

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER



- and -

IN THE MATTER OF AN APPEAL by **JAZZ VAPE AND NOVA BUDS** to a decision of a development officer dated August 16, 2017, which refused an application for a business occupancy permit at 740 Bedford Highway, Halifax Regional Municipality

BEFORE: Roberta J. Clarke, Q.C., Member

APPELLANT: **JAZZ VAPE AND NOVA BUDS**
E. Rodger Stuckless

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
E. Roxanne MacLaurin, LL.B.
Brandon Knill, Articled Clerk

HEARING DATES: January 9 and 10, 2018

DECISION DATE: **February 13, 2018**

DECISION: **Appeal is dismissed.**

I INTRODUCTION

[1] Legislation governing the growth, sale and use of cannabis, or marijuana, and products containing cannabis, is evolving and might be considered complex. The determination of which activities are legal, and which are not, is at the heart of an appeal before the Nova Scotia Utility and Review Board (Board).

[2] Under s. 262(3) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, as amended (*HRMC*), the Appellant, E. Rodger Stuckless, using the name Jazz Vape, filed an appeal of the decision of Erin MacIntyre, a Development Officer with the Halifax Regional Municipality (HRM), which refused to grant a business occupancy permit for Jazz Vape and Nova Budds for premises at 740 Bedford Highway. The reason given for the refusal was that the proposed use of the property was for activities which are federally regulated and illegal, and therefore not permitted under the Mainland South Land Use By-law (LUB).

[3] The Board heard the appeal on January 9 and 10, 2018. Mr. Stuckless appeared on his own behalf. HRM was represented by E. Roxanne MacLaurin, LL.B., and Brandon Knill, Articled Clerk.

[4] The Appellant testified on his own behalf and called no other witnesses. HRM called two witnesses: Constable Jason Wilson, and Erin MacIntyre. At the conclusion of the evidence, the parties made oral submissions.

II ISSUE

[5] Under s. 265(2) of the *HRMC*, the refusal to issue such a permit may only be appealed to the Board "...on the grounds that the decision of the development officer

does not comply with the land-use by-law....” The Board is directed under s. 267(2) not to allow the appeal “...unless it determines that the decision of the Council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law....”

[6] In this appeal, the issue before the Board is whether the Development Officer was correct in concluding that the permit should be refused because the use or proposed use of 740 Bedford Highway by the Appellant is an activity which is federally regulated, and is not a legal use under the federal legislation.

[7] For the reasons that follow, the Board finds that the decision of Ms. MacIntyre as Development Officer does not conflict with the provisions of the Mainland South LUB. The appeal is therefore dismissed.

III EVIDENCE

1. Appellant

[8] Everett Rodger Stuckless was the only witness for the Appellant.

[9] Mr. Stuckless testified that Jazz Vape and Nova Budds are two different registered businesses, with separate operations. Although Counsel for HRM suggested she had been unable to find any record of Jazz Vape with the Registry of Joint Stock Companies, Mr. Stuckless claimed it is registered. He said it sells e-cigarettes, e-juice and other paraphernalia.

[10] Mr. Stuckless agreed that the Permit Application was signed by him, and that he had prepared the notes which were attached to it, describing the businesses of

Jazz Vape and Nova Budds, as well as a sketch showing the outline of the space and location of counters, entrance and exit.

[11] Mr. Stuckless confirmed that Nova Budds Dispensary Inc. operates in 33 sites across Canada, and that 22 of the locations are in conjunction with vape stores. He said none of the locations supply marijuana or act as a dispensary.

[12] The Board pauses to note here that, although the relevant federal legislation uses an “h” rather than a “j” in spelling the name of the substance, it has generally used the spelling “marijuana” in this Decision.

[13] Mr. Stuckless testified that Nova Budds is not a licensed producer of marijuana or products containing marijuana. He said that it is in the final stages of becoming a licensed producer. It does not operate a retail business or deal in any way with non-medical marijuana. He described the operation of the business at the premises: customers who have the correct documentation to show they are registered persons entitled to access medical marijuana would come to the store; once their documents are produced, they can use the computer on site to order products from licensed producers and arrange to have them shipped to the premises for later pick up. A fee is charged to customers for this service, which depends on how long the products are stored as well as the quantity of product.

