

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **GUS GHOSN et al.** from a decision by the Chief Administrative Officer of the Halifax Regional Municipality approving modification of restrictive covenants to allow as of right development as per the Established Residential 3 (ER-3) zone in the Regional Centre Land Use By-law for property located at 1462 Thornvale Avenue and 1445 Birchdale Avenue, Halifax (PIDs 00078352, 40439796, 40490633 and 40490625)

BEFORE: Stephen T. McGrath, K.C., Chair
Julia E. Clark, LL.B., Vice Chair
Marc L. Dunning, P. Eng., LL.B., Member

APPELLANTS: **GUS GHOSN, et al.**
James D. MacNeil, Counsel
Allison Godwin, Counsel

APPLICANT: **MICHAEL RISLEY**
Ian Dunbar, Counsel
Melanie Gillis, Counsel

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
Kelsey Nearing, Counsel
Meg MacDougall, Counsel
William Hatfield, Counsel

INTERVENORS: **SUNIL NIJHAWAN**

BRADLEY LANGILLE

KELLY D'EON

James D. MacNeil, Counsel

Allison Godwin, Counsel

HEARING DATE(S): August 13, 2025
October 31, 2025

FINAL SUBMISSIONS: November 10, 2025

DECISION DATE: **April 15, 2026**

DECISION: **The Board finds that no grounds in the Notice of Appeal are within its jurisdiction to address. The appeal is therefore dismissed.**

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1.0 INTRODUCTION

[1] This is a preliminary decision about the Nova Scotia Regulatory and Appeals Board's jurisdiction to consider an appeal from a decision made by Cathie O'Toole, Chief Administrative Officer (CAO) of the Halifax Regional Municipality (HRM), to modify private covenants impacting properties at 1462 Thornvale Avenue and 1445 Birchdale Avenue (PIDs 00078352, 40439796, 40490633 and 40490625) in HRM. The CAO's decision was requested by the Applicant, Michael Risley, and is being appealed by 12 neighbours (Gus Ghosn and others). The modification allows the properties to be developed under the Established Residential 3 (ER-3) zone, which is the applicable zoning in the governing Regional Centre Land Use By-law. The relevant covenants restrict development to one single-family residential building, garages and outbuildings. The modification removes the limitation that a residence be a single-family unit.

[2] The relevant sections of the *Halifax Regional Municipality Charter*, SNS 2008, c 39 (*HRM Charter*) are s. 257A and ss. 264-269. Section 257A authorizes the CAO to "modify or discharge a private covenant in so far as it is more restrictive than the current zoning for the land it governs with respect to height or density."

[3] The appeal to the Board is on the basis that the revisions to the private covenants for the properties allow multi-unit dwellings. The Appellants say that type of development in their neighbourhood does not reflect the intent of the Municipal Planning Strategy (MPS), contrary to s. 265 of the *HRM Charter*.

[4] The Appellants claim, in the alternative, that s. 257A of the *HRM Charter* is "vague and overbroad", contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Canadian Charter*). They claim the limits on their rights are not reasonable in

a free and democratic society and, therefore, not saved by s. 1 of the *Canadian Charter*. The Appellants served notice of this constitutional question on the Attorney General of Nova Scotia on August 19, 2025, as required by s. 10(2) of the *Constitutional Questions Act*, RSNS 1989, c 89. The Attorney General did not participate in the preliminary hearing.

[5] The Board reviewed the new provisions of the *HRM Charter* and considered the applicable legal interpretation principles. Although the Board has the jurisdiction to hear appeals from decisions of the CAO under s. 257A of the *HRM Charter*, the Board finds that its jurisdiction is limited.

[6] In this appeal, the CAO decided that a private covenant is more restrictive than the current zoning for the land with respect to height and density and purported to modify that covenant to allow development consistent with the underlying zoning for the properties. In these circumstances, the Board finds that its jurisdiction allows it to consider whether the CAO's decision modified or discharged the private covenant as authorized by s. 257A(1). This includes grounds related to whether the private covenant is more restrictive than the current zoning for the land for height or density; and whether, and the extent to which, the changes relate to or affect height or density.

[7] To the extent that the Notice of Appeal raises procedural concerns, the Board strikes out those grounds because it has no jurisdiction to hear them. The Board considers that past decisions of the Court of Appeal addressing the limits of the Board's jurisdiction under the planning provisions of the *HRM Charter* apply (with necessary changes) to this appeal.

[8] Likewise, although the Board has the authority to consider the *Canadian Charter* generally, it cannot provide the requested remedy in this case. The Board may

only allow an appeal in statutorily limited circumstances. These do not include challenges to the constitutionality of the *HRM Charter* or the decision-making process.

[9] As such, the appeal is dismissed.

2.0 BACKGROUND

[10] Section 257A was part of a suite of changes to the *HRM Charter* and the *Housing in the Halifax Regional Municipality Act*, SNS 2023, c 18, that were enacted and came into force on November 9, 2023. The new provision authorizes the CAO to discharge or modify a private covenant if it is more restrictive than current municipal land use by-laws about height or density. The legislation allows for appeals from those decisions to the Board, relying on the existing appeal provisions in Part VIII of the *HRM Charter*, which addresses planning issues.

[11] The Applicant requested a modification to one of a series of covenants attached to the properties at 1462 Thornvale Avenue (PID 00078352) and 1445 Birchdale Avenue (PID 40439796) and two other small parcels, to remove the restriction that only one building for residential use of a single family be allowed on the properties. The application was approved by the CAO on July 4, 2025.

[12] On July 8, 2025, the Board received the Notice of Appeal on behalf of 11 individuals and one body corporate that own property on either Birchdale or Thornvale Avenues. This was one of several appeals of separate decisions of the CAO in relation to restrictive covenants made earlier in July, which are the first such appeals received by the Board.

[13] On September 3, 2025, the Board received and approved a request from Sunil Nijhawan, another neighbouring property owner, to intervene in the appeal. The Board also approved intervention requests from Bradley Langille and Kelly D'Eon, received on September 26, 2025. There was no issue of the Appellants' standing (either individually or as a group) to bring this appeal. HRM brought a preliminary motion for dismissal of this appeal for want of jurisdiction, on the ground that the notice disclosed "no allowable ground of appeal."

3.0 SUBMISSIONS OF THE PARTIES

3.1 HRM's Motion

[14] HRM summarizes the two grounds in the Appellants' Notice of Appeal: that the decision of the CAO is contrary to the intent of the MPS; and that s. 257A is contrary to s. 7 of the *Canadian Charter* because it is "vague and/or overbroad" and therefore unfairly restricts the rights of the Appellants. HRM argues that the Board has no inherent jurisdiction and its powers to hear and decide an appeal from a decision under s. 257A(1) are limited to those powers expressly conferred or that exist by necessary implication. HRM says that neither of these grounds of appeal is expressly or impliedly allowed by the *HRM Charter*.

