DECISION **2016 NSUARB 110**
M07253

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF an Appeal by **JOHN AND ESTHER GHOSN** to the decision of a Development Officer which refused to issue a Development Permit to install an in-ground swimming pool at 6980 Armview Avenue, Halifax

BEFORE:	Wayne D. Cochrane, Q.C.
APPLICANTS:	**JOHN and ESTHER GHOSN** Richard W. Norman, LL.B. Colin Gale, LL.B.
RESPONDENT:	**HALIFAX REGIONAL MUNICIPALITY** E. Roxanne MacLaurin, LL.B. Shawnee Gregory, LL.B.
HEARING DATE:	March 10, 2016
DECISION DATE:	**June 27, 2016**
DECISION:	**Appeal dismissed.**

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1.0 INTRODUCTION

[1] Halifax's Northwest Arm is a long, narrow saltwater inlet running off Halifax Harbour. It presently is, and has been for well over a century, lined with houses which have the dual benefit of being on the Atlantic Ocean while at the same time being within about a mile of the City's downtown core.

[2] The owners of a house on the Northwest Arm want to build a pool. HRM says it would be too close to the Arm; the owners say it would not.

[3] It is undisputed that a pool cannot be constructed closer than 30 feet from the shoreline. HRM says, under its planning rules, the applicable shoreline is that which existed in 2007. The Appellants say that the applicable shoreline is the new one created by them when, after buying the property in 2013, they infilled a portion of the Arm with rock fill.

2.0 ISSUE

[4] There is only one issue in this proceeding:

> **Does the refusal by the Development Officer to issue a development permit for the swimming pool conflict, or fail to comply, with the provisions of the Land-Use By-Law?**
>
> For reasons explained below, the Board finds that the answer to this question is "no," meaning that the appeal is dismissed.

3.0 WITNESSES CALLED BY VARIOUS PARTIES

3.1 Witnesses called by the Appellants, John and Esther Ghosn

[5] The Appellants called no witnesses.

3.2 Witnesses called for Respondent, Halifax Regional Municipality

3.2.1 Luc H.J. Ouellet, MCIP, LPP

[6] Mr. Ouellet is a senior planner with Planning Services for HRM. He has worked as a planner for the last 15 years, in New Brunswick and with HRM. Among other things, Mr. Ouellet is the Past Registrar for the Licensed Professional Planners Association.

[7] The Board found him to be qualified to give evidence as an expert in land use planning, capable of giving expert opinion evidence on land use planning matters, including the interpretation and application of the Halifax Peninsula Land Use By-law, the Municipal Planning Strategy for Halifax, the Halifax Regional Municipal Planning Strategy and Halifax Regional Municipality By-Laws and the extent to which the Development Officer's decision of December 10, 2015, was compliant with the provisions of the Land Use By-Law.

[8] Mr. Ouellet wrote a report entitled "Summary of Evidence of Luc H.J. Ouellet, February 18, 2016," which was filed in evidence in this proceeding.

3.2.2 Sean Audas, Development Officer

[9] Mr. Audas is a development officer who has worked for HRM for more than 20 years.

[10] The Board found him qualified as an expert in land use planning, capable of giving expert opinion evidence on land use planning matters, including the interpretation and application of the Halifax Peninsula Land-Use By-Law and Halifax Regional Municipality By-Law S-700 Respecting Swimming Pools and the extent to which the

Development Officer's decision of December 10, 2015, was compliant with the provisions of the Land Use By-Law.

[11] Mr. Audas wrote a report entitled "Development Permit Review Summary," dated February 18, 2016, which was filed in evidence in this proceeding.

3.3 Significant Issues Dealt with in Preliminary Hearings

[12] Various matters were dealt with at various preliminary hearings which occurred prior to the hearing on the merits in this proceeding. The Board considers two of these preliminary hearings to be of enough significance to be noted in this Decision.

4.0 Preliminary Hearing No. 1

[13] The first was a preliminary to deal with an Application by Counsel for the Appellants to exclude any expert, or opinion, evidence from Mr. Audas and Mr. Ouellet (both members of HRM's planning staff). The grounds for this Application included relevancy and bias.

[14] After reviewing the written submissions of Counsel, and hearing their oral arguments, the Board made two principal decisions, for which it gave reasons orally.

[15] First, the Board decided to allow Mr. Audas and Mr. Ouellet to testify at the hearing on the merits as expert witnesses, within the scope of the qualification statements filed for them.

[16] The Board's reasons for allowing Mr. Audas and Mr. Ouellet to testify as experts were given at length orally, and will not be repeated here. However, the Board does note that, in deciding to admit their evidence, the Board stated it was relying on decisions of the Supreme Court of Canada and Court of Appeal, and that it would rely on

the direction given by these two Courts in making any decisions as to the weight to be given to their oral or written evidence.

[17] Second, it ordered that parts of Mr. Ouellet's report be struck. For greater certainty, the Board said it would not receive evidence from Mr. Ouellet respecting his experiences, or recollections, of the circumstances leading to the adoption in 2007 of MPS and LUB amendments respecting the Northwest Arm.

4.1.1 Preliminary Hearing No. 2

[18] This preliminary hearing, which occurred the day before the hearing on the merits, was requested by Counsel for the Appellants to deal with a matter which the Board will term as the scope of the appeal.

[19] As the Board has already noted, this appeal had arisen from HRM's rejection of the Ghosns' Application for a building permit. That Application included reference to both a swimming pool and a pool house.

[20] The Board inferred from the submissions before it that it had become apparent to the Appellants that Counsel for HRM intended at the hearing on the merits to rely, in part, on the presence of the pool house in the permit application. After Counsel for the Appellants and Counsel for the HRM had conferred, however, both counsel also informed the Board that they were willing for the hearing on the merits to proceed as if the application had been for a pool only, and had not included the pool house. They asked that the Board permit the hearing to proceed on that basis, and, in the judgment of the Board, tacitly (if not expressly) agreed that the Board would still be properly seised of the appeal.

[21] Having considered the submissions of counsel, the Board assented to their request, and directed that the appeal on the merits proceed on that basis.

5.0 FACTS

[22] The Board notes that the following paragraphs refer to a "sewer line." This is consistent with the notations appearing on – for example – a variety of documents filed with the Board. For example, a plan prepared by Rhonda Strickland, of Rhonda Strickland Design, for 698 Armview Avenue, refers to a "City of Halifax sewer easement" which is 30 feet wide. The "Agreed Statement of Facts" prepared by opposing Counsel refers to it as a "Halifax Water easement," with no indication as to whether the easement is for a water line, or for sewer. It is a matter of no consequence to the outcome of this appeal whether the easement is for a sewer or water line. Given the preponderance of references in the documentary evidence filed with the Board to it being a sewer line, however, the Board has referred to it as such.

[23] In 1917, a sewer line was laid through lots adjoining the Northwest Arm. The line is a short distance back from the Arm, and parallel to it, and construction on the easement is, for most purposes, forbidden. Over the century since, its location has presented challenges for those wishing to develop residential properties on shorefront land.

[24] The sewer easement played a key role in the present appeal before the Board, because of the limitations it placed upon the owner Appellants, with respect to their ability to develop the property in the way that they wished. The location of the sewer

easement meant that the only place they could build a pool was between the easement and the shoreline, a relatively narrow space.

[25] In 2002, Halifax Regional Municipality adopted By-Law S-700, a By-Law Respecting Swimming Pools. The Board will refer to various of that By-Law's provisions in the discussion below.

[26] In the same year, increasing controversy became apparent in relation to how some waterfront property owners were developing their properties.

