NOVA SCOTIA COURT OF APPEAL

Citation: *Martell v. Halifax (Regional Municipality)*, 2015 NSCA 101

Date: 20151113
Docket: CA 439419
Registry: Halifax

Between:

Peter Martell

Appellant

v.

Halifax Regional Municipality, Nova Scotia Utility and Review Board and Attorney General of Nova Scotia

Respondents

Judges: Beveridge, Bryson, and Bourgeois, JJ.A.

Appeal Heard: September 29, 2015 in Halifax, Nova Scotia

Held: Appeal dismissed without costs, per reasons for judgment of Bourgeois, J.A.; Beveridge and Bryson, JJ.A. concurring.

Counsel: Peter M. Rogers, Q.C., for the appellant
E. Roxanne MacLaurin and Christopher Keliher, for the respondent Halifax Regional Municipality

Reasons for judgment:

[1] The Appellant is the owner of two large lots of land located on the Waverley Road in Dartmouth. He applied for a development permit which would allow the construction of 17 detached, single-family houses on the lots. The Halifax Regional Municipality's Development Officer refused the application, on the basis that it contravened the Dartmouth Land-Use By-law (DLUB). The Appellant appealed that determination to the Nova Scotia Utility and Review Board.

[2] The Board in a 70 page decision (reported as 2015 NSUARB 78) upheld the Development Officer's decision. The Appellant now appeals to this Court and seeks a reversal of the UARB decision. The Halifax Regional Municipality was the only named respondent to participate in the appeal.

Background

[3] As noted earlier, the Appellant is the owner of two large adjacent lots. There is no dispute that the properties, being located on the Waverley Road, are regulated under the DLUB, and that they fall within the R-1 zone, designated as "Single-Family Residential".

[4] In 2012, the Appellant began the necessary steps to have the properties subdivided into 12 R-1 lots. At some point in time, and after some effort in terms of preliminary submissions to the Respondent, he changed his approach to developing the properties. Utilizing a condominium structure, the Appellant sought to have 17 units created on the two properties. Each unit would be a detached, single-family residence. The Appellant made a formal application to the Respondent seeking a development permit in June, 2014.

[5] By letter dated August 29, 2014, Development Officer Trevor Creaser refused the Appellant's application. His reasons for the denial were as follows:

> The above noted application proposes seventeen (17) single unit dwellings on two existing parcels to be accessed by a common driveway. These properties are regulated under the Land Use Bylaw for Dartmouth and are zoned R-1 (Single Family Residential).
>
> Section 32(2) of the bylaw states:
>
> > Buildings used for R-1 uses in an R-1 Zone shall comply with the following requirements:

> (a) Lot area minimum – 5,000 square feet
>
> (b) Lot coverage maximum – 35%
>
> (c) Side and rear yards shall be provided on each side and at the rear of buildings as provided by the Building By-laws of the City.
>
> It is my interpretation that each dwelling is to be on a separate lot approved through the subdivision process and your proposal does not meet this requirement and is refused.

[6] The Appellant filed a Notice of Planning Appeal in September, 2014. The form provided for such matters asks an appellant to "[d]escribe how the decision of the development officer fails to comply with the land-use by-law or the development agreement". In responding, the Appellant noted:

> The Development Officer erred in refusing the permit on the basis of his interpretation that "each dwelling is to be on a separate lot approved through the subdivision process." The Dartmouth LUB does <u>not</u> prohibit more than one dwelling unit per lot in an R-1 zone. [Appellant's emphasis]

[7] The Appeal before the Board was held on November 7, 2014. Evidence was adduced by both parties. The Appellant testified, as did Ms. Margot Young, who was qualified to give expert evidence on planning and development matters including the interpretation of by-laws. The Respondent called two witnesses, Development Officer Creaser, and Mr. Mitchell Dickey, who were similarly qualified to provide expert opinion.