[15] HRM's analysis of the statute included reviewing the impacts of ss. 265-267 of the *HRM Charter*, which are among the provisions that s. 257A(4) indicate apply "with necessary changes" to appeals of decisions under s. 257A(1). HRM argues that the restrictions on the allowed grounds of appeal set out in s. 265 in relation to appeals from decisions made by Council, development officers, and the Provincial Director of Planning

(not relevant in this appeal), are rooted in the underlying authority in the *HRM Charter* to make those decisions.

[16] HRM says that s. 267 similarly constrains the powers of the Board according to the criteria set out in the relevant enabling provisions for the decisions of Council and development officers. It refers to the Board's recent decision in *Hazelview Investments Inc. (Re)*, 2025 NSRAB 32, (affirmed in *(Halifax Regional Municipality) v Hazelview Investments Inc.*, 2026 NSCA 27 on March 26, 2025, prior to this decision's release), as a guide to the application of ss. 265 and 267 to the current appeal "with necessary changes." It says that the language of s. 257A encapsulates the appropriate test, i.e., whether the private covenant at issue is or is not more restrictive than the current zoning for the land it governs, with respect to height or density.

[17] HRM addresses the role of the CAO, saying it is analogous to a development officer's role rather than Council's. The CAO is not the principal authority for establishing planning policy. HRM argues that requiring the Board to decide whether modifying a covenant and applying the governing land use by-law to a property "carried out the intent of the MPS" could lead to a collateral attack on Council's authority to establish and carry out the policies in the MPS through the land use by-law. Under the *HRM Charter*, the land use by-law must carry out the intent of the MPS. HRM therefore submits that if the CAO's decision simply allows the land use by-law to apply, then it must be consistent with the MPS unless the consistency of the by-law itself is in issue. HRM says assessing the by-law against the intent of the MPS risks an unauthorized collateral attack.

[18] On the Appellants' second ground of appeal, HRM says that relief on the *Canadian Charter* question is beyond the powers of the Board in this case, based on the second arm of the test in *R v Conway*, 2010 SCC 22, which requires a tribunal to not only have jurisdiction to decide questions of law, but also grant the particular remedy sought given the relevant statutory scheme. HRM argues that the Board's remedial power is strictly limited to the allowed grounds of appeal, meaning that it can only reverse the decision of the CAO based on a review of whether the private covenant is or is not more restrictive than the current zoning for the land it governs with respect to height or density.

3.2 Applicant's Position

[19] Mr. Risley, the Applicant seeking modifications to the private covenants, owns the properties involved in this appeal. He agrees with HRM that the Notice of Appeal raises no allowable grounds of appeal and should be dismissed. The Applicant's submission notes that HRM's argument on the appropriate test for a review of the CAO's decision is consistent with the Board's approach in *Hazelview*.

[20] The Applicant also argues that the Board should not apply "a more burdensome test on appeal than the legislation imposes on the discretionary decision maker at the first instance." He notes that, if allowed, the grounds alleged by the Appellants will import the requirement for the CAO to consider the intent of the MPS in their review of an application under s. 257A, which contains no such requirement.

[21] The Applicant says the appropriate remedy in this case is dismissal, rather than the Board allowing time to revise the appeal, on the basis that there is no live controversy for the Board to consider.

3.3 Appellants' Submissions

[22] The Appellants defend their grounds of appeal as proper and urged the Board to allow the matter to proceed to a hearing on the merits of those grounds. They argue that the other parties' interpretation of the *HRM Charter* is too narrow to capture the intention of the appeal provisions and the legislation as a whole.

[23] The Appellants distinguish the Board's decision in *Hazelview*, saying that s. 250A, the provision at issue in that case, provides explicit guidance for appeals. Additionally, that section reverses the onus, requiring the development officer to prove that a requested variance under that section "materially conflicts" with the MPS. The Appellants argue that s. 257A has no similar guidance telling the Board "what to do" on an appeal, or what test should be applied. They say the omission of such additional guidance is important, as the only direction within s. 257A is that "Sections 264 to 269 apply, with necessary changes, to an appeal under this section."

[24] The Appellants equate an appeal from the modification or discharge of a restrictive covenant to appeals from land use by-law amendments or development agreements. These are authorized under s. 265(1), when the municipal council's decision "does not reasonably carry out the intent of the municipal planning strategy." They say that the "necessary changes" to this section give the Board the jurisdiction to allow an appeal if the CAO's decision to modify or discharge the covenant does not reasonably carry out the intent of the municipal planning strategy.

[25] The Appellants relied on past Board decisions, including *Re Adams*, 2017 NSUARB 52, and *Peninsula South Community Association v Chebucto Community Council (Halifax Regional Municipality)*, 2002 NSUARB 7, which concluded that the Board has the jurisdiction to consider general questions of law, and thereby, to interpret and

apply the *Canadian Charter*. The Appellants say that the Board has jurisdiction to overturn the CAO's decision, which means the Board has the jurisdiction to award the remedy they are seeking for what they say is a breach of their *Canadian Charter* rights.

4.0 ANALYSIS AND FINDINGS

4.1 Grounds of Appeal Analysis

[26] This is one of the first appeals to the Board under s. 257A of the *HRM Charter*, which states:

257A (1) The Chief Administrative Officer may modify or discharge a private covenant in so far as it is more restrictive than the current zoning for the land it governs with respect to height or density.

(2) A covenant modified or discharged under subsection (1) is deemed to have been modified or discharged for offending public policy under sub-section 61(1) of the *Land Registration Act* and a certified copy of the decision of the Chief Administrative Officer may be registered or recorded as if it were an order of the court made under that subsection[.]

(3) A decision of the Chief Administrative Officer under subsection (1) may be appealed to the Board.

(4) Sections 264 to 269 apply, with necessary changes, to an appeal under this Section.

[27] Section 257A(2) refers to s. 61(1) of the *Land Registration Act (LRA)*, which says:

61 (1) Every successive owner of a parcel is affected with notice of a condition or covenant included in an instrument registered or recorded with respect to that land and is bound thereby if it is of such nature as to run with the land, but a condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that

(a) the modification or discharge will be beneficial to the persons principally interested in the enforcement of the condition or covenant;

(b) the condition or covenant conflicts with the provisions of a land-use by-law, municipal planning strategy or development agreement issued, made or established pursuant to an enactment and the modification or discharge is in the public interest; or

(c) the condition or covenant offends public policy or is prohibited by law.

