court said that a reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state powers are subject to the rule of law. The majority further said that the focus is on the decision actually made (para. 83). The court said:

> 83…Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. …Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[61] In short, the *Vavilov* decision indicates that a reasonableness review is robust; that the court must always start with the tribunal's reasons, as the reasons are the primary means of demonstrating reasonableness; that the burden is on the applicant; that the review involves a contextual analysis; that it is a respectful analysis, as judges should be attentive to the application by decision-makers of specialized knowledge; and that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. See also *Carroll v. Canada (Minister of Justice)*, 2021 NSCA 71.

[62] In determining whether a decision is reasonable, the court in *Vavilov* identified two distinctive characteristics of a reasonable decision. First, a reasonable decision is based on internally coherent reasoning. Second, a reasonable decision is justified with regard to the legal and factual constraints that bear upon the decision (paras. 101 and 102).

[63] The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov*, para. 100). That burden rests with Kiann.

Procedural Fairness

[64] This judicial review engages the principles of procedural fairness that are applicable to decision-making by a municipal community council relating to an appeal of a site plan for a C&D or CD-2 facility.

[65] While the standard of review in relation to the substantive decision of Community Council is reasonableness, when considering procedural fairness our Court of Appeal has said that a court will intervene if it finds an administrative process was unfair in light of all the circumstances. The Court in *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92, stated:

> [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness. (See for example, T.G. v. Nova Scotia (Minister of Community Services), 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at ¶90).
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge (see: T.G. v. Nova Scotia (Minister of Community Services), supra, at ¶8; Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.,2010 NSCA 19, ¶28; Nova Scotia (Community Services) v. N.N.M., 2008 NSCA 69, ¶40; and Kelly v. Nova Scotia Police Commission, 2006 NSCA 27, ¶21-33.
>
> [Emphasis added]

[66] The Federal Court of Appeal in *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, also stated that when assessing procedural fairness, a court is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors:

> 54 A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 21)

> that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.
>
> [Emphasis added]

[67] The Supreme Court of Canada in *Moreau-Bérubé v. New Brunswick (Judicial Council*), 2002 SCC 11, stated that the nature and extent of the duty of procedural fairness is variable and must be decided in the context of each case. The content of the duty will vary according to the circumstances and the regulatory framework:

> 74 The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. (See, generally, *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), and *Baker*, *supra*.)
>
> 75 The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.), *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), at p. 653, *Baker*, *supra*, at para. 20, *Therrien*, *supra*, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case" (as *per* L'Heureux-Dubé J. in *Baker*, *supra*, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, *supra*, at p. 683); there is no appeal from the Council's decision (see Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 1 (Toronto: Canvasback, 1998) (looseleaf updated 2001,release 2), at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.), at p. 1113).
>
> [Emphasis added]

[68] The court in *Vavilov, supra*, did not change the law in relation to assessing procedural fairness. It said at para. 23:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The

> starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[69] The Federal Court of Appeal noted in *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, that *Vavilov* did not address the standard for determining whether the decision-maker complied with the duty of procedural fairness:

> 35 Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness: see *Khela v. Mission Institution*, 2014 SCC 24, [2014] 1 S.C.R. 502 (S.C.C.), at para. 79; *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385 (F.C.A.), at para. 33 [*Thamotharem*]; *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, [2015] 2 F.C.R. 170 (F.C.A.), at para. 34; *Wsánec School Board v. British Columbia*, 2017 FCA 210 (F.C.A.), at paras. 22-23; *Johnny v. Adams Lake Indian Band*, 2017 FCA 146 (F.C.A.), at para. 19; *Therrien v. Canada (Attorney General)*, 2017 FCA 14 (F.C.A.), at para. 2; *El-Helou v. Canada (Courts Administration Service)*, 2016 FCA 273 (F.C.A.), at para. 43; *Arsenault v. Canada (Attorney General)*, 2016 FCA 179 (F.C.A.), at para. 11; *Henri v. Canada (Attorney General)*, 2016 FCA 38 (F.C.A.), at para. 16; *Abi-Mansour v. Canada (Deputy Minister of Foreign Affairs and International Trade)*, 2015 FCA 135 (F.C.A.), at para. 6; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 (F.C.A.), at paras. 33-56. In fact, it is not at all clear to me why we keep assessing procedural fairness within the framework of judicial review, considering that it goes to the manner in which a decision is made rather than to the substance of the decision, as Justice Binnie aptly observed in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.), at para. 102. What matters, at the end of the day, is whether or not procedural fairness has been met.
>
> [Emphasis added]

[70] In short, where issues of procedural fairness are raised, the court's role is to determine whether the proceedings were fair in all of the circumstances. I will begin by considering the issue of procedural fairness raised by the Applicant.

Procedural fairness analysis

[71] I must first address the nature and content of Community Council's duty of procedural fairness when sitting as the appeal body hearing an appeal of a site plan for a C&D facility.

[72] The Supreme Court of Canada, in *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)*, 2004 SCC 48, confirmed that a municipality is bound by a duty of procedural fairness when making an administrative decision:

> 3 A public body like a municipality is bound by a duty of procedural fairness when it makes an administrative decision affecting individual rights, privileges or interests: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.); *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). The decision to deny the application for rezoning affected the Congregation's rights and interests. There can thus be no question that the Municipality owed the Congregation a duty of fairness.

[73] Clearly, a decision by Community Council on an appeal from a development officer's decision is administrative in nature and not legislative. It attracts procedural fairness. Justice Oland in *Potter v. Halifax Regional School Board*, 2002 NSCA 88, provided a helpful explanation of the distinction between administrative and legislative acts:

> [39] [...] I have found the following passage from S.A. De Smith's text, *Judicial Review of Administrative Action*, [3rd ed.], 1973 London: Stevens at p. 60 on the distinction between administrative and legislative acts helpful for my analysis:
> The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.
>
> [40] The classification of an act as legislative or administrative is not always easily done. There is a great diversity of administrative decision-making with decision-makers ranging from those primarily adjudicative in function to those that deal with purely legislative and policy matters: see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 at para 27. Where a particular decision making power falls on

> this continuum is a consideration in determining the application and extent of any duty of fairness.
>
> [...] I agree with Brown and Evans that those decisions closer to the "legislative and general" end of the spectrum usually have two characteristics: generality (the power is of "general application and when exercised will not be directed at a particular person") and a broad policy orientation in that the decision create norms rather than decides on their application to particular situations: see D. Brown & J. Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback Publishing, 1998) vol. 2 at para 7:2330. In my view, when the Board decides to close a specific school or specific schools, it is applying, among other things, policy and general considerations but to particular situations. Such decisions are not, in my view, so close to the legislative and general end of the spectrum as to foreclose entirely any duty to act fairly.
>
> [Emphasis added]

[74] While it is clear an appeal to Community Council is more administrative than legislative, the real question is what is the nature or content of the duty of procedural fairness owed by Community Council in this context?

