DECISION **2024 NSUARB 162**
M11710

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **PISIQUID CANOE CLUB** (Society #1285631) of a Development Permit issued by the West Hants Regional Municipality for property at 1011 Highway 14, Upper Vaughan (PID: 45041886)

BEFORE: Richard J. Melanson, LL.B., Panel Chair
Julia E. Clark, LL.B., Member
Bruce H. Fisher, MPA, CPA, CMA, Member

APPELLANT: **PISIQUID CANOE CLUB**
Brad Carrigan, Commodore
Sheldon Hope, Vice-Commodore

RESPONDENT: **WEST HANTS REGIONAL MUNICIPALITY**
John T. Shanks, Counsel
Elizabeth (Liz) Campbell, Counsel

HEARING DATE: August 7, 2024

DECISION DATE: **September 25, 2024**

DECISION: The Board does not have the jurisdiction to hear this appeal. The appeal is dismissed.

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I INTRODUCTION

[1] The Pisiquid Canoe Club is operated by a not-for-profit society. The Canoe Club provides many programs and activities associated with sprint (flatwater) canoes and kayaks. These activities were conducted on Lake Pisiquid in Windsor, Nova Scotia until 2022 when Lake Pisiquid was drained because of an order issued by the Federal Department of Fisheries. As mudflats cannot accommodate canoeing and kayaking activities, the Canoe Club had to move. The Canoe Club bought property on Zwicker Lake, at 1011 Highway 14, Upper Vaughan, in the West Hants Regional Municipality (Property).

[2] The move to Zwicker Lake has been difficult. The Canoe Club's new property had been a residential property but is in the Municipality's General Resource Zone. The Canoe Club encountered by-law enforcement issues when it attempted to operate from the location. In February 2023, it obtained a change-in-use development permit "…for athletic Day Camps & equipment storage related to non-profit community canoe club…". A group of Zwicker Lake residents were successful in quashing this permit before the Nova Scotia Supreme Court in *Hardman v. West Hants (Municipality),* 2024 NSSC 22.

[3] Following the Court decision, the Canoe Club applied to the Municipality for a development permit to operate a community centre. The Municipality issued a development permit that included the following wording:

> Development permit issued for a Community Centre. This permit does not allow operation of Day Camps, Outdoor Recreational Uses or related storage.

[4] The Canoe Club appealed to the Board saying the permit wording, while framed as an approval, was in fact a denial because of the “conditions” attached to it. The Canoe Club says these “conditions” essentially nullify the purpose of the permit.

[5] The Municipality says the development permit was approved and that the *Act* does not allow a person to appeal to the Board to change such an approval. The Municipality’s position is that what the development permit labels “conditions” are only an explanation of the findings from the Nova Scotia Supreme Court about what is not allowed in the General Resource Zone under the Municipality’s Land-Use By-Law (LUB). Alternatively, the Municipality says that the Canoe Club is attempting an impermissible collateral attack on the Nova Scotia Supreme Court’s decision quashing the first development permit.

[6] The Board has reviewed the appeal provisions of the *Municipal Government Act,* S.N.S.1998, c.18 (*MGA*), along with the applicable legal principles and the relevant facts of the case. The Board agrees with the Municipality that the wording of the permit does not amount to a denial of the Canoe Club’s application. The Board has no jurisdiction to hear appeals from the granting of development permits. As well, the Board agrees that the Nova Scotia Supreme Court has already ruled that the “prohibited activities” described in the development permit are not allowed as main uses in the General Resource Zone. For the Board to reconsider the same issues a superior court has already decided would be an impermissible collateral attack on that decision. Accordingly, this appeal is dismissed.

II BACKGROUND

[7] The Board is created by statute. It only has the powers the relevant statute gives it. The *MGA* sets out what matters can be appealed to the Board. Section 250(2) of the *MGA* says:

> (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.

[8] Section 251(1)(d) of the *MGA* sets out what remedy the Board can provide when the appeal is about a development permit:

> 251 (1) The Board may:
> …
> (d) allow the appeal and order that the development permit be granted;

[9] No party can appeal the granting of a development permit to the Board because the *MGA* does not allow it. This is why the group of Zwicker Lake residents who opposed the granting of the Canoe Club's original development permit sought a judicial review of that approval, rather than appealing that decision to the Board. They were successful in having the development permit quashed by the Court.

[10] While the outcome of the judicial review was that the original development permit was quashed, as submitted by the Canoe Club, the Court's ultimate conclusion is set out in para. [70] of Gatchalian, J.'s reasons in *Hardman*:

> …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.

[11] The Canoe Club was a party in the judicial review. It had a right to appeal Justice Gatchalian's decision and did not. This decision is a binding precedent for the Board.

