DECISION **2023 NSUARB 233**
M11340

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **DAVID SCHWARTZ** from a Decision of a Development Officer to approve an Amendment to an existing Development Agreement for property located at Amalfi Way & Timberlea Village Parkway, Nova Scotia

BEFORE: M. Kathleen McManus, K.C., Ph.D., Member

APPLICANT: **CANADIAN INTERNATIONAL CAPITAL INC.**
Robert Grant K.C.
Folu Adesanya, Counsel

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
Edward Murphy, Counsel
Meg MacDougall, Counsel

APPELLANT: **DAVID SCHWARTZ**

HEARING DATE: October 30, 2023

DECISION DATE: **December 28, 2023**

DECISION: **The motion of Halifax Regional Municipality and the motion of Canadian International Capital Inc. are granted. The appeal is dismissed.**

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I INTRODUCTION

[1] This decision is about an appeal by David Schwartz of a development officer's approval of an application by Canadian International Capital for a non-substantive amendment to the Links at Brunello Development Agreement (Development Agreement), under s. 245(3A) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (*HRM Charter*).

[2] Halifax Regional Municipality (HRM), the respondent, and Canadian International Capital, the applicant, each brought a motion asking to have the appeal dismissed because the Nova Scotia Utility and Review Board does not have the jurisdiction to hear this matter. Additionally, Canadian International Capital asked, in the alternative, that the appeal be dismissed because neither the Notice of Appeal nor its addendum discloses an adequate ground for appeal that contravenes s. 265(2) of the *HRM Charter*.

[3] For the following reasons, the Board finds it appropriate to grant the motions to dismiss the appeal.

II BACKGROUND

Development Agreement

[4] In 2002, Canadian International Capital Inc. entered into the Development Agreement with HRM, under s. 240 of the *HRM Charter*, which permits development in HRM by way of a development agreement. The Development Agreement has been amended many times, with the last amendment occurring in 2018. The original Agreement and all subsequent amendments were approved by Council.

[5] The original 2002 Development Agreement allows a mixed residential and commercial community development surrounding the Brunello Golf Course in Timberlea. The existing Development Agreement allows 3,200 dwellings in a mix of single unit dwellings, two-unit dwellings, townhouses and apartment buildings and provides a conceptual layout and design criteria for the planned community.

[6] The following provisions of the original Development Agreement (2002) are relevant for these motions:

> **PART 1: GENERAL REQUIREMENTS AND ADMINISTRATION**
> …
>
> **1.4** Pursuant to Section 1.2 and 1.3, nothing in this Agreement shall exempt or be taken to exempt the Developer, lot owner or any other person from complying with the requirements of any by-law of the Municipality applicable to the Lands (other than the Land Use By-law and Subdivision By-law to the extent varied by this Agreement), or any statute or regulation of the Province of Nova Scotia, and the Developer or lot owners agree to observe and comply with all such laws, by-laws and regulations in connection with the development and use of the Lands.
>
> **1.5** Where the provisions of this Agreement conflict with those of any by-law of the Municipality applicable to the Lands (other than the Land Use By-law and Subdivision By-law to the extent varied by this Agreement) or any provincial or federal statute or regulation, the higher or more stringent requirements shall prevail.
> …
>
> **PART 2: USE OF LANDS AND DEVELOPMENTS PROVISIONS**
> …
>
> **2.4.4 Multiple Unit Dwellings** (outside of the Town Centre)
>
> The Developer and the Municipality agree that multiple unit dwellings may be located in areas Re, Brc, BrcO as shown on Schedule B2, and subject to the following guidelines being addressed on detailed plans which shall be subject to approval under clause (ix) of this section.
>
> (i) Minimum Lot Area: 6000 square feet (558 sq.m.). plus 1000 square feet (111.5 sq.m.) for each unit in excess of the first 3 units. Consideration may be given for a reduction in this figure where underground parking is provided.
> (ii) Minimum Front & Flank age Yard […]
> Minimum Side and Rear yards: […]
>
> (iii) Minimum Lot Frontage: […]
> (iv) Maximum Height: […]
> (v) Required Parking: […]
> (vi) Landscaping: […]
> (vii) Amenity Space: […]
> (viii) Architecture: […]

(ix) Approval: The approval of any multiple unit dwelling, including any variations to these guidelines, shall be contingent on review of detailed plans which address the criteria of this section, and approval of an amending development Agreement by minor amendment pursuant to Section 3.1(c).

