DECISION **2016 NSUARB 128**
M07327

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **TASTY BUDDS COMPASSION CLUB INC.** of a decision of a development officer dated February 23, 2016, which refused a development permit application for property located at 958 Cole Harbour Road, Halifax Regional Municipality

BEFORE:	Wayne D. Cochrane, Q.C., Member
APPELLANT:	**TASTY BUDDS COMPASSION CLUB INC.** Godfred Chongatera, LL.B. Alexander MacKillop, Articled Clerk
RESPONDENT:	**HALIFAX REGIONAL MUNICIPALITY** E. Roxanne MacLaurin, LL.B.
HEARING DATE:	May 10, 2016
SUBMISSIONS:	March 30, 2016 and April 6, 2016
DECISION DATE:	**July 18, 2016**
DECISION:	**Appeal dismissed.**

TABLE OF CONTENTS

1.0 INTRODUCTION

[1] Tasty Budds Compassion Club Incorporated appealed the decision of Andrew Faulkner, a development officer with Halifax Regional Municipality, to the Nova Scotia Utility and Review Board. In his decision, Mr. Faulkner refused to issue a business occupancy permit for a store used by Tasty Budds for the retail sale of marijuana to customers legally entitled to buy the drug for medical purposes.

2.0 ISSUE

[2] The Board sees one principal issue in this proceeding, within which there are two sub-issues:

> **Principal issue: Does the refusal by the Development Officer to issue a business occupancy permit conflict, or fail to comply, with the provisions of the Land-Use By-Law?**
>
> For reasons discussed below, the Board finds that the answer to this principal issue is "no," meaning that the appeal is dismissed.
>
> This finding is related to the Board's findings on two sub-issues. These are:
>
> > **Sub-issue (i) Under current Federal legislation relating to medical marijuana, are sales of medical marijuana by the Appellant illegal?**
> >
> > In the opinion of the Board, for reasons discussed in this decision, the answer to this question to be "yes."
> >
> > **Sub-issue (ii) If the answer to Sub-issue 1 is "yes," is the Board's finding that the sale of medical marijuana by Tasty Budds is illegal consistent with the development officer's refusal to issue the permit?**
> >
> > In the opinion of the Board, for reasons discussed in this decision, the answer to this question is "yes."

3.0 WITNESSES CALLED BY VARIOUS PARTIES

3.1 No Oral Evidence

[3] By agreement of Counsel for the Appellant and Counsel for the Respondent HRM, no witnesses testified in this proceeding, nor did any witness file an affidavit. However, Counsel jointly filed with the Board an Agreed Statement of Facts containing 13 paragraphs.

4.0 FACTS

[4] Tasty Budds Compassion Club Inc. was incorporated on December 8, 2015, with the Registry of Joint Stock Companies in Nova Scotia. Its Chief Executive Officer is Malachy McMeekin, who is also a Director; the Recognized Agent is Norman Lawrence, who is also a Director.

[5] On February 17, 2016, the Appellant filed a document entitled "permit application - occupancy" with HRM for what was described in the application as "occupancy for 'Tasty Budds Compassion Club'."

[6] The Board will first note that the language used to refer to the permit being sought by the Appellant by the various parties, and their counsel, varied. As noted, the Application refers to a "permit application-occupancy." Other documentation filed with the Board in this appeal uses other terminology, including: "business occupancy permit"; "municipal development permit"; and "development occupancy permit."

[7] Given the view the Board takes of this proceeding, it sees nothing turning on exactly what is the correct name for the permit sought. For simplicity's sake, the Board

will refer to it as a "business occupancy permit," the phrase used in Mr. Faulkner's letter of refusal of February 23, 2016.

[8] The Board notes that references in the evidence filed with the Board, and even in the submissions by Counsel for the Appellant, repeatedly say Tasty Budds is currently carrying on the business of selling medical marijuana, not just proposing to in future. However, in the judgment of the Board, whether Tasty Budds is, or is not, carrying on such a business has no effect on the outcome of this appeal, and the Board makes no finding on the point.

[9] Tasty Budds' store is located in rented premises at 958 Cole Harbour Road, in the Cole Harbour/Westphal area on the eastern edge of Dartmouth. The property is regulated under the Cole Harbour/Wesphal Land-Use By-Law or LUB, zoned C-2 (General Business Zone).

[10] Tasty Budd's use of the premises relates to retail, and both parties agree that retail uses are a permitted use within the C-2 Zone under the LUB.

[11] The application was reviewed by Mr. Faulkner, a development officer with Halifax Regional Municipality.

[12] On February 23, 2016, at the conclusion of his review, Mr. Faulkner refused the Appellant's application for a permit.

[13] In his refusal, Mr. Faulkner referred to the Cole Harbour/Westphal Land-Use By-Law, Part IV, Section 4.2(b); to Section 186(2) of the *Halifax Regional Municipality Charter;* and to the requirements of the C-2 General Business Zone. The Board will refer to these provisions below, under "Analysis and Findings."

