DECISION **2025 NSRAB 32**
M11816

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

-and-

IN THE MATTER OF AN APPEAL by **HAZELVIEW INVESTMENTS INC.** from a decision of a Development Officer for Halifax Regional Municipality refusing a variance to the requirements of the Suburban Housing Accelerator Land Use By-Law for property located at 41 Cowie Hill Road, Halifax, Nova Scotia

BEFORE:	Roland A. Deveau, K.C., Vice Chair Julia E. Clark, LL.B., Vice Chair Bruce H. Fisher, MPA, CPA, Member
APPLICANT:	**HAZELVIEW INVESTMENTS INC.** Kevin Latimer, K.C. Sarah Dobson, Counsel
RESPONDENT:	**HALIFAX REGIONAL MUNICIPALITY** Kelsey Nearing, Counsel Meg MacDougall, Counsel
HEARING DATE(S):	January 9-10, 2025
FINAL SUBMISSIONS:	March 28, 2025
DECISION DATE:	**May 26, 2025**
DECISION:	**Appeal allowed. Stepback variances granted.**

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1.0 SUMMARY

[1] Hazelview Investments Inc. appealed to the Board from a decision of a development officer for Halifax Regional Municipality (HRM) refusing variances to "stepback" requirements of the Suburban Housing Accelerator Land Use By-Law (LUB) for property located at 41 Cowie Hill Road, Halifax, Nova Scotia. A stepback is defined in the by-law as a horizontal recess that breaks the vertical plane of an exterior wall on a main building.

[2] The relevant section of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (*HRM Charter*) dealing with the consideration of "stepback" variances by development officers is s. 250A. Under s. 250A, a development officer must approve a stepback variance, unless the variance materially conflicts with the municipal planning strategy.

[3] While there is broad policy direction and preamble text in the Suburban Housing Accelerator Secondary Municipal Planning Strategy (SMPS) that would encourage pedestrian-level and human-scale experience, including in the Vision and Core Concepts outlined in the introductory parts of the SMPS, an overarching objective of the SMPS is to provide housing in the designated Housing Accelerator Zone. The SMPS and LUB identified 28 opportunity sites "to prioritize the removal of barriers to housing". The site of the proposed 8-storey building is one of the "opportunity sites". There is nothing in the words of s. 250A that provides, whether expressly or impliedly, that the review in an appeal under that section requires a policy choice or a balancing of policies under the SMPS by the development officer, or by the Board on an appeal. The Board's task in this appeal is to determine whether the requested variance materially conflicts with the SMPS notwithstanding any land use by-law. The Board finds that there is no policy

direction in the SMPS that would limit a stepback variance “abutting a transition line”, or any other stepback variance that is not a “streetwall stepback”.

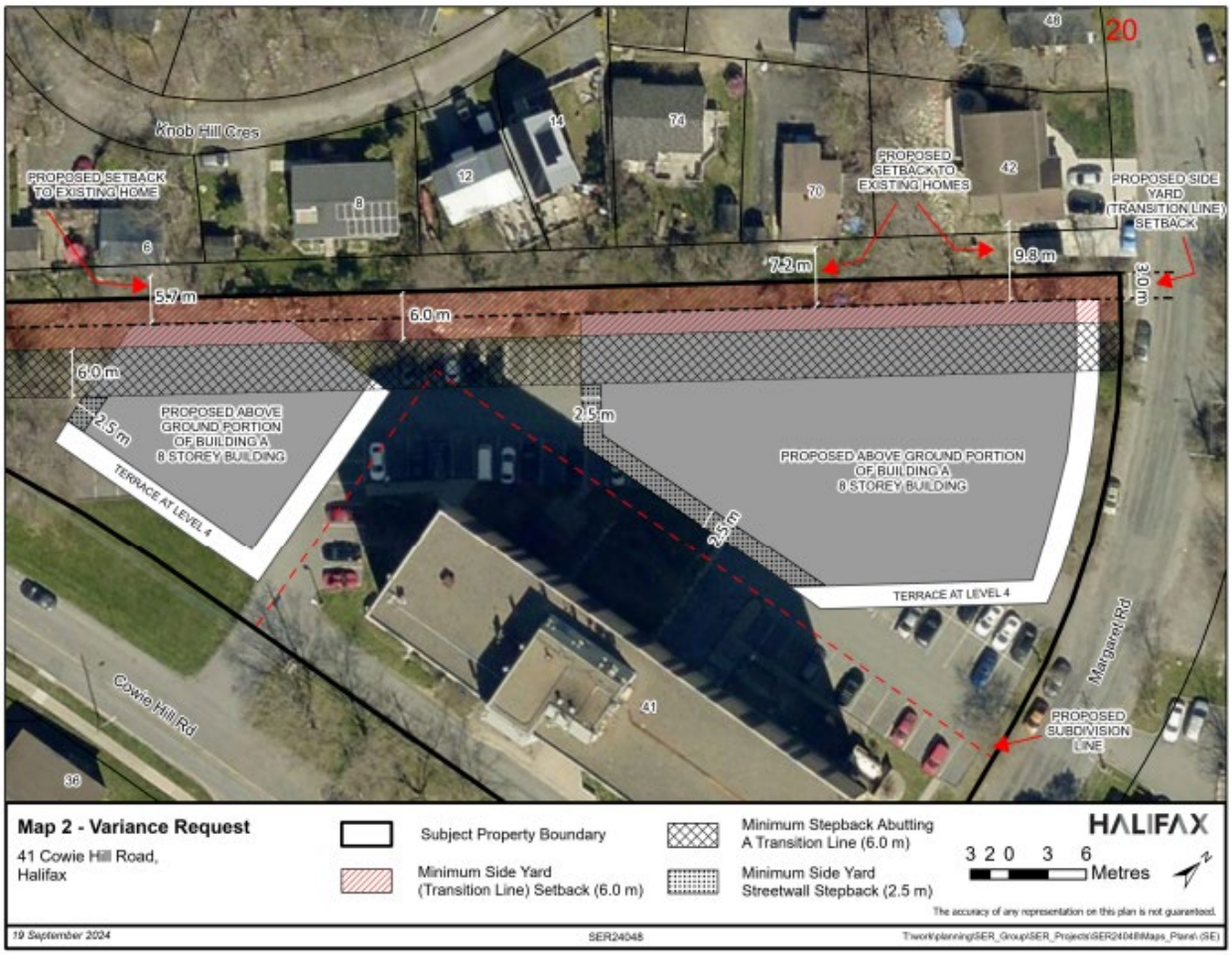
[4] After reviewing the evidence and submissions, the Board finds that HRM has not shown, on the balance of probabilities, that the requested stepback variances materially conflict with the municipal planning strategy. Accordingly, the appeal is allowed.

2.0 DESCRIPTION OF PROPERTY AND PROPOSED DEVELOPMENT

[5] The variance relates to a proposed multi-unit dwelling – a building consisting of two 8-storey towers on a shared podium to be constructed behind an existing 11-storey multi-unit apartment building at 41 Cowie Hill Road, Halifax, Nova Scotia. The existing building is located at the intersection of Cowie Hill Road and Margaret Road, one block west of Herring Cove Road. The proposed 8-storey building is to be built on a new lot to be subdivided from the existing 11-storey building.

[6] The new subdivided lot will itself be bounded on its north (i.e., on the opposite side from the existing 11-storey building) by an approximately 20-foot wide strip of vacant land owned by the Province, which runs adjacent to the entire northern boundary of the new lot. The strip of vacant land is bounded on the north by the rear yards of existing single-unit dwellings on Knob Hill Crescent, and is a natural buffer between the dwellings on Knob Hill Crescent and the proposed 8-storey development to their south. The strip of land includes a rocky outcropping and treed vegetation. It slopes up from the proposed development to the properties on Knob Hill Crescent, so that there is a difference in elevation of about 20 feet, according to the evidence, along certain parts of the boundary.

[7] The surrounding neighbourhood consists of mixed residential housing, with single- and 2-unit dwellings, townhouses and the existing 11-storey multi-unit dwelling, which contains 109 units. The proposed 8-storey building (with two towers), the existing 11-storey building, the street network and surrounding neighbourhood are depicted on the following diagram:



[Exhibit H-10, p. 20]

[8] The diagram also depicts the proposed subdivided lot with the dashed red line, and the minimum stepback requirement from the “transition line” to the north of the proposed development between the development site and neighbouring residences on Knob Hill Crescent.