[28] Sections 264 to 269 of the *HRM Charter* outline the grounds for planning appeals that may be brought to the Board, the Board's authority and certain procedures for these appeals. There are many cases from this Board and its predecessor, the Nova Scotia Utility and Review Board (NSUARB), as well as from the Nova Scotia Court of Appeal, that have noted the limited ability to appeal a decision under s. 265 and the limited remedial authority under ss. 267 and 268 of the *HRM Charter* (and corresponding provisions in the *Municipal Government Act*, SNS 1998, c 18 (*MGA*) and the *Planning Act*, RSNS 1989, c 346, which was repealed when the *MGA* was enacted). In *Heritage Trust of Nova Scotia v Nova Scotia (Utility and Review Board)*, 1994 NSCA 11, the majority of the Court of Appeal said it was apparent from s. 78(6) of the *Planning Act*, which included similar wording to what now exists in s. 267(2) of the *HRM Charter*, that the NSUARB's appellate review was limited by the Legislature. It said:

The Board has a duty under s. 78(4) of the *Planning Act* to determine if the decision of a municipality to enter into a development agreement is consistent with the intent of the planning policies. There is not a full right of appeal to the Board in that s. 78(6) does not permit the Board to interfere with the decision of Council unless the decision of Council cannot be said to be reasonably consistent with the intent of the municipal planning strategy. [Emphasis added]

[1994 NSCA 11, para. 78]

And:

... While I am mindful of s. 27 of the *Utility and Review Board Act* and the duties it imposes upon the Board and also mindful of the provisions of s.78(4) of the *Planning Act*, the Legislature by enacting s. 78(6) of the *Planning Act* clearly intended to restrict the scope of the Board's powers to interfere with a decision of a municipality approving the entry into a development agreement pursuant to s. 55 of the *Planning Act*. While s. 78(4) of the *Planning Act* requires the Board to determine whether the proposed agreement is consistent with the intent of municipal planning strategy subsection (6) clearly states that the Board "shall not interfere with the decision of the Council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy." This restriction on the scope of the Board's powers to interfere with such decisions respecting development agreements is consistent with the objective of the *Planning Act*, as set out in that Act, to place the primary responsibility for planning with the municipalities.... [Emphasis added]

[1994 NSCA 11, para. 103]

And also:

... The *Planning Act* imposes on municipalities the primary responsibility in planning matters. The *Act* gives the municipal council the authority to enter into development by contract which permits developments that do not comply with all the municipal by-laws (s. 55 of the *Act*). In keeping with the intent that municipalities have the primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (s. 78 of the *Act*).... [Emphasis added]

[1994 NSCA 11, para. 164]

[29] The Court of Appeal made similar comments in *3012543 Nova Scotia Ltd.*

v Mahone Bay et al., 2000 NSCA 93:

[5] The Legislature has seen fit to limit the jurisdiction of the Board when aggrieved persons appeal a municipal council's decision to enter into a development agreement. By reason of the provision of s. 78(6) of the *Planning Act* the Board cannot interfere with the Council's decision "unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy." The burden is on the aggrieved person to prove on a balance of probabilities that it is not. [Emphasis added]

[2000 NSCA 93, para. 5]

[30] The Court of Appeal has also made it clear in *Kings (Municipality of the County) v Lutz*, 2003 NSCA 26 that the statutory limitations in the *Planning Act* were carried into the *MGA*:

[21] As noted by Hallett, J.A., in *Mahone Bay*, supra, (referring to the comparable sections of the then *Planning Act*, R.S.N.S. 1989, c. 346) at ¶ 5:

The Legislature has seen fit to limit the jurisdiction of the Board when aggrieved persons appeal a municipal council's decision to enter into a development agreement. By reason of the provision of s. 78(6) of the *Planning Act* the Board cannot interfere with the Council's decision "unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy." The burden is on the aggrieved person to prove on a balance of probabilities that it is not.

[22] In the matter before us on this appeal we are, of course, dealing with the *Municipal Government Act*, as opposed to the *Planning Act*. While the wording in sections 250-251 of the *Municipal Government Act* varies slightly from that contained in its predecessor *Planning Act*, it is obvious that the Legislature has reiterated and more clearly stated its express intention to limit the Board's jurisdiction. [Emphasis added]

[2003 NSCA 26, paras. 21-22]

[31] In 2003, the Court of Appeal noted that the limited scope of appeals from council decisions to the NSUARB has been repeatedly recognized. In *Tsimiklis v Nova Scotia (Utility and Review Board)*, 2003 NSCA 30, the Court of Appeal said:

[18] The subject of the Board's limited jurisdiction in appeals from a council decision and the scope of review of its exercise by this Court has been discussed in a number of recent decisions of this Court, including *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* (1994), 1994 NSCA 11 (CanLII), 128 N.S.R. (2d) 5 (C.A.); *Mahone Bay Heritage and Cultural Society v. 3012543 Nova Scotia Ltd.* (2000), 2000 NSCA 93 (CanLII), 186 N.S.R. (2d) 201 (C.A.); *Bennett v. Knyock et al.* (1994), 1994 NSCA 114 (CanLII), 131 N.S.R. (2d) 334 (C.A.); and *Lutz (Re)*, 2003 NSCA 26.

[19] The Board's jurisdiction, now circumscribed by the provisions of s. 251(2) of the *MGA* and formerly by s. 78(6) of the *Planning Act*, is described by Hallett, J.A. in *Heritage Trust*, supra at para. 99:

99 In reviewing a decision of the municipal council to enter into a development agreement the Board, by reason of s. 78(6) of the *Planning Act*, cannot interfere with the decision if it is reasonably consistent with the intent of the municipal planning strategy. A plan is the framework within which municipal councils make decisions. The Board is reviewing a particular decision; it does not interpret the relevant policies or by-laws in a vacuum. In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. ... [Emphasis added]

[2003 NSCA 30, paras. 18-19]

See also: *Re Bay Haven Beach Villas Inc.*, 2004 NSCA 59, para. 17; and *Halifax (Regional Municipality) v United Gulf Developments Ltd.*, 2009 NSCA 78, para. 38.

[32] Unlike the planning appeals to the Board that are specifically identified in s. 265 of the *HRM Charter*, s. 257A(3) does not explicitly address the permitted grounds of appeal to the Board. However, s. 257A(4) says, "Sections 264 to 269 apply, with necessary changes, to an appeal under this Section" [emphasis added]. As set out above, in many cases going back more than 30 years, the Court of Appeal has recognized that appeals to the Board under these provisions are, by design, limited in scope to respect the intention that municipalities are the primary authority for planning decisions. The issue in this motion is whether the "necessary changes" to ss. 264 to 269 that apply to appeals

to the Board under s. 257A require similar or analogous limitations. This involves an exercise in statutory interpretation.

