

SUPREME COURT OF NOVA SCOTIA

Citation: *Hardman v. West Hants (Municipality)*, 2024 NSSC 22

Date: 20240122

Docket: 522430

Registry: Kentville

Between:

Andrew Hardman, Debbie Innes, Mark Kehoe and Seamus Marriott

Applicants

v.

West Hants Regional Municipality and Pisiquid Canoe Club

Respondents

Judge: The Honourable Justice Gail L. Gatchalian

Heard: November 3, 2023, in Kentville, Nova Scotia

Counsel: Richard W. Norman, for the Applicants
John T. Shanks, for the Respondent Municipality
R. Michael MacKenzie, for the Respondent Pisiquid Canoe Club

By the Court:

Introduction

[1] Until 2022, the Pisiquid Canoe Club operated on Lake Pisiquid in Windsor, Nova Scotia. In 2022, Lake Pisiquid was drained under the terms of a federal Department of Fisheries order. In the spring of 2022, the Canoe Club bought property on Zwicker Lake. The property falls in the General Resource zone under the Land-Use By-Law of the West Hants Regional Municipality. The property had previously been used as a residential property. The Canoe Club wanted to carry out outdoor seasonal day camps on the property. This was a change in use, requiring the Canoe Club to obtain a development permit under the Land-Use By-Law. On February 6, 2023, the Municipality granted a development permit to the Canoe Club, which reads as follows:

...

Proposed Use: *Seasonal Daycamp*

Use Description: Operation of the noted PID's as a paddling club focused on athlete training, equipment storage *seasonal day camp* programming for youth athletes.

...

Conditions:

Development permit issued for change in use for *athletic Day Camps & equipment storage related to non-profit community canoe club. ...*

[emphasis added]

[2] The Applicants, Andrew Hardman, Debbie Innes, Mark Kehoe and Seamus Marriott, also own properties on Zwicker Lake. The Applicants filed an application for judicial review of the decision of the Municipality to issue the development permit to the Canoe Club. The Applicants say that the Land-Use By-Law prohibits the operation of outdoor recreational activities, such as the Canoe Club's day camps, on the property. They want the court to quash the development permit.

Standard of Review

[3] Reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case: *Canada v. Vavilov*, 2019 SCC 65 at paras.23, 33 and 53. The burden is on the Applicants to show that the Municipality's decision is unreasonable: *Vavilov* at para.100.

[4] In circumstances where reasons for an administrative decision are required and available, the decision must be: (a) based on reasoning that it is both rational and logical and (b) justified in light of the relevant factual and legal constraints: *Vavilov* at paras.78 and 101.

[5] Even in circumstances in which a decision-maker is not required to give reasons, the reviewing court must look to the record as a whole to understand the decision: *Vavilov* at para.137. If neither the record nor the larger context sheds light on the basis for the decision, the reviewing court must still examine the decision in light of the relevant constraints on the decision-maker in order to determine whether the decision is reasonable: *Vavilov* at para.138.

The Record

[6] The decision to grant the development permit to the Canoe Club was made by the Municipality's Development Officer, Doug MacInnis. He did not provide reasons when he issued the development permit.

[7] The Municipality filed a 308-page record and a 61-page supplemental record in response to the application for judicial review. I also permitted the Municipality to supplement the record with an affidavit of Mr. MacInnis concerning past decisions of the Municipality: *Hardman v. West Hants (Municipality)*, 2023 NSSC 211. Mr. MacInnis was cross-examined on his affidavit. Further exhibits were entered into evidence at the hearing.

[8] The record shows why Mr. MacInnis made the decision to issue the development permit. After he granted the development permit, Mr. MacInnis

provided the following reasons for his decision in an email to the Applicants dated February 23, 2023:

... The General Resource zone allows a wide range of community non-commercial activities. Pisaquid [sic] Canoe Club is governed by a local board registered under the Societies Act as a not for profit organization which carries out community activities not unlike a tennis club, or soccer club, or softball association which provides sporting and/or training activities to any community members who wish to register and participate for the programs offered. ...

[9] In his affidavit, Mr. MacInnis stated that his decision to issue the permit was based on the material from his file as well as his knowledge that the Municipality and its predecessors have always allowed day camps to take place in buildings that were community centres within the definition the Land-Use By-Law, including at the Ellershouse Community Hall, the Ardoise Community Recreation Centre and the Centre Burlington Hall. Mr. MacInnis stated that each of these buildings is located in a zone that permits “churches, community centres and fire halls,” just as the General Resource zone allows.

