DECISION **2026 NSRAB 54**
M12401 and M12402

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **SARAH MATHESON 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 5914 Chain Rock Drive, Halifax (PID 00000133)

-and-

IN THE MATTER OF AN APPEAL by **JEVON MACDONALD** 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 5914 Chain Rock Drive, Halifax (PID 00000133)

BEFORE:	Stephen T. McGrath, K.C., Chair Julia E. Clark, LL.B., Vice Chair Marc L. Dunning, P.Eng., LL.B., Member
APPELLANTS:	**SARAH MATHESON et al.** Derek Brett, Counsel
APPLICANT:	**AMANDA MEAGHER** (not appearing)
RESPONDENT	**HALIFAX REGIONAL MUNICIPALITY** Meaghan Carlson, Counsel Meg MacDougall, Counsel

INTERVENOR:	**ATTORNEY GENERAL OF NOVA SCOTIA** Caitlin Menczel-O'Neill
HEARING DATE(S):	August 27, 2025 October 21, 2025
FINAL SUBMISSIONS:	October 31, 2025
DECISION DATE:	**April 15, 2026**
DECISION:	**Appeal is dismissed.**

TABLE OF CONTENTS

1.0 INTRODUCTION

[1] This is a preliminary decision about the Nova Scotia Regulatory and Appeal Board's jurisdiction to consider an appeal of a decision made by Cathie O'Toole, Chief Administrative Officer (CAO) of the Halifax Regional Municipality (HRM), to modify private covenants impacting a property at 5914 Chain Rock Drive (PID 00000133) in HRM. The modification was requested by the Applicant, Amanda Meagher, and is being appealed by a group of over 100 neighbouring residents of Inglewood B Subdivision (Sarah Matheson, Jevon MacDonald, and others). The CAO's decision removes a clause in the private covenant and allows the property to be developed under the Established Residential (ER-3) zone, which is the applicable zoning in the governing Regional Centre Land Use By-law.

[2] This decision also addresses whether the Appellants have standing to bring a claim that the CAO had a duty to consult with Indigenous Peoples based on information about Mi'kmaq historical use and burial grounds in the area.

[3] In 2023, changes to the *Halifax Regional Municipality Charter* SNS 2008, c 39 (*HRM Charter)* introduced authority for 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." A decision under that authority can be appealed to the Board. This is one of the first appeals to the Board under the relevant sections of the *HRM Charter*, ss. 257A and 264-269.

[4] In this matter, the group of Appellants asked the Board to reverse the CAO's decision because the revisions to the private covenants allow multi-unit dwellings, which they say will have an adverse impact on their properties in the Inglewood B Subdivision. They also allege that the CAO's decision breached the duty of fairness "procedurally and

substantively," because they did not have adequate notice or opportunities to participate, and that the CAO's decision was unreasonable and provided inadequate reasons.

[5] HRM argues that the Notices of Appeal do not raise any allowable grounds of appeal and should be dismissed in its entirety. In particular, HRM argues that the Board does not have jurisdiction to consider the procedural issues raised by the Appellants, and that the Appellants do not have standing to bring a claim about the duty to consult.

[6] The Board reviewed the new provisions of the *HRM Charter* and considered the applicable legal interpretation principles. The Board has the jurisdiction to hear appeals from decisions made under s. 257A of the *HRM Charter*, however, as the Board decided in its concurrent decision in *Ghosn, Re.* 2026 NSRAB 55, the grounds of appeal that can be made to the Board include 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] The Board finds that past decisions of the Nova Scotia 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. The Board agrees with HRM that the Board does not have jurisdiction to consider any of the procedural grounds raised in the Notices of Appeal. Therefore, the Board strikes those grounds of appeal.

[8] The Board also finds the Appellants whether individually, collectively, or on a public interest basis, do not have standing to advance a claim that the CAO had a duty to consult in this case. Therefore, the Board dismisses this ground of appeal without a direct finding on whether the Board's limited appellate authority under s. 257A(2) could

include grounds related to rights under s. 35 of the *Constitution Act, 1982,* Schedule B to the Canada Act, 1982, c. 11 (UK), and the duty of consultation.

2.0 BACKGROUND

[9] Section 257A came into force on November 9, 2023, as part of a suite of changes to the *HRM Charter* and the *Housing in the Halifax Regional Municipality Act*, SNS 2023, c 18. The new provision authorizes the CAO to discharge or modify a private covenant that is more restrictive than the applicable municipal land use by-laws about height or density. The legislation allows for appeals of the CAO's decisions to the Board under s. 257A(3) and relies on other appeal provisions in ss. 264-269 in Part VIII of the *HRM Charter,* which address planning issues.