[33] The Board follows the well-known principles of statutory interpretation, which it recently set out in *Hazelview*, as follows:

[47] The Board is mindful of *Verdun v. Toronto Dominion Bank*, 1996 CanLII 186 (SCC), [1996] 3 S.C.R. 550, and cases following it (see, for example, *Chartier v. Chartier*, 1999 CanLII 707 (SCC), [1998] S.C.J. No. 79; *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27), which make it clear that the Supreme Court of Canada has adopted what it calls the “modern contextual approach” to legislative interpretation, supplanting earlier rules it has supported, such as the “equitable construction approach”, the “plain meaning rule”, and the “golden rule”.

[48] In *Re Rizzo & Rizzo Shoes Ltd.*, Mr. Justice Iacobucci said:

...Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[49] On the matter of the purpose of legislation, *Nova Scotia (Crop and Livestock Insurance Commission) v. DeWitt*, [1996] N.S.J. No. 566 (S.C.), is of interest. Goodfellow, J., quotes Driedger (3rd ed.) at pages 38 - 39:

... Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews, J.A. recently wrote in *R. v. Moore* [(1985), 1985 CanLII 5875 (NS CA), 67 N.S.R. (2d) 241, at 244 (C.A.)]:

From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.

...in *Thomson v. Canada* (Minister of Agriculture), 1992 CanLII 121 (SCC), [1992] 1 S.C.R. 385, at 416, where L'Heureux-Dubé, J., wrote:

[A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.

[50] The Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation in *Sparks v. Holland*, 2019 NSCA 3. Farrar, J.A., stated:

[27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that “[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at ¶21).

[28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan’s text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.

[29] Ms. Sullivan’s questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:

1. What is the meaning of the legislative text?
2. What did the Legislature intend?
3. What are the consequences of adopting a proposed interpretation?

(Sullivan, pp. 9-10)

[51] The modern rule of statutory interpretation was recently reiterated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65:

A court interpreting a statutory provision does so by applying the “modern principle” of statutory interpretation, that is, that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” [*Vavilov*, para. 117]

[52] The Court went on to elaborate on this concept in the specific context of administrative tribunals:

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. [Emphasis added]

[Vavilov, paras. 119-120]

[53] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[34] With these considerations in mind, the Board turns to consider the text, context and purpose of s. 257A, including the meaning of “necessary changes” in s. 257A(4) and what, if any, restrictions there are on the grounds of an appeal to the Board under s. 257A(3).

4.1.1 Text

[35] A plain reading of the text of s. 257A reveals that it gives the CAO the authority to modify or discharge private covenants that are more restrictive than the current zoning for a property with respect to height and density (s. 257A(1)). The use of the word “may” in s. 257A(1) suggests that the CAO has discretion. The CAO may or may not choose to exercise that discretion. If the CAO chooses to exercise that discretion, they may further choose to modify or discharge some or all of the private covenants that are more restrictive than the current zoning for a property with respect to height and density. If the CAO modifies or discharges those covenants, owners will be able to

develop their properties with more height and density than the private covenants would have permitted, potentially up to the limits for height and density allowed by the underlying zoning.

[36] The CAO's authority under s. 257A is limited. The CAO may modify or discharge only those private covenants that are more restrictive than the current zoning with respect to height and density. The CAO has no authority to modify or discharge other covenants.

[37] Under s. 257A(2), private covenants that are modified or discharged under s. 257A(1) are deemed to be modified or discharged for offending public policy under s. 61(1) of the *LRA* and a certified copy of the CAO's decision may be registered on the property as if it were a court order made under s. 61(1). This provides a means of registering the CAO's changes to covenants on a property so that they will bind, and run with, the property and be legally enforceable.

[38] The CAO's decision under s. 257A(1) may be appealed to the Board (s. 257A(3)). On appeal, s. 264-269 of the *HRM Charter* apply, "with the necessary changes" (s. 257(4)).

[39] The expression "with necessary changes" is the English rendering of the Latin "*mutatis mutandis*", which has often been used in legislation. In *Sullivan on the Construction of Statutes*, 7th ed (Lexis Nexis Canada Inc., 2022) (*Sullivan*), at p. 109, Ruth Sullivan notes, "These expressions are used when a legislature wishes to incorporate by reference existing provisions or an existing legislative scheme into new legislation that deals with a more or less comparable matter." Sullivan notes that the degree of discretion

conferred to adjust the incorporated provisions can vary with the wording of the incorporating provision.

[40] The Supreme Court of Canada, in *R v Penunsi*, 2019 SCC 39, noted that expressions like “necessary changes” are aimed at details rather than indicating an intent to make substantive changes in the law:

[50] The definition of *mutatis mutandis* was recently articulated by this Court in *Besette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535, meaning:

... “[w]ith the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like” (*Black’s Law Dictionary* (6th ed. 1990), at p. 1019; see also the *British Columbia Interpretation Act*, s. 44 (“mutatis mutandis”) and *Samograd v. Collison* (1995), 1995 CanLII 708 (BC CA), 17 B.C.L.R. (3d) 51 (C.A.)). “[W]ith the necessary changes and so far as applicable” therefore cannot be stretched to mean “to the extent that another source of law does not contradict the *Criminal Code*. [Emphasis in original; para. 69.]

[41] Sullivan submits:

Bringing the text into accord with the context and purpose of the incorporating legislation, however, may often involve more than the mere substitution of words or detail; it may also affect the way in which the incorporated provisions are applied and in particular the way in which the discretion conferred by those provisions is exercised.

[Sullivan, p. 110]

[42] To give meaning to the requirement in s. 257A(4) that ss. 264-269 apply to appeals under s. 257A(3), the Board must apply each of these sections, recognizing that some details, and the way it exercises its discretion, may need to be modified. Sections 264, 266 and 269 address matters of process and procedure. These appear to be readily adaptable to appeals under s. 257A. However, the remaining sections address the Board’s powers on appeal, and significantly, impose restrictions on the grounds of appeal that may be brought before the Board (s. 265) and the Board’s ability to allow an appeal (s. 267(2)). These provisions are significantly more challenging to adapt to this appeal. Nevertheless, the Board is explicitly required to apply these sections to appeals under s.

257A, on the basis that the Legislature intended these provisions to apply with the changes that are necessary to suit the context of appeals under s. 257A.

4.1.2 Context

[43] HRM does not enforce private covenants or consider them in determining whether to allow development on a property. As explained in the June 2, 2025, report prepared by Jacqueline Hamilton, Executive Director, Planning and Development, titled “CAO Private Covenant Information Report”:

... Covenants are civil in nature, meaning that they are not considered or enforced by the Municipality. If a proposal for the development of the property was received and determined to meet the Land Use By-law requirements, the permit must be issued, irrespective of any conflict with the covenants. ...

[Exhibit G-3, p. 41]

[44] Before s. 257A came into force, HRM had no legislative authority over private covenants. A property owner wanting to modify or discharge private covenants would have to apply to court for relief under s. 61(1) of the *LRA*. Section 257A now provides an alternative to that process.