[75] The relevant considerations in determining the content of procedural fairness were set out in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) and reiterated by McLachlin C.J. in *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)* 2004 SCC 48 (S.C.C.):

> 5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body…

[76] As noted above, the content of the duty of procedural fairness varies, depending on the context. In *Baker*, *supra*, Justice L'Heureux-Dubé explained:

> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". ...
>
> 22 ... I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure

> that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> [Emphasis added]

[77] It is useful to reference McLachlin C.J.'s description of the five *Baker* factors in *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine, supra*. She said:

> 6 The first factor -- the nature of the decision and the process by which it is reached -- merges administrative and political concerns. The decision to propose a draft by-law rezoning municipal territory is made by an elected council accountable to its constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to their own: *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 51. This decision is moreover tempered by the municipality's charge to act in the public interest: *Toronto (City) Roman Catholic Separate School Board v. Toronto (City)* (1925), [1926] A.C. 81 (Ontario P.C.), at p. 86. What is in the public interest is a matter of discretion to be determined solely by the municipality. Provided the municipality acts honestly and within the limits of its statutory powers, the reviewing court is not to interfere with the municipal decision unless "good and sufficient reason be established": *Kuchma v. Tache (Rural Municipality)*, [1945] S.C.R. 234 (S.C.C.), at p. 243 (*per* Estey J.); see also *Norfolk v. Roberts* (1914), 50 S.C.R. 283 (S.C.C.), at p. 293; *Glover v. Kee* (1914), 20 B.C.R. 219 (B.C. C.A.), at pp. 221-22; *Howard v. Toronto (City)*, [1928] 1 D.L.R. 952 (Ont. C.A.), at p. 965.
>
> 7 However, the elected councillors cannot deny a rezoning application in an arbitrary manner. Where the municipal council acts in an arbitrary fashion in the discharge of its public function, "good and sufficient reason" exists to warrant intervention from the reviewing court in order to remedy the proven misconduct. The need for judicial oversight of arbitrary municipal decision making is only heightened by the aggravated potential for abuse of discretionary statutory authority…
>
> 8 The second factor is the statutory scheme and its provisions, in this case the *Act respecting Land Use Planning and Development*, R.S.Q., c. A-19.1, which grants the Municipality authority to consider a rezoning application. Even so, the absence of an appeal provision demands greater municipal solicitude for fairness. Enhanced procedural protections "will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted": *Baker*, *supra*, at para. 24, *per* L'Heureux-Dubé J.
>
> 9 The third factor requires us to consider the importance of the decision to the Congregation. The stringency of procedural protection is directly proportional to the importance of the decision to the lives of those affected and the nature of its

> impact on them: *Baker*, *supra*, at para. 25; see also *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.), at p. 1113. Here, it becomes important that the municipal decision affects the Congregation's practice of its religion. The right to freely adhere to a faith and to congregate with others in doing so is of primary importance, as attested to by its protection in the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*.
>
> 10 The fourth factor -- the legitimate expectations of the Congregation -- also militates in favour of heightened procedural protection. Where prior conduct creates for the claimant a legitimate expectation that certain procedures will be followed as a matter of course, fairness may require consistency: *Baker*, *supra*, at para. 26; see also *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.); *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.). Here, the Municipality followed an involved process in responding to the Congregation's first rezoning application, in so doing giving rise to the Congregation's legitimate expectation that future applications would be thoroughly vetted and carefully considered.
>
> 11 The fifth factor -- the nature of the deference due to the decision maker -- calls upon the reviewing court to acknowledge that the public body may be better positioned than the judiciary in certain matters to render a decision, and to examine whether the decision in question falls within this realm. Municipal decisions on rezoning fall within the sphere in which municipalities have expertise beyond the capacity of the judiciary, thus warranting deference from reviewing courts. However, this factor may not carry much weight where, as here on the second and third applications for rezoning, there is no record to indicate that the Municipality has actually engaged its expertise in evaluating the applications.
>
> 12 The five *Baker* factors suggest that the Municipality's duty of procedural fairness to the Congregation required the Municipality to carefully evaluate the applications for a zoning variance and to give reasons for refusing them. This conclusion is consistent with the Court's recent decision in *Prud'homme c. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85 (S.C.C.), at para. 23, holding that municipal councillors must always explain and be prepared to defend their decisions. It is also consistent with *Baker*, *supra*, where it was held, at para. 43 dealing with a ministerial decision, that if an organ of the state has a duty to give reasons and refuses to articulate reasons for exercising its discretionary authority in a particular fashion, the public body may be deemed to have acted arbitrarily and violated its duty of procedural fairness.

[78] In *Halifax (Regional Municipality) v. Tarrant*, 2019 NSCA 27, the Nova Scotia Court of Appeal considered a judicial review of a decision of Community

Council sitting on appeal of a development officer's decision to grant a set back variance. As in the present matter, several neighbours had appealed to Community Council. The Court of Appeal described Community Council as "the appellate tribunal under the *Halifax Regional Municipality Charter*."

[79] The court in *Tarrant, supra*, reiterated the proper approach to judicial review for procedural fairness. The two step process requires determining the content of the tribunal's duty of fairness and then determining whether that duty was breached. The starting point is the *Baker* factors:

> [24] *Kelly v. Nova Scotia Police Commission* [sometimes cited as *Burt v. Kelly*], 2006 NSCA 27, is the leading decision in this Province on the approach to procedural fairness. Justice Cromwell said:
>
> > [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
> >
> > [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set up its own procedures. The second step – assessing whether the Board lived up to its duty – assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been**.** Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
> >
> > [emphasis added]
>
> [25] In *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd*, 2016 NSCA 40, leave denied [2016] S.C.C.A. No. 358, the reviewing judge held that an administrative decision was procedurally unfair. This Court overturned that ruling for several reasons, including:
>
> > [54] … The judge's brief reasons do not address the factors cited by Justice Binnie in *C.U.P.E.* [*C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539], para. 103, citing *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817], and by Justice

> Cromwell in *Kelly*, para. 21. There is no analysis of the statutory scheme, expertise of the Board to oversee certification, or deference to the Board's discretion to set its own procedures for certification. The judge's ruling overlooked Justice Cromwell's first step from *Kelly*, which reiterated the Supreme Court's approach from *Baker*. Rather, the judge moved directly to what *Kelly* termed as forbidden reasoning – "simply by comparing the tribunal's procedure to the court's own views about what an appropriate procedure would have been".

[26] Similarly, in *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*, 2017 NSCA 72, Justice Bryson said:

> [16] The judge in this case conducted no analysis of the content of the duty of fairness. After commenting that procedural fairness should "lean toward correctness", she moved immediately to her analysis of whether there was a denial of procedural fairness. This is prohibited reasoning as Justice Cromwell cautioned in *Burt v. Kelly*, 2006 NSCA 27 at para 21 … .

[27] To like effect: *Jono Developments*, paras. 52-53.

[80] The court in *Tarrant, supra*, found as follows with respect to the content of the duty of procedural fairness on a variance appeal hearing under s. 252 of the *HRM Charter*:

> [37] In my respectful view, under *Kelly*'s first step and *Baker*'s criteria, the standards of procedural fairness for a variance appeal under s. 252 of the *Charter* may be synopsized as follows. The outcome is of importance to both sides of the dispute. The nature of the decision, the process, the statutory scheme and the legitimate expectations contemplate a hearing that is informal compared to a judicial proceeding. This means, in particular:
>
> - There is to be a notice of hearing to the parties in advance, access by the parties to the material provided to the Council, and an opportunity for the parties to present their written or oral submissions, should they opt to do so.
> - The hearing is to be managed by elected representatives who are not legally trained. Usually they are assisted by a staff presentation giving the background, and available legal advice from the municipal solicitor.
> - The hearing may generate input from the interested parties on matters of community interest. The input need not be under oath, nor constrained by judicial rules of pleading and rules of evidence.
> - While the councillors need not conform to a judicial code of conduct, they must act objectively, in good faith and without bias.
> - The statutory scheme contemplates a *de novo* analysis, as opposed to a finding of error by the development officer.

> • Normally, the hearing is followed in short order by a vote, without formal reasons.
>
> • Subject to the above, the management of the hearing is in the Council's discretion. That includes whether there should be an adjournment, either on request or on Council's own motion.