[10] The Applicant requested that the CAO modify one of a series of covenants attached to her property at 5914 Chain Rock Drive, which restricts the development on the property to one detached private dwelling house. The application was approved by the CAO on July 3, 2025.

[11] On July 22, 2025, the Board received the Notice of Appeal on behalf of a group of over 100 individuals identified as residents of the Inglewood B Subdivision. The following day, the Board received an appeal of the same decision from Jevon MacDonald (Board Matter M12402). At the initial preliminary hearing, William Ryan, K.C., then acting as Mr. MacDonald's counsel, confirmed Mr. MacDonald's intention to join the larger group of appellants, and the appeals were joined. These were among several appeals of separate decisions of the CAO on restrictive covenant applications that were filed with the Board that month. Three of those matters involved preliminary motions addressing

the grounds of appeal and the scope of the Board's appellate jurisdiction for appeals under s. 257A(3). The preliminary hearings were held within a similar timeframe in October 2025.

[12] As in the matters addressed in the Board's concurrent decisions in *Ghosn et al (Re)* 2026 NSRAB 55 and *Kelly (Re)* 2026 NSRAB 56, HRM brought a preliminary motion seeking to strike the Notices of Appeal for want of jurisdiction, on the grounds that they disclosed "no allowable ground of appeal." HRM argues that the grounds of appeal are all procedural complaints, relating to consultation, public notice and the adequacy of the CAO's reasons. HRM also brought a motion objecting to the Appellants' standing (either individually or as a group) to raise any claims regarding the Crown's constitutional duty to consult with Indigenous Peoples prior to taking any action that could negatively affect established or claimed Aboriginal and treaty rights. There was no challenge to the Appellants' standing as aggrieved persons to bring the appeal, generally.

[13] The Appellants claimed that there is a history of Aboriginal interest in the area and that the CAO failed to meet a duty to consult with Mi'kmaq communities about the requested changes to the private covenants. Under s. 10(4) of the *Constitutional Questions Act,* RSNS 1989, c 89, an application in a proceeding bringing the constitutional validity or applicability of any law into question cannot proceed if notice is not served on the Attorney General of Nova Scotia at least 14 days before the date of argument. Notice of this constitutional question was received by the Attorney General on October 14, 2025, the day before the preliminary hearing. However, the Attorney General consented to shorten the required time for notice and elected to participate in the preliminary hearing only in an observing ("watching brief") role.

[14] The Appellants were represented by their counsel, Derek Brett. Meaghan Carlson and Meg MacDougall represented HRM. The Applicant did not attend the hearing or provide written submissions. Caitlin Menczel-O'Neill attended the hearing as the Attorney General's representative and provided no submissions.

3.0 ANALYSIS AND FINDINGS

3.1 HRM'S MOTION TO STRIKE GROUNDS OF APPEAL

3.1.1 Submissions of the Parties

[15] HRM argues that the Board's powers to hear and decide an appeal of a decision made under s. 257A(1) are limited to those expressly conferred or that exist by necessary implication, and that none of the procedural grounds of appeal raised by the Appellants are expressly or impliedly allowed by the *HRM Charter.* In particular, HRM refers to the Board's consistent application of the principles set out by the Nova Scotia Court of Appeal in *Municipal Board Halifax v Maskine,* 1992 CanLII 2469 (NSCA), and its findings that the Board's statutory authority in planning appeals is narrow and does not extend to considering whether a decision under appeal was procedurally flawed or otherwise unlawful. HRM also indicates there are no policy expectations set out in the *HRM Charter* or the applicable municipal planning strategy, the Regional Centre Plan (MPS), to establish a particular public engagement process or procedural requirements for municipal planning decisions that the CAO should have implemented.

[16] HRM also argues that the Board's remedial power to reverse the CAO's decision is strictly limited to the grounds of appeal allowed in the *HRM Charter*. That is, the Board's role in appeals under s. 257A, applying the same approach as for other types

of planning appeals articulated in s. 265, is to apply the test set out in the section empowering the original decision-maker to decide the planning application. Using that approach means that the Board can only reverse the CAO's decision based on its review of whether the CAO's decision modifies or discharges a private covenant insofar as it is more restrictive than the current zoning for the property with respect to height or density.

[17] The Appellants argue that the grounds of appeal under s. 257A should not be interpreted so narrowly, referring to a line of Board decisions coming out of Kings County, where the Board outlined that the Board must assess whether Council's decision "reasonably carried out the intent of the municipal planning strategy." Where a municipal planning strategy includes procedural requirements for planning decisions, the Board may have cause to consider evidence and make findings on related procedural issues to determine if that process carried out the intent of the relevant policies.