[45] In addition to considering HRM’s authority with respect to restrictive covenants prior to s. 257A coming into force, the Board also considers s. 257A in the context of the *HRM Charter*, in particular Part VIII which governs planning.

[46] Under the *HRM Charter*, Council is charged with making decisions about the municipality. Section 11(1) states that, “The powers of the Municipality are exercised by the Council” and s. 2(a) explicitly gives “broad authority” to Council.

[47] Section 208(b) states that the purpose of Part VIII is to, “enable the Municipality to assume the primary authority for planning ... through the adoption of municipal planning strategies and land-use by-laws.” The relevant documents in the present appeal are:

- Regional Municipal Planning Strategy, passed by Council on June 25, 2014, and approved by the Minister of Municipal Affairs on October 18, 2014, including amendments adopted and in effect as of May 26, 2025 (Regional Plan);
- Regional Centre Secondary Municipal Planning Strategy, in effect November 27, 2021, including amendments adopted and in effect as of April 23, 2025 (Regional Centre Plan); and
- Regional Centre Land Use By-law, in effect November 27, 2021, including amendments adopted and in effect as of April 23, 2025 (Land Use By-law).

[48] In this case, the MPS is comprised of the Regional Plan and Regional Centre Plan.

4.1.2.1 Municipal Planning Strategy

[49] The *HRM Charter* states that the purpose of a municipal planning strategy is to provide statements of policy to guide the development and management of the municipality (s. 228). The municipality must adopt one or more planning strategies such that all land in the municipality is subject to a planning strategy (s. 227(1) and (3)). Consistent with the intent of the *HRM Charter* that the municipality is the primary authority for planning within its jurisdiction (s. 208(b)), the legislation provides for no appeal to the Board from the adoption or amendment of a municipal planning strategy.

[50] Where the municipality adopts a planning strategy that contains policies regulating land use and development, Council must concurrently adopt a land use by-law that enables those policies to be carried out (s. 234(2)). Council cannot adopt or amend a land use by-law except to carry out the intent of a municipal planning strategy (s. 232(3)). In this case, amendments to the Regional Centre Plan and Land Use By-law were enacted concurrently and the latter implements the policies set out in the former.

[51] While the Board can hear appeals from Council decisions to amend or refuse to amend a land use by-law, this ability is, once again, limited to respect the primary planning responsibility of the municipality. Specifically, an amendment to a land use by-

law to make it consistent with a statement of provincial interest or that is required to carry out a concurrent amendment to a municipal planning strategy (s. 263) cannot be appealed to the Board.

4.1.2.2 Land Use By-law

[52] The *HRM Charter* requires that a land use by-law divide planning areas into zones, list permitted uses for each zone and include provisions that are authorized and necessary to implement the municipal planning strategy (s. 235(1) and (2)).

[53] In this case, the Land Use By-law divides the Regional Centre into 26 zones. The properties that are the subject of this appeal are zoned ER-3. The permitted uses in this zone include the following residential uses:

- short-term bedroom rentals;
- backyard suites;
- single-unit and multi-unit dwellings;
- semi-detached dwellings;
- townhouses; and
- duplex apartments.

[54] These uses must comply with the applicable provisions of the Land Use By-law. For example, multi-unit dwellings of eight units are permitted on properties in the ER-3 zone subject to compliance with s. 231.3, which requires the lot be at least 600 m² [Exhibit G-6, pp. 613-614].

[55] The Board notes that private covenants are not mentioned in the Land Use By-law and are not mentioned in the MPS other than a brief reference in an entirely unrelated context to considering them to preserve surplus heritage properties before they are sold [Exhibit G-4, p. 108].

4.1.2.3 Planning Decisions

[56] Planning decisions can be made by Council, development officers, or the CAO.

[57] Council can make decisions adopting or amending municipal planning strategies and land use by-laws and approving or refusing development agreements and certain amendments to those agreements (s. 265(1)).

[58] Development officers are appointed by Council to administer the land use and subdivision by-laws (s. 3(d)). They decide whether to issue variances, development permits, concept plans and plans of subdivision (ss. 250, 250A, 265(2) and 265(3)).

[59] The CAO's role in planning matters is more limited than either Council or development officers. In addition to the authority under s. 257A, the CAO can approve "minor administrative amendments" to development agreements and discharge development agreements (ss. 240D(3) and 244).

[60] The CAO is hired by Council and is the head of administration of the municipality. The CAO has specific duties including coordinating and directing the preparation of plans and programs about municipal property to be submitted to Council; ensuring annual budgets are prepared and submitted to Council; administering budgets after adoption by Council; reviewing draft by-laws and policies and making recommendations to Council; and other duties as Council may direct (s. 35(1)).

4.1.2.4 Appeals from Planning Decisions to the Board

[61] As discussed earlier, certain planning decisions can be appealed to the Board, but there are restrictions on the grounds of appeal, as set out in s. 265:

Restrictions on Appeals

265 (1) An aggrieved person or an applicant may only appeal

(a) an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy;

(b) the approval or refusal of a development agreement or the approval of an amendment to a development agreement, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy;

(c) the refusal of an amendment to a development agreement, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy and the intent of the development agreement.

(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.

(3) An applicant may only appeal a refusal to approve a concept plan or a tentative or final plan of subdivision on the grounds that the decision of the development officer does not comply with the subdivision by-law.

(4) The Director may only appeal on the grounds that the decision of the Council is not reasonably consistent with a statement of provincial interest, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area.

[62] The Board also notes that certain procedures and expedited timelines apply to appeals of planning decisions. Section 266 requires, among other things, that HRM file an appeal record within 14 business days of being notified of an appeal; that the appeal hearing begin within 45 days from the filing of the appeal record; and that the Board render its decision within 60 days after the close of submissions, subject to certain exceptions.

4.1.2.5 Decisions of Council

[63] Decisions of Council to amend or refuse to amend a land use by-law, approve or refuse a development agreement, and approve an amendment to a development agreement can only be appealed to the Board on grounds that Council's decision does not reasonably carry out the intent of the MPS (s. 265(1)(a) and (b)). Council's decision to refuse an amendment to a development agreement can only be appealed to the Board on grounds that the decision does not reasonably carry out the

intent of the MPS and the intent of the development agreement (s. 265(1)(c)). As noted above, the Board has no authority to hear an appeal of an amendment to a land use by-law that is required to carry out a concurrent amendment to a municipal planning strategy.

[64] Ensuring that a decision reasonably carries out the intent of the MPS is not an easy task. It involves interpreting and applying the MPS, which may require making value judgments about intersecting planning perspectives, reaching compromises between conflicting intentions and interpreting “question-begging” terms. The Nova Scotia Court of Appeal has repeatedly held that these decisions are best left to Council as the democratically elected members who are given the primary authority for planning under the *HRM Charter*. In *Heritage Trust of Nova Scotia v Nova Scotia (Utility and Review Board)*, 1994 NSCA 11, para. 164, the Court of Appeal held:

... Planning decisions often involve compromises and choices between competing policies. Such decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions. ...