[9] The Board visited the subject property on February 19, 2025, accompanied by the counsel for both parties. The visit started at the approximate location of the northeasterly corner of the western tower of the proposed 8-storey building, roughly adjacent to 8 Knob Hill Crescent. From that vantage point, the Board could observe the existing 11-storey building to the south as well as the existing single-unit dwellings on Knob Hill Crescent. The Board also observed the strip of vacant land between the proposed 8-storey building and the dwellings on Knob Hill Crescent. Our observations of the strip of land were consistent with the various photographs filed in evidence. The strip contains a rocky outcropping and treed vegetation that varies along the strip. There is a noticeable difference in elevation at certain parts of the boundary, but the elevation difference diminishes as you reach the northeastern corner of the proposed building near Margaret Road. The group also stopped and observed the vantage point from the northeast corner of the proposed new building, next to the dwelling at 42 Margaret Road. The group then traveled in their vehicles north on Margaret Road and turned onto Knob Hill Crescent, traveling along the latter in an easterly direction. The group stopped adjacent to 8 Knob Hill Crescent and observed dwellings on that street, with the existing 11-storey building in the background and the distance between the existing building and the dwellings on Knob Hill Crecent where the new 8-storey building is proposed. Again, this vantage point was adjacent to where the approximate location of the northwest corner of the proposed 8-storey building would be. Finally, the group traveled in their vehicles, turning right from Knob Hill Crescent, south on Margaret Road, turning right on Cowie Hill Road and another immediate right into the parking lot of the existing 11-storey building, returning to the point where the site visit started. It was observed during the visit that a

number of Halifax Transit buses travelled along Margaret Road and Cowie Hill Road. The Board notes that one of the criteria of the Housing Accelerator planning documents is that the site be located within 800 metres of a Rapid Transit route. Compliance with this requirement was acknowledged at the hearing.

3.0 BACKGROUND

[10] On June 26, 2024, Hazelview applied to HRM for "stepback" variances to the requirements of the LUB for the proposed development. This location was identified as an Opportunity Site under the recently completed Suburban Housing Accelerator planning process. The applicable municipal planning strategy is the SMPS.

[11] The proposed 8-storey development is an "as-of-right" development under the LUB (i.e., it does not require a zoning amendment or development agreement). However, Hazelview requested what, effectively, were three distinct variances – one "setback" variance and two "stepback" variances, under Sections 139(4) and 146 of the LUB, respectively.

[12] On June 26, 2024, Chris Markides, a Senior Planner with zzap Consulting Inc., engaged by Hazelview, wrote to HRM requesting the following variances:

> 1. Variance to Section 139(4) to reduce the minimum side yard setback from 6 metres to 3 metres.
>
> 2. Variance to Section 146 to reduce the minimum side and rear step backs to 0 metres.
>
> [Appeal Record, Exhibit H-4, p. 1]

[13] The distinction between "setback" and "stepback" variances are explained in the LUB, along with the accompanying diagram:

> **s. 155(165)** Setback means a required distance to a specified lot line or a transportation reserve boundary from an exterior wall of a building or a use at, above, or below grade. (Diagram 15)

s. 155(183) Stepback means a horizontal recess that breaks the vertical plane of an exterior wall on a main building. (Diagram 15)

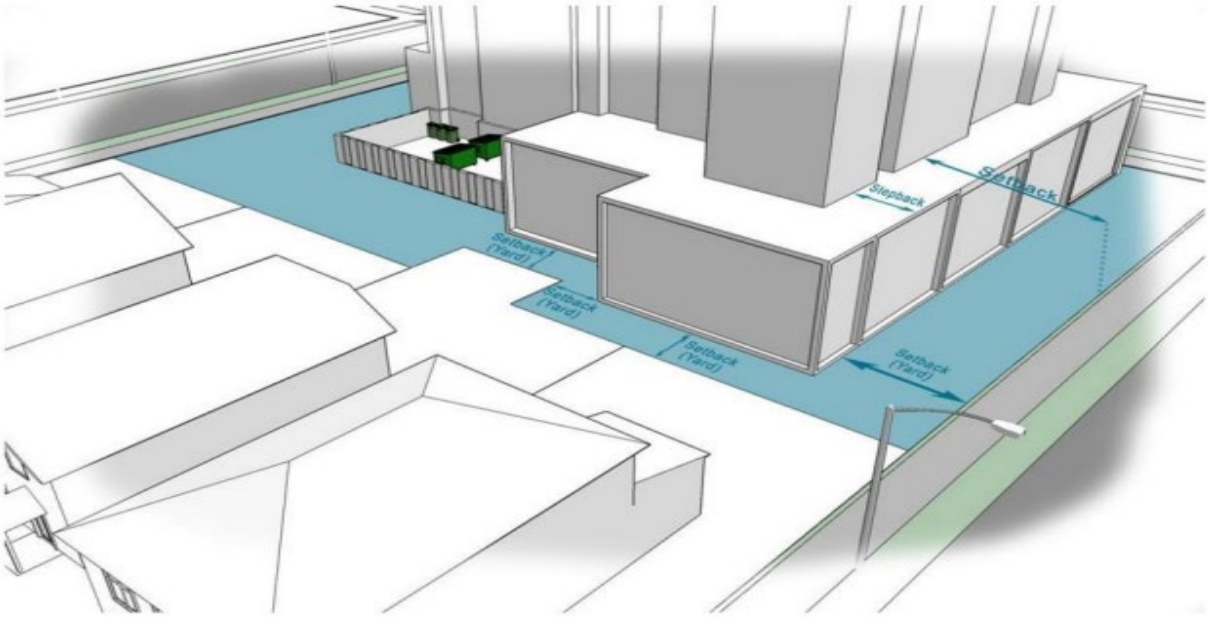


Diagram 15: Setback and stepback, per subsections 155(165) and 155(183)

[14] In a letter dated July 9, 2024, Trevor Creaser, HRM's development officer, refused the entire application. Under s. 251(4) of the *HRM Charter*, the refusal of the side yard setback variance can only be appealed to the HRM Council, which Hazelview appealed. HRM has indicated to Hazelview that the setback appeal will be held in abeyance until the Board issues its decision in this matter.

[15] However, under s. 250A(2) of the *HRM Charter*, a refusal of stepback variances is appealed to the Board. On July 24, 2024, Hazelview appealed the development officer's refusal of the stepback variances to the Nova Scotia Utility and Review Board. On April 1, 2025, on proclamation of the *Energy and Regulatory Boards Act*, S.N.S. 2024, c. 2, Sch. A, the Nova Scotia Regulatory and Appeals Board succeeded the Nova Scotia Utility and Review Board for all planning appeals under the *HRM Charter*.

[16] At the hearing, HRM acknowledged that one of the two stepback variances should have been approved. Mr. Creaser explained that his letter refused all three variances because the setback variance and the “transition line” stepback variance were refused, so as a result the second stepback variance would not occur. However, he stated that, in fact, the requested minimum side yard stepback satisfied the technical requirements of s. 146(1)(a) of the LUB and would otherwise have been approved. Accordingly, the only outstanding issue in this appeal relates to the requested variance to the minimum stepback “abutting a transition line”, under s. 146(3)(c) of the LUB.

[17] HRM raised a preliminary issue in this matter about the Board’s jurisdiction to hear the appeal. HRM’s counsel submitted that the enumerated categories of variances listed in s. 250(1) or s. 250(2) of the *HRM Charter* did not include the requested stepback variances, so the development officer did not have the authority to consider them under s. 250A. HRM argued that no appeal lies to the Board under s. 250A. In its Decision dated October 23, 2024 [2024 NSUARB 174], the Board reviewed the provisions of the *HRM Charter*, along with the applicable legal interpretation principles. It concluded that the development officer had the authority to consider the request for a stepback variance and that the Board had the jurisdiction to determine this appeal.

4.0 SUBURBAN HOUSING ACCELERATOR SMPS AND LUB PROVISIONS

[18] The SMPS and LUB apply to this proposed development. The background behind the adoption of these Suburban Housing Accelerator planning documents provides an important context to the issues in this appeal.

