IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Williams Lake Conservation v. Chebucto Community Council et al, 2003NSSC239

Date: 20031124
Docket: S.H. 205051
Registry: Halifax

Between:

Williams Lake Conservation Company

Applicant

v.

Chebucto Community Council of Halifax Regional Municipality

Respondent

v.

Kimberly-Lloyd Developments Ltd.

Interested Party

Before: The Honourable Justice Glen G. McDougall

Heard: November 3, 2003

Written Decision: December 15, 2003

Counsel: Peter A. McInroy and Kathleen J. Hall, on behalf of the applicant
Michael Moreash, on behalf of the respondent
Michael J. Wood, Q.C., Brian C. Curry and Ann Smith on behalf of the interested party

McDougall, J.: (Orally)

[1] By way of originating notice (application inter partes) filed the 31st day of July, 2003, Williams Lake Conservation Company, (henceforth referred to as "WLCC") is seeking an order in the nature of certiorari to quash a decision of the Chebucto Community Council of Halifax Regional Municipality (henceforth referred to as "CCC") made the 3rd day of March, 2003. This decision of the CCC approved the re-zoning of approximately 156 acres in Mainland South, lands of Kimberly-Lloyd Developments Ltd. (henceforth referred to as "KLD"), from H (Holding) to RDD (Residential Development District). A development agreement with KLD was also approved by the CCC at the same time. This application is made pursuant to rule 56 of the *Nova Scotia Civil Procedure Rules*. All procedural requirements of the rule have been complied with.

BACKGROUND:

[2] On January 12, 1999, KLD submitted an application to the Halifax Regional Municipality for the re-zoning of certain lands in Mainland South known as the Governor's Brook Development. KLD requested that this portion of Governor's Brook be re-zoned from "H" to "RDD". It also sought approval for a development agreement allowing for the creation of 870 dwelling units in a mixture of single family, semi-detached, townhouse and apartment buildings to be developed in 12 phases.

[3] Initially the public hearing respecting the proposed amendment was proposed for January 6, 2003 but at a meeting held on December 2, 2002 a spokesperson for WLCC suggested a later date to enable more time for preparation. Consequently the CCC agreed to conduct the public hearing a month later on February 3, 2003. Notice of this public hearing was given by way of advertisement in the Chronicle Herald and Mail Star on January 18th and 25th, 2003. The notice included the purpose for and the date, time and place of the meeting. It called for both written and oral submissions. Due to an anticipated high level of public interest in this meeting it was decided to change the venue for the meeting from the Keshen Goodman Library at 330 Lacewood Drive to the near-by Halifax West High School Cafeteria, 283 Thomas Raddell Drive, Halifax. Notice of the change in venue was made by placing an advertisement in the newspaper on February 1, 2003 and also by posting a notice at the Keshen Goodman Library. To assist members of the public who might not have read the

newspaper advertisement, the notice placed at the Library included a map showing the easiest way to get to the new venue at Halifax West High School. HRM staff even went so far as to provide a bus to transport those people who showed up at the library to the new venue and to return them after the meeting. At a special meeting of the CCC held on January 28, 2003 the rules of procedure to be utilized at the public hearing were established. It was at this same meeting that the decision was made to change the venue to accommodate the anticipated high public participation.

[4] The rules of procedure adopted for the public hearing on February 3, 2003 contained a number of provisions. It limited individual oral presentations to five minutes and no individual would be allowed to speak more than once. This was done apparently to ensure everyone present the opportunity to be heard without unduly delaying the time to complete the public hearing requirement laid down in the *Municipal Government Act*. Indeed, due to the public interest the public hearing on February 3, 2003 did not provide sufficient time for all those present and wishing to speak to do so. Consequently, after hearing from staff who had earlier filed a report dated November 20, 2002 which recommended the approval of the re-zoning and development agreement, and from 34 separate individuals, it was decided to adjourn the meeting to allow all those wanting to speak and who had signed a sign-up list to come back on February 12, 2003 to be heard. Only those on the "sign-up" list would be permitted to speak. There would be no substitutions nor would anyone else not attending the initial public hearing be permitted to have his/her name added to the list of speakers.