3.1.2 Grounds of Appeal under s 257A of the HRM Charter

[18] The Board reviewed the new provisions of the *HRM Charter* and considered the applicable statutory interpretation principles. The Board concluded 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 an appeal on the same basis. A full analysis of this issue is set out in *Ghosn*. After considering the parties' arguments and circumstances in this case, the Board finds no distinction that permits a different conclusion on the allowable grounds of appeal. Therefore, the Board repeats that analysis and reasoning

from *Ghosn* and applies it in this case. For those reasons, the Board finds that the text, context and purpose of the legislative scheme governing this appeal demonstrates that the Board's appellate jurisdiction is narrow. The Board follows *Hazelview* and the cases cited therein, finding 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."

[19] In this case, as in G*hosn*, the proper questions for the Board include whether the private covenant governing 5914 Chain Rock Drive is more restrictive than the applicable land use bylaw regarding height or density, and whether and to what extent, the changes made by the CAO to that covenant relate to height or density.

3.1.3 Board's Jurisdiction to Consider Procedural Grounds of Appeal

[20] The Board has considered the scope of its appellate jurisdiction in respect of municipal planning and development matters many times. Unlike a court, the Board has no inherent jurisdiction. As discussed earlier, as an adjudicative tribunal, the Board can only exercise the authority and consider the matters that have been delegated to it by statute, either explicitly or as required 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 that, it cannot overturn a decision even where the legality of the decision may be in doubt for other reasons that a court could consider.

[21] As noted by HRM, dating back to 1992, the Board has repeatedly held that it lacks jurisdiction to hear procedural complaints in planning appeals. In *Maskine*, the Court of Appeal indicated that an examination of the procedures followed by Council in

reaching its decision was “not relevant” to the issue before the Municipal Board, the predecessor to the Nova Scotia Utility and Review Board (NSUARB) and the Board. Since that decision, the NSUARB and the Board have consistently held that the legislation only allows them to consider the outcome of a decision and not the decision-making process. Typically, this question has arisen when the appellants raise questions about procedural fairness.

[22] In *Maskine*, the Court of Appeal overturned a Municipal Board decision that overturned a municipal council’s decision refusing to approve a development agreement. The Court of Appeal stated:

> The appellant contends that the only question to be answered by the Municipal Board where an appeal is taken pursuant to s. 79, of the *Planning Act* is whether "the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy". The Council in this case refused to enter into the agreement. A public hearing held by the Sackville Community Committee advised against the proposal. The matter was reviewed by the Planning Advisory Committee. The Municipal Council held a public hearing and voted against the application. The area and the property were zoned R-1. The application required a rezoning to R-4. On the appeal to the Municipal Board evidence was called, representations were heard and the matter was again reviewed. The Board took the view that the application was consistent with the municipal planning strategy.
>
> > "The Board has to determine whether or not the decision of Council can reasonably be said to be consistent with the intent of the M.P.S.
> >
> > “Without repeating the decisions listed above, the Board finds that the Planner's reasons recommending approval of the proposal fell within the intent of the M.P.S. Council differed from the recommendations without valid planning reasons or for reasons unconnected with planning requirements. Thus, for all the reasons stated above, the Board determines that Council's refusal decision cannot reasonably be said to be consistent with the intent of the M.P.S. (Section 79(4) of the *Planning Act*.)"
>
> While the correct question is posed in that passage with respect a review of the decision shows that the Board did not answer the question. The Board entered into a detailed examination of the procedures followed by the Council in arriving at its decision. Those issues were not relevant to the issue before the Board. Nowhere does the Board make a finding that the decision to reject the application was inconsistent with the intent of the Municipal Planning Strategy. The Board substituted its decision for that of the Council as the member concluded that the proposal was consistent with the Planning Strategy. In reversing the decision of the Council in our view the Board erred in interpreting s. 79 of the *Planning Act*. We think it is appropriate to refer to s. 2 of the *Planning Act* which provides in part as follows:

> "2 The purpose of this Act is to
>
> > (b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character through the adoption of municipal planning strategies, land-use by-laws and subdivision by-laws consistent with the policies and regulations of the Province;
> >
> > (c) establish a consultative process which will ensure the right of the public to have access to information and participate in the formulation of policies, regulations, strategies and by-laws, including the right to be notified and heard before decisions are made under this Act, and
>
> With respect that is the course which the Council followed in this case. The appeal is allowed and the decision and order of the Municipal Board is set aside. There will be no order as to costs. [Emphasis added]
>
> [1992 CanLII 2469, pp. 5-6]

[23] As found earlier in this decision, and in accordance with the Board's findings in *Ghosn*, an appeal from the CAO's decision under s. 257A may be made on limited grounds. 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. As such, the Board's jurisdiction allows it to consider limited grounds of appeal, 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 modifications 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 on the same basis. For these reasons, the Board finds it has no authority to consider the Appellants' ground of appeal based on procedural issues and fairness.