[19] In 2023, HRM and the Canada Mortgage and Housing Corporation (CMHC) agreed to use the Housing Accelerator Fund program to fast-track housing supply in

HRM. The agreement was contingent on HRM achieving building permit targets. The Housing Accelerator Fund program was the impetus for the development of the SMPS. The report by Kasia Tota, LLP, MCIP, stated that the planning process for the SMPS:

> … resulted to changes to nearly all of Halifax Regional Municipality's (HRM) planning documents to help accelerate housing supply. The Suburban Housing Accelerator Secondary Municipal Planning Strategy (SHA SMPS) and the Suburban Housing Accelerator Land Use By-law (SHA LUB) are limited to 28 "opportunity sites" to prioritize the removal of barriers to housing within the Urban Service Boundary, and as an interim step to developing a comprehensive Suburban Plan. The sites were selected based on property owners requests directed to the suburban planning process. To help evaluate which opportunity sites should be considered, the following criteria were applied:
>
> - The site must be smaller than 2 hectares.
> - The proposal must meet at least one of the following:
>   - Be located within 800 metres of a proposed Rapid Transit route;
>   - Be located within 1200 metres of a proposed Rapid Transit terminal;
>   - Be located within 800 metres of a post-secondary institution campus; or
>   - Be a site identified by the Provincial Lands for Housing Program or an affordable housing project by a registered non-profit.
> - The proposal must not result in the demolition of an existing multi-unit dwelling (three units or more).
> - The site must not be located within a coastal or watercourse setback.
>
> [Exhibit H-11, pp. 2-3]

[20] Ms. Tota explained that it was "closely modelled on the Higher Order Residential Zones" and was not the first-time HRM had done something such as this. Ms. Tota stated that due to past experience with the Centre Plan framework, recent Regional Plan consultations, and pre-engagement on the suburban plan, there was a much faster completion time for the process. She said, "it was quick, but it was still robust". The development of the SMPS was initiated by Regional Council on September 26, 2023, it was approved on May 16, 2024, and became effective on June 13, 2024.

[21] The SMPS and the accompanying LUB allow as-of-right treatment for properties that normally go through a development agreement process. Ms. Tota explained that LUBs and development agreements "have very similar tools. Land Use By-laws are more broader. Development agreements are very site specific ...".

[22] The development of the SMPS incorporated extensive feedback and engagement and considered 40 properties. Eventually it included 28 opportunity sites with the remaining properties addressed through the existing plans. The Cowie Hill site was initially to be considered as an MPS Amendment "with an option for a development agreement" but in March 2024 the developer requested it be included in the Housing Accelerator (HA) Zone.

4.1 LUB Provisions

[23] The site is designated as Urban Settlement under the Generalized Future Land Use Map (GFLUM). It is zoned Housing Accelerator (HA) Zone under the Mainland South Generalized Future Land-Use Map.

[24] The proposed 8-storey building is a "Tall Mid-Rise Building" under the LUB:

> **155 (194)** Tall Mid-Rise Building means a main building that is greater than 7 storeys but not higher than 10 storeys in height.

[25] Hazelview requested the two stepback variances under s. 146 of the LUB:

> **146 (1)** Subject to subsection (2), for a tall mid-rise building, a portion of a main building above the height of the streetwall must have a minimum required
>
> **(a)** side stepback of 2.5 metres; and
>
> **(b)** rear stepback of 4.5 metres.
>
> **(2)** Except as provided in subsection (4), if a lot abuts a transition line, the wall of a main building facing the transition line must have a required side and rear stepback on the 2nd, 3rd, or 4th storey.
>
> **(3)** The side or rear stepback in subsection (2) must have a minimum of
>
> **(a)** 0.0 metres for a low-rise building;

> **(b)** 2.0 metres for a mid-rise building;
>
> **(c)** 6.0 metres for a tall mid-rise building; or
>
> **(d)** 6.0 metres for a high-rise building.
>
> **(4)** The side or rear stepbacks under subsections (1) and (2) are not required if an entire main building has a minimum side and rear setback of
>
> **(a)** 8.0 metres for a mid-rise building;
>
> **(b)** 12.0 metres for a tall mid-rise building; or
>
> **(c)** 12.0 metres for a high-rise building. [Emphasis added]

[26] As noted above, the only outstanding issue in this appeal relates to the requested variance to the minimum stepback "abutting a transition line", under s. 146(3)(c) of the LUB.

[27] Mr. Creaser referred to the following SMPS statements in considering this variance, which he said were relevant to the issue of the "transition" between the proposed 8-storey building and the single-unit dwellings to the north on Knob Hill Crescent. The preamble in Part 3.2.1 of the SMPS provides:

> **3.2.1** Building Height is the maximum vertical distance between a structure's average finished grade and its highest point. Maximum height requirements encourage the distribution of density on large lots. The maximum building height framework is intended to support strategic growth and the Core Concepts for the Suburban Area Opportunity Sites prior to more detailed planning being completed through the Suburban Planning process, including:
>
> - protecting the pedestrian-level and human-scale experience to promote sky-views and sunlight penetration to the street; and
> - transitioning building heights to adjacent low-rise buildings. [Emphasis added]

[28] In terms of specific policy statements, Policy UD-4 states:

> **Policy UD-4**
>
> **The Land Use By-law shall establish building height transition requirements for mid-rise buildings, tall mid-rise buildings, and high-rise buildings abutting residential low-rise buildings.** [Emphasis added]

[29] Further, the preamble text in Part 3.2.2 of the SMPS states:

> The building envelope describes where new development is permitted on a lot, including its location, size, and massing relative to lot boundaries, surrounding buildings, and the public realm. Additional building envelope controls include maximum building dimension requirements for different portions of buildings. This Plan supports building envelope controls that:
>
> - reinforce the fine-grained and regular lot pattern that supports pedestrian traffic;
> - reinforce 'human-scaled' streetscapes, weather protection, and shorter routes to main entrances;
> - provide transitions in scale to low-density residential areas and neighbourhoods, heritage resources and conservation districts, and the Halifax Harbour;
> - ensure adequate street-level conditions to minimize wind and maximize sun penetration and sky exposure; and
> - balance height and massing relationships.
>
> The building envelopes are organized in the following categories, as defined in this Plan and the Land Use By-law, to reflect the different set of standards that are applicable to different building heights:
>
> - Low-Rise Building;
> - Mid-Rise Building;
> - Tall Mid-Rise Building; and
> - High-Rise Building.
>
> Buildings of different heights and scale have varying impacts on their surroundings and the public realm as their heights increase, which may require different standards, depending on the local context. Specific building envelope controls include:
>
> - establishing minimum streetline setbacks, with possible variations based on the local context;
> - establishing mid-block connections and variety in design through maximum building dimensions and side yard requirements at the street level;
> - implementing interior setbacks, streetwall stepbacks for mid-rise buildings, tall mid-rise buildings and high-rise buildings, to mitigate impacts from wind and shadow at the street level; and
> - transitioning between large-scale buildings and more intense land uses when located next to parks and low-rise residential areas through the use of side and rear setbacks and stepbacks. [Emphasis added]

[30] Before the recent amendments to the *HRM Charter*, the consideration of variances by a development officer was limited to s. 250 of the *HRM Charter*. A

development officer's refusal under s. 250 can only be appealed to Council. There is no appeal to the Board. However, with the recent enactment of s. 250A, a development officer's refusal of a "stepback" variance can be appealed to the Board.

5.0 APPEAL PROVISIONS IN HRM CHARTER

[31] Section 250A was recently added to the *HRM Charter* as part of Bill 329 amending the *HRM Charter* and the *Housing in the Halifax Regional Municipality Act*, S.N.S. 2023, c. 18. The Bill received Royal Assent on November 9, 2023. This amendment provided for variances involving "a setback or a street wall". However, less than six months later, s. 250A was amended by Bill 419, the *Financial Measures Act*, which received Royal Assent on April 5, 2024. That amendment struck out the word "setback" and in its place substituted the words "step back" in s. 250A. The current version of s. 250A, which applied to Hazelview's request for the stepback variances considered by the development officer, reads as follows:

> **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. [Emphasis added]

[32] Unlike other planning appeals, the burden of proof in an appeal to the Board involving a stepback variance is on the development officer, who must show how the variance "materially conflicts" with the municipal planning strategy.

[33] Section 265 of the *HRM Charter* sets out restrictions on planning appeals to the Board from decisions of development officers about development permits, land-use

bylaw amendments and development agreements. Subsections 265 (2) and (3) limit the type of appeals to the Board from a development officer's decision, but these provisions were enacted before s. 250A, which now allow an applicant to appeal certain variance refusals to the Board:

> **Restrictions on Appeals**
> **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.
>
> **(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. [Emphasis added]

[34] Sections 267 and 268 limit the Board's powers on an appeal:

> **Powers of Board on appeal**
> **267 (1)** The Board may
>
> (a) confirm the decision appealed from;
>
> (b) allow the appeal by reversing the decision of the Council to amend the land-use by-law or to approve or amend a development agreement;
>
> (c) allow the appeal and order the Council to amend the land-use by-law in the manner prescribed by the Board or order the Council to approve the development agreement, approve the development agreement with the changes required by the Board or amend the development agreement in the manner prescribed by the Board;
>
> (d) allow the appeal and order that the development permit be granted;
>
> (e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan.
>
> **(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.
>
> **Restrictions on powers of Board**
> **268 (1)** The Board may not order the granting of a development permit, the approval of a plan of subdivision, a land-use by-law amendment, a development agreement or an amendment to a development agreement that
>
> (a) is not reasonably consistent with a statement of provincial interest;
>
> (b) conflicts with an order made by the Minister establishing an interim planning area or regulating or prohibiting development in an interim planning area.