[5] Despite what has been described by some as a severe winter snowstorm on February 12, 2003, the second round of public hearings took place as scheduled. Of the 15 speakers who had previously signed up, 13 actually showed up and made oral presentations. Of the two remaining who did not show up, one of them submitted a written presentation for consideration by CCC. One other individual who was unavailable on the first night sought permission to speak on the second night, however, his request was denied since his name was not on the sign-up list. He did manage to express his concerns about the process and the development by way of internet e-mail to the Chair of the CCC whom he had known personally for a number of years. The only person on the sign-up list who did not either speak or make a written submission was Mr. Morris Givner. However, according to the minutes of the March 3, 2003 meeting of Community Council, Mr. Givner did attend that meeting and made comments regarding his concerns, not about the

development per se but rather about the process that was followed. Apparently he felt the decision should not have been left to only three counsellors given the impact on such a large number of people over an anticipated long duration of time.

[6] It should again be noted that written submissions were also invited which became part of the public record.

[7] In response to a number of concerns raised during the two nights of hearings, Community Council requested additional information from staff. A supplementary report was prepared and made available to the members of the Community Council prior to the March 3, 2003 meeting which was set to decide the fate of the re-zoning application/development agreement. This meeting was not intended for public involvement in terms of a debate or additional public input. Instead it was held to allow council members the opportunity to consider all of the information that had been presented by the public both orally and in writing along with the initial and supplementary reports of staff. At that time, if council members were satisfied that the matter was ready to be decided, they would put the resolution to a vote.

[8] The supplemental staff report was not available for circulation to council members until late on Friday, February 28, 2003 just three days prior to the meeting on March 3, 2003. It is customary to delay public distribution of such reports until after council members have had the opportunity to receive advance copies. In this particular instance this meant that interested members of the public did not have access to the supplemental report until Monday morning, March 3, 2003 - the very day of the meeting to decide the application. This, amongst a number of other factors, was cited by the WLCC as an example of the procedural unfairness of the process which prevented its members from having their concerns adequately addressed prior to the decision being made.

[9] On March 3, 2003 CCC voted 2 to 1 in favour of the application for re-zoning and approved the development agreement presented by KLD.

DISCUSSION AND ANALYSIS:

[10] The issue before me is not whether the decision of the CCC was right for the citizens of Halifax Regional Municipality but rather was the process adopted and implemented by the community council procedurally unfair thus resulting in a

denial of natural justice? Since the members of the CCC were acting in a quasi-judicial role rules of procedural fairness **<u>demanded of the situation</u>** must be followed. If there was a breach of procedural fairness and a consequent denial of natural justice then the court can exercise its discretion and grant the remedy sought. On the other hand, if it is determined that the process did not result in any unfairness then the court should refrain from interfering in the work of the elected representatives of the citizenry of Halifax Regional Municipality.

[11] The principles of natural justice and procedural fairness are described in a text authored by David P. Jones, Q.C., entitled <u>Principles of Administrative Law</u> (2nd ed.) (Toronto: Carswell, 1994) at p. 179:

> "Natural justice" connotes the requirement that administrative tribunals, when reaching a decision, must do so with procedural fairness. If they err, the superior courts will step in to quash the decision by certiorari or prevent the error being made by prohibition. Such an error is jurisdictional in nature and renders the decision void."

[12] Natural justice is comprised of two main aspects: one being the *audi alteram partem* component meaning a person must know the case being made against him or her and be given the opportunity to answer it; the second pertains to the rule against bias. This latter aspect has not been alleged in this case.

[13] WLCC's main concern is with the procedure set by the CCC prior to the commencement of public hearings on February 3, 2003. To a lesser extent the WLCC expresses concern over the change in venue just a few days before the scheduled heraing and community council's decision not to postpone the second night of hearings because of the inclement weather.

[14] Another major area of concern for the WLCC was the timing of the supplemental staff report which only became available to the public on the morning of March 3, 2003. Even if there had been time to properly analyse the contents of the supplementary report there was no provision to challenge it prior to the decision being made later that evening.

[15] With regard to the rules adopted by the CCC for the public hearing entitled "Chebucto Community Council Public Participation Procedures / Guidelines for Public Hearings" which consisted of nine rules, the primary concern of the

applicant was with rules five and six which limited oral presentations to five minutes and prevented any individual from speaking more than once.