[14] His letter of refusal also said:

> Although the C-2, General Business Zone permits retail use at this location your application is premature and has to be refused as the product you are proposing to sell has not been legalized.
>
> [Exhibit T-3]

[15] On February 24th, the day after Mr. Faulkner's refusal, Counsel for the Appellant filed a Notice of Planning Appeal with the Board. The Board notes in passing that the Notice identified the Appellant as "Norman Lawrence" (a principal of Tasty Budds) rather than the corporate name, i.e., "Tasty Budds." However, Counsel for HRM raised no objection to the Notice of Appeal, and the Board considers the appeal to be validly before it.

[16] Counsel for the Appellant stated the following ground of appeal in the Notice:

> The general business zone permits retail use at this location, C-2 Zone. Regardless, there is no need for an occupancy permit in the building as the building has undergone no renovations.

[17] Also on February 24th (the same day the Notice of Appeal was filed) the Federal Court of Canada issued a decision (*Allard v. Canada,* [2016] FC 236).

[18] Included in the evidence before the Board, but not referred to in any significant way by Counsel, were 23 written submissions in relation to this appeal which were submitted by various citizens, who expressed their views on this appeal. Many of the letters were written by people who are, or have been, Tasty Budds customers; all customers expressed support for the store to the Board. Many of the letters contain no indication at all of the places of residence of the writers. One that does, from a homeowner within 500 feet of the store, supports the development officer's decision.

[19] The Board has stated (see above under heading "Issue") that the task before it is to determine if the development officer's decision conflicts, or fails to comply, with the provisions of the Land-Use By-Law. Given the strictly limited jurisdiction of the Board in determining an appeal of this type (i.e., in essence, it must determine if the Development Officer's action conflicts, or fails to comply, with the LUB), the Board concludes that the content of letters – however sincere they may be, with respect to their particular point of view – can be accorded no weight by the Board in deciding the issue before it.

5.0 ANALYSIS AND FINDINGS

5.1 Municipal Government Act and *Halifax Regional Municipality Charter*

[20] Appeals of this type were formerly governed by the provisions of the *Municipal Government Act*, R.S.N.S. 1998, c. 18, s.1, everywhere in the Province. In 2008, appeals relating to property located in HRM were excluded from the jurisdiction of the *Municipal Government Act*, and placed under the new *Halifax Regional Municipality Charter.*

[21] Many provisions in the *Halifax Charter* correspond to provisions which are found in the *Municipal Government Act*. The provisions of the latter *Act* have been explored in earlier decisions of the Court of Appeal, and the Board considers the conclusions in those decisions to be relevant to the interpretation of the *Halifax Charter*.

5.2 Burden of Proof

[22] In this proceeding, as in appeals generally, the Board considers that the burden of proof rests with the Appellants.

5.3 Standard of Proof

[23] The Board has applied the balance of probability as the standard of proof for the determination of facts.

5.4 Nova Scotia Utility and Review Board as a Statutory Tribunal

[24] The Board is a statutory tribunal, meaning that it is established by an act of the Legislature (the *Utility and Review Board Act*). Statutory tribunals lack the inherent jurisdiction of courts such as the Nova Scotia Supreme Court, and their jurisdiction must be found in the legislation under which they operate: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570.

5.5 Standard of Review

[25] Section 265(2) of the *Charter* provides the following:

> 265(2) An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer *does not comply with* the land-use by-law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area. [Emphasis added]

[26] Section 267(1) and (2) of the *Charter* set out the powers of the Board on an appeal such as this:

> 267(1) The Board may
> (a) confirm the decision appealed from;
> ...
> (d) allow the appeal and order that the development permit be granted;
> ...
> (2) The Board may not allow an appeal unless it determines that the decision of…the development officer…conflicts with the provisions of the land-use by-law or the subdivision by-law.

[27] In short, the test for an applicant to appeal a development officer's decision to refuse a development permit is that the decision "does not comply" with the LUB or the Subdivision By-Law: s. 265(2); for the Board to reverse a development officer's decision to refuse, it must find that the decision "conflicts with" the LUB or the Subdivision By-Law:

s. 267(2). The Board sees no difficulty arising from this distinction, at least in the circumstances of the present appeal.

[28] In deciding whether a development officer's refusal does conflict with the LUB, the Court of Appeal has, historically, said that the Board should apply the standard of correctness; more recently, the Court has modified that slightly, saying, in essence, the Board should approach the issue in a manner akin to correctness.

[29] With respect to the standard to be applied by the Board being correctness, see, for example:

> • *Re Bay Haven Beach Villas Inc.*, 2004 NSCA 59:
>
> ...the applicable standard is one of correctness...little deference is owed to the Development Officer's decision.
>
> • *Halifax (Regional Municipality) v. United Gulf Developments Ltd.,* 2009 NSCA 78:
>
> ...the Board was right to apply a correctness standard to the Development Officer's refusal to issue a development permit...given its expertise in planning matters, the Board is well qualified to review decisions of a development officer on a correctness standard.

