

Date: 20010615  
Docket: CA 166476

**NOVA SCOTIA COURT OF APPEAL**

**Cite as: Lewis v. Halifax (Regional Municipality) North West Community Council, 2001  
NSCA 98**

**Flinn, Cromwell and Oland, J.J.A.**

**BETWEEN:**

MARSHALL LEWIS

Appellant

- and -

NORTH WEST COMMUNITY COUNCIL OF HALIFAX  
REGIONAL MUNICIPALITY

Respondent

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**REASONS FOR JUDGMENT**

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Counsel: Jack A. Innes, Q.C. and Douglas B. Skinner for the appellant  
Jocelyn M. Campbell and D. Blair Pritchett for the respondent

Appeal Heard: May 18, 2001

Judgment Delivered: June 15, 2001

**THE COURT:** Appeal allowed per reasons for judgment of Cromwell, J.A.; Flinn and  
Oland, J.J.A. concurring.

**CROMWELL, J.A.:**

**I. INTRODUCTION:**

- [2] The appellant applied to the respondent Community Council to rezone a parcel of land on the Old Sackville Road from R-1 (Single Unit Dwelling) Zone to C-3 (Commercial Corridor) Zone. Council refused the rezoning and the appellant appealed, unsuccessfully, to the Utility and Review Board (Board). He now appeals to this Court pursuant to s. 30 of the **Utility and Review Board Act**, S.N.S. 1992, c. 11.

**II. FACTS AND DECISIONS OF COUNCIL AND THE BOARD:**

- [3] The property is, to quote one of the submissions to the Board, a “banana shaped” parcel, 1.2 acres in size, entirely bounded by the adjacent road system of the Old Sackville Road and Highway 101. It presently contains a single detached dwelling and two small barns. The rezoning was sought to permit a subdivision of the lot and the construction of four automotive related commercial buildings.
- [4] The Generalized Future Land Use Map contained in the Municipal Planning Strategy (“MPS”) shows the subject property within the Commercial Corridor Designation. As stated by staff, the Commercial Corridor Designation is intended to encourage and promote lands along Sackville Drive and adjacent areas as a business and community focus for Sackville. The Land Use By-law (LUB) establishes a Commercial Corridor Zone (C-3) to implement the Commercial Corridor Designation.
- [5] Although in most instances the properties within the Commercial Corridor Designation are zoned C-3, the subject property retained its long standing zoning as R-1 at the time of the passage of the MPS and the LUB.
- [6] In reviewing the application for rezoning, staff concluded that, as the land was within the Commercial Corridor Designation in the MPS, commercial uses could be considered through the rezoning process. Staff observed that the R-1 zone was applied to the property to reflect its actual use as a single unit dwelling. Staff also commented that the proposed rezoning and the commercial uses which it was to facilitate were in keeping with the adjacent uses along Sackville Drive, namely a service station and a tire outlet. Staff concluded that the proposed development was consistent with the intent of the Commercial Corridor Designation and consistent in every respect with

MPS Implementation Policy 13. The North West Planning Advisory Committee considered the proposed rezoning and approved it.

- [7] With the positive staff recommendation and approval of the Planning Advisory Committee, the rezoning application was submitted for decision to the North West Community Council. The Council exercises authority in that regard pursuant to s. 521 and s. 527 of the **Municipal Government Act**, S.N.S. 1998, c. 18 (“**Act**”) and Administrative Order Number 2 of the Halifax Regional Municipality. Most relevant is s. 527(3) of the **Act** which provides:

527 (3) A community council may amend the land-use by-law of the municipality applicable to the community with respect to any property in the community, if the amendment carries out the intent of any municipal planning strategy of the municipality applicable to the property and in doing so, the community council stands in the place and stead of the council and Part VIII applies with all necessary changes.

(emphasis added)

- [8] Council refused the rezoning. As required by s. 210(5) of the **Act**, both councillors participating in the decision stated their reasons. Councillor Kelly gave as his reasons that the application was contrary to Implementation Policy 13, subsections (b)(iv) and (c)(iii) and section (d). These relate to the adequacy of the road networks leading or adjacent to the development (ss. (b)(iv)); traffic generation, access and egress from the site and parking (ss. (c)(iii)); and the suitability of the site in terms of steepness of grades, soil and geological conditions, etc. (s. (d)). The Board on appeal from Council found, essentially, that in light of the staff report, these reasons had no basis in fact. The Board’s conclusion on this point is not challenged.
- [9] Councillor Harvey raised other concerns and then stated as his reason that the MPS was in error to include the subject property in the Commercial Corridor designation. This observation, of course, had no relevance to the issue of whether refusal of the proposed rezoning was consistent with the MPS.
- [10] In this Court, it was not suggested that Council’s decision could be supported by any of the reasons given by the councillors.
- [11] The appellant appealed to the Board. The issue before the Board, as defined by s. 250(1)(a) of the **Act**, was whether the decision of Council to refuse the proposed rezoning did not reasonably carry out the intent of the MPS.
- [12] In considering the matter, the Board observed:

The location of the subject property beside a busy highway and next to other commercial properties might lead one to conclude that a commercial zone would be most appropriate. Although at one time the property was subdivided into seven residential lots, it is difficult to envisage houses at the site, given that it backs onto Highway No. 101.