> **(2)** The Board may not make any decision that commits the Council to make any expenditures with respect to a development. [Emphasis added]

[35] As noted in the recently enacted s. 250A(3), sections 264 to 269 of the *HRM Charter* apply, with necessary changes, to an appeal under s. 250A.

6.0 STANDARD OF REVIEW FOR THIS APPEAL

[36] This is the first time the Board has considered s. 250A and an appeal of a development officer's refusal to approve a variance. In all other cases under the *HRM Charter,* the refusal of a variance is appealed to Council, and the applicant has the burden to prove the development officer's decision should be reversed. Under s. 252, Council "may make any decision that the development officer could have made". However, in the present appeal under s. 250A, the appeal is to the Board and the burden is on the development officer to prove that the requested variance does not "materially conflict with the MPS".

[37] HRM argues that s. 250A requires a development officer to consider the applicable MPS, which is a policy document, and determine whether there is a material conflict between the policy direction in the MPS and the requested step back variance. HRM says that this analysis necessarily involves a review of the intent of the MPS. HRM Counsel says that the development officer's decision is, in many ways, "most analogous to subsection (1)(b) of section 265, which establishes the standard of review for a decision of Council to approve or refuse a development agreement." That standard is whether the decision of Council reasonably carries out the intent of the applicable MPS.

[38] Hazelview disagreed with HRM's characterization of the required standard of review. Instead, the Appellant relies on past decisions of the Board where appeals of development officers' decisions were classified as hearings *de novo* that do not engage

a standard of review analysis. In particular, in *Giles (Re)*, 2021 NSUARB 135*,* the Board summarized the principle:

> [14] In deciding whether a development officer's refusal conflicts with the LUB, the Board must ascertain the meaning of the relevant LUB provisions. An issue arises as to the degree of deference to be afforded to a development officer's interpretation of these provisions. Ms. MacLaurin cited Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation, 2010 NSCA 38, where the Court refers to the standard of correctness, but then says that the Board, as an administrative tribunal constituted by statute:
>
> > …does not immerse itself in *Dunsmuir's* standard of review analysis that governs a court's judicial review. The Board should just do what the statute tells it to do.
> >
> > …The Board said (¶62) that it "may only allow this appeal if it determines that the Development Officer's decision 'conflicts with' or 'does not comply' with the provisions of the Land-Use By-Law". After its analysis, the Board concluded (¶109) that the development officer's "decision to refuse conflicts with, and does not comply with, the LUB", namely s. 67(1)(d) which permits an "other institution of a similar type" in the P Zone. The Board correctly identified its standard of review, i.e., that prescribed by the HRM Charter, to the decision of the development officer. [Emphasis added]
>
> [15] The Board is aware of the Supreme Court of Canada's recent judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which established a new basis for a court's review of the decision of an administrative decision maker in a statutory appeal. That said, the rationale in *Anglican Diocese* as to why the Board should not immerse itself in a standard of review analysis has not changed. The statutory test the Board has applied has not changed.
>
> [16] Planning appeals take the form of a hearing de novo, where the materials in the Appeal Record are supplemented by any additional relevant evidence the parties wish to submit. [Emphasis in original]
>
> [Exhibit H-21, pp. 11-12]

[39] In *Giles (Re)*, the test in the appeal was whether a development officer's decision to refuse a development permit "did not comply" with the LUB, under s. 265(2) of the *HRM Charter*. The Board determined that its task was to complete a *de novo* analysis to determine whether the development officer's decision conflicts, or does not comply, with the proper interpretation of the LUB.

[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.

7.0 INTERPRETATION PRINCIPLES

[46] The principles of statutory interpretation apply in determining the intent of any statute, including in the Board’s interpretation of the statutory provisions in the *HRM Charter*, to determine the scope of the powers conferred upon the Board, and when interpreting the provisions of a municipal planning strategy or land use by-law.

[47] The Board is mindful of *Verdun v. Toronto Dominion Bank,* [1996] 3 S.C.R. 550, and cases following it (see, for example, *Chartier v. Chartier,* [1998] S.C.J. No. 79; *Re Rizzo & Rizzo Shoes Ltd.*, [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), 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] 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] 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.

8.0 EVIDENCE OF THE PARTIES

8.1 HRM's evidence

[54] HRM called two witnesses: Mr. Creaser, the development officer who refused the variance, and Kasia Tota, HRM's Manager of Community Planning. They

were both qualified by the Board to testify as experts, able to provide opinion evidence "on land use planning matters, including the intent, interpretation, and application of the Regional Municipal Planning Strategy, the Suburban Housing Accelerator Secondary Municipal Planning Strategy, and the Suburban Housing Accelerator Land Use By-law".

[55] Mr. Creaser focused his report on the fact that the requested side yard variance was for a lot which abutted a "transition line" on the north of the subject property. Under s. 146(2) and (3) of the LUB, if the wall of a tall mid-rise building (seven to 10 storeys in height) abuts a transition line, the side yard stepback on the 2nd, 3rd, or 4th storey must be a minimum of 6.0 metres. In his report, he stated:

> Although Mr. Markides states in his letter there are no specific policies mandating stepbacks, there is specific MPS context and language relative to the "transitioning" of larger buildings to surrounding low-rise and low-density residential areas, which supports the Transition Line requirements in the LUB as intended. The LUB is the administrative document to carry out the goals and intent of the MPS and it is not silent on this issue.
>
> [Exhibit H-10, pp. 14-15]

[56] Ms. Tota was involved in the development of the SMPS and LUB. In her report, she noted that these planning documents are limited to the 28 opportunity sites and the intent is "to accelerate housing" and "to prioritize the removal of barriers to housing within the Urban Service Boundary, and as an interim step to developing a comprehensive Suburban Plan". She noted that the "planning policies and regulations address detailed land use and built form requirements that would normally only be addressed through a development agreement".

[57] Mr. Creaser and Ms. Tota both referred to preamble text in s. 3.2.1 (building height) and s. 3.2.2 (building envelope) of the SMPS referencing the transition between taller or large-scale buildings and nearby low-rise residential areas. Urban Design Policies UD-4 and UD-5 were cited. UD-4 directs that the LUB "shall establish building height

transition requirements for mid-rise buildings, tall mid-rise buildings, and high-rise buildings abutting residential low-rise buildings" [Emphasis added]. Policy UD-5 directs that the LUB "shall establish building envelope regulations that support context-specific, human-scaled and pedestrian-oriented environments" [Emphasis added] by various means.

[58] While these experts concluded that the requested variance materially conflicts with the SMPS, they also said that the LUB was relevant in considering whether the variance should be granted, as described later in this Decision.

8.2 Appellant's evidence

[59] Mr. Markides testified as a witness for Hazelview. He coordinated the variance application to HRM on behalf of the Appellant. He also testified as an expert about the issues in this appeal, including his report filed as Exhibit H-12. He was qualified by the Board to testify as an expert, able to provide opinion evidence "on land use planning matters including the interpretation and application of municipal planning strategies and land use bylaws and requirements for planning applications".

[60] He said that the developer was requesting the variance because of the "unique site conditions that make compliance with the ordinary LUB requirements challenging". He noted that the enactment of s. 250A had provided a new framework for the consideration of variances by development officers. He noted the mandatory nature of s. 250A in that the variance "shall" be granted unless it materially conflicts with the SMPS. He also highlighted that the new section "explicitly overrides" any conflicting sections of the LUB.

[61] In his report, he reviewed the background leading to the enactment of s. 250A, suggesting that it reflected a "deliberate legislative intent to remove barriers to

development and to facilitate increased density within the municipality". In applying the test about whether the variance "materially conflicts" with the SMPS, he described that exercise as follows:

> **1.** Section 250A stipulates that variances for stepbacks should be denied only if they "materially conflict" with the Municipal Planning Strategy (MPS). The term "materially" must be interpreted meaningfully, indicating that the conflict must be explicit and substantial-not merely an inconsistency or a difference of opinion regarding the MPS interpretation. A material conflict should be demonstrable, with a clear and tangible impact with respect to the MPS policy statement, rather than an abstract or theoretical inconsistency.
>
> **2.** It is essential to differentiate between an inconsistency and a material conflict. Failing to do so risks undermining the intent of s. 250A, which is to remove unnecessary barriers to housing development, particularly during a housing crisis. Therefore, in the absence of specific and compelling evidence that the variance would significantly offend a stated MPS intention, the variance should be granted to support housing goals.
>
> [Exhibit H-12, pp. 6-7]

[62] Mr. Markides stated that the SMPS does not contain specific policies about side yard or rear stepbacks that materially conflict with the proposed variance. Since the SMPS was silent on the matter, he concluded that the "absence of explicit conflict indicates that granting the variance would not materially conflict with the [SMPS]" (p. 7).