[30] The concept that the Board's approach should be akin to applying the standard of correctness, but not, strictly speaking, correctness, appears in a later decisions of the Court of Appeal. See, for example, *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 [affirming *Anglican Diocesan Centre Corporation v. Halifax (Regional Municipality)*, 2009 NSUARB 154]. In *Anglican Diocesan*, the Court refers to the standard of correctness, but then says that the Board, as an administrative tribunal constituted by statute:

> ...does not immerse itself in *Dunsmuir*'s standard of review analysis that governs a court's judicial review. The Board should just do what the statute tells it to do.
>
> The Board said (¶62) that it "may only allow this appeal if it determines that the Development Officer's decision 'conflicts with' or 'does not comply' with the provisions of the Land-Use By-Law". After its analysis, the Board concluded (¶109) that the development officer's "decision to refuse conflicts with, and does not comply with, the LUB", namely s. 67(1)(d) which permits an "other institution of a similar type" in the P

> Zone. The Board correctly identified its standard of review, i.e., that prescribed by the *HRM Charter*, to the decision of the development officer.

[31] This approach appeared more recently in *Royal Environmental Inc. v. Halifax (Regional Municipality),* 2012 NSCA 62, [affirming *In the Matter of the Halifax Regional Municipality Charter and In the Matter of an Appeal by Royal Environmental Inc.,* 2011 NSUARB 141] at paragraph 41.

[32] In the present proceeding, the Board will apply the same standard it applied in *Anglican Diocesan* and *Royal Environmental*.

5.6 Applicable Principles of Statutory Interpretation

[33] The Board considers that the liberal and purposive approach to statutory interpretation applies in this proceeding, see, for example: *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board),* [1994] N.S.J. 50 (*"Heritage Trust 1994"*).

[34] Consistent with the *Heritage Trust 1994* purposive approach is the decision of J.M. MacDonald, J., (as he then was) in *MacDonald v. Halifax Investments* (1997),162 N.S.R. (2d) 214 (SC), an application respecting the National Building Code. The Court referred to:

> ...the dilemma of balancing competing rights in the context of land use legislation...
>
> [para. 16]

[35] He went on to refer to community-based property rights, saying:

> Courts in recent years have endorsed an erosion of individual property rights in favour of land use planning which is primarily designed to benefit the community as a whole. I refer again to *Driedger* at page 373;
>
> In the past, common law courts assumed that the free use and disposition of property, and contractual freedom generally, benefited not only the owner of the property but also society as a whole. While free markets and free trade remain respectable common law values, courts today are less likely to believe that what is good for property owners is good for society as a whole. In current interpretative practice, the value of protecting the freedom of property owners easily gives way to competing values and goals.

I, as well, refer to *Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility & Review Board et al*, (1994), 1994 CanLII 4114 (NS CA), 128 N.S.R. (2d) 5; where at paragraph 97, Hallett, J.A., noted:

> 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. [paragraph 14]

[36] The Court further noted that the:

> …purposive approach to statutory interpretation is as well embodied in our *Provincial Interpretation Act*, 1989, R.S.N.S. c. 235, s. 9(5) provides in part:
>
> > 9 (5) every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters:
> >
> > (a) the occasion and necessity for the enactment;
> > . . .
> > (c) the mischief to be remedied;
> > (d) the object to be obtained;
> > . . .
> > (f) the consequences of a particular interpretation…
>
> [para. 15]

[37] In *Anglican Diocesan,* the Court of Appeal, in reviewing (as the Board noted above) a decision of the Board respecting a decision of a development officer, adopted, and expanded upon, its reasoning in an earlier decision, *Archibald v. Nova Scotia,* 2010 NSCA 27, saying:

> In *Archibald*, ¶ 24, this court summarized the principles that govern the Board in deciding whether an elected municipal council carried out the intent of a municipal planning strategy. Similar principles, but with some adjustment noted below, apply to the Board's appellate role from a decision of a development officer. The authorities for these principles are cited in *Archibald*, ¶ 25.
>
> > **(1)** The Board is the first tribunal to hear sworn and tested evidence. So the Board should undertake a thorough factual analysis of the proposal in the context of the LUB. The appellant bears the onus, on the balance of probabilities, to prove the facts that establish the conflict between the development officer's decision and the LUB. Here, the Board (¶ 57, 59) noted that the Church bore the onus on the balance of probabilities, and made determinative factual findings that I will discuss later.
> >
> > **(2)** The legislation expects the Board to interpret the LUB. *The Board should interpret the LUB not formalistically, but pragmatically and purposively, to make the LUB work as a whole.* The Board here (¶ 60) cited the purposive approach.