[81] The Court of Appeal's comments in *Tarrant, supra,* are directly applicable here. As noted previously, s. 247(2) of the *HRM Charter* provides that the same process, notification procedures and rights of appeal apply when a development officer approves or refuses to approve a site plan as those that apply when a development officer grants or refuses to grant a variance. In both cases, the statute contemplates a *de novo* analysis by Community Council. On appeal, s. 247(4) of the *HRM Charter* states that Community Council may make any decision a development officer could have made. It is noteworthy that a development officer considering a site plan is constrained by the legislation that provides:

> **247 (1)** A development officer shall approve an application for site plan approval unless
>
> (a) the matters subject to site-plan approval do not meet the criteria set out in the land-use by-law; or
>
> (b) the applicant fails to enter into an undertaking to carry out the terms of the site plan.
>
> [Emphasis added]

[82] Community Council was required to apply a limited and particular set of considerations specified in the LUB. The applicable criteria are found at s. 22A.5 of the LUB (set out above in the statutory scheme section of this decision), which indicates the development officer shall approve a site plan where the items listed have been addressed. Community Council, like the development officer, must evaluate the site plan against the specific criteria set out in s. 22A.5 of the LUB. They are to apply the relevant criteria and come to a decision regarding a specific site plan approval application, for a specific site. This resembles an adjudicative process.

[83] In the present case, the outcome of the appeal hearing was clearly of importance to both sides of the dispute. The decision dealt with a specific piece of property which the owners wish to use as a C&D facility. The outcome was also important to the appellants, as the proposed use of the site would impact adjoining

landowners. There was also public interest, as other landowners in the area took part in the hearing as interested parties. With respect to the fifth *Baker* factor, the nature of the deference owed, the Court of Appeal said in *Jono, supra*:

> 104 McLachlin C.J. in *Congregation des Témoins de Jehovah, supra,* (¶5) reframed the fifth *Baker* factor as "the nature of the deference accorded to the body," and this factor recognizes that some decision-makers are given significant latitude in their choice of procedures, and may possess a degree of expertise in crafting them.
>
> [Emphasis added]

[84] Generally, deference is owed to administrative decision-makers on procedural issues. Regarding the deference factor, the court also said in *Kelly, supra*:

> 28 The fifth contextual factor is the nature of the deference owed to the decision-maker. What the duty of fairness requires in a particular case " . . . should . . . take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures . . . ": *Baker, supra* at para. 27 *per* L'Heureux- Dubé, J.; *Knight, supra* at p. 685 *per* L'Heureux-Dubé, J. Subject to the applicable statutes and regulations, an administrative body is the " . . . master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair." *per* L'Heureux-Dubé, J. in *Knight* at p. 685.
>
> [Emphasis added]

[85] After carefully considering the context, taking into account all of the *Baker* factors including but not limited to the nature of the decision being made, the nature of the statutory scheme or legislative context of a site plan appeal, and the importance of the decision to the parties, I find that the five *Baker* factors, taken together, militate in favour of a relatively high duty of procedural fairness. The above analysis suggests that a significant degree of fairness was owed to the parties. While the hearings are more informal than a judicial proceeding, they still attract a high level of procedural fairness.

[86] Now that I have determined the content of the duty of fairness applicable, I turn to whether the duty was breached. The process followed at the appeal hearing is set out below, but I can say that I see nothing unfair about the process itself that was followed at the appeal hearing. The issue is whether any of the members of the Community Council were biased?

Bias

[87] Procedural fairness cannot exist if an adjudicator is biased:

> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. ... The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased.
>
> [Emphasis added]
>
> (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CarswellNfld 170 (S.C.C.) at para. 22)

[88] Parties must have confidence that their participation in an administrative process was meaningful. The rule against bias is designed to preclude conduct by decision makers that will undermine public confidence in the integrity of decisions. In Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada* (Online: Thomson Reuters Canada Ltd, 2024), the authors state at §11:4:

> …the rule against bias is designed to preclude conduct by officials that will undermine public confidence in the integrity of decisions. Thus, the law requires not only that adjudicative decision makers be impartial in fact, but also that they appear impartial, so that parties can have confidence that their participation in the process was meaningful, which in turn will enhance the acceptability of the resulting decision. Accordingly, it is unnecessary, and indeed, inappropriate, for a reviewing court to inquire into the subjective state of mind of the decision maker. ..Accordingly, the rule against bias asks the question whether, in all the circumstances, there was " a reasonable apprehension of bias."
>
> [Emphasis added]

[89] The Supreme Court of Canada in *Baker, supra*, defined reasonable apprehension of bias as follows:

> 46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394:
>
> > ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more

> likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[90] The Supreme Court in *Newfoundland Telephone*, *supra*, at para. 22, noted that "it is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness." Whether there is a reasonable apprehension of bias is an objective standard (*McLaren v. Castlegar (City),* 2011 BCCA 134, at para. 40).

[91] *Baker*, *supra,* confirmed that "the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved" (para. 47). Therefore, it is necessary to undertake a contextual analysis to determine the required level of impartiality applicable to a particular decision-maker, as the level of impartiality will depend on the nature of the activities and the functions of the decision-maker.

[92] Prior to *Baker*, *supra,* the Supreme Court of Canada highlighted the importance of institutional context in three decisions: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170; its companion case of *Save Richmond Farmland Society v. Richmond (Township),* [1990] 3 S.C.R. 1213; and *Newfoundland Telephone*, *supra*. Consideration must be given to all of the circumstances under which the decision-maker operates. As the applicable duty of fairness depends on the nature and function of the decision maker or tribunal, so too does the degree to which members of the tribunal are entitled to have some pre-disposition toward a particular result (*Newfoundland Telephone*, *supra*, at p. 638).

[93] For example, in *Old St. Boniface*, *supra*, the court reiterated the need to examine all of the factors under which a committee of council operates (p. 1192). The court ultimately found that in the context of a hearing by municipal councillors to determine an application for rezoning, that procedural fairness required that "[t]he party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile." (p. 1197). This test that has been applied to municipal councillors and others when exercising policy or legislative functions, has been called a "closed mind" test. The test is whether the councillor in fact had a mind incapable of persuasion and not whether a reasonable person would believe he or she did.

[94] In the companion decision of *Save Richmond*, *supra*, released the same day, the issue was whether a particular Alderman was disqualified by bias from participating in a decision with respect to a specific By-law which had the effect of re-zoning certain land from farming to predominantly residential. Again the closed mind test was applied.

[95] I do not take these decisions of the Supreme Court to mean that municipal councillors, regardless of the function they are performing, will always be held to the standard of a closed mind. Municipal councillors have various roles and the context – including the type of function being performed and the question being decided – will determine the standard. In short, administrative decision makers with more adjudicative type functions, similar to those of the judiciary, will attract the highest standard of reasonable apprehension of bias, whereas administrative decision makers performing policy making discretionary decision making functions will attract the lower standard of a closed mind.

[96] The decision in *Newfoundland Telephone*, *supra*, further illustrates the principle that the test for bias is contextual and varies depending on the context and the type of function performed by the administrative decision-maker. It appears to me from these cases, that the applicable standard for disqualifying bias is a sliding scale of sorts, moving from a reasonable apprehension of bias test to a closed mind test.

[97] In *Newfoundland Telephone*, *supra*, the court applied two different standards to a commissioner of the Board of Commissioners of Public Utilities, depending on the role or function being exercised. During the investigative stage of the process, the standard applied was that of a closed mind, while during the hearing itself, the applicable standard was a reasonable apprehension of bias. It is useful to quote at length from this decision, as it analyses the prior two decisions of *Old St. Boniface*, *supra*, and *Save Richmond*, *supra*; discusses the principle that the courts must take a flexible approach to bias, as the applicable standard varies with the role and function of the board which is being considered; explains that when the commissioner's role changed to a more adjudicative one, so too did the bias test; and, although not needing to be as strict and rigid as that expected of a judge presiding at a trial, nonetheless procedural fairness had to be maintained:

> 25 Bias was considered in a different setting in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 46 Admin. L.R. 161, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134. That case concerned a planning decision which was made by elected municipal

councillors. The governing legislation for municipalities was designed so that councillors would become involved in planning issues before taking part in their final determination. The decision of the court recognized that city councillors are political actors who have been elected by the voters to represent particular points of view. Considering the spectrum of administrative bodies whose functions vary from being almost purely adjudicative to being political or policy-making in nature, the court held that municipal councils fall in the legislative end. Sopinka J., at p. 1197 [S.C.R.], set forth the "open mind" test for this type of situation:

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.