9.0 ANALYSIS AND FINDINGS

9.1 Relevance of Adverse Possession Claim

[63] Parcel HRM-5 is a narrow strip of land separating the Hazelview property from the residential dwellings on Knob Hill Crescent and Margaret Road. The evidence suggests that several of the residential neighbours use portions of that parcel as part of their backyard, including decks, fences and accessory structures.

[64] The Board agreed to grant a request to appear at the hearing from Andrew Christofi, Counsel for Nathan Lewis, who owns a neighbouring property at 8 Knob Hill Crescent, identified as Lot 11 on a plan of survey attached to Mr. Lewis' claim [Exhibit H-7]. Mr. Christofi informed the Board that he has filed a claim in the Supreme

Court of Nova Scotia on Mr. Lewis' behalf under the *Quieting Titles Act*, R.S.N.S. 1989, c. 382. The claim is against Hazelview, Halifax Regional Municipality and the Attorney General in Right of the Province, based on adverse possession. The Court has not yet determined the claim. The Board agreed to include the claim documents in the record and provide Mr. Christofi an opportunity to address Board questions and for the parties to make submissions on what use, if any, the Board should make of the information about this claim.

[65] Mr. Lewis claims a triangular portion of property extending through Parcel HRM-5 into Hazelview's property. Mr. Christofi explained that, should Mr. Lewis' claim be granted, his backyard will immediately abut the proposed development on the transition line. Mr. Lewis is concerned that his property boundaries, including the claimed area, be respected in any decision impacting the stepback and setback of the development from that transition line.

[66] Before the hearing, the Board informed the parties of the panel's intent to ask Mr. Christofi and the parties, "about the relevance of [Mr. Lewis'] claim for adverse possession, and the Board's jurisdiction to consider that issue in the present appeal." Mr. Christofi asked the Board merely to acknowledge that Mr. Lewis' claim exists over a portion of property that may be impacted, in particular, by a variance in the as-of-right setback requirement.

[67] All three Counsel agreed that the Board had no role in a ruling on the merits of the possessory claim. Mr. Latimer clarified the Appellant's position that the claim was not relevant to the ultimate issue the Board had to decide. From HRM's perspective, the legal ownership of the land on the boundaries of the lot is not determinative in terms of

the Board's ultimate decision on the application and interpretation of the SMPS. However, "if anything", Mr. Lewis' claim gives additional context on the *de facto* uses of the boundary lands by Mr. Lewis and his neighbours.

[68] The Board agrees with HRM. The Board's decision on the stepback variance requires a finding on whether approving a reduced stepback for the Hazelview project would result in a material conflict with the SMPS. The stepback will be measured from the property line. The issue of who owns the abutting property does not impact such a finding, and any stepback must be measured from the property line, wherever it is determined.

9.2 Does the Variance Refusal Materially Conflict with the SMPS?

9.2.1 Submissions

[69] When an applicant requests a step back variance, s. 250A of the *HRM Charter* states that the development officer shall grant the variance "notwithstanding any land-use by-law … unless the variance would materially conflict with the municipal planning strategy". This appeal is made under s. 250A(2), which provides that the onus is on the development officer to prove to the Board how the variance materially conflicts with the SMPS.

[70] HRM submitted that eliminating the step back requirement (i.e., reducing it to 0 metres) would materially conflict with the SMPS. In its submissions, it concluded:

> …Allowing two sheer 8 storey towers in close proximity to low-rise residences would be in direct conflict with the statements of intent and policy [of the SMPS]. This conflict is substantial and goes beyond the merely trivial or technical – rather, it is a conflict with the animating and overarching intent of the SMPS to create opportunities for infill developments that balance greater density in suburban areas with sensitivity to the scale and uses of existing communities.
>
> [HRM Closing Submissions, p. 15]

[71] HRM Counsel submitted that although s. 250A states the test applies "notwithstanding any land-use by-law", these words "do not mean that the Board should ignore the existence of the LUB in its entirety".

[72] Hazelview submitted that the variance request does not materially conflict with the SMPS, noting that there are no policy statements about side yard stepbacks in the SMPS that the requested variance application would offend. In its view, that alone should result in a successful appeal.

[73] In the alternative, Hazelview submitted that the variance application does not materially conflict with the policies identified by HRM requiring a transition to the nearby residential neighbourhood, stating that some of those policies and preamble statements do not apply at all. Hazelview stated that the transition between the proposed building and the neighbourhood is addressed by various means, including the grading of the site and the neighbourhood, the presence of a land buffer and vegetation between the two, and the fact that the proposed building acts as a transition between the 11-storey building to its south and the residential neighbourhood to its north. Finally, both parties agreed that an overarching objective of the SMPS is to provide housing in the designated Housing Accelerator Zone (see Markides' Report, p. 10 & 12; and Ms. Tota's Report, p. 430).

9.2.2 Meaning of "materially conflicts"

[74] This is the first appeal to the Board under s. 250A of the *HRM Charter*. There were extensive submissions and evidence by the parties about how the Board should apply the test under this recent amendment to the *HRM Charter*. The Board must determine whether the requested variance "materially conflicts" with the SMPS. The burden of demonstrating this is on the development officer, on the balance of probabilities.

[75] The test differs from the other tests the Board applies under the *HRM Charter*. Typically, appeals from decisions of development officers require the Board to decide whether the decisions conflict with the LUB (rather than the SMPS). Also, the threshold of the test is different. In the typical appeal, the test is whether the decision “conflicts” with the LUB, but in the present appeal the threshold is whether the decision "materially conflicts” with the SMPS. Moreover, the burden is on the development officer, rather than on the Appellant. These are all important distinctions.

[76] HRM submitted that Hazelview’s expert planner, Mr. Markides, had exceeded the proper scope of opinion evidence by venturing into an analysis about the intent of s. 250A generally, including the circumstances leading to the recent amendment to the *HRM Charter* and the intent of the Legislature in enacting the amendment. The Board agrees that it was not appropriate for Mr. Markides to consider the Legislature’s intent in passing the amendment and the Board assigned no weight to such opinion evidence. However, the Board finds that it was appropriate for Mr. Markides to consider how he should interpret the test for the requested variance. That exercise is analogous to when a development officer applies the test under s. 261(1) of the *HRM Charter* in determining whether a development permit application meets the requirements of the LUB.

[77] For its part, HRM’s expert witnesses did not consider the meaning of the new test in the *HRM Charter* and what is meant by “materially conflicts”. In his report, Mr. Creaser noted at p. 10 that “Central to the issue of this refusal is whether the proposed reduced stepback is in material conflict with the [SMPS]”. However, there is no further discussion in his report about the meaning of this new test and the fact that it is quite

different from the test applied by development officers under the *HRM Charter* in considering development permits. In her testimony, Ms. Tota acknowledged that they were not sure about the meaning of the new test:

> …I think the words -- the new words of the Charter, the material difference, is different to what I said in my report, substantive difference. We're not really sure what that means at this point because it is so new. You know, typically the words in the Charter are, you must be, … "reasonably comply with the SMPS," the provincial statements of interest. The "reasonably comply" language is language that we know, the "material difference" is very new and … we did not have the opportunity to discuss with the Province what is meant by that, and there is no criteria in the Charter or in the policy to actually evaluate this "material difference".
>
> So I guess yes but I don't want to -- I just want to be clear that that "substantively conflict" may -- not necessarily the same as what's in the Charter. So, I just want to be careful around that because I don't really know what those words mean at this time.
>
> [Transcript, p. 303]

[78] In this appeal, the central part of the test is whether the requested variance "materially conflicts" with the SMPS. It is entirely appropriate for the development officer, and the planning experts at the hearing, to consider how the words "materially conflict" should be interpreted. Indeed, development officers are required to address those very words in applying the test to the application before them.