[27] Water lots which have been transformed into Infilled Water Lots have been used for a variety of purposes, ranging from simply new and larger lawns through to the place where new, large, buildings have been constructed.

[28] Based on the limited evidence before the Board, the Board concludes that such infilling occurred relatively rarely in past years, but in more recent decades has been perceived as occurring with increasing frequency.

[29] From 2002 onward (the Board concludes from various documents and submissions in this proceeding), discussions about land use along the shore of the Northwest Arm occurred with increasing frequency, and intensity, each year thereafter.

[30] Discussions became particularly frequent and intense in 2005. In August of that year, HRM's Regional Council agreed to initiate an amendment process for the MPS which related, in part, to development along the shore of the Arm. The amendment process for the MPS was a long one, involving repeated and extensive discussions. In 2007, these culminated with Council's adopting amendments to the MPS and LUB.

[31] The controversy around development along the Northwest Arm is complicated by, or even rooted in, the fact that lots were granted by the Crown in Nova

Scotia long before Confederation. These Crown grants could – and along the Northwest Arm often did – include not just property located on dry land (which the Board will term in this decision "Land Lots"), but also property located in the adjoining sea bed (which the Board in this decision will term "Water Lots"). To illustrate, the Crown might grant two acres of property to a purchaser, one acre of which would be a Land Lot and one acre of which was a Water Lot.

[32] The City of Halifax (now HRM) had the power to impose municipal development controls over the one acre of Land Lot, but had no authority to regulate the use of the Water Lot. The Water Lot came under the jurisdiction of the Federal Government.

[33] Owners of property along the Northwest Arm which included Water Lots could apply to the Federal Government to seek approval to develop the Water Lot in specific ways. One of these ways, and the one which is at the centre of the dispute in this proceeding, is the so-called "infilling" of all or a portion of a Water Lot. This involves filling it with rock until it is above the high-water mark and then, most commonly, placing earth to create what looks like a Land Lot, but which the Board will in this decision call an Infilled Water Lot.

[34] The Federal Government, which has charge of navigable waterways, could, if it chose, permit development to occur in the Water Lot portion of the property; in reaching such decisions, the Federal Government was necessarily principally focused upon issues of navigation. If Federal Government was agreeable, the owner of a Water Lot could – free of any municipal restriction, as the Municipality has no authority over Water Lots – proceed to develop it as authorized by the Federal Government, including

infilling all or part of the Water Lot. Depending on the size of the pre-Confederation Water Lot granted by the Crown, the resulting Infilled Water Lot could, and sometimes did, project a significant distance into the Northwest Arm.

[35] When this occurred, the Infilled Water Lot did become subject to municipal control.

[36] Such Infilled Water Lots were treated by HRM (and its predecessor, the City of Halifax) just as if they had always been part of the Land Lot. In essence, the approach taken by the Municipality was that the Infilled Water Lot took on the same designation under the MPS, and zoning under the LUB, as the adjoining Land Lot. This opened up whole new possibilities for development for the owners of shoreline properties.

[37] For example, in addition to enjoying the same designation and zoning, the Infilled Water Lot was included in calculations of total lot area, which can have an effect on a variety of development possibilities. Further, when the MPS or LUB prohibited development closer than a certain distance from the shoreline, the new shoreline of the Infilled Water Lot governed.

[38] In 2007, HRM adopted severe restrictions on development along the Northwest Arm. Whether those restrictions prevent the Ghosns from building their pool where they wish it, or not, is a central issue in this appeal. The Board will, under "Analysis and Findings" below, refer in detail to various provisions relied upon by the Appellants and Respondent.

[39] For present purposes, however, the Board notes that Council's amendments are directed to limiting development possibilities on or near Infilled Water Lots, where those Water Lots were created after July 21, 2007, the effective date of the amendments.

Calculation of distances from shorelines would not be from the shoreline of the Infilled Water Lot, but from the shoreline as it existed in 2007. Additionally, any new land area created with an Infilled Water Lot could not be included in, for example, calculations of lot area for development purposes.

[40] Further, one of the limitations (and one of particular importance in this appeal) was a prohibition – found in s.16L of the LUB – of building any new structures on an Infilled Water Lot created after 2007, or within 30 feet of the 2007 shoreline. The new provisions exempted certain specific structures from this prohibition, but swimming pools are not one of the structures listed as being permitted.

[41] In August 2013 – six years after the MPS and LUB shoreline amendment – Mr. and Mrs. Ghosn (the Appellants in this proceeding) bought the subject property from Diane E. Palmeter, and set out making plans for the redevelopment of the property. The Palmeter property included a Land Lot with an existing house and shoreline on the northwest Arm, with a rock retaining wall and an existing wharf projecting from that rock retaining wall. Also included was a Water Lot extending out from the shoreline.

[42] They also decided they wanted to build a swimming pool between the house and the Arm, and began making plans for that project. On February 6, 2014, Alderney Surveys Limited prepared for Mr. and Mrs. Ghosn a lot-grading plan showing the subject property and referring in detail to certain proposed changes. On February 10th, the Ghosns applied for a permit to install, at a declared cost of $50,000, a new swimming pool.

[43] By early February 2014, Mr. Ghosn was in communication with Stephanie Norman, an HRM Development Technician, recounting his review of HRM's rules with respect to swimming pools.

[44] On February 12th, Ms. Norman sent an email to Mr. Ghosn recounting her conversation with him that day about his proposed house and swimming pool plans. The Board will not refer to her comments respecting the house, about which there is no dispute presently before the Board.

[45] In essence, the Board concludes from this communication and the other evidence before it that, as of February 12th, Ms. Norman had told Mr. Ghosn that a pool could not be legally built so close to the Arm.

[46] Specifically, her email tells Mr. and Mrs. Ghosn that:

> Section 16(I) does not permit any development within 30 feet.

The Board considers that the reference in the email to "within 30 feet" is clearly, in the context of all the evidence before it, to within 30 feet of the Arm.

[47] In an email to Ms. Norman on February 13th (which he copied to Ms. Strickland, who, again, was helping the Ghosns with their house and pool plans) Mr. Ghosn said:

> ...I couldn't find anything that specifies a swimming pool is not permitted with[in] 30 feet of the high water mark...are you certain a pool is considered a development structure?

[48] Half an hour after Mr. Ghosn's email, Ms. Norman replied in an email (copied to Ms. Strickland and to Mrs. Ghosn) to say that she was:

> ...certain a pool is not permitted within that setback and it is considered development.

[49] In a further email, Mr. Ghosn explained to Ms. Norman that avoiding the sewer easement was the reason the pool was "so far down by the water."

[50] On March 12th, Ms. Norman emailed Ms. Strickland to tell her that she had visited the subject property that day and that she would recommend the house permit for approval.

[51] However, Ms. Norman continued to take the view that a permit for construction of the pool could not be granted, and Ms. Strickland and Ms. Norman agreed to cancel the Ghosns' application for a permit.

[52] The Board notes that the emails between HRM and Mr. Ghosn in February and March make no reference to the importance HRM attaches to the 2007 shoreline with respect to the calculation of setbacks; at the time of the emails, of course, the 2007 shoreline was the one which was in existence.

[53] By March 3, 2014, Mr. Ghosn was expressing his annoyance with HRM in an email which he copied to HRM staff which said, in part:

> ...it looks like I won't be building a home this summer, or a wharf, as HRM is not allowing a pool on my property.

After noting that HRM was also preventing him from building a house as big as he wanted, he remarked:

> ...you can thank HRM for protecting us and stagnating growth and prosperity...it's no wonder our population is decreasing.

[54] At this point, it seems the Ghosns decided that if HRM thought the shoreline was too close to their proposed pool, they would solve the problem by moving the shoreline farther away.

