

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **RESIDENTS OF PHASE III MONTAGUE ESTATES** from a decision of the Chief Administrative Officer for the Halifax Regional Municipality to approve the discharge of three clauses (#1, 2 and 16) of the restrictive covenants registered to 43 Braeloch Court, Lake Loon (PID 40548752)

BEFORE: Julia E. Clark, LL.B., Vice Chair

APPELLANTS: **ARCHIE HATTIE**
TIM FRANKTON
Richard Bureau, Counsel

APPLICANTS: **JENNIFER MORRISON**
JANS ELLSFEN

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

HEARING DATE: May 7, 2026

FINAL SUBMISSIONS: July 31, 2026

DECISION DATE: **September 28, 2026**

DECISION: **The appeal is dismissed.**

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1.0 INTRODUCTION

[1] Archie Hattie and Tim Frankton (Appellants), who are property owners in the Montague Estates Subdivision in Lake Loon, Halifax Regional Municipality (HRM), appealed a decision of the Acting Chief Administrative Officer (CAO) of HRM to modify private covenants affecting a property located at 43 Braeloch Court, Lake Loon, HRM (PID 40548752). This is a preliminary decision by the Nova Scotia Regulatory and Appeals Board on a motion by HRM asking that the appeal be dismissed on the basis that the Appellants' Notice of Appeal raised no issues within the Board's jurisdiction to decide.

[2] The CAO's decision modifies clauses in the private covenants to permit a backyard suite, in addition to a single-family dwelling, to be constructed on the property as purportedly allowed under the applicable R-1 zone of the Cole Harbour/Westphal Land Use By-law (LUB). The Applicants, Jennifer Morrison and Jans Ellsfen, requested the changes to the covenants in order to construct a backyard suite for an aging parent to live on their property.

[3] The Appellants asked the Board to reverse the CAO's decision on the grounds that the CAO should have considered the intent of the private covenants or the potential impacts of their removal for neighbouring property owners or road safety in the neighbourhood. They argued that the covenants already included a democratic mechanism to allow changes.

[4] Following its reasoning in an earlier trio of cases (*Ghosn, et al. (Re)*, 2026 NSRAB 55 (*Ghosn*); *Matheson, et al. and MacDonald (Re)*, 2026 NSRAB 54 (*Matheson*) and *Kelly (Re)*, 2026 NSUARB 56 (*Kelly*)), addressing the Board's authority in an appeal under s. 257A of the *Halifax Regional Municipality Charter*, SNS 2008, c 39 (*HRM*

Charter), the Board finds it has no jurisdiction to consider the grounds set out in the Appellants' Notice of Appeal. As past Board decisions have often stated, the Board is not a court and does not have the same jurisdiction as a court. The Board only has the jurisdiction given to it by statute. It does not have the statutory mandate to consider the impacts of changes to these private covenants on the subscribing parties or their property rights.

[5] Because the Appellants did not seek to amend their Notice of Appeal, there are no remaining contested issues for the Board to address in its appellate role. Therefore, the Board dismisses the appeal.

2.0 PROCESS AND BACKGROUND

[6] In 2023, amendments to the *HRM Charter* added a new provision, s. 257A, authorizing 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 made by the CAO under that authority can be appealed to the Board.

[7] In 2025, the Applicants applied for a modification of portions of the suite of private covenants attached to their property at 43 Braeloch Court, which is part of the Montague Estates subdivision in HRM. As they describe it, the proposed backyard suite "is intended to allow for appropriate family support, proximity, dignity and aging in place."

[8] On March 6, 2026, the CAO approved the Applicants' request to discharge three restrictive covenants contained in "Schedule B – Lake Loon Developments Limited Restrictive Covenants." Specifically, the decision approved the removal of three clauses identified by the Applicants that restrict accessory buildings, i.e., Clauses 1, 2 and 16:

1. The lands shall not be used for any use other than private residential purposes only and no buildings shall be erected on the said lands other than a detached private dwelling house to and for the use of a single family with or without an appropriate garage or carport.

2. No dwelling house shall be erected or stand upon the said lands or any part thereof which shall have a ground floor area of less than:

(i) 1,200 square feet in the case of a dwelling of less than two stories;

(ii) 1,000 square feet in the case of a dwelling of two stories or more provided that the total habitable floor area of any such dwelling shall not be less than 2,000 square feet.

...

16. No trailers or mobile homes, either with or without wheels attached, shall be placed or permitted to remain on the said lands.

[Exhibit M-3, pp. 11 & 13]

[9] The Appellants filed their Notice of Appeal on March 16, 2026. They asked the Board to reverse the CAO's decision based on three grounds, including that removing the covenants and allowing backyard suites in the area will have a "detrimental effect on existing residents that live [in the neighbourhood] thinking it was a single home development", that "there is already an existing democratic mechanism within the covenants to make changes ... if desired", and that increasing units in the area would exceed the maximum limit set by HRM policy for safe entrance/exit.