The Position of the Parties

The Applicants

[10] The Applicants say that the decision to grant the development permit is unreasonable because, under the terms of the Land-Use By-Law, day camps are not listed as a permitted use on land zoned General Resource. The Applicants also rely on the fact that the term “day camp” only appears once in the Land-Use By-Law, in the definition of “Recreation Uses, Outdoor.”

[11] “Recreation Uses, Outdoor” is defined as:

... the use of land for parks, playgrounds, tennis courts, lawn bowling greens, outdoor skating rinks, athletic fields, golf courses, driving ranges, picnic areas, outdoor swimming pools, *day camps*, and similar uses to the foregoing together with necessary and accessory buildings and structures but shall not include a track for the racing of animals, or any form of motorized vehicles.

[emphasis added]

[12] Recreation Uses, Outdoor is a permitted use only on land that is zoned Water Supply and Open Space.

The Municipality

[13] The Municipality says that Mr. MacInnis’ decision is based on his conclusion that the Canoe Club meets the definition of “community centre.”

“Community centre” is one of the permitted uses in the “General Resource” zone.

[14] The Land-Use By-Law defines “community centre” as follows:

any tract of land and the buildings thereon, the control of which is vested in the Municipality or local board or agent which is used for community activities and not used for commercial purposes ...

[Emphasis added]

[15] The Municipality says that Mr. MacInnis reasoned that day camps are permitted and customarily included in a community centre, and therefore that the Canoe Club is authorized to operate day camps. The Municipality also says that day camps are permitted as an “accessory use” to a community centre.

[16] Accessory Use is defined in the Land-Use By-Law as “a use *subordinate in impact* and naturally, customarily and normally *incidental to* and exclusively devoted to a *main use* of land or building and located on the same lot” [emphasis added].

Issues

[17] In order to determine whether the Applicants have discharged their burden to show that Mr. MacInnis’ decision to issue the permit was unreasonable, I will consider the following:

1. Whether the conclusion of Mr. MacInnis – that day camps are a permitted use on the property – follows from his analysis that the Canoe Club meets the definition of community centre.

2. Whether an interpretation of the Land-Use By-Law as allowing outdoor recreational activities on property zoned General Resource is justified in light of the governing statutory scheme and the principles of statutory interpretation, in particular, the definition of “Recreational Uses, Outdoor,” the definition of “community centre,” and the context in which “community centre” is used.

Internally Coherent Reasoning?

Legal Principles

[18] As a reviewing court, I must place Mr. MacInnis’ reasons first: *Vavilov* at para.84. I must examine the reasons he provided with “respectful attention” and seek to understand the reasoning process that Mr. MacInnis followed to arrive at his conclusion: *ibid*. I do not ask what decision I would have made in place of that of Mr. MacInnis, attempt to ascertain the “range” of possible conclusions that would have been open to him, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem: *Vavilov* at para.83. I am not to make my own yardstick and then use that yardstick to measure what Mr. MacInnis did: *ibid*.

[19] The reasons of Mr. MacInnis should be read in light of the record and with due sensitivity to the administrative regime in which they were given: *Vavilov* at para.103. For example, I might consider the evidence before Mr. MacInnis, the submissions of the parties, publicly available policies or guidelines that informed his work, and past decisions of the Municipality: *Vavilov* at para.94.

[20] Reasonableness review is not a “line-by-line treasure hunt for error”: *Vavilov* at para.102. However, the reviewing court must be able to trace the decision-maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the decision-maker from the evidence before him to the conclusion at which he arrived: *ibid.*

[21] A decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: *Vavilov* at para.103. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken, or if the reasons read in conjunction with the record do not make it possible to understand the decision-maker’s reasoning on a critical point: *ibid.*

Review of Record

[22] I have reviewed and taken into account the entire record. However, I will only be referring to the most relevant portions of the record in these reasons.

Communication between Development Officer and Applicants

[23] There was a significant amount of communication between Mr. MacInnis and the Applicants concerning the proposed change in use of the Canoe Club's property, beginning as early as May of 2022, and continuing after Mr. MacInnis granted the permit.

[24] The Applicants took the position throughout that day camps were not a permitted use on the property, and that the Canoe Club did not meet the definition of community centre.

[25] At first, Mr. MacInnis and his superior, Madelyn LeMay, the Municipality's Director of Planning and Development, appeared to agree with the position of the Applicants.

August 3, 2022 Email from Ms. LeMay to Mr. MacInnis

[26] On August 3, 2022, Ms. LeMay emailed Mr. MacInnis, asking whether he had obtained a legal opinion regarding whether the term "community centre" includes the use of a sports organization that runs day camps. Ms. LeMay stated that Mr. MacInnis' conclusion that the Canoe Club did not meet the definition of "community centre" was the reason that the Club was asked to apply for a by-law amendment. Ms. LeMay asked Mr. MacInnis to consider that day camps are

included within the definition of Recreation Uses, Outdoor, which is listed as a permitted use only on property zoned Water Supply and Open Space.