26 This same principle was applied in the companion case, *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 46 Admin. L.R. 264, 2 M.P.L.R. (2d) 288, [1991] 2 W.W.R. 178, 52 B.C.L.R. (2d) 145, 75 D.L.R. (4th) 425, 116 N.R. 68. That case concerned a municipal councillor who campaigned for election favouring a residential development. He made public statements that he would not change his mind with regard to his position despite public hearings on the issue. Sopinka J. found that the councillor should not be disqualified for bias because he did not have a completely closed mind. He determined that to have ruled otherwise would have distorted the democratic process by discouraging politicians from expressing their views openly.

27 It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the Legislature.

…

29 Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which

is applied varies with the role and function of the board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

…

31 It can be seen that the board has been given the general supervision of provincial public utilities. In that role it must supervise the operation of Newfoundland Telephone which has a monopoly on the provision of telephone services in the province of Newfoundland. The board, when it believes any charges or expenses of a utility are unreasonable, may of its own volition summarily investigate the charges or expenses. As a result of the investigation it may order a public hearing regarding the expenses. In turn, at the hearing the utility must be accorded the fundamental rights of procedural fairness. That is to say, the utility must be given notice of the complaint, the right to enforce the attendance of witnesses and to make submissions in support of its position.

32 When determining whether any rate or charge is "unreasonable" or "unjustly discriminatory" the board will assess the charges and rates in economic terms. In those circumstances the board will not be dealing with legal questions but rather policy issues. The decision-making process of this board will come closer to the legislative end of the spectrum of administrative boards than to the adjudicative end.

33 It can be seen that the board, pursuant to s. 79, has a duty to act as an investigator with regard to rates or charges and may have a duty to act as prosecutor and adjudicator with regard to these same expenses pursuant to ss.83, 85 and 86.

34 What then of the statements made by Mr. Wells? Certainly it would be open to a commissioner during the investigative process to make public statements pertaining to the investigation. Although it might be more appropriate to say nothing, there would be no irreparable damage caused by a commissioner saying that he, or she, was concerned with the size of executive salaries and the executive pension package. Nor would it be inappropriate to emphasize on behalf of all consumers that the investigation would "leave no stone unturned" to ascertain whether the expenses or rates were appropriate and reasonable. During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

35 The statements made by Mr. Wells before the hearing began on December 19 did not indicate that he had a closed mind. For example, his statement, "[s]o I want the company hauled in here — all them fat cats with their big pensions — to justify (these expenses) under the public glare ... I think the ratepayers have a right to be assured that we are not permitting this company to be too extravagant," is not objectionable. That comment is no more than a colourful expression of an opinion

that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells's statement that he did not think that the expenses could be justified did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind. Even at the investigatory stage statements manifesting a mind so closed as to make submissions futile would constitute a basis for raising an issue of apprehended bias. However, the quoted statement of Mr. Wells was made on November 13, three days after the hearing was ordered. Once the hearing date had been set, the parties were entitled to expect that the conduct of the commissioners would be such that it would not raise a reasonable apprehension of bias. The comment of Mr. Wells did just that.

36 Once the matter reaches the hearing stage a greater degree of discretion is required of a member. Although the standard for a commissioner sitting in a hearing of the Board of Commissioners of Public Utilities need not be as strict and rigid as that expected of a judge presiding at a trial, nonetheless procedural fairness must be maintained. The statements of Commissioner Wells made during and subsequent to the hearing, viewed cumulatively, lead inexorably to the conclusion that a reasonable person apprised of the situation would have an apprehension of bias.

37 On January 24, while the hearing was already in progress, Wells was making statements that might readily be understood by a reasonable observer, as they were by the telecast reporter Jim Thoms, that Wells had made up his mind what his judgment would be even before the board had heard all the evidence. Evidence sufficient to create a reasonable apprehension of bias can be found in some of the statements made by Wells during the course of a January 24 telecast, and in the subsequent comments to the press and to the radio…

38 These statements, taken together, give a clear indication that not only was there a reasonable apprehension of bias but that Mr. Wells had demonstrated that he had a closed mind on the subject.

39 Once the order directing the holding of the hearing was given the utility was entitled to procedural fairness. At that stage something more could and should be expected of the conduct of board members. At the investigative stage, the "closed mind" test was applicable. Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias. The application of that test must be flexible. It need not be as strict for this board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity. This standard of conduct will not of course inhibit the most vigorous questioning of witnesses and counsel by board members. Wells's statements, however, were such that, so long as he remained a member of the board hearing the matter, a reasonable apprehension of bias existed. It follows that the hearing proceeded unfairly and was invalid.

[Emphasis added]

[98] I note that the authors of *Judicial Review of Administrative Action in Canada*, *supra*, indicate that the Supreme Court's decisions involving municipal councillors where the "closed mind" approach to bias was applied were decisions with high policy content. The authors say the following with regard to the above three decisions at §11:14:

> Policy decisions manifest a point of view, whether made in a format that resembles adjudication or legislation, and for this reason courts have recognized that even where the duty of fairness applies, it is inappropriate to apply the judicial standard of bias. Thus, when enacting bylaws, members of municipal councils have been required only to avoid having or appearing to have a "closed mind," even though they were under a statutory duty to provide a prior hearing. (*Old St. Bonaface*, supra; *Save Richmond Farmland Society*, supra…) Moreover, given the high policy content of the decisions to be made, and the fact that the statutorily-designated decision makers were elected, and indeed had campaigned on the issues, the duty of fairness in this context has been held to be satisfied as long as the members remained "capable of persuasion," the minimum standard required to prevent the proceedings from becoming a sham.
>
> In the result, the starting point in each case will be an analysis of the decision making process in order to determine whether any form of participation is to be afforded to affected parties. If it is not, then the relevant standard will depend upon the context. For example, where the process has the essential trappings of adjudication, with a hearing at which the parties are afforded an opportunity to present submissions, a test of bias akin to that applied to judges will presumptively apply. (*Newfoundland Telephone Co*, supra) on the other hand, where the decision making process merely leads to preliminary decisions, or is investigative in nature, or is part of the administration of overall policy, as in the case of the Director of Investigation and Research under the *Competition Act*, or implements or makes policy, or implements a political decision, then a less stringent standard of impartiality, such as only requiring an absence of a conflict of interest, or a mind that is capable of persuasion, may be more suitable.
>
> [Emphasis added]

[99] Simply because the Supreme Court applied the closed mind standard of bias to elected municipal councillors when dealing with policy type hearings, does not mean the standard must apply across all of their functions. Municipal councillors have many functions – political, legislative and adjudicative. In my view, the case law is clear that the applicable standard for municipal councillors depends on the context and type of function being performed.