…

Part 3 AMENDMENTS

3.1 The provisions of this Agreement relating to the following matters are identified as and shall be deemed to be not substantial and may be amended by resolution of the Community Council:

…

(c) development of, or minor adjustments of, multiple unit dwellings pursuant to 2.4.4, as shown on Schedule B3; and development of alternate housing types pursuant to 2.4.3,

…

[Exhibit S-9, Brunello Development Agreement]

[7] While amendments have been made to Part 3 of the Development Agreement, none have changed the wording of the relevant Agreement provisions.

Decision of Development Officer

[8] On September 7, 2023, development officer, Trevor Creaser, as authorized by s. 245 (3A) of the *HRM Charter*, approved an application by Canadian International Capital, the applicant, for a non-substantive amendment to s. 2.4.4 of the Development Agreement, to allow for the construction of a nine-storey residential building containing up to 76 units on the lands located between Amalfi Way and Merlot Court, east of Timberlea Village Parkway, Timberlea.

[9] The approved amendment to s. 2.4.4 allowed the following insertion into the Development Agreement:

2.4.4.3 Development Standards for one multiple unit dwelling (outside the town centre) located on the Lands identified in Schedule A of the Seventeenth Amending Agreement and on the Site Plan in Schedule Y-1

The Developer and the Municipality agree that one multiple unit dwelling consisting of 76 dwelling units may be located on the Lands described on

the Site Plan (Schedule Y-1), subject to the guidelines of Section 2.4.4 and the following requirements:

Requirements Prior to Approval

(a) Prior to the issuance of a Development Permit for the development of a multiple unit dwelling, the Developer shall provide the following to the Development Officer:

(i) A detailed Site Grading Plan prepared by a Professional Engineer;

(ii) A detailed Site Disturbance Plan prepared by a Professional Engineer indicating the sequence and phasing of construction and the areas to be disturbed or undisturbed;

(iii) A detailed Erosion and Sedimentation Control Plan prepared by a Professional Engineer in accordance with Section 2.7.1;

(iv) A detailed Landscape Plan prepared by a Landscape Architect, in accordance with Sections 2.4.4 (vi) and 2.4.4.3 (l) and acceptable to the Development Officer; and

(v) A summary table of the total number of lots and units approved to date, by category, shall be submitted in accordance with Section 2.4.15

(b) Prior to the issuance of any Occupancy Permit for the multiple unit dwelling, the Developer shall provide to the Development Officer, a certification from a Landscape Architect in accordance with Section 2.4.4 (vi) and 2.4.4.3 (l) indicating that the Developer has complied with the landscaping required pursuant to this Agreement, or Security in accordance with Section 2.4.16 of this Agreement has been provided.

General Description of Land Use

(c) The uses permitted are as follows:
(i) One multiple unit dwelling, consisting of no more than 76 dwelling units; and
(ii) Accessory uses.
(d) The multiple unit dwelling shall be developed as generally shown on the Schedules.

Development Standards and Architectural Requirements

(e) The building's siting, height, massing, and scale shall be as generally shown on the Schedules.

(f) Exterior building materials shall include a combination of three or more materials of contrasting texture and colour.

(g) The following external cladding materials are prohibited:

- **i. Vinyl siding;**
- **ii. Plastic;**
- **iii. Plywood;**
- **iv. Unfinished concrete;**
- **v. Cinder block;**
- **vi. exterior insulation and finish systems where stucco is applied to rigid insulation, and**
- **vii. darkly tinted or mirrored glass, except for spandrel glass panels.**

(h) Any exposed foundation walls or portions of the underground parking podium protruding more than 0.6 metres in height above grade shall be clad in the same materials as those used on the connecting building wall.

(i) Large blank or unadorned walls shall not be permitted.

(j) All vents, down spouts, flashing, electrical conduits, metres, service connections, and other functional elements shall be treated as integral parts of the design. Where appropriate, these elements shall be painted to match the colour of the adjacent surface, except where used expressly as an accent.

(k) Rooftop mechanical features shall be visually integrated into the overall design of the building top and screened.