[10] Upon the Appellants' request, and with HRM's consent, the Board adjourned its consideration of any scheduling or preliminary jurisdictional issues in this case until the release of its decisions in *Ghosn*, *Matheson* and *Kelly*. Throughout this process the Applicants underscored the importance of getting a prompt resolution on this matter. The Board decided that for consistency and efficiency of the process, an adjournment was warranted. These cases all involved preliminary decisions addressing the Board's jurisdiction and the proper test to be applied in appeals under s. 257A of the *HRM Charter*.

[11] Section 257A(1) permits 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.” Section 257(3) establishes a statutory right of appeal to the Board from a decision of the CAO under s. 257A(1), and s. 257(4) sets out that ss. 264 to 269 of the *HRM Charter* apply, with necessary changes, to an appeal under s. 257A.

[12] The Board decided in *Ghosn, Matheson and Kelly* that it has limited jurisdiction to hear appeals from decisions made under s. 257A of the *HRM Charter*. The grounds of appeal that can be made to the Board in an appeal under s. 257A include grounds related to whether the private covenants are more restrictive than the current zoning for the land for height or density; and whether, and the extent to which, the changes made by the CAO relate to or affect height or density.

[13] On May 19, 2026, HRM brought its motion to dismiss this matter based on the argument that, following the Board’s reasoning in the earlier cases, the Appellants’ Notice of Appeal does not raise any allowable grounds of appeal within the scope of the Board’s jurisdiction and should be dismissed in its entirety. The Applicants support HRM’s motion. The Appellants object, submitting that the Board’s jurisdiction should not be interpreted narrowly. They argue that the issues raised by HRM should be considered after a full hearing on both the preliminary issues and the merits of the appeal or at least delayed until the issue of the Appellants’ participation in a separate judicial review proceeding, currently before the Nova Scotia Supreme Court, has been determined. These arguments are addressed in the Board’s analysis later in this decision.

3.0 ISSUES

[14] The issues in this preliminary matter are:

- a. Does the Board have jurisdiction to consider the grounds of appeal?
- b. Is a decision on the motion to dismiss the appeal premature?

4.0 ANALYSIS AND FINDINGS

4.1 Does the Board have jurisdiction to consider the grounds of appeal?

4.1.1 Submissions of the Parties

[15] HRM moved to dismiss the appeal at this preliminary stage, arguing that the CAO acted within the authority granted under s. 257A of the *HRM Charter* and that the Notice of Appeal raises no issues within the Board's limited jurisdiction, as articulated in the Board's recent decisions. The Applicants submit that the findings in *Kelly*, with the concurrent decisions in *Ghosn* and *Matheson*, are directly applicable to this case and support dismissal on a preliminary basis.

[16] HRM's principal argument on the motion to dismiss for want of jurisdiction is that the Board's powers in an appeal of a decision made under s. 257A(1) are limited to those expressly conferred by statute or that exist by necessary implication, and that none of the grounds of appeal raised by the Appellants are expressly or impliedly allowed by the *HRM Charter*.

[17] The Appellants suggest that HRM relies on an overly narrow interpretation of the Board's previous decisions and argue that the grounds of appeal must be read in light of the potential consequences of a discharge of the private covenants in this particular case. The Appellants note that the grounds of appeal do not ask the Board to consider the intent of the applicable municipal planning strategy and do not address

grievances about the procedures relied on by the CAO in its decision or the fairness of the consultations or other procedural arguments. They say this differs from the common themes across the appeals in *Ghosn*, *Kelly* and *Matheson*.

4.1.2 Board's Findings

[18] In this case, the Board finds no cause to deviate from its previous findings and its interpretation of s. 257A and the narrow scope of its appellate authority under s. 257A(3). In particular, s. 257A appeals 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. As fully articulated in *Ghosn*, the Board's role in appeals under s. 257A, applying the same approach as for other types of planning appeals articulated in s. 265 "with necessary changes," is to apply the test set out in the section empowering the original decision-maker to decide the planning application. Using that approach, the Board can only reverse the CAO's s. 257A(1) decision and allow the appeal under s. 257A(3) based on 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."

[19] The Appellants argue that the circumstances of their case are materially different from the Board's prior decisions. They say their grounds of appeal are concerned with the specific consequences of approving these changes in a location where safety, access, and the intensity of use are directly implicated. However, the Board agrees with HRM that any consideration of the consequences of a decision is not part of the test that the CAO (or the Board) must apply. The Board addressed this issue in *Kelly*, where the appellants had argued that the area lacked access to services, and the change did not

address “the unique nature and character of the area, nor concerns about local water resources and affordable housing.” In *Kelly*, at para. 24, the Board referred to the analysis in *Ghosn* on the scope of its appellate authority and found:

[24] ... 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 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 on March 26, 2026, prior to this decision’s release), 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.”