> **(3)** Subsections 234(1) and (3) of the *HRM Charter* direct that the LUB "enables" and should "carry out the intent" of the MPS. The MPS does not amend the LUB. But *the LUB's interpretation may be assisted by the MPS, and the Board's purposive approach should encompass the LUB and MPS together*. The Board here (¶ 84) cited the interpretive reflexivity between the MPS and LUB (discussed later ¶ 46-49).
>
> **(4)** The Board's deference to the elected municipal council's difficult choices among vague and intersecting intentions in the MPS, discussed in *Archibald* ¶ 24(7), does not apply to an unelected development officer who applies the LUB. This is apparent from the legislative mandates to the development officer and Board. Section 261(1) of the *HRM Charter* says that a "development permit must be issued if the development meets the requirements of the land-use by-law…" So a development officer with such a compliant application has an executory function. He holds no public hearing of objections as may occur before the council. At the appeal level, the legislation directs the Board to decide whether the council "reasonably carried out the intent of the municipal planning strategy" – a somewhat diffuse standard. But the Board's function with a development officer's decision – to determine whether that decision "conflicts with" the proper interpretation of the LUB – is more pointed. The Board here (¶ 62- 63) noted these principles.
>
> **(5)** The Board hears an appeal. It is not an initiating tribunal offering fresh direction on a planning issue. So the Board should focus on the development officer's decision and stated reasons. Section 260(2) of the *HRM Charter* says that, within 30 days from receipt of the application, the development officer "shall grant the development permit or inform the applicant of the reasons for not granting the permit". Then s. 264(e) states that notice of appeal to the Board must be filed within 14 days from the development officer's notice. Clearly the statute contemplates that the development officer's written reasons be central to the appeal, meaning the Board's decision should address those reasons. As stated in *Archibald*, ¶ 30, the Board is not confined to those reasons. The ultimate question - whether the development officer's refusal conflicts with the LUB - may involve other issues. But the focus on the development officer's stated reasons prompts the Board to respect its appellate role. [Emphasis added]

[38] Paragraph 84 of the Board's decision (referred to by the Court of Appeal, above), says, in part:

> The Board does, of course, not consider it to be in any way inappropriate to review other provisions in the LUB to attempt to resolve ambiguity. The Board does, however, note that the LUB is an expression of the MPS.

[39] The Court of Appeal remarks at paragraph 47 of *Anglican Diocesan* that:

> …the MPS' intent should be the LUB's backbone. For that reason, the MPS may be an interpretive tool to elicit meaning from ambiguity in the LUB: *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality)*, 2004 NSCA 59, para. 26; *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* (1994), 1994 CanLII 4114 (NS CA), 128 N.S.R. (2d) 5 (CA), at para. 123; Archibald, para. 24(8).

[40] In its more recent decision in *Martell v. Halifax (Regional Municipality),* 2015 NSCA 101, affirming *Martell (Re),* 2015 NSUARB 78 (which also dealt with an appeal of a decision by a development officer), the Court of Appeal, in referring to use of the liberal and purposive approach, in place of the strict interpretation approach, made mention of:

> …the tug between restrictive versus purposive interpretation of planning legislation…
>
> [para. 28]

The Court repeated some of the language cited in *Halifax Investments,* including the following:

> The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality.
>
> [para. 78]

5.7 Applicable Provincial, Municipal, and Federal Legislation

5.7.1 Under current Federal legislation relating to medical marijuana are sales of medical marijuana by the appellant illegal?

[41] In Canada, sale and possession of, among other things, marijuana is subject to the *Controlled Drugs and Substances Act,* a Federal enactment.

[42] The Board notes that while the *Act* spells the name of the drug with an "h", rather than a "j" (i.e., "marihuana"), the explanatory documentation issued by Health Canada uses the more common spelling of "marijuana." That is the spelling which the Board has used generally in this decision.

[43] The *Act* says, among other things, that selling marijuana is trafficking unless it is done pursuant to the regulations: s. 2(1); trafficking is an offence unless exempted by Regulation, s. 5(1).

[44] In recent years, an exemption, by regulation, has gradually evolved for the sale of marijuana used for medical purposes.

[45] This evolving exemption for medical marijuana has led to the enactment of two succeeding sets of regulations, and the likely proposed adoption of yet another set of regulations sometime in the coming months (for reasons discussed below in reference to a Court of Appeal decision dealing with the subject).

[46] The first set had been enacted by the Federal Government in response to a decision of the Ontario Court of Appeal respecting medical marijuana. These regulations were entitled the "*Marihuana Medical Access Regulations*" (*MMA Regulations*).

[47] These Regulations were in force until 2014, when they were replaced by the *Marijuana for Medical Purposes Regulations (MMP Regulations).* These were adopted on March 31, 2014, and remain in force today.

[48] On February 24, 2016, the Federal Court of Canada, in *Allard v. Canada,* did declare them to be invalid by reason of an unjustifiable infringement of s. 7 of the *Canadian Charter of Rights and Freedoms.*

[49] However, the Court suspended its declaration of invalidity for six months (i.e., to August 24, 2016) to permit the Federal Government to develop new regulations.

[50] The end result of this suspension is that the *MMP Regulations* remain in full force and effect.

[51] The *Allard* decision contains a detailed comparison of the former MMA Regulations, and their replacement, the *MMP Regulations*. In essence, the Court describes the former regulations as contemplating a "personal cultivation regime," while the *MMP Regulations* rely on "licensed producers" as the source of medical marijuana.