[12] Following the judicial review, the Canoe Club applied to the Municipality for a development permit to allow it to operate a community centre. To provide context, the Board has included the entire text of the permit granted by the Development Officer:

> **Conditions:**
>
> **Development permit issued for a Community Centre. This permit does not allow operation of Day Camps, Outdoor Recreational Uses or related storage.** This Development permit shall automatically expire 12 months from the date of issue if the development has not commenced. Lots in the area may be underlain by rocks of the Windsor group which are prone to the formation of sinkholes and karst topography. There exists a possibility of sinkholes in the area. Redirection of water courses or added sources of surface runoff contribute to the rapid development of karst and should be mitigated during construction and operations. Although WHRM does not require investigation as a requirement to obtain a permit, proper hydrogeological and geotechnical investigations by the owner relating to the potential karst formation is recommended prior to construction. WHRM is not responsible for assessing or remediating problems arising from these conditions. (emphasis added)
>
> [Exhibit P-2, PDF p. 7]

[13] The Canoe Club appealed this decision. The Municipality seeks to have the appeal dismissed on the grounds the Board has no jurisdiction to hear this appeal. That is the only issue the Board must decide at this stage.

III ANALYSIS and FINDINGS

[14] The result of this case turns to a significant degree on what was decided in *Hardman*. The Canoe Club seemed to think that the *Hardman* decision was restricted to the fact that the original development permit was requested for day camps. The appellant says that this description was a mistake that was induced by the Municipality. The Canoe Club argues that it does not operate day camps. It believes that a development permit for a community centre allows them to host the limited outdoor recreation activities, such as soccer or basketball, that Canoe Club program participants may engage in when not on the lake. When questioned by the Board, the Municipality agreed that the LUB does not extend to the canoeing and kayaking activities that take place on Zwicker Lake. The Board

infers, rather, that the limitations on outdoor recreational uses, and any related storage, refer to those uses that take place on the properties owned by the Canoe Club.

[15] While day camps, and the fact that the Canoe Club had originally not applied to operate a community centre, figure prominently in the Court's reasoning, *Hardman*'s outcome is broader than a finding that day camps are not a permitted use in the General Resource Zone. After doing a full statutory interpretation analysis, Justice Gatchalian held that "outdoor recreational activities" were not permitted in the General Resource Zone. This included the reference to day camps "like those carried out by the Canoe Club". The reference to day camps is not surprising. Because of the evidence before the Court, it informed Justice Gatchalian's understanding of the activities carried on by the Canoe Club. The Court's finding was, however, not limited to day camps. This is an important consideration in the Board's analysis.

1. Is an appeal of this nature permitted under the *Municipal Government Act*?

[16] The wording of the development permit is important. It says that "Day Camps, Outdoor Recreational Uses or related storage" are not authorized by the permit. The activities that are listed as not allowed are included under the heading "Conditions." However, the Board agrees with the Municipality's position that the paragraph is an explanation of what the Nova Scotia Supreme Court said is not allowed in the General Resource Zone when it held that "outdoor recreational activities, including day camps," were only allowed in the Water Supply and Open Space Zone. The Board notes the permit content about sinkholes and recommendations about hydrogeological and geotechnical investigations, although under the same heading, are also informational and not conditions.

[17] Alternatively, even if the wording in the development permit is a condition, it would not change the outcome for the Canoe Club. The wording does not nullify the use of the property as a community centre, since, as discussed, the *Hardman* decision held outdoor recreational activities, including day camps, were only allowed in the Water Supply and Open Space Zone. This means these uses are not allowed in the General Resource Zone as a main use, regardless of whether they are carried out in association with a community centre. Storage related to these two uses would be an accessory use that is not permitted if the main use is not permitted.

[18] The Board reiterates that *Hardman* addressed outdoor recreational uses and day camps as main uses and, based on the evidence, the Court said that the Canoe Club day camps were not an accessory use. It further appears to the Board, from the Court's analysis in *Hardman,* that the reference to outdoor recreational activities refers to Recreation Uses, Outdoor, as defined in the LUB. The Court highlighted this definition at paragraphs [11] and [12]:

> "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 in original)
>
> [Appeal Record, p.63]

[19] *Hardman* did not specifically address whether such outdoor activities as playing soccer or basketball for limited periods, or the storage of nets and balls for these activities, were accessory uses. If the wording of the development permit is an explanation of what *Hardman* decided, then what it says is prohibited repeats what that case decided: that outdoor recreational uses, including day camps, and associated storage, within the meaning of the LUB, are prohibited as main uses in the General

Resource Zone. Therefore, the argument that this is a denial in the guise of an approval cannot be sustained. The explanation merely reiterates what the Nova Scotia Supreme Court decided.

[20] Given that there is no right to appeal the approval of a development permit to the Board under the *MGA*, the panel has no jurisdiction to hear this appeal. In the circumstances of this case, the Board does not need to, and makes no finding, on whether a development permit "condition" that nullifies an allowed use can be appealed under s.250(2) of the *MGA*.