[100] The British Columbia Court of Appeal decision in *McLaren v. Castlegar (City)*, *supra*, illustrates the point. In *McLaren*, the court considered the standard that applied to municipal council in deciding whether to require a landowner to demolish and remove buildings from her land. The court applied the reasonable apprehension of bias test and not the closed mind test. As in *Old St. Boniface*, *supra*, the court indicated that elected municipal officials are expected to have opinions on civic priorities and policies and when a policy type decision is before them, they will not be disqualified for having a pre-disposition. The court emphasized, however, that it is not just the nature of the tribunal that must be examined, but also its function:

> 33 In the case before us, the nature of the tribunal — a municipal council composed of elected officials — is of considerable importance. Elected municipal officials are expected to have opinions on civic priorities and policies.
>
> 34 Where a matter that comes before a municipal council is a matter of policy, a member of council will not be disqualified for being pre-disposed in one direction or another. What is necessary is simply that the councillor be willing to listen to the submissions; as long as the councillor is not impervious to submissions such that any arguments would be futile, he or she will not be disqualified on grounds of bias: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385 (S.C.C.); *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 75 D.L.R. (4th) 425 (S.C.C.).
>
> 35 While the nature of the tribunal here suggests a lenient standard should be applied, the Court must also consider the function of the tribunal in this case. Castlegar City Council was not, here, acting as a policy-making body. Rather, it was determining whether certain buildings violated bylaws and codes, whether they were unsafe, whether they constituted a nuisance, and whether they were so dilapidated and unclean as to be offensive to the community. After making those findings, Council was also required to exercise its discretion in determining whether the appropriate remedy was demolition. These various considerations were adjudicative in nature: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342 (S.C.C.). As indicated in *Newfoundland Telephone Co.*, a tribunal exercising primarily adjudicative functions will generally be required to comply with more strict standards of fairness than a policy-making tribunal.
>
> 36 While the fact that the municipal council was engaged in adjudicative functions in this case cannot be ignored, the nature of a municipal council and the fact that it is an elected body is also of significance. Municipal councillors are responsible to their constituents and are vitally interested in the enforcement of municipal bylaws. They are entitled to press city staff to investigate and report on particular perceived problems. When municipal staff identify a problem, it will only be considered by council if an elected member of the municipal council moves for consideration of

a resolution and another seconds the motion. Unlike most adjudicative tribunals, municipal councils are not required to hear whatever disputes come before them; rather, they determine their own agendas. At least some members of council, therefore, will inevitably have made some preliminary estimation as to the merits of a matter before it formally comes before council for resolution.

37 In my view, the standard that was applied in *Old St. Boniface Residents Assn.* and in *Save Richmond Farmland Society* would be too lenient a standard to apply in a case such as the present one. Because members of council were engaging in an adjudicative function, it was not sufficient that they had not irrevocably made up their minds. Rather, they had to be completely open to a fresh evaluation of the evidence and submissions presented to them. In short, they had a duty to be impartial. Keeping in mind, however, that the tribunal was made up of elected politicians who could not be expected to come to the hearing without some knowledge of the situation and without some inkling as to the appropriate disposition, it would be imposing an unrealistically high standard to expect them to come with no preconceptions or inclinations.

38 In my view, the chambers judge was correct in finding that the mayor's comments, in context, did not indicate that he had pre-determined how he would vote on the council resolution. His preliminary view to the effect that "[i]t's just a pretty dilapidated building that we'd really like to see removed" must be assessed in light of his other statements which indicate that he appreciated the need to follow a process and to give the appellants an opportunity to be heard and to present evidence. Taken in context, his remarks of February 1, 2010 did not suggest that he was unwilling to reassess the matter, or that he would not engage in a fresh weighing of the evidence and submissions at the council meeting. He did not display an undue predisposition such as to create a reasonable apprehension of bias. In my view, the chambers judge was right to reject the allegations of bias.

39 Before concluding these reasons, I should advert to one further argument made by the appellants. They say that the question of whether there is a reasonable apprehension of bias is a partially subjective one; the real question, they contend, was not whether an objective observer would consider the mayor to be biased, but rather whether their own worries about his statements were reasonable when viewed from their perspective. They say that the chambers judge ought to have taken into account not only the mayor's own statements, but also those of the newspaper reporter, in order to evaluate the reasonableness of the appellants' concerns.

40 I cannot accept that the determination of whether there was a reasonable apprehension of bias depends on what the appellants may or may not have thought. The test is an objective one. As stated by de Grandpré J. (dissenting, but not on this point) in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at 394, (1976), 68 D.L.R. (3d) 716 (S.C.C.):

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude ...."
>
> 41 The standpoint from which a reasonable apprehension of bias must be measured then, is the standpoint of the informed, neutral observer. The test is an objective one, not a test of whether the petitioners' fears of bias were in some sense understandable.
>
> [Emphasis added]

[101] HRM submits that *McLaren*, *supra*, is an outlier and was not followed by the Alberta Court of Appeal in *Beaverford v Thorhild (County No. 7)*, 2013 ABCA 6. I disagree. The Alberta Court of Appeal indicated the need to assess context and said that the objective reasonable apprehension of bias test is applicable where a councillor is exercising a quasi-judicial function. The court found:

> 26 The respondent proposed two tests for establishing a reasonable apprehension of bias. First it suggested that only lack of an "open mind" would disqualify: see *Baker v. Foothills (Municipal District No. 31)* (1980), [1981] 2 W.W.R. 128, 116 D.L.R. (3d) 636 (Alta. Q.B.); F.A. Laux, *Planning Law and Practice in Alberta*, loose-leaf, 3 rd ed., [Edmonton: Juriliber, 2010] at para 7-32; see also *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.) at paras 25 to 27, p 637. In our view, while the open mind test may apply to tribunals with a policy or legislative assignment, the traditional reasonable apprehension of bias test should apply to the SDAB when executing its quasi-judicial function: Laux at paras 10-6 to 10-7; *Beier* at paras 6 to 10.
>
> 27 Second, the respondent also advanced an alternative test that "a reasonable apprehension of bias may be found to arise only where a person has made statements or actions that are directly targeted at a specific person or development whose appeal they are subsequently required to adjudicate": Respondent's Factum, para 32. This notion of targeted adversity perhaps resembles the targeted malice concept that has existed in the history of the tort of abuse of public office: see *e.g. Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 2002 ABCA 283, 320 A.R. 88 (Alta. C.A.), leave denied [2003] 2 S.C.R. xi, 363 A.R. 194 (note) (S.C.C.) at paras 91 to 116. But the respondent did not cite any authority where a test of targeted adversity was specified as the rule for reasonable apprehension of bias in municipal governance situations.
>
> 28 We are not persuaded that such an approach is preferable to the established test of whether a reasonable person could find a reasonable apprehension of bias on the part of the SDAB by reason of Croswell's involvement. Deciding bias and

> apprehension requires a "careful and thorough examination of the proceeding": *Miglin v. Miglin*, 2003 SCC 24 (S.C.C.), at para 26, [2003] 1 S.C.R. 303 (S.C.C.).
> 29 The respondent cites no provision of the *Municipal Government Act* which would eject the need of at least a measure of impartiality by participants in an SDAB hearing. We do not see that the Legislature intended to immunize a SDAB decision from review even if it was made by councillors with strong opinions which they had publicly announced beforehand and which were exclusive of opposing points of view.
> 30 Nor does *McLaren* suggest that "too lenient" a standard is to be applied to tribunals with adjudicative functions. *McLaren* was dealing with a political body, the City Council, directly. Even then, it asserted that "they had to be completely open to a fresh evaluation of the evidence and submissions presented to them." The lack of confidence of an open mind in the face of a clearly adverse attitude reflected in a history of adverse behaviour is, in our view, sufficient in this case to find that a reasonable and informed person who thought the matter through would have a reasonable apprehension of bias in Croswell. As said, saying so does not mean the open mind standard should be the test. It merely means that proof of an inability to approach the matter with an open mind here is sufficient. We would add that we do not read *Mountain Creeks Ranch Inc.* as positing an automatic rule either.
>
> [Emphasis added]

[102] I note as well that Justice Rosinski adopted the reasoning in *McLaren*, *supra*, in *Dalhousie University v. HRM*, 2023 NSSC 374 (para. 215).

[103] Municipalities are political bodies. Individual municipal councillors are elected to further a political platform. It is a broad range indeed of issues that a municipal councillor will address in their various roles. Often council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise (*Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, at para. 32). However, where their role is adjudicative, as in *McLaren*, *supra*, and in this case, the sliding scale moves, and the standard is that of a reasonable apprehension of bias. That is not to say that elected councillors ought to have no preconceptions but, as was found in *McLaren*, *supra*, they cannot display an undue predisposition such as to create a reasonable apprehension of bias.