[52] The *MMP Regulations* do permit the sale of medical marijuana to qualified patients. The *Regulations* allow a person who is a "licensed producer" (a status defined in detail within those *Regulations*) to sell medical marijuana to qualified patients (Agreed Statement of Facts, paragraph 7).

[53] Counsel for the Appellant acknowledges that Tasty Budds is not a licensed producer of marijuana for medical purposes under the *MMP Regulations*.

[54] Counsel for the Appellant also acknowledges that the *Controlled Drugs and Substances Act*, the *Criminal Code of Canada* and the *MMP Regulations* do not authorize the sale of marijuana for medical purposes through a store front (Agreement Statement of Facts, paragraph 10). This is so even if the person is a licensed producer of medical marijuana.

[55] The Appellant's business is the sale of medical marijuana to qualified patients in a retail store, or storefront, located in a strip mall in Dartmouth.

[56] The Board has already noted that the Appellant, Tasty Budds, is not a licensed producer of medical marijuana, one group which is authorized by the *Regulations* to sell marijuana. Further, apart from the general illegality of sale of marijuana, the growing or possessing of marijuana likewise remains an offence unless otherwise authorized under *Act* and the *MPP Regulations*. The Board has no submissions or evidence before it that would persuade it that the Appellant is so authorized under any other regulation, or, for that matter, under any other provision in the *Act*.

[57] While Counsel for Tasty Budds, then, could not point to any exemption under the applicable Federal legislation which would make their client's business legal, they did, in the course of closing submissions, refer the Board to steps taken by some

other municipalities in relation to the sale of medical marijuana – with particular reference to the City of Vancouver.

[58] Although the Board never became entirely clear on the full nature, or intended thrust, of these submissions as they might relate to the outcome of this appeal, the Board inferred that the Appellant was suggesting that the municipalities in question have chosen to regulate (and permit) retail businesses which are selling marijuana in storefronts to qualified patients.

[59] Given that the *Controlled Drugs and Substances Act*, and its *Regulations,* apply in all provinces and territories in the County, the Board asked Counsel for the Appellant about the legal basis under which a municipality could so choose to regulate or permit these activities. In response, the only basis which Counsel for the Appellant gave the Board was "natural justice."

[60] Without more, the Board does not see a simple reference to natural justice as forming a basis for the legal sale by Tasty Budds of medical marijuana.

[61] In short, the Board sees itself as faced with the following:

- the *Controlled Drugs and Substances Act* prohibits, among other things, the possession and sale of marijuana unless authorized by regulation [Agreed Statement of Facts, paragraph 9];
- the *MMP Regulations* enacted by the Federal Government under the *Controlled Drugs and Substances Act* remain in force;
- under the *MMP Regulations*, licensed producers can sell medical marijuana to qualified patients;
- Tasty Budds is not a licensed producer;
- the *Controlled Drugs and Substances Act,* the *Criminal Code of Canada,* and the *MMP Regulations* do not authorize the sale of marijuana for medical purposes through a storefront.

[62] Taking all these factors into account, the Board considers it has no alternative other than to make a finding that the sale of medical marijuana by Tasty Budds, in their store in a strip mall, constitutes a violation of the applicable Federal Legislation, being the *Controlled Drugs and Substances Act* and the *MMP Regulations*.

[63] The Board cautions that this finding by the Board is done purely for the purposes of the exercise of the Board's jurisdiction in relation to municipal planning matters under the *Halifax Charter.*

[64] It does not constitute a finding of guilt under the *Criminal Code,* or under the *Controlled Drugs and Substances Act* and its associated regulations. The jurisdiction to make such a finding lies solely with the Provincial and Supreme Courts.

[65] In short, the Board has found, then, that the answer to the question posed in Sub-Issue (i) (under current Federal legislation relating to medical marijuana, are sales of medical marijuana by the Appellant illegal?) is "yes." Determining that Tasty Budds' business is illegal is not, however, enough. Having determined that it is illegal, the Board must determine the significance of such illegality. The Board accordingly turns now to Sub-Issue (ii).

Sub-Issue (ii): If the answer to Sub-Issue (i) is "yes," is the Board's finding that the sale of medical marijuana by Tasty Budds is illegal consistent with the development officer's refusal to issue the permit?

[66] The Board saw the facts, and the applicable law, in relation to Sub-Issue (i) as leading along a clear and direct path to a finding of illegality.

[67] On the other hand, while the facts remain the same for Sub-Issue (ii), the law is (in the judgment of the Board) much less clear.

[68] The legislation before the Board in this part was: the LUB; the MPS; the *Halifax Regional Municipality Charter*; and the *Canadian Charter of Rights and Freedoms*. All but the MPS were referred to at some length by Counsel. In summary:

- with respect to the LUB, HRM relied on Part 4, Section 4.2(b);
- with respect to the *Halifax Charter*, Counsel for the Appellant referred to s.2(c)(2)(3) and Counsel for HRM referred to s.186(2);
- with respect to the *Charter of Rights,* Counsel for the Appellant made repeated references, particularly to s.52.