[65] The Court of Appeal made similar findings in *Archibald v Nova Scotia (Utility and Review Board)*, 2010 NSCA 27:

[24] ... I will summarize my view of the applicable principles:

...

(7) When planning perspectives in the MPS intersect, **the elected and democratically accountable Council may be expected to make a value judgment**. Accordingly, **barring an error of fact or principle, the Board should defer to the Council's compromises of conflicting intentions in the MPS and to the Council's choices on question begging terms such as "appropriate" development or "undue" impact**. By this, I do not suggest that the Board should apply a different standard of review for such matters. The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. But **the intent of the MPS may be that the Council, and nobody else, choose between conflicting policies that appear in the MPS**. This deference to Council's difficult choices between conflicting policies is not a license for Council to make *ad hoc* decisions unguided by principle. As Justice Cromwell said, the “purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council's authority should be exercised” (*Lewis v. North West Community Council of HRM*, 2001 NSCA 98, 19). [Emphasis in original]

4.1.2.6 Decisions of Development Officers

[66] A development officer's decision to refuse to issue a development permit can only be appealed to the Board by the applicant on grounds that the decision does not comply with the land use by-law, a development agreement or certain orders (s. 265(2)). A development officer's decision to refuse to approve a concept plan or plan of subdivision can only be appealed on grounds that it does not comply with the subdivision by-law (s. 265(3)). There is no right of appeal to the Board from a development officer's decision to grant a development permit.

[67] Unlike Council, development officers are non-elected employees of the municipality, not recognized as having the primary authority for planning, and not afforded the same deference as Council. In *Hazelview*, the Board identified those factors as important considerations in finding that a development officer's decision to refuse a variance under s. 250A of the *HRM Charter* does not require them to consider the intent of the MPS.

[68] Section 250A of the *HRM Charter* states:

250A (1) A development officer shall grant under Section 250 a variance respecting a step back or a street wall notwithstanding any land-use by-law or development agreement unless the variance would materially conflict with the municipal planning strategy.

(2) A decision to reject a variance under subsection (1) may be appealed to the Board, with the onus on the development officer to prove to the Board how the variance materially conflicts with the municipal planning strategy.

(3) Sections 264 to 269 apply, with necessary changes, to an appeal under this Section.

[69] The original version of this provision was added to the *HRM Charter* at the same time as s. 257A.

[70] Section 250A(3) contains identical language to s. 257A(4). Both state that, “Sections 264 to 269 apply, with necessary changes, to an appeal under this Section.” However, Section 250A(1) clearly states that the development officer must consider whether “the variance would materially conflict with the municipal planning strategy.” And s. 250A(2) provides clear guidance to the Board on an appeal of a development officer’s decision under s. 250A(1), “with the onus on the development officer to prove to the Board how the variance materially conflicts with the municipal planning strategy.” There is no clear guidance in s. 257A for either the CAO’s decision or the scope, burden or standard of review the Board must consider on appeal.

[71] In determining whether a development officer must consider the intent of the municipal planning strategy when refusing a variance under s. 250A, the Board found in *Hazelview* that, in the absence of clear legislative guidance, it should just “do what the statute tells it to do”. In that case, it was to review the variance for a material conflict with the municipal planning strategy. The Board distinguished decisions of development officers from planning decisions of Council and found that, although a development officer is required to determine whether the variance materially conflicts with the municipal planning strategy, that does not involve determining whether the decision carries out the intent of the strategy:

[40] Development officers are not elected officials and are not designated as the primary planning authority under the *HRM Charter*. They are not afforded deference in the same way as elected municipal councils. Their role is not to make policy choices under the SMPS.

[41] In *Halifax (Regional Municipality) v. Anglican Diocesan*, 2010 NSCA 38, at para. 29, the Court of Appeal noted:

[29] ... **(4)** The Board’s deference to elected municipal council’s difficult choices among vague and intersecting intentions in the MPS, discussed in *Archibald*, does not apply to an unelected development officer who applies the LUB. This is apparent from the legislative mandates to the development officer and the Board. [Emphasis added]

[42] In this case, the development officer must consider and apply the SMPS to the variance request. This pulls the development officer's decision-making process out of the technical provisions of the LUB and into the policy realm. HRM notes that planning documents are not intended to be prescriptive or "explicitly and exhaustively stipulate the development requirements that apply to a given property" [HRM's Submissions, p. 4]. HRM submits that an examination of the SMPS to determine a "material conflict" requires an analysis of the intent of the policies.

[43] Under s. 250A, the development officer, and the Board on appeal, are directed to review a requested variance for a material conflict with the MPS, not to engage in policy choices or a balancing of policies to determine whether the decision carries out Council's intent as reflected in the MPS.

[44] This appeal is a hearing *de novo*. The Board finds that, in the absence of other legislative guidance outlining the standard of review, the role of both the development officer and the Board is to do what the legislation tells them to do. The test under s. 250A requires the development officer to review the municipal planning strategy to ensure that the requested variance does not "materially conflict" with the municipal planning strategy. The Board must determine how s. 250A should be interpreted, and assess whether the requested variances materially conflict with the relevant and properly interpreted provisions of the SMPS.

[45] On appeal, the Board considers that the nature of its review under the *HRM Charter*, as the Court of Appeal has stated, is to "do what the statute tells it to do". In this appeal under s. 250A, the Board's task is to determine whether the requested variance materially conflicts with the SMPS. The burden is on the development officer to show that it does materially conflict. [Emphasis added]

4.1.3 Purpose

[72] In determining the purpose of s. 257A, the Board is guided by *Sullivan*:

Propositions underlying purposive analysis

A purposive analysis of legislative texts is based on the following propositions:

- (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
- (2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.
- (3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

[*Sullivan*, p. 257]

[73] The Board takes this guidance to mean that, in interpreting s. 257A, it should, to the extent the language of the section allows, adopt an interpretation that

promotes both the legislative purpose of the *HRM Charter*, in particular Part VIII, and the purpose of s. 257A itself.

[74] Based on this guidance and the consideration of the text and context as set out above, the Board finds that the purpose of s. 257A is to provide the CAO with the discretion to facilitate the development of properties in HRM in accordance with their current zoning with respect to height and density without the need for property owners to be concerned about more restrictive private covenants that may otherwise apply.