August 5, 2022 Letter from Mr. MacInnis

[27] In a letter dated August 5, 2022 to the Canoe Club, Mr. MacInnis informed the Canoe Club that day camps were not a permitted use on the property and that the Canoe Club was in violation of the Land-Use By-Law.

August 8, 2022 Email from Director of Planning and Development

[28] In an email dated August 8, 2022 to Mr. MacInnis, Ms. LeMay suggested that the Canoe Club apply in writing for development permit for a community centre so that Mr. MacInnis could refuse it in writing.

August 18, 2022 Email from Mr. MacInnis

[29] However, on August 18, 2022, after receiving legal advice that the property met the definition of community centre, Mr. MacInnis directed the Canoe Club to apply for a permit for a change of use to day camps.

October 7, 2022 Email from Director of Planning and Development

[30] Ms. LeMay disagreed with Mr. MacInnis' approach. She emailed Mr. MacInnis on October 7, 2022, stating that the Canoe Club must first apply to use the property as a community centre and then apply for a separate permit to operate a day camp.

October 7, 2022 Email from Mr. MacInnis

[31] Later on October 7, 2022, Mr. McInnis wrote to the Canoe Club, suggesting that the Club complete an application to use the property as a community centre and stating that he would then determine whether such a development permit could be issued.

November 2, 2022

[32] Approximately one month later, on November 2, 2022, Mr. McInnis wrote to the Canoe Club, pointing out that he had not yet received an application for a development permit to operate a "not for profit community sports organization," and that he was passing the matter on to the Municipality's lawyer for legal action.

Application and Permit

[33] The Canoe Club eventually applied for a permit to authorize “[o]peration of the noted PID’s as a paddling club focused on athlete training, equipment storage seasonal day camp programming for youth athletes.”

[34] Ultimately, Mr. MacInnis granted the development permit, which authorizes the property to be used for seasonal day camps.

Conclusion re: Internally Coherent Reasoning

[35] There is a fatal flaw in Mr. MacInnis’ reasoning process. According to his rationale, the Canoe Club is permitted to run a day camp because it meets the definition of a community centre. However, the Canoe Club did not apply for nor did Mr. MacInnis grant the Canoe Club a development permit to operate a community centre. In the absence of such a permit, the Canoe Club is prohibited from operating a community centre under the terms of the Land-Use By-Law. The Club cannot, therefore, operate a day camp on the property. The conclusion reached by Mr. MacInnis – that day camps are a permitted use on the property – cannot follow from his analysis.

Consistent with the Text, Context and Purpose of the Statutory Scheme?

Legal Principles

[36] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Vavilov* at para.105. A number of elements will generally be relevant in evaluating whether a decision is reasonable: the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision-maker, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies: *Vavilov* at para.106.

[37] In this case, the most relevant constraints are the governing statutory scheme and the principles of statutory interpretation.

[38] Matters of statutory interpretation are also evaluated on a reasonableness standard: *Vavilov* at para.115.

[39] On a question of statutory interpretation, I do not undertake a *de novo* analysis of the question or ask myself what the correct decision would have been: *Vavilov* at para.116.

[40] Administrative decision-makers are not required to engage in a formalistic statutory interpretation exercise: *Vavilov* at para.119. However, they are to

interpret the contested provision in a manner consistent with the text, context and purpose of the provision: *ibid* at para.121. The decision-maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome: *ibid*.

[41] If it is clear that the decision-maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be unreasonable: *Vavilov* at para.122. Omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision-maker: *ibid*.

[42] Even if my task is not to perform a *de novo* analysis or to determine the correct interpretation of a disputed provision, it may sometimes become clear that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision: *Vavilov* at para.124.

The Governing Statutory Scheme

The Municipal Government Act

[43] Municipal planning is governed by the *Municipal Government Act*, S.N.S. 1998, c.18.

[44] The purpose of the *Act* includes vesting municipalities such as the West Hants Regional Municipality with broad authority: see ss.2 and 9A of the *Act* and *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115 at para.33.

[45] The subjects of planning and development of land are dealt with in Part VIII of the *Act*. Under Part VIII, municipalities are given primary authority over planning: see s.190 of the *Act* and *Midtown Tavern & Grill* at para.34.