[55] The way to do this, of course, was by way of infilling a part of their Water Lot with rock, thereby creating an Infilled Water Lot, which would have a shoreline further out in the Northwest Arm.

[56] There is nothing in the evidence before the Board indicating whether the Ghosns concluded on their own that filling in the Arm would be a useful approach to solving the problem of setback of the pool from the shoreline, or whether they received advice from someone that this would work.

[57] On April 11, 2014, Robbie Fair of Atlantic Road Construction and Paving Limited wrote to Mr. Ghosn to describe the infilling activities which he was prepared to do for the Ghosns. The work would involve the construction of an access road, a silt boom or curtain in the water, removal of the existing retaining wall, the delivery of rock infill, the construction of a new pre-cast concrete block wall, final grading, and cleanup.

[58] By some time in April 2014, Rhonda Strickland Design had produced a plan showing the existing rock retaining wall along the shoreline and the existing wharf, together with an area in the Water Lot (i.e., currently under water, outside the rock retaining wall) to be infilled. That area was 75 feet wide (the full width of the lot), and at its deepest point, 39.3 feet beyond the existing rock retaining wall. The Board notes that the area of land designated to be infilled in the Strickland plan is only a portion of the total Water Lot.

[59] On August 21, 2014, the Ghosns applied to the Federal Government for permission to infill an area of their Water Lot "in order to meet by-laws for pool permit." They supplied plans to accompany their application, which was reviewed by Transport Canada under its Navigation Protection Program. On October 31, 2014, Transport Canada said that the proposed infill was "not likely to substantially interfere with navigation" and granted permission.

[60] Owners of neighbouring properties learned of the Ghosns' intentions with respect to infilling so they could build a swimming pool. At least some communicated their concerns directly to the Ghosns, and also to at least one municipal councillor, Linda Mosher. The Appeal Record contains a number of communications relating to neighbours, Councillor Mosher, and the Ghosns.

[61] Nevertheless, the Ghosns decided to proceed with their infill project. Just when they began the work is not entirely clear from the evidence before the Board, but limited evidence which is before it indicates that the work was completed by April 2015.

[62] Immediately after completion of the infilling, on April 24, 2015, Mr. Ghosn filed a second permit application for a swimming pool. There followed various communications back and forth between the Ghosns, HRM, and Mark Van Zeumeren, P.Eng., of B.D. Stevens Limited.

[63] On June 2, 2015, Mr. Van Zeumeren emailed Ms. Norman requesting a meeting, as he was "seeking clarity" about, among other things, the allowable uses near the Arm, Paul Sampson, a planner with HRM, emailed Mr. Van Zeumeren on June 5th, enclosing a copy of HRM's 2007 staff report regarding infilling of lots on the Northwest Arm which led to the adoption of the new MPS and LUB provisions that year.

[64] In short, HRM told the Ghosns that it was the 2007 shoreline that mattered for measuring distance, and not the 2015 shoreline created by the Ghosns through infilling.

[65] On June 8th, HRM met with Mr. Van Zeumeren and discussed the pool. HRM was, the Board concludes from all of the evidence before it, clear then, and remained steadfast thereafter, that a pool in the proposed location was not permitted under the

MPS and LUB as it would be within 30 feet of the shoreline of the Northwest Arm as it existed in 2007 prior to the infill.

[66] It appears Mr. Van Zeumeren at one point suggested that the proposed in-ground pool could properly be classed as "passive recreation," permitted within the MPS and LUB. HRM did not agree. The Board will return to this briefly below under "Analysis and Findings."

[67] On July 13, 2015, Mr. Ghosn wrote to Ms. Norman and to Mr. Audas to say that the denial of the pool permit had come "as a shock" after the time and expense the Ghosns had invested in infilling. While a number of communications occurred between Mr. Ghosn and HRM (including whether omitting a diving board or slide from the pool would make it acceptable), HRM remained of the view that construction of a pool in the location proposed was not permitted.

[68] On July 28, 2015, Mr. Audas suggested to Mr. Ghosn that he consider applying for an amendment to the Land-Use By-Law. Mr. Ghosn declined, however, saying that he was:

> ...far too busy to deal with the small minority groups that seem to over control our City and staff that are afraid to make decisions that may be unfavourable to the two or three old folks that will complain.

[69] On July 30, 2015, HRM formally refused the Ghosns' second application for a pool permit. On August 13, 2015, the Ghosns appealed that decision to the Board.

[70] Communications continued between Mr. Ghosn and Councillor Mosher, in which she recounted to him her views of the intent of the restrictive rules for development adopted by HRM in 2007.

[71] On September 22, 2015, the Ghosns submitted an amended Notice of Appeal to the Board, but on October 9th, they withdrew their August 13th appeal, as amended on September 22nd.

[72] On October 14th, the Ghosns applied yet again for a swimming pool permit, relying on By-Law S-700, the Swimming Pool By-Law, as their authority. In essence, the Ghosns were arguing that it was from the 2015 shoreline that the 30 feet must be measured. They told Mr. Audas that:

> We recognize the restrictions imposed under the LUB against erecting structures on the Arm. In this case, however, By-Law 700 expressly authorizes the development and, to the extent any conflict exists between the two by-laws, S-700 expressly states that the provisions of S-700 prevail.

[73] On December 10, 2015, HRM, through Mr. Audas, turned them down again. In a two-page letter, Mr. Audas made reference to the Swimming Pool By-Law and to s.16(L)(b) of the Halifax Peninsula Land-Use By-Law, including its reference to the 2007 shoreline. Mr. Audas maintained the position which HRM had taken in the preceding months, which was that the setback of 30 feet of the swimming pool from the shoreline had to be measured from the shoreline as it existed on July 21, 2007, and not the shoreline as it existed after the 2015 infilling done by the Ghosns.

6.0 ANALYSIS AND FINDINGS

6.1 *Municipal Government Act* and *Halifax Regional Municipality Charter*

[74] Appeals of this type were formerly governed by the provisions of the *Municipal Government Act*, R.S.N.S. 1998, c. 18, s.1, everywhere in the Province. In 2008, appeals relating to property located in HRM were excluded from the jurisdiction of the *Municipal Government Act*, and placed under the new *Halifax Regional Municipality Charter.*

[75] Many provisions in the *Halifax Charter* correspond to provisions which are found in the *Municipal Government Act*. The provisions of the latter *Act* have been explored in earlier decisions of the Court of Appeal, and the Board considers the conclusions in those decisions to be relevant to the interpretation of the *Halifax Charter*.

6.2 Burden of Proof

[76] In this proceeding, as in appeals generally, the Board considers that the burden of proof rests with the Appellants.

6.3 Standard of Proof

[77] The Board has applied the balance of probability as the standard of proof for the determination of facts.

6.4 Standard of Review

[78] Section 265(2) of the *Charter* provides the following:

> 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. [Emphasis added]

[79] Section 267(1) and (2) of the *Charter* set out the powers of the Board on an appeal such as this:

> 267(1) The Board may
>
> (a) confirm the decision appealed from;
> ...
> (d) allow the appeal and order that the development permit be granted;
> ...
>
> (2) The Board may not allow an appeal unless it determines that the decision of...the development officer...conflicts with the provisions of the land-use by-law or the subdivision by-law.

[80] In short, the test for an applicant to appeal a development officer's decision to refuse a development permit is that the decision "does not comply" with the LUB or the

Subdivision By-Law: s. 265(2); for the Board to reverse a development officer's decision to refuse, it must find that the decision "conflicts with" the LUB or the Subdivision By-Law: s. 267(2). The Board sees no difficulty arising from this distinction, at least in the circumstances of the present appeal.