[8] The Board identified and summarized "the heart of the dispute" before it as follows:

> [154] In the view of the Board, the heart of the dispute in this proceeding lies in one simple fact: it is undisputed, even by HRM, that there is nothing in the text of the Dartmouth Land-Use By-Law that expressly prohibits multiple main buildings on a single lot in the R-1 Zone.
>
> [155] It is Ms. Young's view that the Dartmouth LUB allows multiple main buildings or dwellings to be built on individual R-1 lots. She believes this to be so whether one uses the condominium approach or not.
>
> [156] As the Board mentioned in "Facts," above, the Dartmouth LUB is the only one of HRM's 21 LUB's that does not contain a clause that says whether multiple buildings on a single lot are or are not permitted on an R-1 lot. Before looking at the Dartmouth LUB's provisions, the Board will first turn, for illustrative purposes, to the Bedford and Eastern Shore East LUB's, which show an approach commonly used in HRM's land-use by-laws:

> **Bedford LUB** – General Provisions
> 15. ONE MAIN BUILDING ON A LOT
> No person shall erect more than one (1) main building on a lot in a RSU, RTU, RMU, RTH, RCDD, or RR zone.
>
> **Eastern Shore (East) LUB** – General Provisions
> 4.6 ONE DWELLING ON A LOT
>
> Not more than one (1) dwelling shall be erected on a lot.
>
> …
>
> Section 32(2) was a provision quoted by Mr. Creaser in his letter of refusal.
>
> [157] Thus, the Dartmouth LUB provisions just quoted do not expressly say that only one main building or dwelling is permitted on an R-1 lot; however, they likewise do not expressly say that more than one main building or dwelling is permitted on an R-1 lot.
>
> [158] Ms. Young argues that the omission of any such restriction means that multiple main buildings or dwellings are permissible on an R-1 lot. HRM takes the opposite view, in effect arguing that that the context in which the provision appears means that only one main building or dwelling is permitted.

[9] In its decision, the Board reviewed the arguments put forward by the Appellant as to why the Development Officer was wrong to refuse a permit, and specifically why his interpretation of the DLUB was flawed. Similarly, the Board examined the arguments advanced by the Respondent as to why the interpretation utilized by the Development Officer, particularly of s. 32(2), should be upheld.

[10] The Board undertook its own interpretative analysis of the by-law in question, and concluded that s. 32(2) of the DLUB prohibited the construction of multiple main buildings or dwellings on R-1 lots. As such, it was found that the Development Officer's decision to deny the permit, did comply with the by-law.

[11] It is fair to say in reviewing the decision, that although the Board ultimately agreed with the interpretation advanced by the Respondent, it did not agree universally with the arguments it advanced. How the Board undertook the task of interpreting the by-law will be addressed in the analysis to follow.

Standard of Review

[12] The standard of review this Court is to apply to the Board's decision is not controversial. In *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 43, this Court discussed the appropriate standard in the

context of the Board's review of a development officer's refusal to grant a development permit. MacDonald, C.J.N.S. noted as follows:

> [27] Again, I will first deal with the applicable standard of review. Here, in assessing the development officer's decision, the Board heard evidence (an advantage we did not have) and interpreted a statute with which it has significant experience. This, therefore, commands deference, meaning that we will interfere only if the Board's decision is unreasonable. In other words, it is not necessarily our interpretation of the facts and legislation that will prevail. Instead, as long as the Board followed a reasonable decision-making path and the decision falls within a range of acceptable outcomes, it will be the Board's analysis that will prevail. This Court, in *Halifax (Regional Municipality)* v. *United Gulf Developments*, 2009 NSCA 78, in a similar context, explained this Board's right to deference:
>
> > 56 Taking into account the privative clauses, the purpose of the planning provisions of the **MGA** and the role the Legislature has set for the Board in relation to them, the discrete and administrative regime created for the Board by the **URB Act**, the Board's expertise in planning matters and the nature of the issues before the Board and before this court, I am satisfied the Board's decisions in this case are entitled to deference. The standard of review is one of reasonableness.
> >
> > 57 In **Dunsmuir, supra**, the Supreme Court of Canada indicates that when applying the reasonableness standard, the reviewing court is to consider both the process by which the decision was reached and the outcome:
> >
> > > 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. **In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.** [Emphasis in original]

[13] I will apply a standard of reasonableness in reviewing the Board's decision. In doing so, Fichaud, J.A.'s succinct description of the "reasonableness" analysis in *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33 is helpful. He stated:

> [30] …Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan*, *supra*, at paras 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras 11-17.
>
> [31] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, Justice Abella for the majority reiterated:
>
> > [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. …

Issues

[14] In his Notice of Appeal, the Appellant advances the following grounds:

1. The Board erred in usurping the function of Halifax Regional Municipality's Council to make by-laws by adding a very specific restriction to the land-use by-law for the R-1 zone for Dartmouth which cannot be found, directly or indirectly, anywhere within the by-law text;
2. The Board erred in not identifying the text in the by-law which it was purporting to interpret when determining that the by-law did not permit multiple dwellings on a lot;
3. The Board erred in treating the interpretation of a land-use by-law, which is a detailed implementation document intended to clearly and simply identify permitted and prohibited land uses for the public, as though it were a broad policy document, such as a municipal planning strategy, and applying general, aspirational goals for orderly growth and development as an interpretive aid for notionally finding in the by-law a proscription which the Board believed would be wise for the land-use by-law to contain, but which it plainly did not contain;

4. The Board erred in finding that a land-use by-law which permitted single-family dwelling land uses should be deemed to prohibit a subset of such land uses notwithstanding the absence of any applicable restriction on such land uses in the by-law;

5. The Board erred in ignoring the important legislative history of the Dartmouth land use by-laws and in giving undue weight to municipal planning strategy amendments on unrelated subjects enacted long after the relevant provisions of the Dartmouth land-use by-law.

[15] Although couched in words suggesting the Board acted beyond its jurisdiction, ground 1, like all the others, is anchored in the Board's interpretation of s. 32(2) of the DLUB. In my view, all of the grounds distill into one primary issue:

Did the Board unreasonably interpret s. 32(2) of the DLUB when concluding that lots containing multiple main buildings or dwellings were prohibited in the R-1 zone?

Analysis

[16] The Appellant, while acknowledging that the Board's decision is entitled to deference, submits that it fails both components of the reasonableness analysis. I will address the Appellant's concerns with the Board's reasoning path and outcome in due course. At this point however, I will consider an argument advanced by the Appellant which weaves itself into both components, and is foundational to his arguments on appeal.

The Appellant's "well-recognized precept"

[17] The Appellant sets out what he says is a well-recognized precept:

> 2. . . .Underlying the case is the well-recognized precept that a land owner can do with its land whatever is not prohibited by valid municipal, provincial or federal law. …

[18] The Appellant explains this concept in more detail as follows:

> 28. While the statute enables a land use bylaw to use permissive language as well as prohibitory language, the nature of a bylaw is prohibitory. As stated by Ian MacF. Rogers and Alison Scott Butler, in *Canadian Law of Planning and Zoning*, 2nd at Chapter 1.4, p1-8:

> "Zoning bylaws should not be regarded as giving to the owner the right to use his land for the uses authorized by the by-law, a right he had before its enactment. Rather, a zoning bylaw should be regarded as limiting these rights..."
>
> 29. The same text notes that:
>
> > "While zoning and land use regulation affect land values, no compensation is available from government for diminution of land value because of such zoning or regulation."
>
> 30. The confiscatory nature of land use bylaw restrictions is one of several reasons that the default rule remains highly relevant to bylaw interpretation, i.e. that <u>anything that is not prohibited is permitted</u>. HRM itself has drafted and interpreted land use bylaw provisions dealing with the number of buildings on a lot in this prohibitory fashion with the singular exception of the DLUB. Thus we see in all the other 21 HRM land use bylaws, clear prohibitions in some zones on multiple dwellings or buildings on a lot. We see that the permission or authorization to have multiple buildings on a lot in some zones is typically not affirmatively conferred, but merely excepted from the prohibition. This is because there is no need to authorize – whatever is not prohibited is automatically permitted. [Footnotes omitted; Emphasis in original]

[19] It is clear from the record that the same concept was central in the Appellant's evidence and submissions before the Board. Simply put, he argued because s. 32(2) of the DLUB did not explicitly prohibit multiple buildings on an R-1 lot, then the above "well-recognized precept" meant it was allowed. End of analysis.