3.1.4 Questions of "Substantive Fairness"

[24] The Appellants also submit that substantive fairness addresses the quality and justifiability of the decision, requiring that decisions reflect a balanced consideration

of relevant interests. They say that procedural errors contributed to substantive unfairness by limiting the Appellants' and other interested parties' ability to participate in the decision-making process. They also submit that the decision did not properly consider the character of their neighbourhood or the purpose of the ER-3 zoning.

[25] The Board's inability to consider procedural issues has already been addressed in this decision.

[26] While articulated differently, the allegations that the character of the neighbourhood and the purpose of the underlying zoning were not considered are variations of the allegations in *Ghosn* and *Kelly* that the CAO's decision did not reasonably carry out the intent of the MPS. As noted in those decisions, 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. For those reasons, the Board finds that the text, context and purpose of the legislative scheme governing this appeal demonstrate that the Board's appellate jurisdiction is narrow. The Board follows *Hazelview Investments Inc. (Re)*, 2025 NSRAB 32 (affirmed in *Halifax (Regional Municipality) v Hazelview Investments Inc.,* 2026 NSCA 27 prior to release of this decision), and the cases cited therein, finding 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.”

[27] In this case, as in *Ghosn*, the proper questions for the Board include whether the private covenant governing 5914 Chain Rock Drive is more restrictive than the LUB regarding height or density, and whether, and to what extent, the changes made by the CAO to allow for the construction of multi-unit dwellings relate to height or density.

[28] The Board finds there is nothing in the words of s. 257A that provides, either expressly or impliedly, that the review in an appeal under that section requires a policy choice or a balancing of policies under the MPS by the CAO, or by the Board on an appeal. The Board finds that the role of the Board in an appeal is to not review the intended effect of the private covenant nor consider the type of development it was meant to prioritize and protect. The analysis must focus on the height and density requirements for the zone under the LUB.

3.1.5 Appellants’ Standing to Raise the Duty to Consult

[29] The second of HRM’s motions addressed its objection that the Appellants lack standing to bring a claim that HRM had a duty to consult with Mi’kmaq peoples before deciding the private covenant application. HRM argues that the Supreme Court of Canada provided a clear statement of law in *Behn v Mouton Contracting Ltd.* 2013 SCC 26, namely, that standing to bring a duty to consult claim is limited to potentially three groups: First Nations communities who hold an Aboriginal or treaty right under s. 35 of the *Constitution Act, 1982*; parties authorized by First Nations communities to bring a duty to consult claim on their behalf; and, potentially, a third category of individual claimants who hold an Aboriginal right with an individual dimension (although this category has yet to be defined in jurisprudence).

[30] The Appellants admit that none of the three categories articulated in *Behn* apply to them collectively or individually. They say they are not members or representatives of a group with a collective claim to a duty of consultation. However, they say that *Behn* should not be interpreted as a closed list of who may initiate a duty to consult claim. Rather, they submit that *Behn* should be limited to its facts because it was based primarily on an abuse of process argument. In *Behn,* the Supreme Court considered whether an individual member of the Fort Nelson First Nation could defend a civil claim by Moulton Contracting, who had been granted a licence to log on land which Mr. Behn and others blockaded in an attempt to prevent access. The Court found, in part, that neither the individual appellants nor any Aboriginal community had attempted to legally challenge the Crown's grant of the logging licences that allowed the activities the *Behn* appellants were protesting. As such, the Court found that it would be an abuse of process for an individual to assert a collective right like the duty of consultation as a defence to a civil tort claim. The Court also offered comments on the duty to consult beyond those strictly necessary to resolve the controversy between the parties, including enumerating the categories for standing discussed earlier. HRM says, therefore, that it should be taken as an authoritative statement on the law of standing to claim a duty to consult.

[31] Of course, there is a recognized constitutional obligation on the Crown to consult with Indigenous Peoples when the Crown contemplates actions that might adversely affect their established or asserted Aboriginal or Treaty rights. These are the inherent collective rights of Indigenous Peoples which are protected under s. 35 of the *Constitution Act, 1982* (*Haida Nation v British Columbia,* 2004 SCC 73). Three conditions

must be met to trigger a duty to consult. First, there must be Crown conduct/action or a Crown decision; second, there must be a known potential or established Aboriginal or Treaty right or claim; and third, there must be a possibility that the Crown conduct or decision may negatively impact the asserted Aboriginal right or claim in question (*Haida Nation; Rio Tinto Alcan v Carrier Sekani Tribal Council,* 2010 SCC 650).