[14] Mr. Stuckless said that the staff can assist customers with their choice of product. Nova Budds offers safe and secure storage of the product in appropriate conditions.

[15] Mr. Stuckless agreed that there is a back room at the premises which was not shown on the sketch he prepared to accompany the Permit Application. He said that

this was sometimes used by a third person who does computer-related work. He described the room as small and said it is locked. He said products are not stored there, but in a locked case.

[16] On cross-examination, Mr. Stuckless said that they had started business on April 24, 2017, the same day he applied for the Permit. He was aware of several of the websites which Ms. MacLaurin questioned him about, particularly weedmaps®, but claimed he was unaware of weedHUB, for example.

[17] Mr. Stuckless was able to identify various kinds of marijuana identified by names referred to on the weedmaps® website. He said that his then manager, Mr. MacDonald, was the person who followed up on the comments in response to postings about Nova Budds and those products on that website.

[18] Additionally, Mr. Stuckless acknowledged that the premises had an exterior sign stating “Nova Budds Medical Marijuana Dispensary” bearing a drawing of a marijuana leaf, which he said is their logo and a registered trademark. He agreed that similar wording appeared on the business cards available at the counter.

[19] Ms. MacLaurin asked about an email exchange which Mr. Stuckless had on May 11 and 12, 2017, with David Hanna, a Planner employed by HRM. Mr. Stuckless said that the products which he told Mr. Hanna had been stored at the premises, unknown to him, were medical marijuana; they were in a locked case at the back of the facility, and not behind locked doors. He said that he had asked customers to come and pick up their product, and suggested there may still have been some there when Constable Wilson attended at the premises. He said he had been completely unaware that the staff had

been taking orders and storing marijuana there, and as a result, the manager and staff were terminated.

2. Respondent

[20] The Respondent called two witnesses: Constable Jason Wilson, and Erin MacIntyre.

a) Constable Jason Wilson

[21] Constable Wilson has been an officer with Halifax Regional Police (HRP) for 11 years. He is a School Resource Officer in Spryfield. During the period from January to June 2017 he was seconded as a Community Response Officer for the Bedford area. His responsibility there was to focus on quality of life issues, e.g., complaints, instead of the patrol division, and to find solutions to issues.

[22] Constable Wilson testified that HRP was becoming aware of marijuana dispensaries “popping up” in anticipation of changes in the law. He was assigned by his supervising officer to locate and attend at such establishments to speak to the operators. His role was to find out how the businesses were being operated and advise on safety issues.

[23] On the afternoon of May 17, 2017, Constable Wilson attended at 740 Bedford Highway, in uniform, arriving in a marked police vehicle. The premises were advertised as a marijuana dispensary. He was greeted by a female clerk, who identified herself as an employee and gave him a tour of the premises. She said that they sold marijuana from this location, as well as vaping products, grinders, bongs and other items. Based on their conversation, he considered that she had extensive knowledge of both the

products available and the operations of the business. On cross-examination, he acknowledged that his visit to the premises was short.

[24] The clerk told Constable Wilson that a purchaser who comes to the store would have his or her medical marijuana or Health Canada card verified. The purchaser would then use the computer, which Constable Wilson had noted, to apply for marijuana, and then is taken to the back room to select from 70 products including edibles and candy. These were in addition to any products he observed in the main part of the premises. He was told this back room was locked. Constable Wilson agreed on cross-examination that the clerk did not tell him she had herself gone to the back room to sell products. He also agreed that she told him she fulfills customers' requests, verifies the documents, and assists with the submission of documents.

[25] Constable Wilson testified that he observed a strong odour of marijuana in the premises. In response to questions from Mr. Stuckless, he was unable to say whether there is a difference in the odour of medical and non-medical marijuana.

[26] He also observed high-end security cameras there. He was not permitted to enter the locked area, which is where the clerk told him purchasers would go to select product. The clerk then said that once a customer selects the product, it is placed in an opaque bag and a sticker is placed on the bag before the customer leaves the premises. He was given one of the stickers which he placed in his notebook. A copy of the sticker was entered in evidence as Exhibit J-11.