[16] Affidavits were filed indicating that, for some, five minutes was simply not enough time to present all of their concerns. There is case law that would suggest that there is no real magic to the so-called "5-minute rule". Depending on the circumstances of the case more (or in some cases less) time should be set aside to ensure interested persons directly affected by the decision have an adequate amount of time to present their concerns. This does not mean that each presenter should be given whatever amount of time he or she desires in order to totally exhaust the topic of discussion. This could lead to unduly long public hearings that could, in effect, actually hinder or prevent the decision-making body from carrying out its mandate. It might also prevent other interested parties from making a presentation. Once the rule is adopted and provided it is not designed to fetter full public participation or to curtail meaningful input then the rule has to be applied equitably. To suggest that it be applied to some and not to others would create patent unfairness. It has to be applied fairly and equitably and that means without exception. In this particular case each presenter was also permitted to file a written submission with the legislative assistant that became part of the record. Even if an individual found that five minutes was not adequate to fully address the issues, a written presentation could easily flesh out his/her position. There were no limitations placed on the written submissions nor were they accepted only from those individuals who showed up at the meeting to speak. Anyone wishing to present his / her views could have filed a written submission for consideration. There was concern raised by one of the witnesses that there was no way of knowing that written submissions would even be read however oral submissions would at least ensure that their concerns would be heard. Although this might be a valid point there is no guarantee that what is being presented orally is actually being listened to. There has to be at least some faith and trust in the elected members of the community council that they will listen or read and consider what has been presented to them.

[17] In my opinion the five minute rule adopted by the CCC did not result in any unfairness to those who wanted to participate in the public hearing. Based on the relatively high public participation it was a prudent rule to adopt - one that would ensure adequate time for everyone who wished to participate. As stated earlier once this rule was adopted it had to be applied to all. If not it could not be considered a rule at all. To suggest that certain individuals, because of their

position or their education or training, should have been allocated additional time would only have led to accusations of bias.

[18] As regards the change of venue, the use of the sign-up sheet at the close of the first night of hearing, the decision not to cancel and adjourn the second night of hearing due to existing weather conditions I do not view any of these as amounting to unfairness either separately or when taken as a whole.

[19] From the beginning when it was decided to hold the public hearing on February 3, 2003 and not on the earlier date of January 6, 2003 as suggested by the President of the WLCC, CCC demonstrated a willingness to accommodate the public's participation. This was not the first proposal to re-zone the land in question. It was recognized that any development of the land would generate a great deal of public interest. The procedure adopted by the CCC was designed to accommodate and allow for meaningful public participation. Anything less would have been unacceptable.

[20] The other major concern raised by the applicant is the issue of the supplementary report which was filed by staff at the request of the members of the CCC. This request for additional information and clarification came at the conclusion of the second night of the public hearing. HRM staff were asked to address the issues and concerns raised by members of the public and to answer questions put to them by the CCC members. As stated this request was made at the conclusion of the public hearing. It did not call for a new report nor did the supplementary report result in any different recommendation from staff. If there was any new information it was only to address issues raised by the public or to answer questions put to staff by the elected members of the CCC. The CCC postponed the decision they could have made after the public hearing concluded on February 12, 2003 in order to get further information or clarification of the initial report. It was not intended to generate another round of public hearings but rather to provide the members of the CCC with the best possible information on which to base a decision.

[21] The timing of the supplemental report might possibly have been a concern if it had been substantially altered to include things not mentioned in the initial report or if it had resulted in a different recommendation based on completely different factors.

[22] This is not the case here. Staff, by way of the supplemental report, addressed the issues raised by concerned members of the public by providing additional information to clarify these points. As well they provided answers to the questions put to them by members of the CCC.

[23] Based on the foregoing I am not convinced that there has been any procedural unfairness nor a denial of natural justice. The process of public participation required of the CCC under the *Municipal Government Act* has been conducted fairly, in my opinion.

[24] Consequently I am not prepared to grant the remedy requested and the application is denied.

DECISION ON COSTS:

[25] I realize that this is a very sensitive issue for all concerned. A great deal of time and effort has gone into this process.

[26] Public participation in the decision-making process is not only welcomed but encouraged. I can see from the information provided and the excellent submissions of all counsel that this process has been motivated by genuinely concerned citizens - people who are concerned with the environment and the preservation of our natural surroundings. I commend them for that. Fortunately or unfortunately, development of hitherto unused and unspoiled land is inevitable in a growth area such as HRM.

[27] It is thanks to people who care about the environment that such on-going development can occur with proper regard for what Mother Nature has provided. This concern for planned development is also shared by many developers who are motivated by a social conscience and not simply by financial success.

[28] Hopefully the concerns of both can be successfully accommodated as our population continues to grow.

[29] As to costs, it is customary for costs to be awarded to the successful party (or parties); however, costs are at the discretion of the court. Under the circumstances I think it appropriate to award costs of $750.00 to be shared equally

by the respondents - Chebucto Community Council of Halifax Regional Municipality and Kimberly-Lloyd Developments Ltd.

J.