[32] In the Board's view, there is ample authoritative support that both Aboriginal and Treaty rights are collective or communal in nature (see *Haida, supra*). While such rights may be exercised, in some cases, by individual members of the community, the rights remain collective (*R v Powley,* 2023 SCC 43; *Behn*). On the issue of standing of an Aboriginal collective, Justice Lebel states in *Behn* at para 30:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: Beckman at para 35; Woodward at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see e.g. *Komoyue Heritage Society v. British Columbia (Attorney General),* 2006 BCSC 1517 (CanLII), 55 Admin L.R. (4th) 236 [Emphasis added]

[33] The key issue before the Board is whether the Appellants have standing to claim that the CAO had a duty to consult with Mi'kmaq communities, not whether or to what extent such a duty applies to the CAO; the nature of any asserted rights, if any; or what collective may raise the claims. In the Board's view, the Appellants have, by their own admission, failed to prove themselves as an established rights-bearing community, or to be acting in these proceedings in an authorized representative capacity as, or on behalf of, any potential rights holders, either individual or collective.

[34] The Appellants claim that, even without an individual or collective right to claim a duty to be consulted, they are directly impacted by the outcome of the CAO's decision and are therefore entitled to assert a form of "public interest standing" to pursue that ground of appeal. They rely on the test set out by the Supreme Court of Canada in

Canada (Attorney General) v Downtown Eastside Sex Workers United against Violence Society, 2012 SCC 45, which outlines three factors to weigh in deciding whether individuals or groups should be granted public interest standing to bring constitutional challenges to court. First, the case must raise a serious justiciable issue; second, the proponent must have a real stake or a genuine interest in the outcome and be capable of raising the issues; and third, having regard to a number of factors, the process is a reasonable and effective means to bring the issue forward.

[35] The Appellants assert that the question of whether a duty to consult was triggered by the application is a serious issue. They claim the property and surrounding areas may have historic and spiritual importance to Mi'kmaq peoples. The Appellants produced a letter from Richard B. Tilley MSM, CD, who indicates he is a 61-year resident of the neighbourhood. The letter formed part of the appeal record and included the following statement:

> 3. Between 2010 and 2013, I was a member of the Point Pleasant Park Advisory Committee. Although I was most keenly interested in community and military concerns, the Micmac member of our committee regularly reminded us that that the history and future of the park involves three distinct cultural interests: early European, military and Micmac. This fact is clearly stated in the park review report that was written after Hurricane Juan. Moreover, the Micmac representative frequently reminded us that Micmac history involves the length of the park along the Northwest Arm, continues further along the arm and goes inland at least a few hundred yards. He noted that there are Micmac grave sites throughout this area, most of which have not been formally identified for fear of being disturbed. While accepting that the past might not be changed, he made it very clear (on behalf of the Micmac people) that any future changes involving this land should include Micmac consultation. 5914 Chain Rock Drive, located as it is immediately behind a key Micmac landing site (and a Point Pleasant Park beach) must include Micmac consultation. There is no evidence that this has been done.
>
> [Exhibit M-1, p. 18]

[36] The Chain Rock Drive property is part of an area along the Northwest Arm where Mi'kmaq historical use and burial sites were reported to Mr. Tilley by a colleague on the Point Pleasant Park Advisory Committee. Because this information about Mi'kmaq

history and interest was in HRM's possession, the Appellants say HRM had "constructive or actual notice of First Nations Issues," which triggers a procedural requirement "for it to provide notice, consultation and inquiry as to whether or not to approve something that would allow for greater height or density in that particular area and what the impact would be" (Transcript p. 62). The Appellants assert the Board should grant them public interest standing to oppose the decision based on an interest in the CAO's decision-making process and what they say is the harmful impact of that decision on future development of the land. The Appellants claim that they have a genuine stake in the issue, as they are residents directly affected by the modification of the covenant, which alters the density and character of their neighbourhood. Finally, they say that the legislation provides for an appeal to the Board from the CAO's decision, so these proceedings provide a reasonable opportunity to address the claim.

[37] HRM urges the Board, in considering the *Downtown Eastside* factors, to weigh the general interest of the public in scrutinizing the legality of government with "the very real hazard that allowing litigants to litigate issues in which they don't have a direct [interest] could prejudice parties who do have a real interest in that issue." (Transcript, p. 36). HRM also notes that the Board's adjudicative process relies on adversarial parties to raise the issues and present the evidence required to resolve them.

[38] In considering the first factor, the Board accepts that the potential failure of the decision-maker to fulfil a duty to consult with First Nations would be a serious justiciable issue. There is no agreement between the parties that such a duty exists, in the case of the municipality or the CAO in her role as administrative decision-maker;

however, there is little debate that this issue, by itself, would be a serious justiciable matter.