[20] The Board rejected the Appellant's argument, finding that to apply it would result in moving away from the modern approach to statutory interpretation. It addressed the Appellant's position as follows:

> **5.7 The Appellant and the Strict Construction Approach**
>
> [83] The strict construction approach to statutory interpretation, which generally favoured property owners, was traditionally applied by courts in such matters as expropriation and municipal planning. Today, it has been supplanted by the liberal and purposive one.
>
> [84] In *Anglican Diocesan*, HRM argued, as one of its grounds of appeal to the Court, that the Board was mistaken in using the MPS to assist it in interpreting the LUB.
>
> [85] In response, the Court said, in part, in *Anglican Diocesan*:
>
> > …the LUB's interpretation may be assisted by the MPS, and the Board's purposive approach should encompass the LUB and MPS together.

[86] At certain points in the present proceedings, the Board perceived the Appellant (whether through its expert witness, or its counsel) as sometimes taking a position similar to that adopted by HRM in *Anglican*.

[87] Ms. Young, for example, when asked where she looked for "guidance" in giving planning advice, said that she looked to the LUB: "it's the Bible." She said that if there was ambiguity or uncertainty "on the face" of the LUB, she would then look to the MPS. However, in this instance she said she saw no ambiguity in the LUB. She remarked:

> Normally if the Land Use By-law is silent on something that is, you know, normally allowed, we are allowed to do it.

[88] Consistent with these positions, Counsel for the Appellant at one point summarized his position succinctly – and accurately, in the view of the Board – in the following sentence:

> It is the position of the Appellant that multiple single-family dwellings are permitted on an R-1 lot because the LUB does not specifically state otherwise.

[89] Of similar import is the following submission made to the Board by Counsel for the Appellant:

> …the question on a development permit appeal is not whether a consequence of the LUB may be good or bad, but what the LUB actually prohibits.

[90] The Board interpreted some of the evidence and arguments put forward on behalf of the Appellant (including the positions put forward by Ms. Young) as attempting to restrict the Board's review insofar as possible to the literal words of s. 32 of the LUB (dealing with the R-1 Zone). It sometimes perceived the Appellant's position as perhaps moving (implicitly, although not explicitly) away from the purposive approach, and urging an approach – as in the submissions just quoted – reminiscent of strict construction.

[91] Thus, Counsel for the Appellant at one point argued – after acknowledging that the MPS can be used in interpreting the LUB – that:

> …the MPS should only be used <u>against</u> the developer when there is a genuine ambiguity on the face of the LUB…

The Board is unaware of any legislative provision, or decision of the Court of Appeal or Supreme Court, which supports such a principle of interpretation. [Emphasis in original]

[21] Before this Court, the Appellant asserts that the Board's rejection of the "well recognized precept" was the fundamental error which lead it into an unwarranted exercise in statutory interpretation, resulting in an unreasonable outcome. More about that later.

[22] The Respondent submits that the Appellant is misguided about the existence of a "default rule" which provides that what is not expressly prohibited, is permitted. In its factum, the Respondent notes the lack of legal authority for such a position, and submits it is contrary to s. 235(2) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (the *HRM Charter*) which specifically permits a land use by-law to list either permitted uses or prohibited uses in a zone. That provision reads:

> 235 (2) A land-use by-law must
>
> (a) list permitted or prohibited uses for each zone; and
>
> (b) include provisions that are authorized pursuant to this Act and that are needed to implement the municipal planning strategy.

[23] Is there support for the Appellant's "well-recognized precept"? There is historically, but it appears to be challenged and not universally applied in modern times. There is ample authority for the view that such a restrictive approach to by-law interpretation has been superseded by the modern purposive approach.

[24] In Pierre-André Côté's text *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at pp. 511-516, Professor Côté comprehensively examines the tension between both approaches. He writes:

> **Statutes which Encroach Upon Enjoyment of Property**
>
> "Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law" [*Harrison v. Carswell*, [1976] 2 S.C.R. 200 at 219 (Dickson J.)] To this right corresponds a principle of interpretation: encroachments on the enjoyment of property should be interpreted rigorously and restrictively.
>
> Rigorous interpretation: conditions imposed by statute that limit the enjoyment of property must be followed strictly. Restrictive interpretation: if a genuine problem in interpreting statute that limits the enjoyment of property arises, the judge is justified in choosing the construction that limits the effect of the law and favours the enjoyment of property.
>
> …
>
> Planning bylaws have frequently been construed restrictively in the light of the principle of free enjoyment of property. In *City of Montreal v. Morgan*, Justice Anglin asserted that "…by-laws in restraint of rights of property as well as penal by-laws should be strictly construed" [(1920), 60 S.C.R. 393 at 404].