[27] While Constable Wilson was at the premises, the clerk received a phone call. She told him it was the owner of the business, and he spoke with a male who identified himself as the owner, Rodger Stuckless. Constable Wilson asked if marijuana

was being sold from the building, and Mr. Stuckless said no. He told Constable Wilson that a customer would place an order at the store. The order would then be sent to a warehouse and the product thereafter sent to the customer.

[28] Shortly after the conversation, Mr. Stuckless arrived at the store and had a brief conversation with Constable Wilson in which he told the constable that the product was sent through the mail to the customer. Constable Wilson testified this was inconsistent with what the clerk had told him. Mr. Stuckless would not tell the constable where the warehouse is located. He told Constable Wilson that he owned other medical marijuana dispensaries throughout Canada.

[29] Constable Wilson testified that he asked Mr. Stuckless to explain how he could be engaged in an illegal activity, and was given what he called a “circuitous answer.” Mr. Stuckless said “the city” was “giving him a hard time.”

[30] Constable Wilson obtained a Nova Budds business card with the website, email, phone number and physical address listed on it. He said he was not familiar with the weedmaps® website until he was subpoenaed to testify at this hearing.

[31] Constable Wilson reviewed the photographs included in the Appeal Record (Exhibit J-5, Tab 5) and confirmed that they showed the premises with signage, the counter and the door leading to the back room, cash register, credit card machine, business cards, and a sign showing the hours of operation. He agreed with Mr. Stuckless that the signage referred to medical marijuana. Further, he said that the signage has now changed. He also agreed that the sign showing the operations did not refer specifically to either Jazz Vape or Nova Budds. It appeared that there was some discrepancy in the hours which the clerk had told him, as recorded in his notebook, and the sign.

[32] The Appeal Record at Tab 3, pages 11-12, contained an email communication which Constable Wilson confirmed he had sent on May 24, 2017, to his supervisor, an HRP crime analyst, and others including Mr. Grbac of HRM. The email was a report of his visit on May 17, 2017, to the premises, and stated that the business "... does sell Marijuana and paraphernalia from the building...."

[33] When asked why he had reached that conclusion, Constable Wilson said it was based on the comments of the clerk, the signage at and inside the premises, and the continuous strong odour of marijuana throughout the premises.

[34] Constable Wilson completed a police report which was entered into evidence as Exhibit J-12. He confirmed that this document was a true and accurate report of his observations from his visit to the premises.

b) Erin MacIntyre

[35] Erin MacIntyre was, at the relevant time, a Principal Planner and Development Officer employed by HRM. More recently she has assumed responsibilities as Program Manager for the Land Development and Subdivision Group, and now supervises planners and development officers. She was responsible for the refusal to grant the permit sought by the Appellant. Her refusal letter, dated August 16, 2017, stated, in part:

Development Approvals is in receipt of the above application, which seeks approval of a business occupancy permit for "Jazz Vape and Nova Buds". This property is regulated by the Halifax Mainland Land Use By-law (LUB), and is zoned C-2B (Highway Commercial). The following section of the LUB pertains to your application:

Where privately owned or occupied property is to be used for a federally regulated activity, the federal jurisdiction may, depending on the particular circumstances, override the requirements of this by-law.

In addition, Section 186 (2) of the HRM Charter states:

A By-law must not be inconsistent with an enactment of the Province or of Canada.

The determination of the proposed product has been made through police contact. Although the C-2B Zone permits commercial enterprises at this location, your application is premature and **must be refused** as the product you are proposing to sell has not been legalized.

[Exhibit J-5, Tab 2, p. 6]

[36] Ms. MacIntyre prepared a report, dated October 17, 2017, which was filed as Exhibit J-8, Tab 2. She was qualified as an expert, with the consent of the Appellant, capable of giving opinion evidence on land use planning matters, including the interpretation and application of Municipal Planning Strategies and Land Use By-laws.

[37] In her report, Ms. MacIntyre reviewed her understanding of the facts leading to the refusal. She then opined:

[22] Preamble within the LUB outlines that where privately owned property is to be used for a federally regulated activity, the federal jurisdiction may, depending on the particular circumstances, override the requirements of the LUB. This is stated in the LUB after the certification page and directly before the Table of Contents.