4.1.4 Interpretation of Section 257A

[75] The Board finds that there are restrictions on the grounds of appeal to the Board of the CAO's decision to modify a covenant under s. 257A(1). This is apparent from s. 257A(4) which says that "Sections 264 to 269 apply, with necessary changes, to an appeal under this section", which directs us to those sections, including s. 265. Section 265 sets out specific restrictions on the grounds of appeal to the Board from decisions of Council and development officers. The statute directs the Board to apply s. 265 "with necessary changes", and not to ignore it entirely. Therefore, it follows that the grounds of appeal to the Board from a CAO's decision under s. 257A would be limited in a similar fashion as the appeals from other planning decisions that are addressed in that section. What are those restrictions in this case? Section 257A(4) simply says, "Sections 264 to 269 apply, with necessary changes, to an appeal under this section."

[76] In the absence of clear legislative guidance setting out restrictions on the grounds of appeal, the Board follows *Hazelview* and the cases cited therein. The Board finds that the role of both the CAO under s. 257A(1), and the Board on appeal under s. 257A(3), is, as the Court of Appeal instructed in para. 23 of *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation*, 2010 NSCA 38, to "do what the statute tells it

to do.” In this case, that means that the CAO, and the Board on appeal, are required to review the private covenants and determine whether they are more restrictive than the current zoning for the properties, as set out in the Land Use By-law, with respect to height or density.

[77] The Appellants submit that, like appeals relating to land use by-law amendments and development agreements, the permitted grounds of appeal from a CAO’s decision include that the decision is not consistent with the MPS. However, those appeals involve decisions made by Council, elected officials who are mandated to balance the sometimes subjective and often conflicting policies in the MPS.

[78] The CAO and the Board are not primarily tasked to make value judgments on intersecting planning perspectives, compromises with respect to conflicting intentions, or determine how to interpret “question-begging” terms. As the Court of Appeal has repeatedly held, those decisions are best left to Council as the primary stewards for planning under the *HRM Charter*.

[79] The Board finds that if the Legislature intended the CAO or the Board to consider the MPS, it would have explicitly said so, as that would be giving significantly more planning authority to the CAO and intruding into areas previously reserved exclusively for Council. This finding is reinforced by considering s. 250A and s. 257A. Both were enacted at the same time. Both state that, “Sections 264 to 269 apply, with necessary changes, to an appeal under this Section” (ss. 250A(3) and 257A(4)). Section 250A makes explicit reference to the MPS, requiring a development officer to consider whether the requested variance “materially conflicts with the municipal planning strategy”, whereas there is no explicit reference whatsoever to the MPS in s. 257A.

[80] This interpretation is also consistent with the text of s. 257A, which suggests a narrow focus on whether private covenants are more restrictive than the current zoning of a property with respect to height and density, not a broader focus that requires the CAO or the Board to review and analyze municipal planning strategies. The focus is on zoning and zoning is dealt with in land use by-laws, not municipal planning strategies.

[81] The Board notes that s. 232(1) of the *HRM Charter* states, “The Municipality may not act in a manner that is inconsistent with a municipal planning strategy.” This does not mean that the CAO is required to interpret the MPS in making a decision under s. 257A. Provided the CAO interprets the Land Use By-law correctly, her decision will be consistent with the MPS because the Land Use By-law implements the MPS.

[82] The modification of private covenants in this case allows the council-approved land use by-law to apply. In the context of an appeal from a CAO’s decision under s. 257A the Board finds no scope in the legislation that would allow it to review the consistency of the current land use by-law requirements against the MPS, for at least two significant reasons. First, any part of the land use by-law that was made to implement a concurrently adopted municipal planning strategy or concurrent amendments to a municipal planning strategy cannot be appealed to the Board. Second, there is a statutory period for appealing any non-concurrently made land use by-law amendments. The Board has no authority to extend this time or hear appeals filed with the Board beyond the statutory appeal period. To this extent, the Board accepts HRM’s submission that in an appeal under s. 257A, the existing land use by-law must be taken as being consistent with the intent of the MPS, and that doing otherwise would amount to an improper collateral attack on the land use by-law.

[83] The CAO's decision found that the private covenant is more restrictive than the current zoning for the land with respect to height and density and purported to modify that covenant to make it consistent with that zoning. The Board finds the "necessary changes" required by s. 257A(4) are to read s. 265 such that the CAO's decision may be appealed to the Board on grounds including whether the private covenant is more restrictive than the current zoning for the land for height or density; and whether, and the extent to which, the changes relate to or affect height or density.

4.2 Section 7 of the *Canadian Charter*

[84] The *Canadian Charter* is enshrined in the *Constitution Act*, and forms part of the supreme law of Canada. All other laws must be consistent with the rules set out in the *Constitution Act*, or they risk being found to be invalid.

[85] From the Notice of Appeal, it appears that the Appellants intend to argue that the amendment to the *HRM Charter* resulting in s. 257A should be found to be invalid under s. 7 of the *Canadian Charter*. However, in their written submissions for this motion and at the oral hearing, the Appellants clarified their position that the CAO exercised her discretion in a manner that did not appropriately consider the Appellants' *Canadian Charter* rights. They submit the Board has jurisdiction to decide this issue at a hearing on the merits, and if the Board agrees there was a breach of the Appellants' *Canadian Charter* rights, the CAO's decision must be set aside. Section 7 guarantees "the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[86] In *R v Conway*, the Supreme Court of Canada reviewed the authority of administrative tribunals to consider and apply the *Canadian Charter*. After considering the development of the law through several cases, the court said:

[81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

[82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

[2010 SCC 22, at paras. 81-82]

[87] HRM agrees that the Board has the authority to grant *Canadian Charter* remedies generally. It disputes that the Board can grant the remedy sought in this case under the statutory scheme that applies to appeals to the Board under s. 257A of the *HRM Charter*.

[88] The Board accepts the Appellants' submission that it would be premature, at this preliminary stage, to question the application of s. 7 of the *Canadian Charter* to the circumstances of this case. The critical question for the Board's jurisdiction is whether the Board can grant the requested relief, if it were to find that the Appellants' s. 7 rights were violated.

[89] As discussed earlier, the Board can only exercise the authority and consider the matters that have been delegated to it by statute, either explicitly or by necessary implication. Under the *HRM Charter*, the Board's ability to allow appeals is quite limited. The Board can allow appeals in the circumscribed instances set out in ss. 267(2) and 268 of the *HRM Charter*. Beyond those, it cannot overturn a decision, even in cases where the legality of the decision may be in doubt for other reasons that a court could consider.

[90] In *Northern Construction Enterprises Inc. v Halifax (Regional Municipality)*, 2015 NSCA 43, the Court of Appeal considered a decision of the NSUARB denying an appeal from an HRM development officer's refusal to grant a development permit for an aggregate quarry. One of the arguments advanced by the appellant in that proceeding before the NSUARB was that HRM's land use by-law was illegal (*ultra vires*) because it attempted to regulate quarries, which were governed by provincial legislation. The NSUARB determined it did not have the jurisdiction to consider the legality of the HRM by-law. The Court of Appeal agreed:

[24] In my view, the Board got it right. It is a creature of statute and its jurisdiction is limited to the parameters of the enabling legislation. Here, Northern appeals a refusal to issue a development permit. Its right to do so is limited by the HRM Charter.