[46] Under the *Act*, a municipality must appoint a development officer to administer its land-use by-law [s.243(1)], a development permit must be obtained before any development is commenced [s.244(1)], and a development permit “shall” be issued for a proposed development if the development meets the requirements of the land-use by-law [s.246(1)].

The Municipal Planning Strategy

[47] A municipality must adopt a municipal planning strategy, and all land within a municipality must be the subject of a municipal planning strategy: ss.212(1) and (3) of the *Act*.

[48] Under s.213 of the *Act*, the purpose of a municipal planning strategy is to provide statements of policy to guide the development and management of the municipality.

[49] Section 9 of the Municipality's Municipal Planning Strategy sets out the policy of the Municipality in relation to lands designated "Resource," including lands zoned General Resource. Section 9.1 sets out the Municipality's policy in relation to the General Resource zone. Policy 9.1.2 of the Municipal Planning Strategy provides as follows:

Policy 9.1.2 It shall be the policy of Council to permit in the General Resource (GR) zone uses such as: agricultural and agricultural support uses; forestry and forestry related uses; structures associated with sand and gravel extraction operations; single and two unit dwellings, manufactured homes; ***community and commercial uses which serve the local area such as community centres, churches, fire halls, restaurants, small retail stores, automobile service stations, farm equipment sales and personal service shops.***

[emphasis added]

[50] Under s.219(1) of the *Act*, where a municipality adopts a municipal planning strategy that contains policies about regulating land use and development, it must, at the same time, adopt a land-use by-law that enables the policies to be carried out.

[51] A land-use by-law must divide the planning area into zones and list permitted or prohibited uses for each zone: s.220(1) and (2) of the *Act*.

[52] Section 2.4 of the Municipality's Land-Use By-Law states that: (a) unless otherwise stated in the By-Law, no person shall use land without first obtaining a development permit from the development officer, and that (b) the development officer shall only issue a development permit in conformance with the By-Law.

[53] Section 4.4(a) of the Land-Use By-Law states that "any use not listed as a permitted use in a zone *is prohibited* in that zone unless otherwise indicated" [emphasis added]. Section 4.4(b) states that, "[w]here a permitted use within any zone is defined in this By-Law, the uses permitted in the zone include any *similar uses* that satisfy such definition except where a definition specifically excludes any similar use" [emphasis added].

[54] Section 5.1(g) of the Land-Use By-Law states that "[a]ccessory uses" shall be located on a lot held in the same ownership and: (i) within the same zone as the

main building or use it is intended to serve or within an abutting zone in which the main use or building is permitted; and (ii) on a lot which directly abuts or is directly across a public street or highway or private road from the lot containing the main building or use it is intended to serve.

[55] Section 22.1 of the Land-Use By-Law states that “[t]he following uses shall be permitted in the General Resource (GR) zone.” Sixteen permitted uses are listed, including “Churches, community centres and fire halls.” Day camps are not listed as a permissible use in the General Resource zone.

[56] Section 35.1, the definition section of the Land-Use By-Law, states that “all words carry their customary meaning except for those words and phrases defined as follows...” Section 35.1 contains the definitions for the terms “Recreation Uses, Outdoor,” “Community Centre,” and “Accessory Use.”

Conclusion re: Consistency with Text, Context and Purpose of Governing Statutory Scheme

[57] The decision of Mr. MacInnis to issue a permit for the day camps proposed by the Canoe Club is not justified in light of the constraints imposed on him by the text of the Land-Use By-Law considered as a whole and in the context of the *Act* and the Municipal Planning Strategy. In coming to this conclusion, I have not

undertaken a *de novo* analysis or asked myself what the correct decision would have been. Rather, I have asked myself whether the merits of Mr. MacInnis' decision are consistent with the text, context and purpose of the relevant statutory provisions.

[58] While it is true that, under the *Act*, the Municipality is given broad authority, the role of the Municipality's Development Officer within the governing statutory scheme is quite strictly constrained: see *Entertainment Software Association v. Society Composers*, 2020 FCA 100 at para.33, appeal dismissed, 2022 SCC 30. No person shall use land without first obtaining a development permit from the development officer. The development officer *must* issue a development permit for a proposed development *if* the development meets the requirements of the Land-Use By-Law. He may *only* issue a development permit in conformance with the Land-Use By-Law. A land-use by-law *must* list permitted or prohibited uses for each zone. Any use not listed as a permitted use in a zone is *prohibited* in that zone unless otherwise indicated.

[59] The specific reference to the term "day camp" in the definition of Recreation Uses, Outdoor in the Land-Use By-Law, and the absence of that term anywhere else in the By-Law, strongly suggests that the Municipality intended that outdoor

recreational activities such as the day camps run by the Canoe Club would only be allowed in zones with Recreation Uses, Outdoor listed as a permitted use.