[23] Section 186(2) of the HRM Charter states that 'A By-law must not be inconsistent with an enactment of the Province or of Canada'.

[24] The application to occupy the building at 740 Bedford Highway as 'Jazz Vape and Nova Budds' included the retail sale of marijuana.

[25] Marijuana is a Schedule II drug under the Controlled Drug and Substances Act. As such, it is illegal to purchase or sell marijuana in Canada, from a storefront dispensary. Health Canada's website advises that storefront operations selling cannabis are not licensed by Health Canada under the current law and are illegal.

[26] As Jazz Vape and Nova Budds is unlicensed by Health Canada, and was confirmed by Halifax Regional Police to be selling marijuana from the site and through online transactions, the business does not comply with Section 186(2) of the HRM Charter or the LUB.

[sic]

[28] Based on the review of the Land Use By-law and HRM Charter as outlined above, it was determined that the proposal to occupy the building at 740 Bedford Highway as Jazz Vape and Nova Budds did not comply with either the LUB or the HRM Charter, and so the application was refused.

[Exhibit J-8, Tab 2, p. 7]

[38] Although she found that the proposed occupancy complied with height, parking, and street setback requirements of the LUB, Ms. MacIntyre concluded:

[32] The relevant requirements of the LUB and HRM Charter have been reviewed. As the LUB allows for consideration of federal jurisdiction, and further permits that the federal

jurisdiction should take precedence in certain circumstances. The HRM Charter disallows the LUB to be inconsistent with an enactment of Canada. While the zone may permit retail use, the LUB can not permit the retail of an illegal substance, as that would contravene the Controlled Drug and Substances Act.

[33] In summary, it is my opinion that the August 16, 2017 decision of the Development Officer to refuse the permit application 159748 at 740 Bedford Highway is consistent with the LUB.

[Exhibit J-8, Tab 2, p. 8]

[39] The original Development Officer assigned to the Permit Application was Sean Audas. He was on vacation at the time when Mr. Stuckless contacted Ms. MacIntyre to determine the status of his application. She then took over the file. Ms. MacIntyre testified she undertook a complete review of the file.

[40] Ms. MacIntyre clarified that the photographs included in the Appeal Record (Exhibit J-5, at Tab 5) had been provided to her by HRM staff. She understood that they had been taken by Trevor Oliver, a Compliance Officer with HRM. She had never spoken to Mr. Oliver or discussed any complaint about the premises with anyone.

[41] With respect to the pages from the weedmaps® website, Ms. MacIntyre testified that she became aware of the website because there had been a link to it in email communication between Mr. Hanna and Mr. Audas. She did not believe that Mr. Hanna had printed anything from the website. She reviewed the website when conducting her review, and printed off the portion which appears at Tab 4 in the Appeal Record (Exhibit J-5). Ms. MacIntyre said that only the section where comments, reviews and feedback appeared regarding Nova Budds was produced.

[42] Most of Mr. Stuckless's cross-examination of Ms. MacIntyre related to her review of the Permit Application, and her decision to refuse the permit, rather than her expert opinion.

[43] Ms. MacIntyre acknowledged that she had not attended at the premises. In response to Mr. Stuckless, she testified:

MR. STUCKLESS: And so, when scrolling weedmaps® you're looking for evidence in regards to refusal of permits, or are you looking for evidence in regards to the functions and the location etc. of the businesses? Is that what you're doing?

MS. MACINTYRE: I'm looking for compliance with the regulations as set out in the Land Use By-law, and one of those aspects is the use of land.

MR. STUCKLESS: OK. And when you are looking through, you're looking for evidence in regards to the land use and are you looking for illegal activity in regards to the land use? Are you looking for – what exactly are you looking for when you're scrolling through, or looking at evidence posted on the internet? And as we know, that can be very ambiguous, to say the least.

MS. MACINTYRE: I'm looking to fully understand what the existing and proposed use of the property is in whatever form that may come as part of the application.

MR. STUCKLESS: OK.

[SF06105, 13:32-14:53]

[44] When Mr. Stuckless suggested that the decision to refuse the permit had been made before Ms. MacIntyre had looked at the weedmaps® site, she testified that her decision was reached after she had reviewed the file "...in completion, so that included everything that's in the record here today". She said:

My recollection of my specific involvement, the beginning of it, was because – and I'm not certain how you obtained my contact information. I suspect, though I don't know, you may have called the main line and been referred forward to me because I was in the office that day.