[21] The Board also expressly makes no findings about whether the outdoor activities described by the Canoe Club in this matter are prohibited by the LUB. That is a by-law enforcement issue over which the Board has no jurisdiction.

2. Does the appeal amount to a collateral attack of the decision of the Nova Scotia Supreme Court in *Hardman v. West Hants*?

[22] While the Board's decision on the first issue determines the outcome of the Municipality's motion, it will also address the Municipality's collateral attack argument. *Wilson v. The Queen*, 1983 CanLII 35 (SCC), at p.599, explains that the doctrine prohibiting collateral attacks on a decision of a court having jurisdiction is based on that decision being "…binding and conclusive unless it is set aside on appeal or lawfully quashed." In the same case, the Supreme Court of Canada went on to describe a collateral attack on a court decision:

> …a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

There is some suggestion that this is a collateral attack on the *Hardman* decision in the Canoe Club's own submissions, where it said its activities were "misinterpreted in the judicial review…."

[23] The issue can also be determined based on what *Hardman* decided. To be successful in this appeal, the Canoe Club would have to show that the Municipality was wrong to impose the "condition" that it did. Otherwise, there would be no point to the appeal, since, as Mr. Shanks submitted, enforcement of prohibited uses by the Municipality is not based on whether the challenged wording is in the permit or not.

[24] The *Hardman* decision addresses whether outdoor recreational activities, including day camps, are allowed as a main use in the General Resource Zone. It only addresses day camps as an accessory use by finding, on the facts before it, that day camps were the Canoe Club's main use.

[25] The term used in the development permit is "outdoor recreational uses." It likely refers to the defined term in the LUB, in keeping with the analysis in *Hardman.* For this appeal to have an outcome that assists the Canoe Club, the Board would presumably have to determine that outdoor recreational uses, including day camps, are allowed as a main use in a community centre in the General Resource Zone.

[26] The Board is not privy to what submissions were made, if any, by the Canoe Club in *Hardman*. In the Canoe Club's oral submission before the Board, it was indicated it relied primarily on the Municipality's arguments. Since primary and accessory uses were clearly argued in *Hardman*, including submissions about day camps, and community centres, the Canoe Club would at least have had the opportunity to raise all the same issues about its actual activities and how they relate to permitted uses in that case.

[27] The Board notes that even though *Hardman* was a judicial review, the Court allowed the Municipality to file affidavit evidence. There is no indication the Canoe Club tried to file any evidence before Justice Gatchalian to correct what it now considers to be a misinterpretation of the facts. Introducing new evidence and a different theory of the case before the Board than was put to the Nova Scotia Supreme Court, to show that decision was wrong, in the hope of having a different outcome, is an impermissible collateral attack on the *Hardman* decision. It also raises *res judicata*, estoppel and abuse of process issues.

[28] In any event, as discussed above, the extent to which a development permit allows or does not allow a particular activity on a property is not an issue for this Board. They are enforcement issues over which this Board has no jurisdiction. Also, the Board has no jurisdiction over what impact the *Hardman* decision has on other community centres in the General Resource Zone, or on the issues raised by the Canoe Club about what it perceives to be selective by-law enforcement. The Canoe Club also submitted that the Municipality should be responsible for initiating any land-use by-law amendments that may be required to clarify community centre uses. Again, the Board has no jurisdiction over any process, or associated responsibilities, about land-use by-law amendments. It only has jurisdiction if an appeal is brought about the outcome of a requested land-use by-law change.

IV CONCLUSION

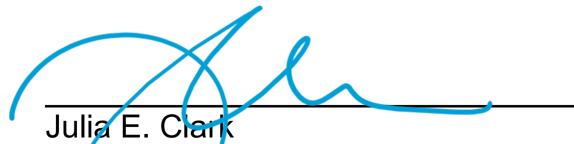
[29] The Board has determined that the Canoe Club's application for a change-in-use development permit allowing it to operate a community centre was granted. There

is no appeal to the Board from this type of decision. The Board has further determined this appeal is an impermissible collateral attack on the Nova Scotia Supreme Court decision in *Hardman*. The Board does not have the jurisdiction to provide the remedies the appellant seeks.

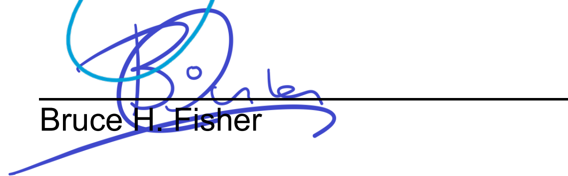
[30] This appeal is, therefore, dismissed. An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 25th day of September, 2024.

Richard J. Melanson



Julia E. Clark



Bruce H. Fisher