[104] With respect to my conclusion that Community Council sitting on appeal of a site plan must be held to the standard of reasonable apprehension of bias and not that of a closed mind, I refer to my analyses under procedural fairness above at paragraphs 72 to 86. My conclusion with respect to the applicable standard of bias follows my conclusion that a relatively high degree of procedural fairness is owed to the parties. In summary, the legislation provides that Community Council is the appellate tribunal for site plans under the *HRM Charter*. It conducts a *de novo*

analysis. Council members hear evidence and assess the site plan in light of the totality of the evidence before them. They are constrained, as was the development officer at first instance, by the legislation, and specifically by the detailed criteria set out in s. 22A.5 of the LUB.

[105] It is in keeping with the legal framework regulating site plan appeals to require that Community Council avoids conduct that gives rise to a reasonable apprehension of bias. First, an appeal of a site plan is not essentially a policy-based decision to which it might be appropriate to apply the less stringent standard of impartiality of a closed mind. The decision-making process for appeals involves hearing evidence from the appellants and the respondents concerning the site plan and conducting an analysis referencing the legislative criteria in relation to the proposed site plan and the evidence before the Community Council. Second, the application of the more stringent test of an apprehension of bias advances the objectives of the legislation, considering the importance of the transparency and fairness of the process to the parties. Parties before the Community Council sitting as an appellate tribunal must have confidence in the integrity of the process and decision making.

[106] Like other aspects of the duty of fairness, the reasonable apprehension of bias test must be applied contextually. Here the context is a site plan appeal before elected councillors who may well have previously taken positions on the very issues before them. In this context, this is not, in and of itself, a reason to find bias. Bias connotes a reasonable apprehension that the decision-maker could have been influenced by an improper consideration, or has made up her mind to such an extent that hearing the matter is incompatible with a fair hearing. I see no difficulty with the councillors in this public hearing indicating that the HRM policy and By-laws regarding C&D sites needed to change. However, they cannot display an undue predisposition to a particular result, they must conduct the appeal with fairness, so as not to create a reasonable apprehension of bias. As our Court of Appeal said in *Tarrant*, "While the councillors need not conform to a judicial code of conduct, they must act objectively, in good faith and without bias" (para. 37).

[107] Kiann alleges disqualifying bias on the part of councillors Purdy, Hendsbee and Kent. As noted above there is a video and audio recording of the appeal hearing before Community Council.

[108] During the debate portion of the hearing and before the vote was taken, Councillor Purdy (after having relinquished the Chair) made it clear that it did not matter what the respondent put before her, there would be no approval by her of a

site plan for a C&D Facility in this residential area. She did not base her position on the criteria to be applied under s. 22A.5, but said that even if there were no concerns about wetlands, this was not a good idea and should not be located in this area. In my view, her comments create a reasonable apprehension of bias. She stated as follows when speaking to the motion before Community Council:

> **Councillor Purdy, Chair:**
> Can you take the Chair for a second, Councillor Hendsbee?
> **Councillor Hendsbee:**
> I'll take the Chair, sure. Perhaps it would be easier for another because I think I'm a little too …
> **Councillor Purdy:**
> Okay, go ahead, thank you. Yeah, I just want to speak to this as well and to your suggestion for a supplemental. I, I know that we need C&D facilities. We are in a building boom but absolutely not in a residential area, absolutely not. I have residents in District 4 who are tormented because the by-laws and the land use by-laws cannot be changed and they are, their, their quality of life is severely affected. Their property, their, their property values affected. Noone wants to live there. They can't open their windows in the summer. The dust is intense. They can't breathe. The, the noise is constant and there is no Compliance Officer that's going to help them because they're allowed to, to…
> **Councillor Hendsbee:**
> The Ross Road site …
> **Councillor Purdy:**
> No, it's not actually the Ross Road site. I'm not even talking about that. I have two other places and no, absolutely not. So, even if there were not the considerations for wetlands, this is not a good idea. Once this goes in, once this is approved, there is nothing that's going to protect the residents. No. No. No. So, absolutely not. I will not be voting in favour of this facility at all. We do need this facility, not in this area. At all. So, whatever needs to happen, do it. Provincial, our staff, like no, if the, if the land use by-laws are outdated then I, I don't understand why everything takes so long but this is a very wrong and dangerous decision for the community. Five hundred trucks a day on one of my residential streets, five hundred. Tell me a how a person can live with that amount of truck traffic.
> **Councillor Hendsbee:**
> [inaudible – 1:55:47]
> **Councillor Purdy:**
> Yeah, okay, we don't have to say it. No. No, No. This is, this is not right and it's not okay. No. No. No. So, I will not be supporting a supplemental, I will, I will be voting for the Appellants, absolutely, and whatever that means, that means but this needs, the fact that this can be allowed in this area needs to change.
>
> [Emphasis added]

[109] Later, Chair Purdy said as follows:

> **Councillor Purdy, Chair:**
> Okay. Call for the question. So, that the appeal be allowed. All in favour. Aye. [in unison, with hands raised -- Councillor Mancini, Councillor Kent, Councillor Purdy and Councillor Hendsbee].
> **Councillor Purdy, Chair:**
> Okay, and no nays so the Appellants, yeah, so the appeal has been approved. [woo hoo … clapping from audience]. Okay.
> **Councillor Kent:**
> At the end …
> **Councillor Purdy, Chair:**
> At the end of it, yes, absolutely [speaking to Councillor Kent]. Wonderful. So, thank you everyone for coming. Thank you speaking and for all the correspondence that we've received. It's greatly appreciated. Thank you for staff's work on this as well. Okay, we are moving on to correspondence, petitions and delegations…

[110] The video illustrates Chair Purdy clapping when the appeal is upheld along with some of the audience.

[111] In my view, the above comments clearly illustrate a reasonable apprehension of bias on the part of Councillor Purdy. An informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that it is more likely than not that she, whether consciously or unconsciously, would not decide the matter fairly. She stated that even if there were no wetland concerns, her decision would be the same – she would not allow this C&D operation in this area. She referred to other C&D operations and their impact on residents. At no point did she provide any reason for her conclusion other than that such operations are not appropriate in this residential area. Despite the NSUARB agreeing with Kiann's argument that Community Council's decision to deny the re-zoning did not reasonably carry out the intent of the MPS and ordering the Property zoned CD-2, which allows for a C&D facility, Councillor Purdy declared that a C&D operation should not be allowed in this area – full stop. She said it would be a very wrong and dangerous decision for the community. It is one thing for a councillor to express the opinion that changes should be made to the MPS or policy, but it is quite another for her to completely disregard her function at the appeal hearing and pronounce that she will never approve a C&D operation in this area.

[112] Not only do Councillor Purdy's comments illustrate a reasonable apprehension of bias, which I have concluded is the applicable test here, they also reflect a mind incapable of persuasion. In other words, I find that Councillor Purdy's comments meet both the reasonable apprehension of bias test and the less stringent

standard of impartiality, the closed mind test. I am of the view that she exhibited a completely closed mind to the Site Plan evidence. She did not put herself in the shoes of a development officer and determine whether the Site Plan met the criteria in s. 22A.5 based on the evidence presented on appeal. Instead, Councillor Purdy simply declared that this proposed operation, by virtue only of its location in a residential area, was inappropriate. Her comments represent a prejudgment of the matter to the extent that any representations at variance with her view would be futile.

[113] It is noteworthy that Councillor Kent described Councillor Purdy's comments as a passionate plea of "I just think it's the wrong thing to do." In responding to the question of whether the appeal should be paused to obtain further information, Councillor Kent said:

> Yes, thank you. Just on Councillor Mancini's question around which way to go, I had, I had wondered the same thing and I'm glad he asked that question but I think that tonight we, we have two things that, to consider here. For me is, I think the onus needs to be on the, on the Applicant to provide what is needed to satisfy us. So, I won--, I would rather not defer. I would rather vote in favour of the, of the appeal. I also think it's an important if, for any reason, it ends up being challenged in a Supreme Court, I, I, I stand strongly behind the rationale that we have. I don't feel any, any concerns. Sometimes we're put in the position of, of having to, a passionate plea as Councillor Purdy has done around, I just think it's the wrong thing to do. That doesn't always hold up. It's passionate and it's great that we have, we have councillors like her but I think tonight a message to our, our public, who are here tonight and who are here in other areas within the municipality, is that we will stand with this appeal and I think that, I hope that this is a message as well to our staff who are developing and reg-- going forward with our, our regional planning and, and our master, our planning visioning processes within our communities now that this is a big message to hear and I hope it's incorporated into, into the reports that are, that will go forward and I look forward to maybe an opportunity for us to bring something more specific around C&D sites to the table in the future. So, I would like to, again I'll support voting in favour. I did, I think I did spoke, spoke poorly around not, not supporting the staff recommendation when, in fact, they didn't really have a recommendation. They just showed us the options. So, the motion that's on the floor is what I will be supporting which is that the appeal be allowed, just to clarify that.