[39] In *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179, reversed for other reasons by 2017 SCC 40, the Federal Court of Appeal allowed the Nammautaq Hunters & Trappers Organization – Clyde River (HTO) to apply for judicial review of a National Energy Board decision to authorize an offshore seismic survey program that had potential impacts on the natural environment and livelihood of the HTO's Inuit membership. The Court found that, because the HTO's members were directly affected by the authorization and the organization had a real stake in the issues, the group met the test for standing to bring the judicial review. Also, based on a review of the common law factors, the Court found that the HTO had a real stake and genuine interest in the potential Aboriginal and Treaty rights issues. Therefore, the application raised serious justiciable issues about the reasonableness of the decision and whether the Crown's obligation to consult was met. Finally, the Court found that a judicial review by that group was a real and effective way to bring those issues before the Court. The HTO was also granted public interest standing to assert claims about Aboriginal or Treaty rights.

[40] The Board agrees with the Appellants' point that they have a "genuine interest in what happens with a development of the land and to the density and character of the community." The Appellants have a genuine stake in the ultimate outcome of this appeal, as well as in their own opportunity to participate in the process by which the initial decision was made. The Appellants are interested, as private property owners, in changes to the expected development patterns in their neighbourhood.

[41] Despite this, the Board finds that the Appellants do not have the same genuine interest in whether, and to what extent, the CAO has a duty to consult. The Appellants did not demonstrate any history, involvement, special knowledge or interest with respect to protection or litigation of s. 35 rights. The Appellants did not engage with First Nations communities or seek a mandate to raise, in a Board hearing, the issue of a municipality's duty to consult on a planning decision. While the Appellants' concerns appear sincere, their interest in that aspect of the process would be akin to the general societal concern that Aboriginal and Treaty rights must be respected and preserved under the *Constitution,* and in the spirit of truth and reconciliation.

[42] The Supreme Court of Canada has expressed that the potential problem with allowing people with such general interests (somewhat pejoratively referred to in older cases as "busybodies") to litigate an issue that does not directly impact them is not only about scarce judicial resources, but the potential to affect the interests of those with a direct and personal claim. As articulated by Justice Cromwell in *Downtown Eastside*:

> [27] The concern about screening "mere busybodies" relates not only to the issue of a multiplicity of actions, but, in addition, to the consideration that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other challenges by partes with "specific and factually established complaints."
>
> [*Downtown Eastside*, para. 27]

[43] The last factor the Board must consider is whether the Appellants' ground of appeal is "a reasonable and effective means to bring the challenge to court" (*Downtown Eastside,* para. 44). In this case, the challenge alleges a failure of the CAO to follow a reasonable process, including failing to consult and notify First Nations. For reasons articulated earlier, the Board is not an appropriate venue to challenge the CAO's decision

on procedural grounds (or as discussed by the Board in its concurrent decision in *Ghosn*, to challenge the legality or unconstitutionality in the context of arguments advanced under s. 7 of the *Canadian Charter*). The Board has no cause to infer that Mi'kmaq communities could not have challenged the decision-making process in this case by way of a judicial review.

[44] At the outset of its motion, HRM indicated that it was arguing only that the Appellants did not have standing to raise the duty to consult as a ground of appeal. It did not take a position on whether the Board would have jurisdiction, within the context of a planning appeal, to reverse a decision based on a finding that there was a duty to consult that was not met in a particular case. In other words, HRM did not take any position on whether the usual limits on the Board's jurisdiction to address procedural issues would apply to grounds of appeal based on the duty to consult. Although the Board asked some contextual questions on this topic during the hearing, in the absence of two parties with standing to draw out all the arguments, the Board declines to make any findings on that question.

[45] In weighing all the factors, the Board finds that the Appellants have no standing to appeal the CAO's decision on grounds that she failed to uphold a duty of consultation with Mi'kmaq communities that may have an interest in the area around the Inglewood B Subdivision. That ground of appeal is dismissed.

3.2 Appellants' Motion for Additional Disclosure

[46] The Appellants take issue with the appeal record filed by HRM. They say it is incomplete. They filed a motion seeking an order that HRM produce the following:

1. All correspondence between HRM staff and members of the public, including Indigenous residents, concerning the application;

2. All correspondence between HRM staff and between staff and the CAO concerning the application;

3. All internal memoranda, reports, submissions and briefing notes concerning the use of s. 257A, whether specific to this file or informing staff and CAO understanding of those powers;

4. All established standards, guidelines or internal directives governing the exercise of s. 257A authority;

5. All documents evidencing HRM's investigative steps concerning matters germane to the discharge of restrictive covenants, including public safety, environmental impact, notice/public participation, and consultation with potentially affected grounds;

6. A privilege log for documents withheld on the grounds of privilege, identifying for each document the date, authority, recipients, subject matter, and the specific privilege invoked; and

7. An affidavit describing the methodology of the search conducted for documents (custodians consulted, repositories searched, date range used, and categories excluded).