[69] The Board will turn first to the *Charter of Rights.*

5.8 Canadian Charter of Rights and Freedoms

[70] In their submissions, Counsel for the Appellant made frequent reference to the *Charter of Rights*. Ultimately, however, the Board was left uncertain as to the context of these references, and just what the Appellant thought the Board should do, if anything, under the *Charter of Rights*.

[71] As one example, a written brief on behalf of Tasty Budds refers to the Development Officer's refusal letter, which quoted s.186(2) of the *Halifax Charter* and s. 4.2(b) of the Cole Harbour/Westphal Land-Use By-Law (both reproduced below in full at paragraphs 88 and 89). Counsel for the Appellant reasonably summarized the combined meaning of these two provisions as being that:

> The By-Law must not conflict or be inconsistent with an enactment of the Province or of Canada. If any Municipal or provincial regulations, By-laws or codes, conflicts with federal law, the federal law prevails.

[72] The brief then goes on to refer to s. 52 of the *Charter of Rights*, saying:

> This section of the Constitution gives the courts the power to rule that a particular law is not valid if it violates the Charter, which is itself part of the Constitution...it provides courts with an important power to strike down laws that violate Charter rights.

[73] The brief then goes on to refer to the findings of the Federal Court in *Allard* that the provisions in the *MMP Regulations* violate the *Charter of Rights.* The summary of *Allard* is detailed, and the Board has no disagreement with it, or with the summary of s. 52 of the *Charter of Rights*.

[74] Nevertheless, however correct these statements of the law may be, the Board has been unable to see the connection between them and the task which the Board has before it.

[75] At one point in the arguments presented by Counsel for the Appellant, the Board found itself wondering whether perhaps it was about to be asked to go where the Federal Court in *Allard* had chosen not to – and, in essence, treat the *MMP Regulations* as no longer in effect, even though the Court had suspended its finding of invalidity.

[76] The Board eventually concluded that this was not what was being asked, although it remained uncertain as to the purpose of these arguments.

[77] Moreover, even if the Board were to (purely hypothetically) regard the *MMP Regulations* as no longer in effect, the *Controlled Drugs and Substances Act* certainly remains in effect. That *Act* says that the sale of marijuana is illegal *unless* authorized by regulation. And the Board is unaware of any regulation authorizing Tasty Budds to sell marijuana (medical or otherwise) to anyone. Indeed, it considers that Counsel for the Appellant acknowledged this.

[78] Further, the Board did not perceive Counsel for the Appellant to be arguing that any provisions of the *LUB* or *Halifax Charter* were, in whole or in part, invalid because of the *Charter of Rights*.

[79] Lastly, even if this were to be so, the Board is unaware of the Appellant having given notice of a *Charter* challenge under the *Constitutional Questions Act* [see, in particular ss. 10(1)(a) and s. 10(2)].

[80] In short, the Board is left unpersuaded as to the *Charter of Rights* having any effect on the decision it must make in relation to Sub-Issue (ii), or indeed Sub-Issue (i), or the primary issue itself.

[81] Accordingly, the Board turns from the *Charter of Rights* to the *Halifax Charter* and LUB.

5.9 *Halifax Charter* and LUB Provisions

[82] The Board will deal, first, with an argument appearing in a written submission from Counsel for the Appellant referring to s.2 of the *Halifax Charter.* He marked for emphasis (with bold letters) parts of s. 2 (c) (ii) and (iii):

> Purpose of Act
>
> 2 The purpose of this Act is to
> …
> (c) recognize that the functions of the Municipality are to
> …
> (ii) provide services, facilities and other things that, in the opinion of the Council, are necessary or desirable for all or part of the Municipality, and
> (iii) develop and maintain safe and viable communities.

The submission then goes on to say:

> Providing the Appellant with their development occupancy permit will not violate the purpose of the *HRM Charter* and the By-Laws. *The permit will further the purpose of the By-Laws which is to protect the public and provide valuable services*. (Emphasis added by Board)

[83] Again, the Board finds this unpersuasive.

[84] To illustrate, Counsel say: "the permit" will, in effect, "provide valuable services." The services being provided are, presumably, medical marijuana, to be provided by Tasty Budds. The *Halifax Charter* in s. 2(c) (ii) does indeed use the words

"provide services," but is referring to "the functions of the Municipality." The "services" referred to, in other words, are ones that HRM itself decides to provide, as a municipal government function.

[85] The Board does not see s. 2(c), or the point urged in the brief of Counsel for the Appellant, as providing significant support for their client's cause.

[86] Turning to the submissions of Counsel for HRM, the Board sees one part of her argument as relating to the overall intent of the municipal planning documents, i.e., the LUB and MPS. In part, it is encapsulated in the following sentence from a written submission by her to the Board, in which she says:

> In HRM's view, the Council did not intend to establish a regulatory scheme which required the issuance of licenses for illegal or criminal uses.

[87] She sees support for this statement of intent in the two legislative provisions (one in the LUB, and one in the *Halifax Charter*) which were relied on by the Development Officer when he refused to grant the permit.