[114] Councillor Hendsbee voiced his view that C&D facilities should be located in industrial parks and not in residential areas. He referred to the site as not being in an appropriate area. He appeared to want the Province to step forward, and provide areas for siting these facilities. When the option was raised of pausing the appeal until Community Council received a supplemental report on the wetlands,

Councillor Hendsbee preferred to vote on the matter and "encourage the Province to do what it should be doing in the first place relocate this in an appropriate location." While he did reference the wetlands and potential traffic issues, his comments suggest a view that the way to address this specific appeal was by expropriation and re-siting the C&D facility to an industrial park. I find that a neutral observer would conclude that Councillor Hendsbee did not consider the Property to be an appropriate site for a C&D facility, regardless of whether the Site Plan met the criteria of s. 22A.5. An informed person would conclude that it was more likely than not that he, whether consciously or unconsciously, would not decide fairly.

[115] If I am wrong and the less stringent standard of impartiality or closed mind test applies in the current circumstances, I am further of the view that Councillor Hendsbee's comments also meet that test. The statements, taken together, clearly demonstrate that he had a closed mind on the subject. His comments represent a prejudgment of the matter to the extent that any representations at variance with this view would be futile. The comments reflect his opinion that C&D facilities belong in industrial parks, not residential areas, and he called on the Province to address the situation.

[116] It is useful to consider Councillor Hendsbee's comments in detail. When speaking to the motion, his initial comments focused solely on this being an inappropriate location for a C&D facility and his belief that the way to proceed was for the Province to expropriate the Property and re-site the C&D facility to an industrial park:

> **Councillor Hendsbee:**
> Madame Chair, I'll put the motion on the floor that the appeal be allowed. I also want to acknowledge the correspondence that were received by Josh Norwood of Nature Rich Homes as well as Robert and Bernadette Ferguson that was also received by email. I want to make sure they were noted on the record. I want to take the opportunity now to thank the residents …
> **Councillor Kent:**
> Can we second that first?
> **Councillor Hendsbee:**
> Okay.
> **Councillor Kent:**
> I'll second that.
> **Councillor Hendsbee:**
> Okay. Thank you. I want to acknowledge the participation tonight by the Appellants. I want to thank you very much for your presentations tonight and those who also spoke. It's been a long process for many of the residents in the area. We

> at the Community Council are familiar with this application. We've been through this process before. We felt that the, the siting of the location, in a rural, residential area, even though it was zoned at the time, res-- rural resource, rural enterprise, it is still not, is still not an appropriate location. I've been a strong advocate that the, these should be in industrial park settings. My concern though is that the, we need to re-evaluate our so-called solid waste strategy. I said this last time that our construction demolition debrief siting criteria needs to be re-evaluated. Our municipal planning strategies for the areas are well outdated. We know that. We're going through a process now to just try to update the suburban plans before we even get to the rural plans. We just finished doing the urban plan so, it's a long time coming to have a re-evaluation and rethink of our strategy. And if the Province is eager to have housing starts to be created and everything else like that, there's going to be more and more demand for construction demolition debrief facilities and processing. So, I'm hoping that the Province will be stepping forward as they should have in the past. The previous MLA for the area could have done an option in regards to at least expropriating the property from the munic—from, from the property owner, expropriating the property from the municipality and the industrial park to resite it or provide their own property in a provincial industrial park and I'll be advocating to the new MLA for the area that this is affected to do that. I believe that's the appropriate thing to do. So, Madame Chair, I'll be standing with the Appellant and I support the appeal.
>
> [Emphasis added]

[117] Later, when Councillor Mancini raised the option of pausing the appeal until Community Council received a supplemental report on the wetlands and the results of an independent biophysical assessment, Councillor Hendsbee indicated he was not in agreement and that the vote should proceed. He then said again that he encouraged the Province to do what it should have done and locate the facility in an appropriate location:

> **Councillor Hendsbee:**
> Well, Madame Chair, I can appreciate that, but that concern or that request but I also sit as a community liaison person, you know, the community representative on the C&D site in Atrum and that's the only C&D disposal site we have in the province or for HRM area. And through that whole process, the issue first rose when the airport expanded its highway or its runway. It exposed acidic rock and stuff. We had run-off from the airport and fish were showing up dead in Porter's Lake and Lake Echo because the run-off coming from the airport. The Atrum, just outside of [inaudible] is in the same watershed area. So, when they put the C&D site there, that was the, one of the major concerns being raised by the residents at the time from Lake Echo and Porter's Lake, so that' why as the local rep—elected representative, I'm the exofficio on that C&D Liaison Committee. And what they had to do up there is put in clay liners and everything else to meet the Department of Environment standards put clay liners in the ground up there to ensure there'd

> be no seepage of leachate or any materials that would be in the C&D materials. You know, I have seen nothing in this application going from clay liners or anything like that to demarcation with the wetlands, in my opinion, has been shown by the, by the Appellant to be fair and reasonable and I think that, to have this go back, I think it would be up to the Applicant in my opinion to prove that and not to go for a, for a suspended hearing. I think that the time to, in my opinion, is to vote on this matter now and I still encourage the Province to do what it should be doing in the first place, relocate this in an appropriate location.

[118] Councillor Hendsbee also commented on what he considered to be general problems with C&D facilities. When he then said "it's not just site specific but it has to name neighbourhoods that it has to go through and that's what I'm also concerned about", it is unclear whether he was referring to needed changes in HRM zoning or LUBs, etc. The s. 22A.5 criteria address adjoining uses, but Councillor Hendsbee's comments are much broader than adjoining or surrounding land impacts, as he mentions that the way to get to the site is by Highway No. 7 through East Preston and Lake Echo and also Porter's Lake. It seems his concern was that the zoning allowed this facility in an area where trucks would have to pass through several communities to reach the site, rather than whether the Site Plan met the relevant statutory criteria:

> **Councillor Purdy, Chair:**
> Okay. Thank you very much. Yes, second time for Councillor Hendsbee, go ahead.
> **Councillor Hendsbee:**
> Also, this is not site specific, but I think the impacts it has on the neighbourhoods. You know, we talked about not just the wetlands on site but we have to take into account the traffic issues. Highway No. 7 through East Preston and Lake Echo and also Porters Lake are the only two ways to get, the only two roads to get into this location and affects those communities. We've already heard about the complaints we have on Ross Road, about materials being fallen off of trucks and flat tires because of roofing nails and everything else like that. We have too many complaints. We have complaints also the truck traffic on McLaughlin Road and Lake Loone. So, I just want to make sure that these facilities do have a lot of impact to neighbourhoods. It's not just site specific but it has to name neighbourhoods that it has to go through and that's what I'm also concerned about is the additional traffic and wear and tear but more of the public safety concerns but as I, as I said before I'll be standing with the Appellants. Thank you.
>
> [Emphasis added]

[119] Under the *HRM Charter* and related By-Laws and policies, Municipal councillors have various roles. For example, they sit as members of Council, they sit as members of committees before whom public hearings are held, and, as here, sit as the appellate tribunal on site plan and variance appeals. In their various roles, they

may have previously expressed their views on the issues being considered. As elected representatives, it is natural that councillors may have preconceived opinions. It would not equate to disqualifying bias for a Community Council member on a site plan appeal to simply express their opinion that the legislation, policy, by-laws are outdated and change is needed. That said, Council cannot rely on that opinion as the basis for allowing an appeal. When a matter comes before Community Council members in their capacity as decisionmakers, it is imperative that they remind themselves of their responsibility to adjudicate the matter before them fairly and with an open mind. They cannot abandon their function in a manner that focuses on matters that raise a reasonable apprehension of bias. The comments of Councillor Hendsbee taken together not only raise a reasonable apprehension of bias but also indicate that his mind was made up (closed) that the issue ought to be addressed other than through s. 22A.5 of the LUB.