[47] HRM says that it filed a complete record. It also voluntarily provided the Appellants with the documents requested under 1, 2 and 3 (specific to this appeal only) above, on the condition that doing so does not constitute an admission that the record is incomplete or that the documents are relevant. These additional documents were later filed with the Board as Exhibit M-6 (270 pages of emails and other correspondence) and Exhibit M-7 (4 pages of emails).

[48] HRM refuses further disclosure on the basis that the appeal record is, and always has been, complete, and that further disclosure would be inconsistent with the Board's jurisdiction on this appeal, the Board's *Municipal Government Act Rules*, NS Reg 114/2017 (*MGA Rules*) and the expedited timelines associated with planning appeals under the *HRM Charter*.

[49] The Appellants take the position that HRM is required to provide all of the additional documents requested in order to meet its disclosure obligations; that they will be prejudiced without these documents because they will not be able to prove their grounds of appeal, which relate to alleged procedural and duty to consult failures; that the Board has the authority to order additional disclosure; and that allowing an incomplete record will undermine public confidence in the appeal process.

[50] Following the hearing of the disclosure motion, the Appellants provided the Board with a map showing the location of an alleged Mi'kmaq historical site close to the subject property and sought leave to file additional materials, including documents pertaining to procedures used by HRM for applications to modify or discharge covenants, and a 74-page document addressing the Chain Battery area, where the subject property is located. The Appellants say that all of these documents are relevant in determining the disclosure motion.

[51] The Board has reviewed and considered all the documents provided by the parties.

[52] As noted earlier in this decision, ss. 264 to 269 of the *HRM Charter* apply, with necessary changes, to this appeal. Section 266(1) requires HRM to file an appeal record:

> **266 (1)** The Municipality shall file a complete appeal record with the Board, and any other person as the Board may require, within fourteen business days of the Municipality being notified by the Board of the appeal.

[53] Section 26(2) of the *MGA Rules* sets out what must be included in an appeal record:

> **26 (2)** An Appeal Record shall consist of the following:
>
> (a) a table of contents;
>
> (b) the application;

> (c) the decision under appeal;
>
> (d) a copy of the advertisements for any public hearing held relating to the subject of the appeal;
>
> (e) a copy of the minutes of any public hearing respecting the subject of the appeal;
>
> (f) a copy of the minutes of any council meeting at which the subject of the appeal was discussed;
>
> (g) a copy of any report, letter, submission, recommendation or other matter respecting the subject of the appeal which was submitted to or was considered by council or the Development Officer, excluding any legal opinion prepared for the municipality for which privilege is claimed; and
>
> (h) a copy of the publication of the notice of the decision; or a copy of the written notice which was sent to the applicant.

[54] Sections 13(1)(f) and (i) of the *MGA Rules* give the Board the authority to consider a request for disclosure and direct disclosure where necessary:

> **13** **(1)** In any appeal or application, the Board may, on its own initiative or at the request of any party, hold a preliminary hearing to deal with any matter that may aid in the disposition of the hearing, including to
>
> …
>
> (f) consider a request for access to information in the custody or control of any party;
>
> …
>
> (i) make any directions for the pre-filing of witness lists or expert witness statements and reports (except as otherwise provided for in these rules), or direct further disclosure where necessary; and
>
> …

[55] Also, s. 27 of the *Energy and Regulatory Boards Act*, SNS 2024, c 2, Schedule A, allows the Board to receive any document into evidence that may assist in dealing with a matter.

3.2.1 Findings

[56] Section 26(2)(g) of the *MGA Rules* requires the appeal record to include, “a copy of any report, letter, submission, recommendation or other matter respecting the

subject of the appeal which was submitted to or was considered by council or the Development Officer, excluding any legal opinion prepared for the municipality for which privilege is claimed." The Appellants say this requires the record to include all of the additional disclosure requested in their motion. The Board disagrees. In the Board's view, s. 26(2)(g) must be interpreted considering ss. 265 and 257A of the *HRM Charter* and requires that the appeal record include the materials that were submitted to or considered by the decision-maker whose decision is under appeal. This is apparent from a plain reading of those provisions. For example, on an appeal from a decision of council to approve a development agreement under s. 265(1)(b), the record must include the materials submitted to or considered by council. In an appeal of a development officer's decision to refuse a development permit under s. 265(2), the record must include the materials submitted to or considered by the development officer. In the context of this appeal, the Board finds that for purposes of s. 26(2)(g) of the *MGA Rules*, the record must include the materials submitted to or considered by the CAO. It does not mean any document submitted to or in the possession of HRM. This interpretation does not mean that other, relevant disclosure is prohibited, only that it would not normally occur through the appeal record, as discussed below.