So, my first involvement in this permit application was when you spoke to me. You indicated to me on the phone that you understood that your permit was to be refused, but you didn't have a copy of the letter and so, I had said that I would look into it, and I would get back to you.

I looked up the permit application in our system and saw that it was assigned to Mr. Hanna and so, I asked him to bring me the file and when he did I reviewed it from back to front. Included in it was the email relative to the link to weedmaps® and so I went on that webpage and reviewed it.

There was also included an email string copied and forwarded by several people in our department through Sean and Dave that included the site visit photos. I did not know who took them. I only understood at the time that there was municipal compliance staff were involved, and I understood that they had been on site, and so I presumed that they had taken those photos and they were dated and so, I understood where they had originated, but I had no idea who the Municipal Compliance Officer was who is involved specifically.

So, I looked at weedmaps® and I looked at the photos and I looked at your application letter and at the floor plan and at some of the exchanges on email that you had had with Mr. Hanna. There was also included an email from Constable Wilson, and so I called Mr. Wilson, Constable Wilson, and asked for his confirmation of what he understood was the use of the land, and he confirmed that for me and so I finalized the permit refusal letter and sent it off to you.

[SF06105, 23:14-25:32]

[45] Ms. MacIntyre concluded:

My decision was based on the fact that the product that was being distributed from that location and retailed at that location was, and remains, illegal. It's in contravention of the federal act.

[SF06105, 37:42-37:58]

IV ANALYSIS

1. Burden and Standard of Proof

[46] The onus or burden of proof rests with the Appellant in this appeal, as in most appeals.

[47] The standard of proof is on the balance of probabilities, and not, as in criminal matters, proof beyond a reasonable doubt. Here, to be successful, the Appellant must persuade the Board that it is more likely than not that Ms. MacIntyre's decision to refuse the permit conflicted, or failed to comply, with the LUB.

2. Standard of Review

[48] Previous decisions of this Board, and guidance from the Court of Appeal, required the Board to apply a standard of correctness when considering an appeal from the decision of a development officer. *Re Bay Haven Villas Inc.*, 2004 NSCA 59; *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, (2009) NSCA 78. However, as outlined by the Board in later decisions, the Court of Appeal has referred to a standard, which the Board described in *Re Tasty Budds Compassion Club Inc.*, [2016] NSUARB 128, (affirmed at 2017 NSCA 22) as "...akin to...but not strictly speaking, correctness". In this regard, the Board referred to the decisions of the Court of Appeal in *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38, which affirmed the Board's decision at [2009] NSUARB 154, and in *Royal Environmental Inc. v.*

Halifax (Regional Municipality), 2012 NSCA 62, which affirmed the Board's decision at [2011] NSUARB 141. In addition to its decision in *Tasty Budds*, the Board has applied this approach in other cases dealing with appeals of the decisions of municipal development officers, e.g., *Re Martell*, [2015] NSUARB 78, affirmed at 2015 NSCA 101, and *Re Ghosn*, [2016] NSUARB 110, which was affirmed at 2016 NSCA 90.

[49] The Board will apply the same approach in this matter.

[50] Further, the Board has been directed to apply a liberal and purposive approach in interpreting planning documents, as reviewed by the Board in *Tasty Budds* at paras. 33-40.

3. Submissions

[51] Mr. Stuckless submitted that there was nothing illegal in the activities of either Jazz Vape or Nova Budds, and that therefore HRM should have issued the permit. He stated that Nova Budds was merely acting as a receiver of medical marijuana and products containing medical marijuana on behalf of registered persons who used a computer at his business to order them from licensed producers. The business stored the products under appropriate conditions to be picked up when the registered persons wished to do so, rather than have them delivered to their places of residence.

[52] In the Appellant's submission, these activities are not prohibited by any federal regulation. Mr. Stuckless said that Nova Budds was not acting as a dispensary, and had not applied to HRM to operate a dispensary at the premises.