[88] Looking first at the LUB, we find in Part 4, Section 4.2(b) of the LUB:

> Where the provisions in this By-law conflict with those of any other municipal or provincial regulations, by-laws, or codes, the higher or more stringent requirements shall prevail.

[89] These words are similar to, but an expansion of, those found in the *Halifax Charter*, in s. 186(2), which says:

> Power to regulate, license and prohibit
>
> 186
>
> (2) A by-law must not be *inconsistent with an enactment* of the Province or of Canada. 2008, c. 39, s. 186.

[90] Both provisions, then, say that a by-law must not be inconsistent with a federal enactment. In the present case, neither party (as the Board heard their

submissions) is saying the by-laws under which HRM may issue a permit are themselves "inconsistent" with provincial or federal legislation.

[91] The Board does note in passing that the LUB provision, unlike the one in the *Halifax Charter*, says, in effect, if there is a difference in requirements between an LUB and a federal or provincial enactment, the "more stringent" is to apply. In this case, the LUB can be taken to be the "more stringent" since it is the LUB and not the *Halifax Charter* which contains that reference. The Board does not see any arguments before it suggesting that this means the LUB is bad law for being inconsistent with provincial legislation (i.e., the *Halifax Charter*).

[92] Quite apart from whether the Board would have any jurisdiction to rule on the point (for present purposes, the Board will assume, without finding, that it has no such jurisdiction), s. 186 as provincial legislation is not susceptible to that argument, and is, standing entirely on its own without the help of the LUB's provision, consistent with HRM's position in this appeal.

[93] In effect, Counsel for HRM is arguing that, if the *Halifax Charter* and LUB require that a municipal by-law must not be inconsistent with a provincial or federal enactment, it follows that that a municipal by-law must not be enforced so as to authorize a business which is illegal under such an enactment.

[94] Accordingly, if Tasty Budds' business is illegal under current federal legislation (as the Board has found it to be, earlier in this decision), HRM must not issue a business occupancy permit to Tasty Budds for that business.

[95] The Board has reflected on this point at length. Applying the "liberal and purposive" approach to statutory interpretation which the Supreme Court of Canada and

Court of Appeal have directed be used, the Board concludes that HRM's argument on this point is consistent with the development officer's refusal to issue the permit.

[96] In the present instance, HRM has – as do other municipalities – a specialized legislative structure in its LUB and MPS.

[97] Land-use by-laws, and their associated municipal planning strategies, are typically highly detailed – sometimes not just street by street, but by individual lot. They constitute a complex, interlocking, legislative structure which is often many hundreds of pages long, referring to the various types of uses which are, and are not, permitted, often with explicit reference to compatibility as a factor.

[98] Such rules (whether they be in an LUB, an MPS, or both) are only adopted after lengthy consultations. These always involve municipal councillors and planning staff, and very often the public – a common statutory requirement. For example, the *Halifax Charter*, like the *Municipal Government Act*, has requirements for public consultation.

[99] One common feature, in the Board's experience – and one that it perceives in the MPS and LUB before it here – is that uses identified in municipal planning strategies and land use bylaws are legal ones.

[100] In the present appeal, Tasty Budds' business of selling medical marijuana is an illegal use. No such business is referred to in the MPS or LUB. Further, Counsel for neither party directed the Board's attention to any reference in the MPS or LUB to any other illegal business, much less to any provision authorizing such activity, or specifying the occasion where particular illegal uses may occur. Further, the Board has received no

submissions which suggest that HRM has issued business occupancy permits for any other businesses that were known to be illegal.

[101] Nevertheless, while Counsel for the Appellant acknowledges that Tasty Budds' business is an illegal one, he says that HRM should have issued a business occupancy permit to his client.

[102] One reasonable inference to be drawn from the position taken by Counsel for the Appellant is that because HRM has not expressly prohibited a marijuana store as a retail use in a C-2 Zone, it follows that it therefore must be permitted.

[103] The Board does not agree.

[104] The Board can think of a variety of businesses which are classed as illegal under the *Criminal Code,* but for which no prohibitions commonly appear in any MPS or LUB (at least none of which the Board is aware).

[105] One such business which has been, and remains controversial, and which is currently undergoing change (just as is the law respecting the sale of medical marijuana) is the law respecting prostitution.

[106] While change has occurred in the prostitution legislation recently, and may occur yet again, the prohibition in the *Criminal Code* against keeping a "common bawdy-house," or brothel, remains. Municipalities do not, however – at least in the Board's experience – put prohibitions against the establishment of bawdy houses into the zoning by-laws found in their LUBs.

[107] However, applying the logic which the Board sees in the Appellant's position, if someone were to apply to a municipality for a business occupancy permit for a brothel, the municipality would be obliged to issue it.

[108] Professor Ruth Sullivan, in *Sullivan on the Construction of Statutes,* 6th Edition (Markham: Lexus Nexus, 2014) remarks:

> Legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labeled absurd. [p. 313]

Certain writers, including Sullivan, refer to the approach to "absurdity", as outlined in the quoted passage, as "objective." The objective approach, in essence, means that a tribunal does not impose its own subjective standard about whether something is absurd. Instead, the tribunal looks at whether the proposed interpretation leads to contradiction of, or internal inconsistency with, other applicable provisions in the legislation.