[81] In deciding whether a development officer's refusal does conflict with the LUB, the Court of Appeal has, historically, said that the Board should apply the standard of correctness; more recently, the Court has modified that slightly, saying, in essence, the Board should approach the issue in a manner akin to correctness.

[82] With respect to the standard to be applied by the Board being correctness, see, for example:

- *Re Bay Haven Beach Villas Inc.*, 2004 NSCA 59:

> ...the applicable standard is one of correctness...little deference is owed to the Development Officer's decision.

- *Halifax (Regional Municipality) v. United Gulf Developments Ltd.,* 2009 NSCA 78:

> ...the Board was right to apply a correctness standard to the Development Officer's refusal to issue a development permit...given its expertise in planning matters, the Board is well qualified to review decisions of a development officer on a correctness standard.

[83] The concept that the Board's approach should be akin to applying the standard of correctness, but not, strictly speaking, correctness, appears in a later decisions of the Court of Appeal. See, for example, *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 [affirming *Anglican Diocesan Centre Corporation v. Halifax (Regional Municipality)*, 2009 NSUARB 154]. In *Anglican Diocesan*, 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.

[84] This approach appeared more recently in *Royal Environmental Inc. v. Halifax (Regional Municipality),* 2012 NSCA 62, [affirming *In the Matter of the Halifax Regional Municipality Charter and In the Matter of an Appeal by Royal Environmental Inc.,* 2011 NSUARB 141] at para. 41.

[85] In the present proceeding, the Board will apply the same standard it applied in *Anglican Diocesan* and *Royal Environmental*.

6.5 Applicable Principles of Statutory Interpretation

[86] The Board considers that the liberal and purposive approach to statutory interpretation applies in this proceeding, see, for example: *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board),* [1994] N.S.J. 50 (*"Heritage Trust 1994")*.

[87] Consistent with the *Heritage Trust 1994* purposive approach is the decision of J.M. MacDonald, J., (as he then was) in *MacDonald v. Halifax Investments* (1997),162 N.S.R. (2d) 214 (SC), an application respecting the National Building Code. The Court referred to:

> ...the dilemma of balancing competing rights in the context of land use legislation...
> [para. 16]

[88] He went on to refer to community-based property rights, saying:

> Courts in recent years have endorsed an erosion of individual property rights in favour of land use planning which is primarily designed to benefit the community as a whole. I refer again to *Driedger* at page 373;
>
> In the past, common law courts assumed that the free use and disposition of property, and contractual freedom generally, benefited not only the owner of the property but also society as a whole. While free markets and free trade remain respectable common law values, courts today are less likely to believe that what is good for property owners is good for

society as a whole. In current interpretative practice, the value of protecting the freedom of property owners easily gives way to competing values and goals.

I, as well, refer to *Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility & Review Board et al*, (1994), 1994 CanLII 4114 (NS CA), 128 N.S.R. (2d) 5; where at paragraph 97, Hallett, J.A., noted:

> Therefore, there is case law to support the view that a liberal and purposive approach to the interpretation of planning policies is appropriate. The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality. [paragraph 14]

[89] The Court further noted that the:

> ...purposive approach to statutory interpretation is as well embodied in our *Provincial Interpretation Act*, 1989, R.S.N.S. c. 235, s. 9(5) provides in part:
>
> > 9 (5) every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters:
> >
> > (a) the occasion and necessity for the enactment;
> > . . .
> > (c) the mischief to be remedied;
> > (d) the object to be obtained;
> > . . .
> > (f) the consequences of a particular interpretation...
>
> [para. 15]

[90] In *Anglican Diocesan,* the Court of Appeal, in reviewing (as the Board noted above) a decision of the Board respecting a decision of a development officer, adopted, and expanded upon, its reasoning in an earlier decision, *Archibald v. Nova Scotia,* 2010 NSCA 27, saying:

> In *Archibald*, ¶ 24, this court summarized the principles that govern the Board in deciding whether an elected municipal council carried out the intent of a municipal planning strategy. Similar principles, but with some adjustment noted below, apply to the Board's appellate role from a decision of a development officer. The authorities for these principles are cited in *Archibald*, ¶ 25.
>
> > **(1)** The Board is the first tribunal to hear sworn and tested evidence. So the Board should undertake a thorough factual analysis of the proposal in the context of the LUB. The appellant bears the onus, on the balance of probabilities, to prove the facts that establish the conflict between the development officer's decision and the LUB. Here, the Board (¶ 57, 59) noted that the Church bore the onus on the balance of probabilities, and made determinative factual findings that I will discuss later.
> >
> > **(2)** The legislation expects the Board to interpret the LUB. *The Board should interpret the LUB not formalistically, but pragmatically and*

> *purposively, to make the LUB work as a whole*. The Board here (¶ 60) cited the purposive approach.
>
> **(3)** Subsections 234(1) and (3) of the *HRM Charter* direct that the LUB "enables" and should "carry out the intent" of the MPS. The MPS does not amend the LUB. But *the LUB's interpretation may be assisted by the MPS, and the Board's purposive approach should encompass the LUB and MPS together*. The Board here (¶ 84) cited the interpretive reflexivity between the MPS and LUB (discussed later ¶ 46-49).
>
> **(4)** The Board's deference to the elected municipal council's difficult choices among vague and intersecting intentions in the MPS, discussed in *Archibald* ¶ 24(7), does not apply to an unelected development officer who applies the LUB. This is apparent from the legislative mandates to the development officer and Board. Section 261(1) of the *HRM Charter* says that a "development permit must be issued if the development meets the requirements of the land-use by-law…" So a development officer with such a compliant application has an executory function. He holds no public hearing of objections as may occur before the council. At the appeal level, the legislation directs the Board to decide whether the council "reasonably carried out the intent of the municipal planning strategy" – a somewhat diffuse standard. But the Board's function with a development officer's decision – to determine whether that decision "conflicts with" the proper interpretation of the LUB – is more pointed. The Board here (¶ 62- 63) noted these principles.
>
> **(5)** The Board hears an appeal. It is not an initiating tribunal offering fresh direction on a planning issue. So the Board should focus on the development officer's decision and stated reasons. Section 260(2) of the *HRM Charter* says that, within 30 days from receipt of the application, the development officer "shall grant the development permit or inform the applicant of the reasons for not granting the permit". Then s. 264(e) states that notice of appeal to the Board must be filed within 14 days from the development officer's notice. Clearly the statute contemplates that the development officer's written reasons be central to the appeal, meaning the Board's decision should address those reasons. As stated in *Archibald*, ¶ 30, the Board is not confined to those reasons. The ultimate question - whether the development officer's refusal conflicts with the LUB - may involve other issues. But the focus on the development officer's stated reasons prompts the Board to respect its appellate role. [Emphasis added]

[91] Paragraph 84 of the Board's decision (referred to by the Court of Appeal, above), says, in part:

> The Board does, of course, not consider it to be in any way inappropriate to review other provisions in the LUB to attempt to resolve ambiguity. The Board does, however, note that the LUB is an expression of the MPS.

[92] The Court of Appeal remarks at para. 47 of *Anglican Diocesan* that:

> ...the MPS' intent should be the LUB's backbone. For that reason, the MPS may be an interpretive tool to elicit meaning from ambiguity in the LUB: *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality)*, 2004 NSCA 59, para. 26; *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* (1994), 1994 CanLII 4114 (NS CA), 128 N.S.R. (2d) 5 (CA), at para. 123; Archibald, para. 24(8).