[53] Mr. Stuckless maintained that Jazz Vape and Nova Budds are separate businesses, and that no element of the vape operations is illegal. He further submitted

that the Development Officer had given too much, or improper, weight to the statements on the weedmaps® website, claiming it was completely unreliable, since comments were not attributed in any way. Additionally, he claimed that while Constable Wilson was a credible witness, the clerk who had given him information about the operation was not a reliable source. In Mr. Stuckless's submission, "misinformation" wrongly led Ms. MacIntyre to refuse the Permit Application.

[54] The Appellant said that HRM had submitted that the only way for a person to access medical marijuana is from a licensed producer, and that this is incorrect. Mr. Stuckless said that the federal regulations allow a registered medical marijuana user to have an unlicensed person grow and store marijuana on their behalf. He argued that receiving a legal product ordered by a registered person, and having that registered person come to pick it up at the premises is not, as he said HRM claims, trafficking, but is perfectly legal.

[55] Mr. Stuckless said that the decision of the Board in *Tasty Budds* could be distinguished from his situation because, in that case, the business did not dispute it was a proposed retail dispensary.

[56] Mr. Stuckless also disputed the use of s. 186(2) of the *HRMC* to justify the refusal of the permit. He said that the section means that there must be some inconsistency in the LUB for it to apply.

[57] On behalf of HRM, Ms. MacLaurin noted that retail uses are permitted under the LUB; however, she submitted the refusal of the application by the Development Officer was consistent with the provision in the preamble to the LUB, and s. 186(2) of the *HRMC*.

[58] Through contact with HRM Police, the Development Officer determined that the use of the premises was illegal.

[59] Ms. MacLaurin also noted that Mr. Stuckless had not been able to confirm that Jazz Vape was a “legal entity”. He confirmed that Nova Budds Dispensary Inc. was the same as Nova Budds, and it is the only legal entity at the premises. She said that no separate application had been made to HRM for Jazz Vape.

[60] Submitting that it is up to the Board to determine the use being made of the premises, i.e., the nature of the business operated and whether it is permitted, Ms. MacLaurin said that whether Nova Budds is a dispensary or merely receiving and delivering medical marijuana, both uses are illegal under federal law. Since uses contemplated by the LUB can only be legal commercial uses, HRM cannot permit illegal activities by granting the permit.

[61] Ms. MacLaurin pointed to the Permit Application which was made by both Jazz Vape and Nova Budds on the same day that Nova Budds joined the weedmaps® website on which it described itself as a dispensary, and included a product menu. She also noted the email exchange between Mr. Hanna and Mr. Stuckless. Mr. Stuckless was the person in charge; it is his business. In the hearing, he had acknowledged there was marijuana on site when Constable Wilson visited the premises. Ms. MacLaurin also submitted that the signage on the premises, the advertising on websites, and the responses of the employee to comments on the websites, should leave the Board in no doubt as to the nature of the business.

[62] Ms. MacLaurin submitted that Constable Wilson’s evidence of his conversation with the clerk is reliable, noting the clerk had not, and indeed no member of

the staff had, testified on behalf of the Appellant. Constable Wilson concluded that the clerk had been in the back room and had knowledge of the products there. She noted that the back room was not shown in the sketch which accompanied the Permit Application. She also noted Constable Wilson was denied access to the room, and that he had observed high-end security cameras in the premises, the advertising, business cards and stickers which were to be attached to products, as well as the strong odour of marijuana while there.

[63] All of this, taken with the photographs of the exterior signage, and the website reviews undertaken by Mr. Hanna and Ms. MacIntyre, she submitted, lead to the conclusion that the activity carried on was contrary to federal legislation. In Ms. MacLaurin's submission, starting with the provisions of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (*CDSA*), the possession or sale of marijuana (a substance prohibited in Schedule II of the *CDSA*) is illegal, unless allowed under the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 (*ACMPRegs.*). She said that the existing regulations, i.e., *ACMPRegs.*, do not allow for dispensaries or the business model which Mr. Stuckless said was in place at the premises.

[64] Thus, Ms. MacLaurin concluded, the Development Officer was correct to refuse to grant the permit.

[65] Ms. MacLaurin submitted that the Board should consider its decision in *Tasty Budds* which was affirmed by the Court of Appeal. She said there is no change to the conclusion that to allow criminal activity would be overstepping the jurisdiction of HRM. She acknowledged changes in the regulatory scheme under the *ACMPRegs.*

which came into effect after the decision in *Tasty Budds*, do not extend to the operation of Nova Budds or Jazz Vape.