[79] The parties both submitted case authority where the meaning of "material" was considered by the Courts in other statutory contexts. Hazelview referred to *Kritz v. Guelph (City)*, 2016 ONSC 6877, at para. 51, where the Ontario Superior Court considered the meaning of a "material alteration", citing *R v. Lemieux*, 2009 ONCJ 676:

> 57. In regards to the word "material", the Dictionary of Canadian Law (3rd edition, Thomson-Carswell, 2004) defines "material" as "important, essential" as well as "that which goes to the foundation of the decision or which goes to the crux of a central issue before the court".
>
> 58. I am satisfied that the word "material" when used as an adjective applied to a change or alteration means significant or important or essential and must go to the crux of an issue. The use of words and their natural meaning is critical and represents a pathway for us to follow.
>
> [*Kritz v Guelph (City)*, paras. 51]

[80] The judgment identified by HRM attributed a similar meaning to “material”. In *Graham Industrial Services Ltd. v. Greater Vancouver Water District*, 2004 BCCA 5, the Court considered the meaning of “material” respecting non-compliance with the terms of a tender:

> 32 "**Material**" is defined in the Concise Oxford Dictionary to be "important, essential, relevant...concerned with the matter not the form of reasoning...". Black's Law Dictionary, 7th ed. (West Group: St. Paul, 1999) includes in the definition for **material**: "of such a nature that knowledge of the item would affect a person's decision-making process; significant, essential".
>
> 33 This Court also considered the definition of materiality recently in *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, [2003] B.C.J. No. 2588 [paragraph] 27. In the context of determining disclosure obligations of a seller under a contract for purchase and sale of a gold mine, Levine J.A. held that a **material** fact is one where there is
>
> > ...a substantial likelihood that disclosure of the omitted fact would have assumed actual significance in the deliberations of the reasonable purchaser, or would have been viewed by the reasonable purchaser as having significantly altered the total mix of information made available.
>
> 34 According to these definitions, in the context of the present case, **material** non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select. [Emphasis added in original]

[81] The Board considers that the meaning attributed to “material” in these two judgments is consistent and effectively identical. The word “material” denotes something that is significant, important or essential. Further, for the issue to be “material”, it must impact a decision-making process such that it goes to the “foundation of the decision” or to the “crux of a central issue”. Similarly, in the words of the Court in *Inmet Mining Corp.*, the use of the word “material” reflects something that “would have been significant in the deliberations”. The Board finds that the above meaning of “material” applies to the words “materially conflict” in the present appeal. Accordingly, to refuse a variance, the development officer must show the conflict with the SMPS is significant, important or

essential, and that the conflict goes to the "foundation of the decision" or to the "crux of a central issue" to be decided by the development officer, or by the Board on appeal.

[82] However, the Board finds that HRM mischaracterized how this ordinary meaning of the word "material" should be applied in the test under s. 250A. HRM identified two other uses of the adjective "material" or "materially" in other parts of the *HRM Charter*. The first is in s. 283(13) about subdivision requirements for parkland or cash-in-lieu requiring land conveyed to HRM to be free and clear of all encumbrances except an easement that does not materially interfere with the use and enjoyment of the land. The second is in s. 300(1), which states that an approved final plan of subdivision may be amended, provided the amendment does not materially alter the boundaries of a lot created by the approved plan. After noting these two other instances in the *HRM Charter*, HRM said that interpretation principles require that the same meaning be afforded to all three uses of the word "materially". The Board agrees that, unless a contrary intention appears, a similar meaning should normally be attributed to all uses of a word in a statute. However, HRM submitted:

> HRM submits that the "material conflict" standard established by s 250A should be understood similarly: that where a variance to an LUB requirement would fail to carry out the intent of the municipal planning strategy's policy direction, it shall be refused.
>
> …
>
> HRM submits that the use of "materially" in both of these [*HRM Charter*] provisions suggests that some technical or trivial level of interference or alteration is permitted but that encumbrance or change that results in a real or effective interference or alteration is prohibited. … [Emphasis added]
>
> [HRM Closing Submissions, p. 8]

[83] HRM concluded its submissions on this point by stating:

> Section 250A is not a blanket provision that requires approval of all stepback variance requests in all circumstances. The legislative decision to establish a test of whether a proposed variance "materially conflicts with" the MPS indicates that the legislative intent is that there is some control over the granting of variances and that they should be granted

> only where reasonable MPS policy support for the stepback requirement is not available. [Emphasis added]
>
> [HRM Closing Submissions, p. 9]

[84] With respect, HRM has mischaracterized the test under s. 250A, including the ordinary meaning of the word “material” considered in the above court judgments. HRM’s submissions imply that anything more than a “technical” or “trivial” conflict equates to a “material conflict”. It also substituted the adjectives “real or effective” for “significant, important or essential”. Moreover, it ignored another important part of the discussion identified by the courts by not addressing the requirement that “materially” goes to the “foundation of the decision” or to the “crux of a central issue” to be decided by the development officer, or by the Board on appeal. The Board finds that this is not a reasonable interpretation of “materially conflict”.

[85] The Board does not accept HRM’s conclusion that the legislative intent of s. 250A was that variances “should be granted only where reasonable MPS policy support for the stepback requirement is not available”. That is not the test under s. 250A. Rather, the test is that the variance must be granted unless the development officer can show that the variance “materially conflicts” with the SMPS.

[86] In applying the term “materially conflicts”, the Board concludes that to refuse a variance the conflict with the SMPS must be significant, important or essential, and that the conflict must go to the “foundation of the decision” or to the “crux of a central issue” to be decided by the development officer, or by the Board on appeal. To the extent that the development officer misapplied the test under s. 250A, the Board assigns less weight to his evidence.

9.2.3 Absence of “stepback” policies in the SMPS

[87] Hazelview submitted that there are no specific policies about side yard stepbacks in the SMPS. It argued that the variance request consequently does not materially conflict with the SMPS. HRM’s witnesses acknowledged in their testimony that there are no SMPS policies that deal specifically with side yard stepbacks that are not “streetwall” stepbacks.

[88] The Board confirmed in its review that there are only six references to stepbacks in the 66-page SMPS, but four of the six relate specifically to “streetwall stepbacks”. Further, five of the six references to stepbacks are contained in preamble text in the SMPS. The only policy statement in the SMPS that refers to stepbacks is Policy UD-6, which directs that the LUB “shall establish streetwall requirements in the HA Zone to support human-scale design”.

> **Policy UD-6**
>
> **The Land Use By-law shall establish streetwall requirements in the HA Zone to support human scale design. The streetwall requirements shall:**
>
> **…**
>
> **b) establish minimum streetwall stepbacks for mid-rise buildings, tall mid-rise buildings and high-rise buildings to mitigate impacts of wind and shadow on the street;**

[89] The stepbacks under review in this appeal are not streetwall stepbacks. LUB s. 155(188) defines a “streetwall” as the “wall of a building, or the portion of a wall of a building that faces the streetline”. Neither of the requested stepbacks face a streetline. Thus, the four references to streetwall stepbacks in the SMPS are not relevant to this appeal.

[90] The two other references to stepbacks in the SMPS are references to stepbacks generally and are contained in preamble text. As discussed later in this

decision, preamble text may provide context for understanding policy direction in the SMPS, but it is only the policy statements themselves that provide policy direction to Council (and in this case to the development officer).

[91] Accordingly, the Board agrees with Hazelview's Counsel that there is no specific policy direction in the SMPS about side yard stepbacks. Hazelview argued that this should automatically mean that the requested variance does not materially conflict with the SMPS. While the Board does not accept the Appellant's argument that the absence of specific policy direction about side yard stepbacks is necessarily determinative of this appeal, the Board places significant weight on this factor in deciding whether the requested variance materially conflicts with the SMPS.

9.2.4 Conflict or inconsistency with the LUB

[92] Section 250A of the *HRM Charter* states that the development officer shall grant the variance "notwithstanding any land-use by-law" unless the variance would materially conflict with the SMPS. In its submissions, HRM stated:

> These words do not mean that the Board should ignore the existence of the LUB in its entirety in interpreting the MPS.
>
> …
>
> In this case, the municipal planning strategy and the LUB were produced concurrently, as part of the same targeted planning process. The text of the LUB is therefore useful in the interpretive exercise demanded by s 250A of the Charter.
>
> [HRM Closing Submissions, p. 6]

[93] As noted in HRM's submissions, the Nova Scotia Court of Appeal has discussed the assistance an LUB can provide in deducing the intent of its MPS, when both planning documents are adopted concurrently: see *Archibald v. Nova Scotia (Utility and Review Board*), 2010 NSCA 27. The Court of Appeal previously noted that a review of the LUB "may assist in throwing light on the intent" of an MPS, but also cautioned that

such assistance need not be applied “when the intent of the strategy is clear,”: see *Mahone Bay Heritage and Cultural Society v. Town of Mahone Bay* and *3012543 Nova Scotia Limited*, 2000 NSCA 93, paras. 94-95.