Similarly, Rivard J. in *Cité de Sherbrooke v. King Street Shopping Centre Ltd.* wrote:

> A zoning bylaw always encroaches on the free exercise of property rights. The municipalities that possess such power are obliged to exercise it in clear and precise terms which must be construed strictly. When the public interest and the common good require the municipality to interfere with the exercise of private rights, these are exceptional measures which must be applied in the exact terms provided for by the statute. [[1963] Que. Q.B. 340 at 343 *(translation*)].

However, this traditional approach to urban planning bylaws, a natural outgrowth of the laissez-faire philosophy which prevailed in the nineteenth century, is now challenged by public policy concerns related to a more rational organization of urban life. Thus, there is a clear trend toward a less strict interpretation of urban planning legislation. This trend, manifested principally in decisions of the Ontario courts, has influenced the Supreme Court. Justice Spence in *Bayshore Shopping Centre Ltd. v. Township of Nepean,* [[1972] S.C.R. 755 at 764], summarized the two conflicting philosophies regarding urban planning regulation: a restrictive attitude, because such bylaws limit free enjoyment of property (the traditional approach), and a more liberal attitude, aimed at protecting society and promoting the public interest (the innovative approach). Taking note of this contradiction, he approached "the interpretation and application of the by-law without acknowledging any compulsion to consider its provision either strictly or liberally".

If, in the *Bayshore* case, a restrictive interpretation was overruled by a neutral one, the Court went a step further in *Soo Mill & Lumber Co. v. City of Sault Ste-Marie,* [[1975] 2 S.C.R. 78], by liberally interpreting the Ontario *Planning Act* and the regulations of application authorized by it.

In *Leiriao v. Val-Bélair (City)* the majority of the Supreme Court preferred to give "full meaning" to a provision concerning the powers of a municipality to establish land reserves by expropriation, rather than to interpret it restrictively, as was proposed in dissent [[1991] 3 S.C.R. 349].

This evolution reflects major changes in values. It is taking place unevenly, from province to province and from court to court, but, despite some wavering, a definite trend has been established, as it reflects a more general recognition of the relative nature of property law, particularly when property rights are set against collective interests.

The reasons of Forget J.A. of the Quebec Court of Appeal, in *Ville de Mascouche v. Thiffault*, clearly illustrate the evolution that is taking place:

> I start this analysis by the last proposition of the trial judge with respect to the restrictive interpretation of a zoning by-law. This opinion is rather well established; however, with the greatest respect, I have great difficulty conceiving its basis.

> During the period of economic liberalism in the 19th Century, property rights were deemed absolute. Things have evolved since; the notion of common interest, of harmonious development, of quality of life and the environment – once inconceivable – are now at the centre of preoccupation of citizens and are the object of many statutes and public regulations. …
>
> Advocates of restrictive interpretation seem to juxtapose individual property rights with those of a distant disembodied community, whereas zoning by-laws are enacted for the benefit of one and all for a given zoning district and the illegal use of one owner is generally detrimental to another.
>
> By analogy, one can highlight that in tax matters it has always been repeated that statutes and regulations are to be restrictively interpreted. The Supreme Court [in *Québec (Communauté urbaine) v. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3], has brought this position to an end. It ruled that in this area, as in all others, one must seek the intention of the legislature. I really do not see why we should not follow the same path with respect to municipal zoning by-laws.

…

In conclusion, it should not be forgotten that the principle of strict interpretation of enactments encroaching on the free enjoyment of property does not relieve the courts of their duty to examine the particular text in order to determine its meaning and scope. Only when there is serious doubt about the legislature's intention does the principle come into play. In *Wilson v. Jones*, [[1968] S.C.R. 554 at 559], a zoning bylaw case, Spence J. emphasized the need to study the enactment in its entirety before invoking the principle of restrictive interpretation:

> … a by-law restricting the use of land must be strictly construed and that any doubt as to the application of the by-law to prevent the erection of a specific building should be resolved in favour of such proposed use. No authority need be cited for each of these propositions. These principles, however, need only be applied when upon the reading of the whole by-law there is an ambiguity or difficulty of construction.