... It appears that the subject property could have been zoned C-3 (Commercial Corridor) Zone when the L.U.B. [Land Use By-law] was adopted. The wording of the policy [i.e., Policy COR-2] suggests that it can still be rezoned from R-1 to C-3.

The overall intent of placing the subject property within the Commercial Corridor Designation would seem to be to permit it at some future time to be rezoned C-3. It was clearly placed in the Commercial Corridor Designation and appears to belong there. ...

- [13] Notwithstanding these findings and the fact that the rezoning would make the zoning consistent with the designation of the property in the MPS, the Board dismissed the appeal. It accepted the respondent's argument that there was no policy in the MPS which specifically provides for the rezoning sought and that, in the absence of such a policy, Council's decision refusing to rezone was reasonably consistent with the MPS. The Board stated that:

It is necessary to review the M.P.S. to determine whether there is a policy which permits the requested rezoning. ...

While the Board believes that it was intended that the subject property could be rezoned C-3 when the MPS and LUB were adopted, there is no policy which specifically provides for the rezoning at this time ... In the absence of a specific policy permitting the rezoning, Council's decision refusing to rezone is reasonably consistent.

(emphasis added)

- [14] With great respect to the Board, I do not find it easy to discern the basis of its decision from its reasons. However, counsel agreed in this Court that what the Board decided was that, absent a specific policy in the MPS authorizing the proposed zoning change, Council had no power or authority to grant the rezoning request. The Board's decision (and the respondent's position) are summarized as follows in the respondent's factum:

50. While it may have been intended that the subject property could be rezoned, there being no policy which permitted council to consider such a re-zoning, it is submitted that the Board correctly found that council had no power to grant the re-zoning request.

51. Accordingly, while the MPS and LUB may have been adopted with the intent that the re-zoning to C3 could take place a further step was required to confer upon council the discretion/authority to consider such a re-zoning. ...  
(emphasis added)

### III. ISSUE:

- [15] It is common ground on appeal to this Court, which is restricted to issues of law or jurisdiction, that our role is to determine whether the Board misinterpreted, failed to consider or failed to correctly apply relevant legislation and whether it failed to ascribe to the MPS an intent which it can reasonably bear: see **Mahone Bay Heritage and Cultural Society v. 3012543 Nova Scotia Ltd. et al.** (2000), 186 N.S.R. (2d) 201 (C.A.) at § 7.
- [16] The issue on appeal is whether the Board committed reversible error in holding that Council had no authority to amend the zoning as requested by the appellant.

### IV. ANALYSIS:

- [17] In my respectful view, the Board erred by concluding that Council had no authority to amend the zoning by-law in the absence of a specific empowering provision in the MPS.
- [18] There is no question that Council has the authority to amend the LUB to give effect to the rezoning sought in this application: see s. 527(3) of the **Act**. Of course, the amendment must carry out the intent of the MPS: see s. 527(3). The question, therefore, is not whether the MPS specifically confers authority on Council to consider the rezoning sought in this application. No such specific policy is necessary given the authority conferred by s. 527(3) of the **Act**. In other words, the fact that there is no specific policy relating to rezoning of this parcel of land does not remove from Council the discretion to rezone the property provided the rezoning is consistent with the planning policy directives of the MPS.
- [19] The respondent submits that, where discretion to amend a by-law is intended by the MPS, it is specifically mentioned as it is in paragraph CC-2 of the Community Commercial Designation. In my opinion, neither a review of the MPS nor a consideration of its purpose supports this submission.
- [20] The purpose of the MPS is not to confer authority on Council but to provide policy guidance as to how Council's authority should be exercised. As

stated in s. 213 of the **Municipal Government Act**, “[t]he purpose of a municipal planning strategy is to provide statements of policy to guide the development and management of the municipality...”. While the MPS may contain policies governing the amendment of land use by-laws (s. 214(1)(o)(ii)), the absence of such policies does not take away the authority to amend zoning by-laws which Council derives from other sources.

- [21] The Board’s interpretation of the MPS is also inconsistent with paragraph IM-1 in the Implementation Section of the MPS. It provides that the MPS is to be implemented by means of powers conferred upon Council by the relevant legislation. While the MPS does provide specific policy direction in relation to numerous types of LUB amendments (see e.g., IM-8, IM-9; Urban Residential Designation policies UR-4, 5, 7, 13, 14, 17 and 26), it is not a reasonable interpretation of the MPS to conclude that there is no authority in Council to amend the LUB absent specific reference to such authority in the MPS. As was stated by Hallett, J.A. in **Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility and Review Board** (1994), 128 N.S.R. (2d) 5 at 35, the MPS is intended to provide a framework in which development decisions are to be made and narrow, legalistic interpretations will not be consistent with its overall objective.
- [22] It follows that the Board erred in dismissing the appeal. To the extent that the Board thought that Council lacked the authority to change the zoning, it erred in law. To the extent that it concluded that the absence of a specific provision explicitly referring to the proposed amendment in the MPS meant that the proposed rezoning was not permitted, it gave the MPS a meaning which it cannot reasonably bear.
- [23] I would allow the appeal, set aside the Board’s order confirming the decision of Council and remit the matter to the Board for decision on the merits of the appeal on the basis that Council does have the authority to effect the proposed rezoning if it carries out the intent of the MPS.
- [24] The appellant should have his costs of the appeal which I would fix at \$2500 plus disbursements.

Cromwell, J.A.

Concurred in:

Flinn, J.A.

Oland, J.A.