[94] At times in this appeal, Ms. Tota appeared to place significant weight on the interpretation of the LUB in discerning the intent of the SMPS respecting the issues in this appeal. For example, in her report about the side yard stepback abutting a transition line, Ms. Tota stated:

> In my professional opinion a zero (0 m) stepback could meet the intent of the policy, but only if the rear setback was increased. This flexibility is already provided by the S. 146 (4) of the LUB where the setback is increased from 6 m to 12 m. In the context of the application, the proposed development is proposed on a lot that has significant frontage on Margaret Road but sharply narrows on Cowie Road. It also abuts existing low density residential buildings that are between 1 and 3 storeys tall.
>
> Staff recommendation for a maximum height of 8 storeys (tall mid-rise) under SHA SMPS and LUB was inherently connected to and based on meeting the transition requirements under the LUB, including a 6 m setback, a 6 m stepback and landscaping. This would mitigate some of the impacts of a larger scale building on surrounding properties such as noise, shadow and reduced privacy. More flexible transition requirements are available under the by-law should one or both buildings be reduced in scale. [Emphasis added]
>
> [Exhibit H-11, p. 14]

[95] Later in her report, Ms. Tota concluded:

> Staff recommended a maximum height of 8 storeys on the site, subject to meeting all zone requirements. As a form-based by-law, the SHA LUB regulates density and height transitions through specific built form requirements such as maximum height, streetwalls, setbacks and stepbacks as opposed to using complex density calculations or angle controls used by older by-laws. Therefore, the maximum height recommended was based on meeting these built form requirements. [Emphasis added]
>
> [Exhibit H-11, p. 16]

[96] In her rebuttal evidence, Ms. Tota held steadfast in her view that the maximum 8-storey height of the proposed building was contingent on the “built form requirements” contained in the LUB. In referring to the policy direction in SMPS Policies UD-4, UD-5 and UD-10 (which are discussed later in this decision but which do not specifically address side yard stepbacks), she appeared to reiterate her view that the built

form requirements in the LUB dictated the limits of the flexibility on the development of the proposed building, despite the absence of specific policy restrictions in the SMPS about side yard variances:

> [Policies UD-4, UD-5 and UD-10] are implemented through specific setbacks and stepbacks. It is not reasonable that the SMPS would contain an explicit direction or number for every regulation it enables or that the test for "material difference" can be equated to whether a number is specified in policy or not. … If the SMPS had to contain explicit direction for every regulation, there would be no need for a land use by-law. The SHA Plan and LUB seek to provide significant flexibility to support the development of new housing while managing some of the impacts of development on adjacent properties through transition requirements. [Emphasis added]
>
> [Exhibit H-13, p. 3]

[97] Hazelview submitted that Ms. Tota's latter statement represented HRM's "misapprehension of the legislation and this Appeal". The Board agrees.

[98] Ms. Tota's evidence is flawed in three important respects in relation to her consideration of the LUB. First, her evidence misapprehended the relationship between the SMPS and the LUB. Section 234(1) of the *HRM Charter* provides that when Council adopts an MPS it must, at the same time, adopt an LUB "that enables the policies to be carried out". Further, s. 234(3) provides that Council may not adopt an LUB "except to carry out the intent of a municipal planning strategy". The SMPS provides the policy direction enabled in the LUB, not vice versa. By suggesting that the "built form requirements" in the LUB should somehow define or restrict the policy direction in the SMPS, her view is not in accord with the relationship between the two planning documents as contemplated in the *HRM Charter*.

[99] Second, on a related point, the LUB cannot be used to impart an intent on the SMPS that it does not otherwise express. As noted by the Court of Appeal in *Archibald* and *Mahone Bay*, a review of the LUB "may assist in throwing light on the intent" of an MPS. The interpretative exercise must not extend beyond discerning the intent of the

SMPS. The LUB requirements must not be used to define policy direction that is otherwise not in the SMPS.

[100] Third, and most importantly in this appeal, by stating that it is "not reasonable that … the test for 'material difference' can be equated to whether a number is specified in policy or not", Ms. Tota appears to have misconstrued the test in s. 250A, which provides that, "notwithstanding any land-use by-law", the development officer is to approve the variance unless the variance materially conflicts with the SMPS. The Board considers that one of the key factors in applying the test in s. 250A is the specificity of the policy direction, its importance in the context of the SMPS and the proposed development, and whether the requested variance materially conflicts with it. In the Board's view, it is indeed reasonable to place significant weight on the absence of such policy direction in determining whether the variance materially conflicts with the SMPS. Also, this test must be considered "notwithstanding any land-use by-law". To the extent that Ms. Tota relied on the built form requirements in the LUB to weigh the variance against the SMPS, she misapplied the test in s. 250A by ignoring that this review must be done notwithstanding any land use by-law.

[101] Given the above findings, the Board places little weight on Ms. Tota's opinion evidence in this appeal.

9.2.5 SMPS policy or preamble statements

[102] HRM's expert witnesses acknowledged that there was no specific policy in the SMPS about side yard stepback variances. However, the witnesses referred to other policies in the SMPS that they stated supported a refusal of the requested variance. Mr. Creaser, the development officer who considered the application, focused his report on the fact that the requested side yard variance was for a lot which abutted a "transition

line" on the north of the subject property. Transition lines are prescribed in Schedule 4 of the LUB. As noted earlier in this Decision, under s. 146(2) and (3), if the wall of a tall mid-rise building (seven to 10-storeys in height) abuts a transition line, the side yard stepback on the 2nd, 3rd, or 4th storeys must have a minimum stepback of 6.0 metres.

[103] In his report, Mr. Creaser stated that:

> Although Mr. Markides states in his letter there are no specific policies mandating stepbacks, there is specific MPS context and language relative to the "transitioning" of larger buildings to surrounding low-rise and low-density residential areas, which supports the Transition Line requirements in the LUB as intended. The LUB is the administrative document to carry out the goals and intent of the MPS and it is not silent on this issue.
>
> [Exhibit H-10, pp. 14-15]

[104] He referred to preamble text in the SMPS in s. 3.2.1 (building height) and s. 3.2.2 (building envelope), that both mentioned transition. As noted earlier in this Decision, the preamble text in s. 3.2.1 about building height refers to "transitioning building heights to adjacent low-rise buildings", while the preamble in s. 3.2.2 about building envelope refers to "transitioning between large-scale buildings and more intense land uses when located next to parks and low-rise residential areas through the use of side and rear setbacks and stepbacks".

[105] With respect to building height, the only specific policy direction he identified was Urban Design Policy UD-4, which provides:

> **Policy UD-4**
>
> **The Land Use By-law shall establish building height transition requirements for mid-rise buildings, tall mid-rise buildings, and high-rise buildings abutting residential low-rise buildings.**

[106] The Board finds that Mr. Creaser's references to the SMPS do not support his conclusion that the proposed variance materially conflicts with the municipal planning strategy. First, the Board accepts Hazelview's submission that there is no specific policy direction that would materially conflict with the requested variance. This was

acknowledged by HRM. As noted above, the Board places significant weight on this factor in deciding whether the requested variance materially conflicts with the SMPS.

[107] Second, in like fashion to the evidence given by Ms. Tota, Mr. Creaser relied heavily on the LUB to conclude that the transitioning land-use controls should not be relaxed between the proposed tall mid-rise building and nearby residential low-rise buildings. As noted earlier, the LUB cannot be used to impart an intent on the SMPS that it does not otherwise express. It is not appropriate to use LUB requirements to define or restrict policy direction in the SMPS. This is especially true, as in this case, where there is actually no policy direction about stepbacks that do not abut streetlines. Moreover, by relying on the LUB as he did, Mr. Creaser ignored an important part of the test in s. 250A which he had to apply in his review of the SMPS “notwithstanding any land-use by-law”.

[108] Third, Mr. Creaser and Ms. Tota both noted Policy UD-4, which directs that the LUB shall establish “building height transition requirements” for mid-rise buildings, tall mid-rise buildings, and high-rise buildings abutting residential low-rise buildings. To the extent that such “building height transition requirements” have been implemented in the LUB, those requirements are in place and, similar to the finding above, the review by the development officer should focus on the test in s. 250A and whether the variance materially conflicts with the SMPS “notwithstanding any land-use by-law”. Further, the Board notes that Policy UD-4 refers to establishing building height transition requirements for tall mid-rise buildings “abutting residential low-rise buildings”. This policy does not apply on the facts of this appeal. Based on the evidence in this matter, the residential low-rise buildings on Knob Hill Crescent do not “abut” the proposed building. There is a narrow

strip of unzoned land about 20 feet in width separating the Hazelview property from the residential dwellings on Knob Hill Crescent.