[93] In its more recent decision in *Martell v. Halifax (Regional Municipality),* 2015 NSCA 101, affirming *Martell (Re),* 2015 NSUARB 78, the Court, in referring to use of the liberal and purposive approach, in place of the strict interpretation approach, made mention of:

> ...the tug between restrictive versus purposive interpretation of planning legislation,
>
> [para. 28]

repeating some of the language cited in *Halifax Investments,* including the following:

> The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality.
>
> [para. 78]

[94] Mr. Norman argues that swimming pools are not mentioned anywhere in the MPS or LUB so he says these amendments relating to Water Lot are not intended to apply to swimming pools.

[95] The Appellants challenge the development officer's decision who refused to issue a permit for a swimming pool. As the Board has outlined above, the standard which it is to apply to the development officer's decision is one akin to correctness.

[96] A wide range of legislative provisions were brought to the Board's attention by opposing Counsel in this proceeding, including provisions under the LUB, the MPS, the Swimming Pool By-Law, and the *Halifax Regional Municipality Charter*.

[97] The Board will turn first to the Halifax Peninsula Land-Use By-Law provisions adopted in 2007 at the conclusion of the discussions about restricting development along the Northwest Arm. Section 16L of the LUB appears under the heading "Development

and Subdivision on the Northwest Arm." It is reproduced in full in the Appendix to this decision.

[98] Section 16L(a)(iii) defines "shoreline" as that which existed on the Arm on July 21, 2007, the date the provision became effective.

[99] Counsel for the Ghosns and Counsel for HRM agree that the proposed swimming pool would be less than 30 feet from the shoreline as it existed in July of 2007, but more than 30 feet from the shoreline after the Ghosns infilled it in 2015.

[100] According to s.16L(b) of the By-Law with certain exceptions, "no structure" may be located within 30 feet of the shoreline as it existed in 2007. The exceptions enumerated in s. 16L(b)(i) are:

- boathouses;
- public works and utilities;
- ferry terminal facilities;
- parks on public lands;
- wharves;
- docks;
- gazebos;
- municipal, provincial and national historic sites and monuments; and
- existing structures.

[101] The proposed pool, then, would be within 30 feet of the 2007 shoreline. It is not one of the enumerated exceptions, i.e., it is not a boat house or any of the other items listed above in the bulleted list.

[102] Section 16L (b)(i), however, prohibits the locating of a "structure" within 30 feet of the 2007 shoreline. One of the arguments which Counsel for the Appellants raises is that a swimming pool is not a "structure." While the Board has examined his arguments with care, it will deal with this point only briefly.

6.6 Is a Swimming Pool a "Structure"?

[103] Counsel for the Appellants points to the definition of "swimming pool" in the Swimming Pool By-Law which is that it is:

> ...an artificial body of water outside a building, excluding ponds, having more than 100 square feet of surface area that is designed or intended to be used for swimming purposes and contains or is capable of containing a water depth of more than 24 inches.

[104] While the Board has no difficulty seeing a pool as an artificial body of water, it rejects the suggestion of Counsel for the Appellants that it is not a "structure."

[105] The Board will not explore all of his arguments on this point, but will touch on a few. The term "structure" is defined in the "Land-Use By-Law Peninsula Area" as follows:

> 1. In this by-law:
>
> "Structure" means everything that is built or constructed of parts joined together and includes "Building" and "Erected."

[106] "Building" is defined in the LUB thusly:

> "Building" means every structure placed on, over, or under the land and every part of the same...

[107] "Erect" is defined in the LUB thusly:

> "Erect" includes excavating ground for a foundation, laying a foundation, constructing, reconstructing, removing, or changing the location or orientation of a building or any part thereof.

[108] In the view of the Board, any swimming pool must be built "of parts joined together," the words used in the definition of "structure."

[109] Further, a swimming pool is something which is necessarily built over, and in the case of an in-ground pool, under, the land (words used in the definition of "building").

[110] Lastly, installing a swimming pool will necessarily require "excavating ground for a foundation" which can bear the weight of such a pool.

[111] No matter how the Board looks at it, it sees a swimming pool as a "structure" within the meaning of the LUB.

[112] Swimming pools are not, as the Board has noted above, one of the enumerated exceptions to the prohibition in s.16L of any structure within 30 feet of the 2007 shoreline. Accordingly, in the view of the Board, if one looks at the LUB only, the decision of the development officer appears to be entirely consistent with it.

6.7 LUB s. 16L and the Swimming Pool By-Law

[113] Counsel for the Appellants, however, argues that it is not s. 16L which should determine the outcome of this appeal. The various arguments which he raised in support of his client's position were complex, nuanced, and carefully-constructed, but the Board ultimately found all of them to be unpersuasive. The Board will in this decision touch on only a few of them.

[114] Counsel for the Appellants relies heavily on By-Law S-700, the Swimming Pool By-Law, as did his clients in their third application for a swimming pool permit. The Swimming Pool By-Law is reproduced in the Appendix to this decision.

[115] In part, he argues that because swimming pools are not mentioned at all in the MPS and LUB provisions adopted in 2007, but they are the specific subject of the Swimming Pool By-Law adopted in 2002, it is the Swimming Pool By-Law which should govern.

[116] In so doing, he refers to, among others, s.5(3) of the Swimming Pool By-Law which sets a minimum distance from the swimming pool of (in effect) 30 feet to:

> ...any water course...

[117] He points out that the term "water course" is defined in the *HRM Charter,* and also in the Land-Use By-Law, and argues that it is this definition which should govern. The definition of "watercourse" in the *Charter,* and the LUB, simply refers to, among other things, the "ocean" or "other body of water" with no special definition of shoreline. Section 209 of the *HRM Charter* states:

> (s) "watercourse" means a lake, river, stream, ocean or other body of water. 2008, c. 39, s. 209; 2008, c. 41, s. 2; 2013, c. 18, s. 2.

The same definition, with the addition of the word "natural" before "body" appears in the LUB Definitions section at page 15. The LUB definition was adopted October 18, 2014.

[118] The definition of "water course" which he refers to makes, of course, no reference to the 2007 shoreline which is the subject of LUB s.16L.

[119] In essence, the Board inferred from the arguments of Counsel for the Appellants that these definitions of "water course" should be taken to mean that the distance from a proposed pool to the shoreline is simply the distance from the pool location to wherever the water now happens to be lapping against the land.

[120] He dismisses the definition of "shoreline" in LUB s. 16L – which is fixed on the point where the water and land met in July 2007 – saying instead that it is the term "watercourse" which should govern.

[121] He also points to an unusual conflict provision in s.8 of the Swimming Pool By-Law, which provides as follows:

> **CONFLICT WITH LAND USE BY-LAWS**

> 8. In case of conflict between the provisions of this by-law and the provisions of any land use by-law, the provisions of this by-law shall prevail except where this bylaw specifies that the provisions of the land use by-law apply.

[122] He argues that this provision means that if a Swimming Pool By-Law and s. 16L of the LUB are in conflict, it is the Swimming Pool By-Law which should prevail.

[123] There is, in the view of the Board, undeniably conflict between the Swimming Pool By-Law and the more recent LUB, s.16L, adopted in 2007, five years after the Swimming Pool By-Law.

[124] Which should govern in the event of conflict? In the view of the Board, the answer is LUB s.16L, and the associated provisions of the MPS.

[125] In explaining its reasons for this conclusion, the Board will refer first to s.13 of the *Interpretation Act.* This provision was relied upon by Counsel for the Appellants:

> Meaning of expression in regulation or order
>
> 13 Except when a contrary intention appears, where an enactment confers power to make regulations or to grant, make or issue an order, writ, warrant, scheme or letters patent, expressions used therein *have the same respective meanings* as in the enactment conferring the power. R.S., c. 235, s. 13. [Emphasis added]

The Board inferred from his argument that he was suggesting the definition of "water course," appearing as it does in the *Charter,* which is an enabling statute, should govern.