[*Kelly (Re)*, 2026 NSUARB 56]

[20] The Board’s authority comes from the *HRM Charter*. Questions about the intent of the private covenants and the impact of their removal on safety, access, and the intensity of use, are not factors that the Board can read into its scope of review of the CAO’s decision. Therefore, the Board does not consider them part of the allowable grounds of appeal.

[21] None of the grounds of appeal address the outcome of the removal of the private covenants as related to the current zoning for the property for height or density, or whether the changes relate to height or density, and to what extent. The Appellants’ first and third grounds of appeal, i.e., “Removing the covenant will have a detrimental effect on existing residents that live here thinking it was a single detached home development,” and the “entrance safety [is] now at maximum limits”, imply that residents may be affected based on their expectations for the built form and density of the Montague Estates subdivision under the covenants. However, they do not allege that the decision to remove the covenants resulted in allowances for height or density unrelated to the current zoning requirements applicable to the area, for example.

[22] The Appellants' submissions attempted to distinguish their grounds of appeal by indicating that they did not make a "free-standing procedural challenge", which the Nova Scotia Court of Appeal has found to be outside the scope of the Board's intended authority under the planning sections of the *HRM Charter* and the *Municipal Government Act*, SNS 1998, c 18. However, the Appellants' second ground of appeal refers to an "already existing democratic mechanism within the covenants to make changes to [them] if desired." Though this ground of appeal was not elaborated upon directly by the Appellants, it suggests to the Board an allegation of unfairness or an unlawful decision of the CAO in relation to the existing covenants. At the very least, this alleged ground may suggest that a procedural issue is involved because the Applicants had an alternative route to address their matter.

[23] To the extent this ground may seek to address procedural issues or questions about the fairness or legality of the decision, the Board applies the principles set out by the Nova Scotia Court of Appeal in *Municipal Board Halifax (County) v Maskine*, 1992 CanLII 2469 (NSCA), and elaborated on in *Kelly*. The Court found 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. Those principles apply to this case, as well. The Board's remedial power to reverse the CAO's decision is limited to the grounds of appeal allowed in the *HRM Charter*. The Appellants stated grounds of appeal raise a question about which mechanism, statutory or contractual, should have been relied on to amend the covenants. This question cannot be fairly or contextually tied to the statutory issue before the Board under s. 257A.

4.2 Timing of the Board's Decision on the Motion to Dismiss

[24] The Appellants argue that deciding the outcome of the motion to dismiss for want of jurisdiction at this stage is premature. Their submissions say that there is no value to engaging in the grounds issue prior to hearing the entire case.

[25] In addition to this appeal, the Appellants have sought to intervene in a pending request for judicial review of the decision of the CAO regarding private covenants on a property on Chain Rock Drive in Halifax, which was the subject of the Board's decision in *Matheson*. The *Matheson* appellants are seeking judicial review of the CAO's initial decision in that matter, but not the Board's decision to dismiss their appeal. The Appellants maintain "that the Board should not dispose of this appeal in a manner that forecloses the opportunity to consider the practical or legal consequences of the decision under appeal before the Supreme Court's pending directions hearing in *Matheson* ... If the appeal is dismissed before the Court addresses [the Appellants'] intervenor-status and stay request, the landowner may act quickly to proceed with installation of a prefabricated mini-home, creating concrete prejudice that could be difficult or impossible to unwind later."

[26] The Board has already concluded that it will decide HRM's motion to dismiss at this stage. The Board has the ability to control its own process. The process for determining HRM's motion to dismiss, which was filed on April 21, 2026, was addressed at a preliminary hearing by teleconference on May 7, 2026. At that time, with the agreement of the parties then in attendance, the Board directed that arguments on the motion would be addressed by written submissions and all further filing and hearing dates would be stayed pending the Board's decision on the motion. On May 25, 2026, the Appellants informed the Board of their decision to engage legal counsel, and with the

consent of the parties, were granted an extension of time to file their response to the motion.

[27] The Appellants, through their new counsel, brought a motion to hold the Board's preliminary decision on HRM's motion to dismiss, and any further actions on the appeal, in abeyance until the proceeding for judicial review of the CAO's decision in the *Matheson* matter concluded. The Board denied that motion for the reasons outlined in its decision letter dated July 10, 2026, and provided a revised timeline to complete final written submissions on HRM's motion.

[28] The planning provisions in the *HRM Charter* set short timelines for a hearing on the merits of a planning appeal. In this case, for reasons of procedural efficiency, avoiding duplication of efforts and procedural fairness, the preliminary phase of the process has exceeded those timelines. However, the Board cannot continue to a hearing on the merits where it has no jurisdiction to decide the matter. The Board has the authority to interpret the statute to determine the scope of its jurisdiction, and, in this case, does not require additional evidence or direction from other ongoing legal processes to do so.

5.0 CONCLUSION

[29] The Notice of Appeal does not include any grounds of appeal within the Board's jurisdiction to decide.

[30] The appeal is dismissed.

[31] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 28th day of September 2026.



Julia E. Clark