[109] Fourth, Mr. Creaser and Ms. Tota both referred to preamble text about "transitioning" in the SMPS in s. 3.2.1 (building height) and s. 3.2.2 (building envelope). Ms. Tota also referred to other preamble text including the Vision and Core Concepts in the SMPS. In the absence of related policy direction, little or no weight can be given to preamble text in the SMPS. In *Can-Euro Investments Ltd., (Re)*, 2008 NSCA 123, the Court of Appeal held that "a preamble to a policy may provide context for understanding the policy; however, it is the policy itself that guides council" (para. 47).

[110] HRM's witnesses referred to s. 3.2.2 relating to building envelope. In addition to the preamble text, to which the Board assigns little weight, Ms. Tota identified Urban Design Policy UD-5 respecting building envelope. This Policy states that the LUB "shall establish building envelope regulations that support context-specific, human-scaled and pedestrian-oriented environments" by various means. However, while Policy UD-5 lists ten specific land-use controls that "shall" be established in the LUB to "support context-specific human-scaled and pedestrian-oriented environments", there is no mention whatsoever to stepbacks, despite the earlier reference to stepbacks in the preamble text of s. 3.2.2. The wording of UD-5 appears exhaustive and suggests that these 10 items are a complete list of the "building envelope regulations" controls which the LUB shall "establish". The text does not suggest that there might be other controls or that the 10 items are illustrative of the controls to be established. The Board finds that the provisions relating to building envelope do not apply to the issue in this appeal.

[111] Urban Design Policy UD-10 cited by Ms. Tota relates to landscaping requirements to be implemented in the LUB. The Policy does not refer to stepbacks and there is no evidence that the proposed development will not be able to comply with such requirements. Indeed, while outside the scope of this appeal, the proposed development will have to comply with such requirements.

[112] Finally, while HRM's witnesses referred to broad policy direction and preamble text in the SMPS that would encourage pedestrian-level and human-scale experience, including in the Vision and Core Concepts outlined in the introductory parts of the SMPS, both parties agreed that an overarching objective of the SMPS is to provide housing in the designated Housing Accelerator Zone. As acknowledged by HRM, the SMPS and LUB identified 28 opportunity sites "to prioritize the removal of barriers to housing within the Urban Service Boundary". The introductory preamble text to s. 2.2 - Housing Accelerator Designation, provides:

> The Housing Accelerator Designation, shown on Map 1, is intended to recognize vacant and under-utilized sites that are characterized by alignment [to] the Housing Accelerator Fund Site Specific Request Criteria, the Regional Plan, Priority Plans, and the goals of the Federal Housing Accelerator Fund.
>
> Lands in the Housing Accelerator Designation are located in some of the most densely populated communities in the Suburban Area. Many of these neighbourhoods are served by transit and located close to places of employment and the goods and services needed for daily living. Existing multi-unit dwellings in the surrounding areas range in size between low-rise, mid-rise, and tall mid-rise buildings based on the scale and character of the neighbourhood.
>
> The Housing Accelerator Designation supports additional housing opportunities by allowing for the development of new multi-unit dwellings at a scale that is compatible with surrounding neighbourhoods. [Emphasis added]

[113] Thus, there is support in the SMPS for both policy contexts put forward by the parties in this appeal. However, as noted earlier in this Decision, there is nothing in the words of s. 250A that provides, whether expressly or impliedly, that the review in such an appeal involves a policy choice or a balancing of policies under the SMPS by the

development officer, or by the Board on an appeal. The Board's task in this appeal is to determine whether the requested variance materially conflicts with the SMPS "notwithstanding any land-use by-law". The Board finds that there is no policy direction in the SMPS that would limit the side yard stepback variances in this appeal.

[114] Moreover, the Board accepts Hazelview's evidence that there are several factual items that provide context for approving the side yard variance. These factors would address the transitioning references in the SMPS. First, the Board notes from the SHA zoning map that the subject site is one of the largest "opportunity sites" identified in the LUB, if not the largest. This alone would tend to favour a development with greater density, like a new multi-unit 8-storey building. The development of the proposed 8-storey multi-unit building itself represents a transition within the existing neighbourhood, with an existing 11-storey multi-unit apartment building on the south and residential dwellings to the north on Knob Hill Crescent. Further, the transition between the proposed 8-storey multi-unit building and the dwellings on Knob Hill Crescent is supported by the presence of a natural buffer between the two, namely an approximately 20-foot wide strip of largely vacant unzoned land owned by the Province which runs adjacent to the entire northern boundary of the proposed development. Also, this strip of land includes a rocky outcropping and treed vegetation, which slopes up from the proposed development site to the properties on Knob Hill Crescent, so that there is an elevation difference of up to 20 feet along much of the boundary between the two, as noted by Mr. Markides. Thus, Mr. Markides said, which the Board accepts, that this elevation difference results in the proposed 8-storey building having an effective height of only six to seven storeys from the perspective of dwellings on Knob Hill Crescent. The Board notes that, in her initial

report, Ms. Tota incorrectly stated that the grade of the land sloped from Knob Hill Crescent up to the proposed development. She also identified the strip of land between the two as being zoned R-2. She corrected these statements in her reply evidence. However, these errors also reduce the weight that the Board attributes to her evidence. These errors are noteworthy considering that she relied so heavily on her view that the "built form requirements" contained in the LUB should limit or define any policy direction in the SMPS. In doing so, she did not fully consider the factual context of the requested variance in this appeal.

[115] In summary, s. 250A of the *HRM Charter* provides that the development officer shall grant the variance notwithstanding any land use by-law unless the variance would materially conflict with the SMPS. As noted earlier in this Decision, to prove that a variance "materially conflicts" with the SMPS, the development officer must show the conflict with the SMPS is significant, important or essential, and that the conflict goes to the "foundation of the decision" or to the "crux of a central issue" to be decided by the development officer, or by the Board on appeal. The Board finds that there is no specific policy direction in the SMPS about side yard stepbacks abutting a transition line. Further, the Board finds, on the balance of probabilities, that the requested variance does not conflict with the SMPS in a way that is significant, important or essential, particularly in assessing the crux of the central issue to be considered in this appeal, i.e., whether the requested variance materially conflicts with the SMPS. Based on the evidence and the submissions, the Board finds that HRM has not shown, on the balance of probabilities, that the requested variance to the minimum stepback "abutting a transition line", under s. 146(3)(c) of the LUB, materially conflicts with the SMPS.

10.0 COSTS

[116] When the *HRM Charter* was amended to add s. 250A, the Legislature also added a provision allowing the Board to order costs against HRM when the Board overturns a variance refusal by a development officer. The Appellant submitted that it should be awarded costs in the event it was successful in this appeal. Section 266(6A)-(9) provides:

> **266 (6A)** Notwithstanding subsection 28(1) of the Utility and Review Board Act, the Board shall, by order, impose costs on the Municipality if
>
> (a) the Board overturns a decision of a development officer under Section 250A; and
>
> (b) the Board determines that the awarding of costs is in the interests of justice.
>
> **(7)** When imposing costs pursuant to subsection (6) or (6A), the Board shall consider, in addition to what the Board considers relevant, the financial ability of the party to pay and the conduct of the party in the appeal.
>
> **(8)** This Section only applies to appeals to the Board made pursuant to this Part.
>
> **(9)** This Section only applies to proceedings commenced on or after the coming into force of this Section.

[117] The Board will receive submissions from the parties on the issue of costs.

11.0 CONCLUSION

[118] Based on its review, the Board finds that HRM has not shown, on the balance of probabilities, that the requested variance to the minimum stepback “abutting a transition line”, under s. 146(3)(c) of the LUB, materially conflicts with the SMPS. Accordingly, that appeal is allowed.

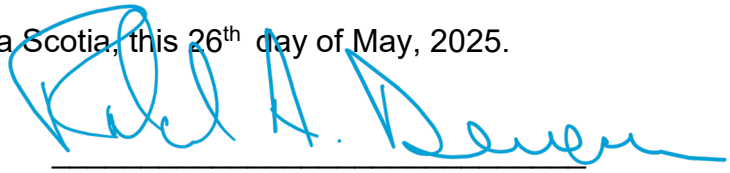
[119] As noted earlier in this Decision, the development officer explained that because he refused the setback variance and the “transition line” stepback variance, he also refused the requested side yard stepback variance because it would not occur without the other two variances. At the hearing, Mr. Creaser stated that, in fact, the

requested minimum side yard stepback satisfied the technical requirements of s. 146(1)(a) of the LUB and would otherwise have been approved. Accordingly, the Board also allows the appeal in relation to the requested variance for this side yard stepback.

[120] The appeal is allowed on both points and, under s. 267(1)(d) of the *HRM Charter*, the Board orders that both stepback variances be granted.

[121] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 26th day of May, 2025.



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