In the words of Lord Radcliffe, in *A.G. for Canada v. Hallet & Carey Ltd.*, [[1952] A.C. 427 at 450], "…where the import of some enactment is inconclusive or ambiguous, the Court may properly lean in favour of an interpretation that leaves private rights undisturbed." [footnotes omitted]

[25] A similar review and analysis is undertaken by Stanley M. Makuch, Neil Craik & Signe B. Leisk in *Canadian Municipal and Planning Law*, 2nd ed (Toronto: Carswell, 2004), after which they conclude at page 247:

> The Courts have continued to apply both approaches, notwithstanding their apparent incompatibility. If, however, these decisions are viewed in light of the broader approach to the balancing of the rights between landowners and municipalities, an approach which favours the private rights of individual landowners at the expense of the broader public interest appears to be out of step with the broader trend towards recognizing the legitimate role of municipalities in protecting the public interest through land use regulation and the need to give municipalities a degree of flexibility and autonomy in carrying out those duties. This is an approach which is largely recognized with respect to the interpretation of municipal by-laws generally and is consonant with the public regarding and democratic nature of local government.

[26] Professor Ruth Sullivan also weighs in on this topic in *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) as follows:

> **§15.48** A third aspect of the presumption against interference with property rights focuses on the freedom of the property owner to use and dispose of property as he or she sees fit, without hindrance or control. In the past, common law courts assumed that the free use and disposition of property, and contractual freedom generally, benefitted not only the owner of the property but also society as a whole. While free markets and contractual freedom remain respectable common law values, courts today are less likely to believe that what is good for private property owners is good for society as a whole. In current interpretative practice, the value of protecting the freedom of property owners is balanced against competing values and goals. As Spence J. wrote in *Bayshore Shopping Centre. v. Nepean (Township)*:
>
>> No authority need be cited for the proposition that a man's property is his own which he may utilize as he deems fit so long as in such utilization he does not commit nuisance, entrap the unwary or act in breach of statutory prohibitions, and therefore by-laws restrictive of that right should be strictly construed. Yet it has been said that modern zoning provisions have been enacted to protect the whole community and should be construed liberally having in certain [sic] the public interest . . .

[27] The Appellant has presented no case authorities utilizing the interpretive premise that if a by-law does not prohibit a use, it is, by default, permitted. Similarly, no authorities have been presented which establish that what the appellant describes as a "well-recognized precept", has survived the clear move

towards the more modern liberal and purposive approach to statutory interpretation.

[28] It is worthy to note that this Court has previously considered the tug between restrictive versus purposive interpretation of planning legislation. In *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50, this Court, after noting Professor Côté's description of the interpretative dichotomies referenced above, stated:

> **97** Therefore, there is case law to support the view that a liberal and purposive approach to the interpretation of planning policies is appropriate. The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality.
>
> **98** Support for a pragmatic approach to interpretation is to be found in Berardinelli v. Ontario Housing Corporation, [1979] 1 S.C.R. 275, where Mr. Justice Estey stated at p. 284:
>
>> "When one interpretation can be placed upon a statutory provision which would bring about a more workable and practical result, such an interpretation should be preferred if the words invoked by the Legislature can reasonably bear it . . ."

[29] I am unable to conclude that the Board erred in declining to apply the "well-recognized precept" advanced by the Appellant. The Board was not obligated to accept that the absence of an explicit prohibition against multiple main buildings on an R-1 lot in the DLUB unequivocally meant such was permitted. I turn now to the reasonableness of the Board's decision.

Is the decision justifiable, intelligible and transparent?

[30] The Appellant says the Board's reasoning path is unclear for one primary reason. This is explained in his factum as follows:

> 38. The Board's own decision path is unclear, however, in that it does not identify what text in the bylaw is ambiguous – without which there is no basis to scour a variety of extrinsic sources as interpretative aids. Respectfully, for the reasons given above regarding the rights of land owners in the absence of a land use bylaw, it errs in implicitly finding a bylaw which neither expressly prohibits nor expressly permits to automatically be ambiguous. The construction of single family dwellings in the R-1 zone is expressly permitted and if a subset of those

> uses – i.e. when multiple such buildings are to be built on a lot – is to be prohibited, the bylaw had to say so, or at least to raise an ambiguity about it in the text. Nothing is identified in the text as the source of the ambiguity.