[109] The Board has outlined in earlier paragraphs, the deliberate, detailed specification of land uses which typifies any MPS and LUB, including this one. There is little doubt that the drafters of MPS and LUB provisions may succeed to a greater or lesser degree in their attempts to create a coherent legislative scheme. Nevertheless, in the view of the Board, there is equally little doubt that, to suddenly begin interpreting an MPS or LUB as permitting illegal uses (for example, under the *Controlled Drugs and Substances Act*, as with Tasty Budds, or the *Criminal Code* as with a brothel) simply because the particular uses have not been expressly prohibited in the MPS and LUB, would damage that coherence. It would make the regulation of land use even less predictable than it sometimes already is. The Board accordingly finds that (applying the language of Professor Sullivan, as quoted above) the interpretation urged by the Appellant is "absurd," in the legal sense of the term, in that it is likely to:

> ...produce confusion or inconsistency or undermine the efficient operation of a [legislative] scheme.

[110] The Board has no idea what the new Federal medical marijuana regulations may say. It also notes in passing that it does not of course know what form the proposed

new Federal legislation for the legalization of non-medical marijuana, including its sale, may take. The Board notes this latter point because Counsel for the Appellant emphasized to the Board that his client's business involves not just the sale of medical marijuana to qualified customers, but also the sale to anyone (not just qualified customers) of products which may be used in the preparation and consumption of marijuana (e.g., rolling utensils and papers, smoking apparatus, grinding tools, vapourizing machines, etc.)

[111] For purposes of this appeal, the Board will address only medical marijuana sales. The Board infers that the Appellant believes, or at least hopes, the new medical marijuana regulations will legalize the sale of medical marijuana through store fronts – that is the business model it has, and the one for which it wants the business occupancy permit. If, purely hypothetically, the new regulations were to do this, this would mean that it would become legal for such stores to be established within whatever framework the new regulations made under the *Controlled Drugs and Substances Act* may prescribe.

[112] If this were to occur, the Board thinks it reasonable to expect that many, if not all, municipalities would want to discuss the implications of such a change to their MPS and LUB provisions, including where they wanted such stores to be, and not to be.

[113] The end result of such a process cannot be predicted. For example, they might range from, on the one hand, completely permissive land-use rules allowing such stores anywhere in any C Zone; on the other hand it is also conceivable that more restrictive land-use rules might be imposed.

[114] Whatever the eventual outcome of such a process, the discussion leading to it would necessarily include members of the public: the *Halifax Charter* contains requirements for public consultation in a wide variety of circumstances.

6.0 SUMMARY OF BOARD FINDINGS

[115] In this decision, the Board dismisses an appeal of an HRM Development Officer's refusal of an Application by Tasty Budds for a business occupancy permit. The permit related to the operation of a medical marijuana business in a storefront in a Dartmouth strip mall.

[116] The Board's authority in appeals such as this is strictly limited by the Statute: it must not allow any appeal unless it determines that the development officer's decision "conflicts with" or "does not comply with" the applicable provisions of the Land-Use By-Law.

[117] The Cole Harbour/Westphal Land-Use By-Law, or LUB, sets a C-2 (General Business) zone for the strip mall. HRM agrees that the C-2 zoning permits retail uses.

[118] However, in this appeal, the Board finds that the Appellant's proposed business of the sale of medical marijuana, even to patients qualified to buy it, is currently illegal under the applicable Federal Legislation. While that legislation is expected to be revised soon, at present it only provides for the sale of medical marijuana by persons who qualify as "licensed producers" under the *Act.* Counsel for the Appellant acknowledges that Tasty Budds is not a licensed producer.

[119] To be clear, the law does not say that no one can sell medical marijuana to qualified patients, in the right circumstances. However, the law does say that the Appellant cannot, under any circumstances, sell medical marijuana to qualified patients.

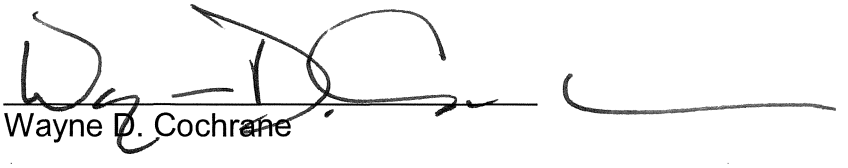
[120] Having concluded that Tasty Budds' medical marijuana business is illegal, the Board then turns to the question of whether the illegality of its business supports the development officer's decision to refuse the permit.

[121] The Board concludes that it does. In reaching this conclusion, it relies on provisions of the *Halifax Charter* and the *Land-Use By-Law,* and its perceptions of the intent of the MPS and LUB in regulating land use.

[122] In the view of the Board, a decision by a development officer to refuse a business occupancy permit to a business, on the sole grounds that the business is illegal under federal or provincial legislation, does not conflict with, or fail to comply with, the LUB.

[123] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 18th day of July, 2016.



Wayne D. Cochrane