<u>Landscaping</u>

(l) In addition to the requirements of Section 2.4.4 (vi), the following requirements shall also apply:

(i) Where the subject site abuts low density residential uses, an opaque fence 1.8 metres high shall be provided and/or a landscape buffer as per section (ii) below.

(ii) A landscape buffer shall be provided as shown on Schedule Y-1. This landscape buffer shall be a minimum 2.5 metres wide and consist of at least one tree (with a minimum base caliper of 50 millimetres for deciduous trees and a minimum 2 metre height for coniferous trees) for every 4 linear metres of buffer. Trees in a landscape buffer may be grouped or unevenly spaced. Existing vegetation shall be acceptable if it meets the above standards, as certified by a member in good standing of the Canadian Society of Landscape Architects.

(iii) Notwithstanding Schedule Y-1 and (i), the retaining wall along the north property boundary shall be terraced, from the building wall to the property line, to ensure it steps down in height. Landscaping shall be provided on each terrace of the retaining wall and shall meet the requirements of Section 2.4.4 (vi).

Parking, Circulation and Access

(m) Notwithstanding the minimum parking requirement of Section 2.4.4 (v), the required number of parking spaces may be reduced, provided:

(i) A minimum of 97 parking spaces shall be provided;
(ii) Of those, a maximum of 17 outdoor surface parking spaces are permitted. The remaining parking spaces shall be located internal to the building; and
(iii) The surface parking areas shall be provided generally as shown on Schedule Y-1.

(n) Parking areas shall be located no closer than 15 feet from any lot line and screened using landscaping and fencing, from the ground floor view of any abutting single unit dwelling or townhouse.

[Exhibit S-8, HRM Appeal Record, Report Package, July 25, 2023, pp. 136-137]

Appeal of Development Officer's Decision

[10] On September 21, 2023, David Schwartz appealed the development officer's decision to the Nova Scotia Utility and Review Board, under s. 262(1)(a) of the *HRM Charter*.

[11] In his Notice of Appeal, Mr. Schwartz stated the grounds for his appeal were:

> 1) Is the HRM Planning Department (HRMPD) interpreting Section 2.7.8 of the Development Agreement (DA) correctly;
> 2) do the negligent and/or fraudulent misrepresentation by TLAB, which HRMPD is aware of, preclude the construction of a 9-story Apartment building on the lands in question;
> 3) in the alternative do the words and deeds of TLAB require that a proposal for such a building on the lands in question be dealt with, procedurally, on a substantive basis rather than "as of right" in a non-substantive manner by HRMPD; and
> 4) other issues as set out below.
>
> [Exhibit S-1, Notice of Appeal]

[12] Attached to the Notice of Appeal is a 21-page document explaining Mr. Schwartz's appeal and requesting the following remedies:

> 1) The approval of the proposed building should be denied on the basis of the Common Law principle of proprietary estoppel and this Board should issue an Order stating that any future developments of land in questions be limited to single family dwellings or townhouses;

2) In the alternative the approval should be denied on the basis that HRMPD [HRM Planning Department] has failed to properly interpret, in accordance with Legal Standards, Section 2.7.8 and that this Board should order that any subsequent proposal for the development of the lands in question must be include the retention of the 6m NDA [non-disturbance area];

3) In the further alternative this Board determine that as a result of the representations and actions of TLAB [The Links at Brunello] that the Application be resubmitted on a Substantive basis instead of "as of right" on a non-substantive basis.

4) Additionally, if the Board adopts alternative three (3) that it directs TLAB to address the waste-water management issues in its application as well as re-submit a TIS [Traffic Impact Statement] that is in compliance with HRMPD Guidelines and considers future development intersection concerns.

[Exhibit S-1, Notice of Appeal]

Motions to Dismiss

[13] HRM and Canadian International Capital Inc. filed motions to dismiss the appeal. HRM states that the Board does not have the jurisdiction to hear an appeal of the development officer's decision, made under s. 245(3A) of the *HRM Charter*, to approve a non-substantive amendment to the Development Agreement.

[14] Canadian International Capital also states the Board does not have the jurisdiction to hear this appeal of the development officer's decision to approve a non-substantive amendment to the Development Agreement. Also, it states that neither the Notice of Appeal nor its appeal addendum disclose any case to answer, as there is no allegation that the decision of the development officer contravenes the Development Agreement or the municipal planning strategy, and therefore does not provide an adequate ground(s) for an appeal that contravenes s. 265(2) of the *HRM Charter*.