[57] Section 13(1)(f) of the *MGA Rules* and s. 27 of the *Energy and Regulatory Boards Act* give the Board the authority to require additional disclosure, beyond the record, in appropriate circumstances. For example, if the disclosure is relevant or would assist the Board in determining a matter.

[58] In *Robbins (Re)*, 2009 NSUARB 11, council approved a development agreement, and the appellant requested additional disclosure in order to challenge the

public engagement process followed by council in making its decision. The Board found that the documents requested were not relevant because the Board did not have the jurisdiction to consider an appeal based on procedural issues:

> [25] … the Board lacks authority under the *Act* or its predecessor legislation, the *Planning Act,* to reverse a decision by a municipal council on the ground that the council in some way misconducted itself; for example, with respect to an allegation of procedural fairness or natural justice or as the Appellants assert in this matter, that the public participation process was seriously flawed and that relevant information was not properly considered. …
>
> …
>
> [28] Consequently, the current state of the law in Nova Scotia is that the Board does not have the jurisdiction to decide any procedural issues leading to Council's decision. If there are procedural difficulties with proceedings adopted by council in reaching its decision, there may be another legal remedy a party may pursue by way of judicial review in a court of competent jurisdiction.
>
> [*Robbins (Re)*, 2009 NSUARB 11, at paras. 25 and 28]

[59] The Board has reviewed the appeal record and finds that it meets the requirements of s. 26(2) of the *MGA Rules* in the context of this appeal. In particular, the materials provided to or considered by the CAO in making this decision, as required by s. 26(2)(g), appear to have been produced.

[60] The Board declines to order the additional disclosure the Appellants are seeking because it is not relevant. Their request for additional disclosure is rooted in seeking documents that they believe will be useful in proving their grounds of appeal, which are based on alleged procedural and duty to consult failures, and which are outside of the Board's jurisdiction to address. The motion for additional disclosure is dismissed.

4.0 CONCLUSION

[61] The grounds of appeal relied upon by the Appellants in this proceeding allege that the CAO's decision should be quashed because it was procedurally and substantively unfair and the CAO failed to comply with duty to consult obligations.

[62] The Court of Appeal has repeatedly noted that 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 the limited jurisdiction expressly, or by necessary implication, prescribed to the Board in the legislation. Consistent with this, appeals to the Board are also intended to be expeditiously conducted in keeping with the limited timelines set out in s. 266 of the *HRM Charter*. This timeline explicitly applies to appeals under s. 257A.

[63] In this case, as in *Ghosn*, within its limited jurisdiction the proper questions for the Board include whether the private covenant governing 5914 Chain Rock Drive is more restrictive than the LUB regarding height or density, and whether, and to what extent, the changes made by the CAO to allow for the construction of multi-unit dwellings relate to height or density. The Appellants did not raise these grounds of appeal.

[64] The Board finds that the Appellants, neither individually nor collectively, have standing in their personal capacity to advance arguments on whether the CAO had a duty to consult. The Appellants conceded that they are not Indigenous or representing an Indigenous person, community or collective. On the question of whether the Appellants may establish public interest standing to advance arguments on this issue, the Board finds that balancing the *Downtown Eastside* factors weighs decidedly against allowing the Appellants' standing to raise grounds of appeal related to consultation with Indigenous Peoples as well as arguments on the Board's jurisdiction to consider them. Therefore, the Board strikes grounds of appeal related to the duty to consult, and without making any

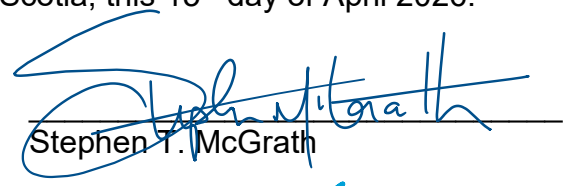
decision on whether it has jurisdiction to consider such grounds if brought by someone who has standing.

[65] The enumerated grounds in the Notices of Appeal are struck because the Board finds it does not have jurisdiction to hear them. The appeal is dismissed in its entirety. The Appellants' motion for additional disclosure is dismissed.

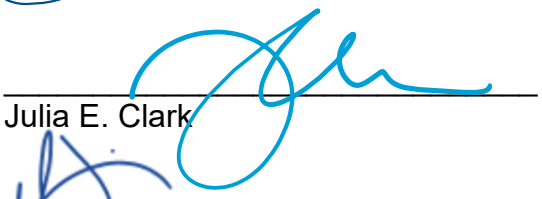
[66] The issue before the Board on these motions is its jurisdiction to consider the grounds of appeal that have been raised by the Appellants. The Board's lack of jurisdiction to hear the grounds set out in the Notices of Appeal does not mean that the Appellants are necessarily without recourse. That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

[67] 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