[126] The Board finds this argument unpersuasive. First, the definition of "water course" as it appears in the enabling legislation is, in the view of the Board, legislation which is general, as opposed to specific, as is LUB s. 16L, and the corresponding MPS provision.

[127] More to the point, s.13 of the *Interpretation Act* begins with the following words:

> Except when a contrary intention appears…

[128] In the view of the Board, while s. 16L of the LUB and MPS Policy 8.12 do not explicitly redefine the term "watercourse," their explicit and express definition of the term "shoreline," and their reasons for adopting that definition, stated at length in the MPS and LUB, are ample indication of a "contrary intention" to the restrictive definition of "water course" which Counsel for the Applicants urges the Board to adopt.

[129] The Swimming Pool By-Law, while specific to swimming pools, is at the same time a provision of general application, intended to be used anywhere in HRM. Section 13L of the LUB is, on the other hand, highly specific to the shoreline of the Northwest Arm.

[130] Quite apart from LUB s. 16L, however, are the provisions of the MPS which – in the view of the Board – are decisive in this appeal, more than anything else.

[131] MPS Policy 8.12, and its associated subsections, were adopted after a long and detailed discussion, spanning over several years.

[132] The Board referred earlier in this decision to what the Court of Appeal has termed the "reflexive" relation between provisions in the Land-Use By-Law and provisions in the MPS. As the Court of Appeal put it in *Anglican Diocesan:*

> ...the MPS intent should be the LUB's backbone.
>
> [para. 47]

Accordingly, if the Board perceives ambiguity in a land-use by-law, it may turn to the MPS to assist it in interpreting it: see also *Archibald,* [para. 24(8)].

[133] In the present instance, the Board does not see s.16L of the LUB as being, in and of itself, ambiguous. However, the Appellants in effect say that the Swimming Pool By-Law shows that s. 16L of the LUB cannot, as HRM insists it should, prevent the construction of a pool within 30 feet of the 2007 shoreline.

[134] To the extent that the Swimming Pool By-Law raises an ambiguity or a question as to intent, or proper scope, of LUB s. 16L, the Board thinks it appropriate to turn to the MPS as an "interpretive tool" (as the Court of Appeal puts it) in determining the correct scope of the LUB.

[135] The Board has reproduced the 2007 amendments to the MPS in the Appendix to this decision. It need not repeat them here. The Board will, however, quote those portions which it believes particularly illuminate the intent of the MPS and LUB amendments, and assist in their proper interpretation.

[136] MPS Policy 8.1.2 says that HRM:

> *...recognizes that subdivision, development and Water Lot infilling activities along the Northwest Arm may result in undesirable impacts* on the aesthetic character and traditional built form of the Northwest Arm, on its recreational use and navigability, and on its marine environment. As a means of protecting the character of the Northwest Arm, the municipality shall control development and subdivision on lots and Water Lots along the Northwest Arm. Specific measures will include *limiting the type of structures* that will be allowed on both infilled and non-infilled Water Lots, implementing a setback from the Northwest Arm, limiting the type and size of structures to be built within the Northwest Arm setback, and *preventing infilled and non-infilled Water Lots from being used in lot area and setback calculation.* [Emphasis added]

[137] The Board considers that the words it has just quoted, together with others within the MPS amendment, provide, to a much greater level of detail than is often encountered in municipal planning strategies, the underlying intent and objective of the 2007 amendments.

[138] In the view of the Board, the intent of the MPS as demonstrated in this and other provisions includes three expressly stated key aspects:

- the first is severe restrictions on types and size of structures which can be built;
- the second is eliminating Infilled Water Lots from lot area and setback calculations;
- the third is discouraging infilling of the Arm.

[139] In the view of the Board, the first two aspects are – again both explicitly and implicitly – also intended by the MPS to assist in dealing with third.

[140] The Board will deal with these three aspects in sequence.

6.8 Aspect 1: Restriction on Types and Sizes of Structure

[141] With respect to the specification of structures which can be built under s.16L of the LUB the Board sees MPS Policy 8.1.2 as reinforcing the strict limitations which appear in s. 16L(b)(i). That provision of the LUB says that, unless a structure is listed within that provision as an exception, it cannot be built.

[142] MPS Policy 8.1.2, in the view of the Board, is consistent with the view that the list is intended to be exhaustive and definitive. MPS Policy 8.12 says that:

> specific measures [in the LUB] will include limiting the type of structures that will be allowed...

[143] That is exactly what s.16L(b)(i) of the LUB does. Thus, the LUB and MPS point to a very short list of structures that can be built on Infilled Water Lots or near the 2007 shoreline. Further, the language of the MPS and LUB point, in the judgment of the Board, to a conclusion that anything not on the list cannot be built.

6.8.1 Is a Swimming Pool "Passive Recreation"?

[144] It will be recalled that MPS Policy 8.12.1 and 8.12.2 both refer to "passive recreation uses" as being excluded from the s.16L prohibition. Mr. Van Zeumeren, of B.D. Stevens, engaged by the Ghosns to help with their swimming pool project, had suggested to HRM that a swimming pool was a "passive recreation."

[145] The Board has only briefly considered, but rejects, this argument.

[146] No definition of the term "passive recreation" appears in the MPS and LUB. Further, no definition appears in dictionaries ordinarily consulted by the Board. In

reviewing the case law, the Board encountered a variety of differences, some, it seemed, driven by legislative definitions and some not. Further, most seemed to be simply a reference to the term rather than an attempt to provide a precise definition.

[147] In the circumstances, the Board will simply state, by way of example, things which it sees as included, and excluded, from the term "passive recreation." The Board sees "passive recreation" as including lying in the sunshine on a lawn next to the Northwest Arm. It does not see "passive recreation" as including swimming in a pool next to the Arm.

6.8.2 Development Agreement Not Available

[148] The Board will here refer to one additional point which reinforces its conclusions in this regard.

[149] The Board notes that the 2007 amendments to the MPS and LUB do not include the possibility of a development agreement. Instead, Council chose, in making its 2007 amendments, to adopt a fixed list of items which are permitted to occur on Infilled Water Lots created through infilling after the adoption of the amendments in 2007. In making the amendments, it certainly would have been open to Council to, had it wished, include the possibility of a development agreement between HRM and a property owner. This would allow the relaxation of strict requirements within an MPS and LUB, in circumstances where Council had satisfied itself that whatever criteria it had set for such agreements have been properly considered. Such an approach is taken, from time to time, in municipal planning strategies adopted by a wide range of municipalities. As noted, the Board sees no such provision in the 2007 amendments to the MPS and LUB. In effect, Council chose not to include the possibility of a development agreement, with

its associated flexibility. Instead, it adopted a short list of a few structures which would be permitted, and stopped there. While the Board accords relatively little weight to the omission of a development agreement option, it nevertheless sees this omission as not inconsistent with the Board's conclusion that the MPS and LUB intend to allow only a few uses for Infilled Water Lots.

6.9 Aspect 2: Waterlots not Useable for lot area or Setback Calculations

[150] The 2007 amendments to the MPS and LUB also prohibited the use of Water Lots in doing lot area calculations (see MPS Policy 8.12 and LUB s. 16L(d)(ii)), as well as in relation to the calculation of setback. This means that adding land area to an existing property, through infilling a Water Lot, no longer increases the land area available for the purposes of calculations related to – for example – the size and location of a house, or a garage, or other structure.