III ISSUES

[15] The Board must determine if it has the jurisdiction to hear and allow an appeal from the development officer's decision, made under s. 245(3A) of the *HRM Charter*, to approve a non-substantive amendment to the Development Agreement.

[16] The Board must determine if it has the jurisdiction to find that the development officer made a procedural error in determining that Canadian International Capital's application qualified as a non-substantive amendment to the Development Agreement.

[17] In the alternative, the Board must determine if Mr. Schwartz's Notice of Appeal and the 21-page attachment do not disclose any case to be answered, as it does not state an adequate ground for appeal that contravenes s. 265(2) of the *HRM Charter*.

IV ANALYSIS AND FINDINGS

Board's Authority to Consider Motions to Dismiss an Appeal under the HRM Charter

[18] The Board's *Municipal Government Act Rules* (*MGA Rules*) created under section 12 of the *Utility and Review Board Act*, S.N.S. 1992, c. 11, s. 1, set out the rules of practice and procedures applicable to planning appeals brought under the *HRM Charter* and the *Municipal Government Act*.

[19] As confirmed in two recent decisions of the Board in *Sanford (Re)*, 2023 NSUARB 30 and *McShane (Re)*, 2023 NSUARB 143, the Board has the authority to consider a preliminary motion to dismiss an appeal brought under the *HRM Charter*, under s. 13 of the *MGA Rules*. Section 13 states:

> **Preliminary hearings**
> **13 (1)** In any appeal or application, the Board may, on its own initiative or at the request of any party, hold a preliminary hearing to deal with any matter that may aid in the disposition of the hearing, including to
>
> **(a)** consider any preliminary motion for an order dismissing the appeal or application on the on the grounds that the Board lacks the jurisdiction to hear the appeal or application, that an appellant is not an aggrieved person, that a Notice of Appeal was filed too late, or for other reasons that may appear; [Emphasis added]

Board's Jurisdiction to Consider an Appeal of a Development Officer's Decision to Approve a Non-Substantive Change to a Development Agreement

General Principles Regarding the Scope of the Board's Authority

[20] Both HRM and Canadian Investments Capital point out that the Board is created by statute and must restrict itself to matters within its jurisdiction. Further, they both state that the *HRM Charter* does not give an aggrieved person the authority to appeal to the Board a decision of a development officer approving a non-substantive amendment to a development agreement. Additionally, they state that the Board has no jurisdiction to hear such an appeal and no authority to allow such an appeal.

[21] The Board agrees that it can only exercise the authority that it has been given by statute. As it is often stated, the Board is a "creature of statute" whose power is limited to what is expressly stated in the applicable statute or which is required by necessary implication. The Board's decision in *Nova Scotia Power Inc., Re*, 2023 NSUARB 12 described the scope of the Board's jurisdiction as follows:

> [31] The Board is an administrative body, established under the laws of the Province of Nova Scotia as a continuation of predecessor boards under the *Utility and Review Board Act,* S.N.S. 1992, c. 11 (*UARB Act*). It exercises adjudicative and regulatory decision-making authority under approximately 40 statutes and related regulations. In doing so, it must follow legislative requirements and administrative law principles. The Board's decisions may be appealed to the Nova Scotia Court of Appeal on any question of law or its jurisdiction.
>
> [32] The Board is what has sometimes been referred to as a "creature of statute". In *Administrative Law in Canada*, 7th ed. (LexisNexis Canada, 2022), Sara Blake described the powers of such entities:
>
> > An administrative tribunal is created by statute and has only those power conferred on it by statute. It has no inherent power to undertake proceedings or to make an order that affects a person's substantive rights or obligations. Most Interpretation Acts confer on tribunals all powers that are necessary to enable them to make decisions and do the things they are expressly empowered to do. The powers that exist by necessary implication may be deduced from the wording of the Act, its structure, and its purpose. A tribunal's powers should be interpreted so as to enable the tribunal to fulfil the purposes of the statute rather than sterilized by overly technical interpretation, but statutory power may not be expanded to accomplish what the tribunal thinks it ought to do to further its mandate in

> the public interest. If a tribunal has broad authority to make any order to remedy a violation of the Act, the remedy must be related to the violation, its consequences and the purposes of the Act.
>
> [p. 137]