[31] Clearly, the above reasoning is rooted in the premise discussed above. The Appellant submits that there can be no ambiguity if one applies the precept he advances – the by-law clearly does not prohibit multiple main buildings, therefore such is permitted. It is asserted the Board failed to identify an ambiguity which would permit the interpretative exercise which followed.

[32] The Appellant's assertion that the existence of an ambiguity in the by-law was a necessary springboard to permit the interpretation which followed, is flawed. A finding of ambiguity is not a precondition of a proper contextual analysis. As this Court said in *Isaac Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, citing the Supreme Court of Canada, such an analysis is required in any event:

> [26] In *McLean*, the Supreme Court was satisfied that the plain meaning of the statutory words were consonant with the British Columbia Security Commission's interpretation. But the court went on to say:
>
> > [43] However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of their work of interpretation. That is so because
> >
> > > [w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.
> >
> > (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)

[33] As noted earlier, the Board rejected the Appellant's submission that a lack of expressed prohibition equates to permission. The Board noted the by-law in question was silent, neither containing a prohibition against, or endorsement of, the type of development being advanced by the Appellant. The Board identified this silence as the "heart of the dispute". It then undertook an interpretative exercise, rejecting a number of arguments advanced by both parties as being unpersuasive,

but ultimately concluding that multiple main buildings on an R-1 zone lot was prohibited.

[34] In its decision, the Board explained what it did find persuasive, including

- The Municipal Planning Strategy has an overall goal of providing "an orderly system of growth and development" in the HRM, and that permitting multiple dwellings on one lot, would be inconsistent with that goal;
- The Board considered the R-1M and R-1A zones, and found the wording of both supported a conclusion that the R-1 zone did prohibit multiple main buildings on a single lots. For example, relying on a concession of the Appellant's expert, the Board found it would make no sense that special zoning for "granny flats" would be necessary, if R-1 Zoning already permitted a "granny flat" to be built in the backyard;
- The Board concluded that the Appellant's proposed interpretation of s. 32(2) would create absurd results, and applied as an interpretative principle, a presumption against absurdity;
- The Board considered the wording of the Regional Subdivision By-law, specifically s. 65, and found that it was supportive of a prohibition against multiple main buildings on an R-1 zone lot.

[35] In reviewing the decision, I understand why the Board found s. 32(2) to be non-conclusive, and can readily track its reasoning path to the conclusion it reached. As such, the decision meets the first component of the reasonableness analysis.

Does the Board's conclusion inhabit the range of acceptable outcomes?

[36] The Appellant argued that the outcome could not possibly be reasonable, as the Board failed to recognize that the absence of a prohibition meant his desired use was permitted. The Board then wrongly proceeded to "scour the earth" for sources outside the plain text of the by-law, and should not have looked to the Municipal Planning Strategy, other parts of the by-law or other planning documents to supplant the only reasonable interpretation available.

[37] Having reached the conclusion that the Board was not bound by the precept advanced by the Appellant, it was not unreasonable for the Board to engage in the

interpretative exercise it did. It is a specialized tribunal, with expertise in the interpretation of planning legislation. It is entitled to deference unless clear error in approach or substance is demonstrated. It has not been in this case.

[38] The Board by virtue of s. 267(2) of the *HRM Charter* was, in its decision-making, subject to the following restraint:

> (2) The Board may not allow an appeal unless it determines that the decision of the Council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

[39] There were, in the circumstances before it, two outcomes available to the Board: find that the decision of the Development Officer conflicted with s. 32(2) of the DLUB, or conversely, that it did not. After engaging in a substantial and well-described interpretative analysis, the Board found that the Development Officer's refusal to issue a development permit, did comply with the DLUB. I am satisfied that decision inhabits the range of reasonable outcomes.

Conclusion

[40] For the reasons outlined above, I would dismiss the appeal, without costs.

Bourgeois, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.