6.10 Aspect 3: Municipal Objective of Discouraging Infilling

[151] The Board concluded that the position taken by Mr. and Mrs. Ghosn, both in their initial contacts with HRM, and all ensuing ones, was that the only objective of the MPS and LUB is to restrict or discourage development near the Arm - particularly buildings and other structures which may project upward and impair views.

[152] For example, in the course of attempting to negotiate permission for their swimming pool, they offered to eliminate any pool accessories (such as a diving board, or slide) which would project above the ground.

[153] However, the Board considers that the MPS, both implicitly and explicitly, has the intent of reducing the amount of infilling itself. This is in addition to restricting activities on Infilled Water Lots, such as the construction of houses.

[154] The MPS refers not just to a concern about structures which stick up above the ground (be they large, like houses, or small, like a diving board). While it does refer to "development," the MPS very specifically says that:

> ...Water Lot infilling activities...

may have:

> ...undesirable impacts on...the Northwest Arm...

[155] HRM says, then, that infilling may have undesirable effects on the Arm.

[156] However, HRM cannot itself prohibit infilling. The reason – as the Board has noted previously – is the division of powers between the Federal, Provincial and Municipal Governments. The decision to allow infilling or not belongs to the Federal Government; the Municipal Government has no power in relation to it.

[157] While the Municipality has no power to stop infilling, it does, however, have the power to restrict the uses to which infilled property can be put. Furthermore, if it restricts these uses severely – as, in the judgment of the Board, it has here – it may discourage people from infilling at all. Infilling is an expensive process, as the nature of the work carried out by contractors on behalf of the Ghosns (described above, under "Facts") illustrates.

[158] HRM, by drastically limiting the uses to which an Infilled Water Lot may be put, may cause people to decide that infilling is too great a cost for too little benefit.

[159] The Board finds this conclusion to be one not simply likely on the balance of probabilities, but almost to a standard of beyond a reasonable doubt.

[160] To touch briefly on points supporting this conclusion, the Board notes: first, as just described, the MPS expressly says "Water Lot infilling activities" may have "undesirable impacts"; second, it has prohibited all but a few new, small structures from

being built on Infilled Water Lots; third, it has required that the 2007 shoreline (rather than any subsequent shorelines created by infilling) be used to determine setbacks for construction; fourth, it has prohibited the new land area created in Infilled Water Lots from being used in area calculations.

[161] In the Board's judgment, HRM has taken great care to try to convince people that infilling the Northwest Arm is more trouble and expense than it's worth.

6.11 2014 Amendments to the RMPS

[162] The above discussion by the Board relates to MPS Policy 8.12, with the associated LUB s. 16L, both adopted in 2007. The Board notes in passing that Counsel for HRM in her submissions pointed to the following provisions in the Regional MPS (as opposed to the Halifax MPS) adopted in 2014:

> 2.3.3 Riparian Buffers
>
> HRM recognizes that development and *Water Lots that have been infilled may result in undesirable impacts* on the marine environment and the aesthetic character of the surrounding environment.
>
> E-20 HRM may, through secondary planning strategies and land use by-laws, consider measures to regulate development of Water Lots that have been infilled, including establishing setbacks of buildings and structures from the water. [2014 RMPS G-7, p.16]

[163] She suggests, and the Board agrees, that the intent embodied in the RMPS is consistent with the intent which the Board has concluded is embodied in the 2007 amendments to the Halifax MPS and LUB.

6.12 Legislative History Ignored

[164] In reaching its conclusions in this matter with respect to the intent of the 2007 amendments respecting infilling, the Board gave no weight – as it decided it would in preliminary hearing no. 2 (above) – to the recollections of Mr. Ouellet about the intentions of the amendments.

[165] While the Board read the entire record of public meetings and council meetings which led to the 2007 amendments, it likewise chose to give no weight whatever to what might be called legislative history, including statements contained therein about the intent of the drafters.

[166] Instead, the Board's conclusions with respect to intent (including the Board's conclusions about an intent to restrict infilling) were based upon its interpretation of the actual language, as enacted, of the 2007 amendments to the MPS and LUB.

[167] If, however, it were to be found that the Board erred in ignoring that evidence, and should have placed weight on the legislative history of the discussions leading to the amendments, the Board would in the alternative find that those discussions are, on balance, consistent with the Board's conclusions as to the intent of the 2007 amendments as drafted. While the record is voluminous, an excerpt from minutes quoted by Counsel for the Appellants, at the Board hearing, is illustrative. The minutes, from a public information meeting in 2005, include the following excerpt:

> Potential Amendments
>
> Mr. Ouellet indicated the concerns are the infilling itself, and what could potentially be built on an infilled Water Lot.

7.0 SUMMARY AND FINDINGS

[168] In this decision, the Board dismisses an appeal by a property owner of a decision by one of HRM's development officers to refuse an application for a development permit to build a swimming pool near the Northwest Arm.

[169] The Board's authority in appeals such as this is strictly limited by the statute: it must not allow the appeal unless it determines that the Development Officer's decision "conflicts with" or "does not comply with" the applicable provisions of the Land-Use By-Law.

[170] A pool cannot be constructed closer than 30 feet from the shoreline of the Northwest Arm.

[171] In essence, HRM says "shoreline" means the shoreline which existed in July 2007, when HRM adopted new MPS and LUB provisions, which highly restrict development on the Arm.

[172] The Appellants say the applicable shoreline is not the 2007 one, but a new one created by them several years later, when, after buying the property in 2013, they infilled a portion of the Arm with rock fill.

[173] If built, the Ghosns' pool would be more than 30 feet from the newly-created shoreline; it would be less than that from the shoreline as it was in 2007.

[174] In this decision, the Board reviewed, among others, the 2007 amendments to the MPS and LUB, as well as HRM's 2002 Swimming Pool By-Law, upon which the Appellants placed great emphasis.

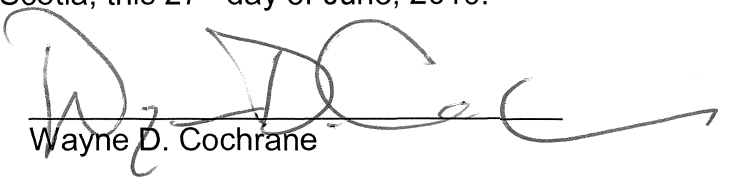
[175] Ultimately, the Board concluded that Appellants have failed to establish, on the balance of probabilities, and using a standard of review akin to correctness (as established by the Court of Appeal in *Anglican Diocesan* and affirmed in *Royal Environmental*), that the Development Officer's decision conflicts with or does not comply with the provisions of the LUB.

[176] The 2007 shoreline governs.

[177] The appeal is dismissed.

[178] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 27th day of June, 2016.



Wayne D. Cochrane

Appendix "A" to Decision of Board

Municipal Planning Strategy for Halifax

SECTION II CITY WIDE OBJECTIVES AND POLICIES

8. ENVIRONMENT

Objective: The preservation and enhancement, where possible, of the natural and man-made environment, and especially of those social and cultural qualities of particular concern to the citizens of Halifax. [G-3, MPS, p.29]

8.12 The Northwest Arm is a narrow, recreational inlet characterized by major urban parks (Sir Sandford Fleming, Point Pleasant, Deadman's Island and Horseshoe Island Parks), historical assets and predominantly residential uses. The Northwest Arm is also home to a number of boat/sailing clubs which generate significant boating traffic in the Arm. Consequently, the Halifax Regional Municipality recognizes that subdivision, development and Water Lot infilling activities along the Northwest Arm may result in undesirable impacts on the aesthetic character and traditional built form of the Northwest Arm, on its recreational use and navigability and on its marine environment. As a means of protecting the character of the Northwest Arm, the Municipality shall control development and subdivision on lots and Water Lots along the Northwest Arm. Specific measures will include limiting the type of structures that will be allowed on both in-filled and non-in-filled Water Lots, implementing a setback from the Northwest Arm, limiting the type and size of structures to be built within the Northwest Arm setback, and preventing in-filled and non-infilled Water Lots from being used in lot area and setback calculations.