[120] Kiann says that not only were Councillors Purdy and Hendsbee biased but also Councillor Kent. Councillor Kent spoke of the need for things "to change and be done better" and that she hoped this was "a message as well to our staff who are developing … going forward with our, our regional planning and, and our master, our planning visioning processes within our communities now that this is a big message to hear and I hope it's incorporated into, into the reports that are, that will go forward and I look forward to maybe an opportunity for us to bring something more specific around C&D sites to the table in the future." However, she also spoke specifically of the Site Plan that was before them. She appropriately noted that the kind of criteria that had "to be looked at is what's in place today and anything changing in the future would be a decision of Regional Council." She referred specifically to the "piece around the mitigation around the noise, dust, the, the buffer" saying it was very strongly a concern for her. Councillor Kent further indicated that she had a "grave concern around as well, the wetland." She said that if Kiann came back having addressed "some of these things", then that would be progress and they might not be able support an appeal next time. While Councillor Kent noted the need for change, her comments do not support a finding of a reasonable apprehension of bias. She did not display an undue predisposition such as to create a reasonable apprehension of bias. In addition, Councillor Kent clearly did not have a closed mind. She spoke specifically of the possibility that Kiann might be successful once the additional information was provided.

[121] I note that both Councillor Mancini and Councillor Hendsbee were members of the Community Council that heard and refused Kiann's application in April 2019 to rezone the property, and that decision was ultimately overturned by the NSUARB.

This, in and of itself, is not sufficient to represent a disqualifying bias. Council is empowered by the *HRM Charter* to decide both re-zoning applications and subsequent site plan approvals.

[122] As noted above, councillors sitting on Community Council are elected members, and it is to be expected they will opine on issues of importance to their constituents, including potential reforms of HRM policies, such as land use bylaws relating to C&D facilities and their locations. Any test of bias must be sensitive to the institutional context in which the decision is being made. However, councillors must still approach a site plan appeal hearing fairly and give due consideration to the parties' positions in assessing whether the site plan in question meets the criteria. Councillors Purdy and Hendsbee did not engage with the site plan appeal process, fixating instead on their belief the Property was simply not an appropriate location for a C&D facility.

[123] I am of the view the comments from Community Councillors Purdy (Chair) and Hendsbee illustrate both an apprehension of bias and a closed mind. Their comments would make it apparent to a reasonable bystander that Kiann was not given a fair hearing in front of decision makers that were open to persuasion. As the respondent at the appeal hearing, Kiann was entitled to procedural fairness. The Councillors were required to conduct themselves so that there would be no reasonable apprehension of bias. Their comments undermined any sense of impartiality. The comments strayed so far outside the reasonable realm of proper consideration that one cannot conclude otherwise than that they raise a reasonable apprehension of bias. The clear impression is that they were not deciding based on the applicable statutory scheme and the evidence before them. Their comments indicate a disqualifying predisposition to denying Kiann's appeal on the basis of their view that the site was inappropriate for a C&D facility. Therefore, because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias (and also a closed mind), I would allow this judicial review.

[124] Because of my finding on the issue of bias, I need not decide the remaining issues raised by the Applicant.

The Consequences of a finding of bias

[125] Given my determination of bias on the part of two of the four councillors, I must now address the consequences of a finding of bias. It is not possible for there to have been a fair hearing where there has been a finding of a reasonable

apprehension of bias (*Oleynik v. Canada (attorney General*, 2020 FCA 5, at para. 51, leave to appeal refused, 2020 CarswellNat 1551(S.C.C.)). Based on the caselaw, I am of the view that a finding of a reasonable apprehension of bias by an adjudicative decision maker normally results in the decision being set aside and a new hearing ordered.

[126] The Supreme Court in *Newfoundland Telephone*, *supra*, discussed the consequences of a finding of bias. In that case, the comments of a member of the Board of Commissioners of Public Utilities were found to create a reasonable apprehension of bias. The court said that the Board member's comments were such that a reasonable apprehension of bias would exist so long as he remained a member of the Board hearing the matter. The court concluded that the hearing proceeded unfairly and was invalid. It declared the Board's decision void *ab initio*:

> **The Consequences of a Finding of Bias**
>
> 40 Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void. In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, 16 Admin. L.R. 233, [1986] 1 W.W.R. 577, 69 B.C.L.R. 255, 49 C.R. (3d) 35, 63 N.R. 353, 23 C.C.C. (3d) 118, 24 D.L.R. (4th) 44 at p.661 [S.C.R.] Le Dain J. speaking for the court put his position in this way:
>
> > ... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.
>
> 41 In my view, this principle is also applicable to this case. In the circumstances, there is no alternative but to declare that the order of the Board of Commissioners of Public Utilities is void.
>
> [Emphasis added]

[127] I note that in *Baker*, *supra,* the Supreme Court found there was a reasonable apprehension of bias on the part of an immigration officer and set aside his decision, returning the matter to the Minister for redetermination by a different immigration officer.

[128] I find that the decision of Community Council must be set aside. Kiann submits that instead of remitting the matter to Community Council, this court should grant its application for a site plan approval. HRM argues that if I find that the matter cannot be remitted back to the Community Council because of a finding of bad faith or bias on the part of some councillors that cannot be corrected, then the court should remit the matter to the full HRM Regional Council and direct that the subject councillors not participate in the new hearing.

[129] In some circumstances, courts will provide a disposition on the merits, for example, where it is obvious a particular outcome is inevitable and that remitting the case would serve no useful purpose (*Vavilov, supra*, at paras. 140-142). It is a discretion that must be exercised sparingly. Determining whether a site plan meets the LUB criteria is a task that the legislature delegated to HRM Council which, in turn delegated it to Community Council. In my view, the court's discretion to step into the shoes of Community Council and decide an appeal of this nature should only be exercised in the clearest of cases.

[130] Although s. 22A.5 of the LUB identifies the criteria for site plan approval for all C&D operations and states that the development officer shall approve where the items have been addressed, there is considerable discretion for Community Council in determining whether all of the requirements have been met. For example, the wording used in the listed requirements includes language connoting discretion, such as:

- in such a manner to minimize land use impacts on adjacent land uses;

- to ensure the development does not negatively impact upon surrounding properties;
- such that no aspect impacts upon adjacent uses or streets
- that protects and minimizes land use impacts on adjoining lands
- adequate screening measures;
- to adequately address the management of stormwater and surface water

[131] In the circumstances of this matter, I am of the view that I should not be usurping the discretionary decision making authority of Community Council under s. 22A.5 of the LUB. Having watched the video of the appeal hearing and reviewed the written materials that were before Community Council, including the evidence presented on appeal, I find that, in the circumstances, it would be inappropriate for the court to exercise the function of Community Council and determine the merits. I see no reason to deviate from the usual practice of remitting the matter for a re-hearing. I would allow the judicial review, set aside the decision of Community Council, and remit the matter to the full HRM Regional Council, excluding Councillors Purdy and Hendsbee.

Conclusion

[132] Kiann's application for judicial review is allowed with costs. I remit the matter to the full HRM Regional Council, excluding Councillors Purdy and Hendsbee.

[133] If the parties cannot agree on costs, I will entertain brief written submissions within 30 days.

Jamieson, J.