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.

[25] In turn, the Board's jurisdiction is limited:

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

[26] These provisions are clear. In the context of this ground of appeal, the Board's jurisdiction is limited to interpreting HRM's land-use by-law. It has no authority to question its legality. In fact, under the Charter, that power appears to be expressly reserved for the Supreme Court of Nova Scotia:

207 (1) A person may, by notice of motion that is served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the Council, in whole or in part, for illegality.

[27] I would dismiss this aspect of the appeal. [Emphasis added]

[2015 NSCA 43, paras. 24-27]

[91] The Court of Appeal's reasoning in *Northern Construction* was later applied by the NSUARB in the context of a *Canadian Charter* challenge in *Re Adams*. In that

case, the NSUARB considered an appeal from an HRM development officer's refusal to issue a development permit for community-based special care housing (a "small options home"). The appellant alleged that the development officer's decision contravened s. 7 of the *Canadian Charter* and discriminated against individuals who may benefit from that housing, contrary to s. 15 of the *Canadian Charter*. The NSUARB found it did not have the jurisdiction to provide the remedy sought, stating:

[35] Counsel for the Appellant said that the Board is able to grant the remedy sought under s. 24(1) of the Charter. He referred to s. 251(1)(d) of the *MGA* which, as the Board has already indicated, is the same as s. 267(1)(d) of the *HRMC*.

[36] Section 267(1)(d) of the *HRMC* provides:

267 (1) The Board may

...

(d) allow the appeal and order that the development permit be granted;

[37] Counsel for HRM said, however, that the *HRMC* provisions only allow the Board to grant such a remedy if, as set out in s. 267(2), the development officer's decision "...conflicts with the provisions of the land-use by-law...". She cites the limits on the Board's powers as set out by the Court of Appeal in *Northern Construction*.

[38] In *Northern Construction*, the Court of Appeal said at paragraph 25, "...the Board's jurisdiction is limited to interpreting HRM's land-use by-law."

[39] The question then is whether the remedy which the Appellant seeks pursuant to s. 24(1) of the Charter is what the Board's statutory mandate allows.

[40] The Board finds its mandate under the Charter is restricted because it can only grant the remedy, i.e., to order the permit sought to be granted, if the development officer's decision is found to conflict with the land-use by-law. The Board concludes that the statutory mandate given to the Board under the *HRMC* was intended to be limited; its jurisdiction is limited by s. 267(2). The Board acknowledges that s. 207 restricts the question of the legality of a by-law to a decision of the Supreme Court. Thus, in the particular circumstances of this matter, the second part of the test in *Conway* has not been met. [Emphasis in original]

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[92] These cases demonstrate that, despite the possibility that a land use by-law may be *ultra vires*, unconstitutionally discriminatory or applied by a development officer in an illegal or discriminatory way, the Board cannot provide a remedy for those

reasons. It can allow an appeal only in statutorily prescribed circumstances that do not include illegality or unconstitutionality. In attempting to distinguish these decisions, the Appellants submit that they are not challenging the legality of the land use by-law, or necessarily, the constitutionality of s. 257A itself. Rather, they argue that in exercising her discretion, the CAO did not take their constitutional rights into account and reached a conclusion that was not reasonably consistent with the MPS.

[93] As found earlier in this decision, this appeal from the CAO's decision under s. 257A(1) may only be made on limited grounds, including whether the private covenant is more restrictive than the current zoning for the land for height or density; and whether, and the extent to which, the changes relate to or affect height or density. A consistent reading of s. 267(2), with necessary changes, means the Board can only allow an appeal if it determines that the Appellants have proven those grounds on a balance of probabilities.

[94] Moreover, even if the Board accepts the Appellants' argument that they may bring an appeal on the ground that the CAO's decision did not reasonably carry out the intent of the MPS, that does not allow the Board to read in that it may also allow an appeal for illegality, unconstitutionality or an otherwise improper exercise of discretion. For these reasons, the Board finds it has no authority to consider the Appellants' ground of appeal based on s. 7 of the *Canadian Charter*.

[95] While of much lesser weight in the analysis, the Board also notes that the provisions of s. 266 of the *HRM Charter*, including expedited timelines, apply to appeals under s. 257A(3). The Board considers that these timelines would not be conducive to

the evidentiary record and legal analysis needed for a full-blown challenge under the *Canadian Charter*.

5.0 Conclusion

[96] The grounds of appeal relied upon by the Appellants in this proceeding, as set out in the Notice of Appeal, allege that the CAO's decision should be quashed because it is contrary to the intent of the MPS under s. 265 of the *HRM Charter*, or alternatively, because s. 257A of the *HRM Charter* is contrary to s. 7 of the *Canadian Charter*. As clarified by the Appellants in this motion, the allegation relating to the *Canadian Charter* is not exactly aimed at the provision itself, but is that in making her decision, the CAO did not properly consider the Appellants' rights under s. 7 of the *Canadian Charter*.

[97] For the reasons set out earlier in this decision, the Board finds that in applying s. 265 of the *HRM Charter*, with necessary changes, an appeal of the CAO's decision under s. 257A to modify a private covenant may only be brought to the Board on grounds including whether the private covenant is more restrictive than the current zoning for the land for height or density; and whether, and the extent to which, the changes relate to or affect height or density. Likewise, applying s. 267(2) of the *HRM Charter*, with necessary changes, the Board may only allow this appeal on the same basis. Although the Board generally has the jurisdiction to consider and apply the *Canadian Charter*, it does not have the ability to provide the requested remedy. Under s. 267(2), the Board can only allow this appeal if it determines that specific and limited grounds exist. These grounds do not include illegality or unconstitutionality.

[98] As a result, this appeal must be dismissed.

[99] While this conclusion may appear counterintuitive given the explicit right of appeal to the Board, as the Court of Appeal has repeatedly noted, planning appeals to the Board are not intended to provide a full right of appeal. They are restricted in scope, and the Board has only limited jurisdiction. Consistent with this, they are also intended to be expeditiously conducted in keeping with the timelines set out in s. 266 of the *HRM Charter*, which generally suggest that final appeal hearings should occur within two or three months from the filing of a Notice of Appeal. This timeline explicitly applies to appeals under s. 257A.

[100] The issue before the Board on these motions is its jurisdiction to consider the grounds of appeal that have been raised by the Appellants. The Board's lack of jurisdiction to hear the grounds set out in the Notice of Appeal does not mean that the Appellants are necessarily without recourse. That recourse may be available to them in another forum.

[101] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 15th day of April 2026.



Stephen T. McGrath



Julia E. Clark



Marc L. Dunning