8.12.1 In order to carry out the intentions described in 8.12, the Municipality shall designate the seabed of the Northwest Arm seaward of the Ordinary High Water Mark, as it existed on the effective date of the adoption of this amendment and as generally shown on Appendix A (Generalized Future Land Use Map) as Water Access. Through the Land Use By-laws, the Municipality shall establish a corresponding Water Access Zone which shall apply to any new land created by infilling of the Northwest Arm. Development within this Zone shall be limited to public works and utilities, ferry terminal facilities, municipal, provincial and national historic sites and monuments, passive recreation uses and wharves and docks.

8.12.2 The Municipality shall encourage the respective provincial and federal approval authorities from issuing any approval to permit the infilling of Water Lots, which would be detrimental to the objectives described in 8.12. Infilling activities related to the construction of public works and utilities, ferry terminal facilities, municipal, provincial and national historic sites and monuments, passive recreation uses, and wharves and docks are not considered to be detrimental to the objectives of 8.12.

8.12.3 The Municipality shall also encourage the respective provincial and federal approval authorities to refer any marine related infrastructure or infilling requests and

applications occurring within Halifax Harbour, including the Northwest Arm, to the Development Officer for review of compliance with the Land Use By-law.

[Exhibit G-7, Tab 4D]

Regional Municipal Planning Strategy

2.3.3 Riparian Buffers

HRM recognizes that development and Water Lots that have been infilled may result in undesirable impacts on the marine environment and the aesthetic character of the surrounding environment.

E-20 HRM may, through secondary planning strategies and land use by-laws, consider measures to regulate development of Water Lots that have been infilled, including establishing setbacks of buildings and structures from the water. [2014 RMPS G-7, p.16]

[Exhibit G-7, Tab 4F, p.103]

Halifax Peninsula Land Use By-Law

1. In this by-law:

"Accessory Building" means a building that is:

(a) not used for human habitation;

(b) located on the same lot as the main building;

(c) naturally and normally incidental, subordinate and exclusively devoted to the main use of the land or the main building; and

(d) separate from a main building, except for a connection pursuant to the requirements for this By-law.

"Development" includes any erection, construction, addition, alteration, replacement or relocation of any building or structure and any change or alteration in the use made of land, buildings or structures.

"Northwest Arm Water Access Area" means the area shown on map ZM-21 attached to this By-law.

"Structure" means everything that is built or constructed of parts joined together and includes "Building" and "Erected".

"Watercourse" means a lake, river, stream, ocean or other natural body of water.

DEVELOPMENT AND SUBDIVISION ON THE NORTHWEST ARM

RC – May 1/07; E-Jul 21/07 [G-3, Tab 3, p.34 (LUB)]

16L For any development or subdivision within the Northwest Arm Water Access Area, in addition to all other applicable requirements of this By-law, the following requirements shall apply:

(a) Definitions:

(i) "Boathouse" means a building or structure, whether permanent or temporary, which is located on a waterfront lot, which is roofed, which does not contain toilet, bathroom, kitchen or sleeping facilities and which is used/or the shelter or storage of boats, watercrafts and associated marine accessories and equipment, but not for the accommodation of persons, animals, or vehicles as defined by the *Motor Vehicle Act.*

(ii) "Gazebo" means a freestanding, roofed accessory building or structure, which is not enclosed, which does not contain toilet, bathroom, kitchen or sleeping facilities, and which is not used for the accommodation of animals or vehicles as defined by the *Motor Vehicle Act*.

(iii) "Shoreline" means the Ordinary High Water Mark as defined under the Nova Scotia Land Surveyors Regulations and as it existed on the effective date of this Section.

(iv) "Water Lot" means any part or parcel of land on the Northwest Arm located seaward of the Shoreline.

(b) In addition to all other applicable requirements of this by-law:

(i) No structure, with the exception of boathouses, public works and utilities, ferry terminal facilities, parks on public lands, wharves, docks, gazebos, municipal, provincial and national historic sites and monuments, and existing structures may be located within 9 metres (30 feet) of the Shoreline of the Northwest Arm; and,

(ii) Where boathouses and gazebos are to be located within 9 metres (30 feet) of the Shoreline of the Northwest Arm, they shall be limited to one boathouse and one gazebo per lot and each structure may have a maximum area of 121.92 square metres (400 square feet), a maximum width of 6 metres (20 feet) on the side that

is most parallel to the Shoreline, a maximum depth of 7.8 metres (26 feet), a minimum roof pitch of 5/ 12 and a maximum height of 4. 2 metres (14 feet);

(c) Notwithstanding Subsection (b), the 9-metre (30-foot) Northwest Arm Shoreline setback shall not apply to the properties identified by the following P.I.D. numbers: 41020439, 00079020 (St. Mary 's Boat Club), and 00079186 (The Waegwoltic Limited).

(d) No portion of a Water Lot shall:

(i) be included within the calculation of the minimum setback required by clause (b) (i);

(ii) be included within the calculation of the minimum lot area requirements of this by-law: and,

(iii) have frontage on any street not opened/or vehicular use as of April 1, 2007.

(e) The requirements of this Section shall continue to apply to Water Lots following any subsequent consolidation with abutting Land Lots.

[Exhibit G-7, Tab 4E]

HRM By-Law S-700 (Swimming Pool By-Law)

INTERPRETATION

2.(c) In this By-law "swimming pool" means an artificial body of water outside a building, excluding ponds, having more than 100 square feet of surface area that is designed or intended to be used for swimming purposes and contains or is capable of containing a water depth of more than 24 inches.

COMPLIANCE REQUIRED

3. It shall be unlawful to construct, maintain, install or enlarge any swimming pool in Halifax Regional Municipality except in compliance with all the provisions of this by-law.

PEMIIT REQUIRED

4. It shall be unlawful to proceed with the construction, installation, enlargement or alteration of any private residential swimming pool and appurtenances within Halifax Regional Municipality unless a development permit and building permit therefor has been obtained.

LOCATION

5. (1) No portion of a swimming pool, pumps, filters or pool water disinfection equipment installations shall be located closer than four feet from any side or rear property line.

(2) No portion of a swimming pool, pumps, fillers or pool water disinfection equipment installations shall be located closer to any street line less than the distance applicable to the main building as set out in the land use bylaw for the area in which the pool is located.

(3) No portion of a swimming pool, pumps, filters or pool ,rnter disinfection equipment installations shall be located closer to any watercourse than the distance applicable to a main building or accessory building, whichever is less, as set out in the land use by-law for the area in which the pool is located.

PREVENTION OF UNAUTHORIZED ACCESS

7. (1) All swimming pools shall be completely separated from adjacent properties by an obstruction such as a fence, building, deck or similar structure.

(2) The enclosure shall be constructed to prevent unauthorized access by providing a vertical obstruction having a minimum height of five feet with no opening exceeding four inches in width or height and no member shall be constructed to facilitate climbing.

CONFLICT WITH LAND USE BY-LAWS

8. In case of conflict between the provisions of this by-law and the provisions of any land use by-law, the provisions of this by-law shall prevail except where this bylaw specifies that the provisions of the land use by-law apply.

[Exhibit G-7, Tab 4G]