[66] As support for her position, Ms. MacLaurin referred to a decision of the British Columbia Supreme Court in *Abbotsford (City) v. Mary Jane's Glass & Gifts Ltd.*, [2017] B.C.J. No. 274, 2017 BCSC 237, made after the *ACMPRegs.* had come into effect. This decision confirmed, at paragraph 49, she said, that "...the new federal regulations do not authorize or allow access to marihuana for medical purposes through retail marihuana dispensaries".

4. Findings

[67] The Board finds that the Permit Application made by Mr. Stuckless was for both Jazz Vape and Nova Budds. Both entities were described in the materials prepared by him and attached to the Application.

[68] The Board finds that the production, distribution, and use of cannabis or marijuana are activities which are federally regulated under the *Controlled Drugs and Substances Act*, being listed in Schedule II of that *Act*, and the *ACMPRegs.*

[69] The *ACMPRegs.* make provisions for licensed producers, licensed dealers, registered persons, and designated persons to produce, grow or possess medical marijuana.

[70] The Appellant introduced no evidence to support the claim that the business of Nova Budds was either a licensed producer, a licensed dealer, or a designated person (if this definition would include a 'corporate' person, a question on which the Board makes,

and need make, no finding) within the meaning of the *ACMPRegs.* governing access to medical marijuana.

[71] The Board finds that the business model of Nova Budds as described by Mr. Stuckless is not lawful under the *ACMPRegs.*

[72] The Board prefers the evidence of Constable Wilson over the evidence of Mr. Stuckless. The evidence persuades the Board that what Mr. Stuckless stated about the business operation to Constable Wilson and his testimony at the hearing was clearly inconsistent. The Board concludes that marijuana and products containing marijuana, whether medical or not, were being kept and sold from the premises at 740 Bedford Highway.

[73] As a result, in the absence of authority under the *ACMPRegs.*, the use of the premises contravenes federal legislation.

[74] The preamble to the LUB provides in part:

...when privately owned or occupied property is to be used for a federally regulated activity, the federal jurisdiction may, depending on the particular circumstances, override the requirements of this by-law.

[Exhibit J-7]

[75] Further, s. 186(2) of the *HRMC* provides:

A by-law must not be inconsistent with an enactment of the Province or of Canada.

[76] The Board adopts the reasoning applied in *Tasty Budds* to the present matter, where it said:

[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 [*s/c*] 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.

...

[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.

...

[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.

[77] While the decision of the British Columbia Supreme Court in *Abbotsford* addressed the constitutional validity of that City's by-laws, the Board observes that the decision followed the "new" regulations which superseded those in place when *Tasty Budds* was decided. The Court in *Abbotsford* had no issue with the illegality of retail marijuana dispensaries.

[78] The Board therefore finds that the business operated by Jazz Vape and Nova Budds at the premises is illegal. Accordingly, the Board finds the decision of the Development Officer to refuse to grant a business occupancy permit on the sole grounds that the business is illegal under federal legislation does not conflict with, or fail to comply with, the LUB.

V CONCLUSION AND SUMMARY

[79] The Appellant has not met the burden of proof on the balance of probabilities in this matter. The Board finds that Ms. MacIntyre, in her role as Development Officer, concluded, after considering the Permit Application and attached documents, the email exchange between David Hanna and Mr. Stuckless, the information

on the various websites which listed Nova Budds, the photographs of the premises, and the report of Constable Wilson, that the use to which the premises would be put was illegal.

[80] In the view of the Board, whether Nova Budds operates as a dispensary, retail seller, or a mere “middleman” as the Appellant suggested, there is no evidence that it is authorized in any way under the *ACMPRegs*. Without such authority, the use to which it put or intended to put the premises is illegal under the *CDSA*.

[81] Therefore, the decision of the Development Officer complied with the provisions of the LUB, and, in particular, the preamble, and with s. 186(2) of the *HRMC*.

[82] As a result, the Board dismisses the appeal.

[83] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 13th day of February, 2018.


Roberta J. Clarke .