[60] My conclusion is supported by the fact that the definition of Recreation Uses, Outdoor includes “similar uses” to those uses listed, which include the use of land for tennis courts, lawn bowling greens, outdoor skating rinks, athletic fields, golf courses, driving ranges, and outdoor swimming pools. As recognized by Mr. MacInnis in his February 23, 2023 email, the Canoe Club carries out community activities not unlike a tennis club, or soccer club, or softball association that provides sporting and/or training activities. The Canoe Club’s outdoor day camps clearly fall within the definition of Recreation Uses, Outdoor.

[61] The question is whether there is another reasonable interpretation of the Land-Use By-Law, that is, whether outdoor day camps are also permitted to be carried out by a community centre.

[62] In my view, Mr. MacInnis’ interpretation of “community centre” as encompassing the outdoor day camps proposed by the Canoe Club fails to consider the words used in the definition of “community centre” and the context within which the term “community centre” is used in the Municipal Planning Strategy and within the Land-Use By-Law.

[63] The definition of community centre in the Land-Use By-Law is “any tract of land *and* the buildings thereon...” [emphasis added], suggesting that the activities of a community centre are operated out of a building and cannot be exclusively outdoor activities. This alone might not be sufficient to render the decision of Mr. MacInnis unreasonable. However, when the entire context is considered, I lose confidence in the outcome reached by Mr. MacInnis. In the Municipal Planning Strategy and the Land-Use By-Law, “community centre” is used in a manner that strongly suggest that it is an indoor use or operated out of a building, and that it does not refer to recreational activities that are solely conducted outside.

[64] In Policy 9.1.2 of the Municipal Planning Strategy, which describes the types of uses permitted in the General Resource zone, community centres are listed along with churches, fire halls, restaurants, small retail stores, automobile service stations, farm equipment sales and personal service shops as examples of “community and commercial uses.” All of these examples operate out of a building.

[65] In the Land-Use By-Law, “community centre” is not listed by itself as a permitted use in the General Resource Zone. Rather, the permitted use is worded as “Churches, community centres and fire halls.” Churches and fire halls are buildings.

[66] In the “Rural Residential” zone, one of the permitted uses is “[e]xisting churches, community centres, fire halls, schools and post offices,” all buildings. In the “Manufactured Home Park” zone, the Land-Use By-Law refers to “indoor recreational uses *such as community or recreation centres*” [emphasis added]. In the “Agricultural Priority Two” and “Agricultural Priority Three” zones, the Land-Use By-Law sets out the maximum height of the main building for “Dwellings, Churches, Community Centres, Fire Halls.” In the Institutional zone, community centres are listed as a permissible use along with 14 other uses that appear to involve a building, for example, churches, colleges and indoor recreation uses.

[67] Mr. MacInnis appears to have focussed only on part of the definition of community centre, and to have failed to consider the words “and the buildings thereon” in the definition as well as other key elements of the text, context and purpose of the relevant statutory provisions.

[68] It was therefore unreasonable for Mr. MacInnis to find that the day camps proposed by the Canoe Club fall within the definition of “community centre” and that they are therefore a permitted use on the Club’s Zwicker Lake property.

[69] Although not necessary, I will address the argument of the Municipality that the proposed day camps are an “accessory use” to a community centre. Even if the

Canoe Club met the definition of “community centre,” the proposed day camps would not be a use subordinate in impact to the community centre purportedly operated by the Canoe Club. The proposed day camps are not incidental to a main use. The day camps are the main use.

Conclusion

[70] Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another: *Vavilov* at para.194. In some case, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision: *ibid*. In this case, the text of the Municipality’s Land-Use By-Law, considered as a whole and in the context of the *Act* and the Municipal Planning Strategy, points overwhelmingly in favour of only one reasonable interpretation: that the intention of the Municipality was to limit outdoor recreational activities, including day camps like those being carried out by the Canoe Club, to land zoned Water Supply and Open Space.

[71] As Mr. MacInnis’ decision to issue the development permit to the Canoe Club is not justified in relation to the relevant statutory constraints, it is

unreasonable. The application for judicial review is granted, and the development permit is quashed.

Remedy

[72] Declining to remit a matter to the decision-maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: *Vavilov* at para.142. For the reasons already outlined, the text of the Municipality's Land-Use By-Law leads inevitably to the conclusion that the Canoe Club's day camps are not a permitted use on its Zwicker Lake property. I exercise my discretion not to remit the matter to the Development Officer for redetermination.

Gatchalian, J.