[22] The Board's general functions, power, duties and jurisdiction are expressly addressed in the *Utility and Review Board Act*, S.N.S. 1992, c. 11:

> **Functions, powers and duties**
> **4 (1)** The Board has those functions, powers and duties that are, from time to time, conferred or imposed on it by
>
> (a) this Act, the *Assessment Act*, the *Expropriation Act*, the *Gasoline and Diesel Oil Tax Act,* the *Health Services Tax Act*, the *Heritage Property Act*, the *Insurance Act*, the *Motor Carrier Act*, the *Municipal Government Act*, the *Public Utilities Act*, the *Education Act*, the *Shopping Centre Development Act*, the *Tobacco Act* or any other enactment; and
>
> (b) the Governor in Council;
>
> …
>
> **Jurisdiction**
> **22 (1)** The Board has exclusive jurisdiction in all cases in respect of all matters in which jurisdiction is conferred on it.
>
> **(2)** The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact.

[23] Given that the Board can only exercise the power that it has been given, the question becomes whether the *HRM Charter* gives the Board the authority to hear and allow an appeal of a development officer's decision, made under s. 245(3A) of the *HRM Charter*, to approve a non-substantive amendment to a development agreement.

Statutory Scheme

[24] The power of a development officer under section 245(3A) was introduced through s. 9(1) of *An Act to Amend Chapter 39 of the Acts of 2008, the Halifax Regional Municipality Charter, Respecting Housing*, S.N.S. 2022, c. 13 when Bill 137 received Royal Assent in April 2022. Also, at this time, an amendment was made to insert section 245(3) which states a development officer cannot approve amendments to a development

agreement if the amendments are a combination of substantive and non-substantive. Section 245 states, in part:

> **Adoption or amendment of development agreement by policy**
> **245** **(1)** The Council shall adopt or amend a development agreement by policy.
> **(2)** The Council shall hold a public hearing before approving a development agreement or an amendment to a development agreement.
> **(3)** Only those members of the Council present at the public hearing may vote on the development agreement or the amendment.
> **(3A)** Notwithstanding subsections (1) to (3), a development officer may approve non-substantive amendments to a development agreement without holding a public hearing.
> **(3B)** Subsection (3A) does not apply where amendments to a development agreement are a combination of substantive and non-substantive amendments. [Emphasis added]

[25] The *HRM Charter* authorizes the Board to hear appeals from municipal council decisions approving development agreements or approving amendments to development agreements under s. 262 which states:

> **Appeals to the Board**
> **262** **(1)** The approval or refusal by the Council to amend a land-use by-law may be appealed to the Board by
> (a) an aggrieved person;
> (b) the applicant;
> (c) an adjacent municipality;
> (d) the Director.
> **(2)** The approval, or refusal to approve, and the amendment, or refusal to amend, a development agreement may be appealed to the Board by
>
> (a) an aggrieved person;
> (b) the applicant;
> (c) an adjacent municipality;
> (d) the Director.
>
> **(3)** The refusal by a development officer to
> (a) issue a development permit; or
> (b) approve a tentative or final plan of subdivision or a concept plan,
> may be appealed by the applicant to the Board. [Emphasis added]

[26] Under s. 265(1)(b) of the *HRM Charter*, an aggrieved person may only appeal the approval of an amendment to a development agreement on the grounds that Council's decision does not reasonably carry out the intent of the municipal planning strategy. Section 265(1)(b) provides as follows:

Restrictions on appeals

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

…

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

[27] Similarly, under s. 267(1)(b) and (c) of the *HRM Charter*, the Board may only allow an appeal from a decision of Council to amend a development agreement. This section does not authorize the Board to allow an appeal from a decision of a development officer that amends the development agreement. The Board can only allow appeals from decisions of development officers about development permits and approvals of subdivision or concept plans. Section 267(1) states as follows:

Powers of Board on appeal

267 (1) The Board may

(a) confirm the decision appealed from;

(b) allow the appeal by reversing the decision of the Council to amend the land-use by-law or to approve or amend a development agreement;

(c) allow the appeal and order the Council to amend the land-use by-law in the manner prescribed by the Board or order the Council to approve the development agreement, approve the development agreement with the changes required by the Board or amend the development agreement in the manner prescribed by the Board;

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

(e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan.

Relevant Statutory Interpretation Principles

[28] The principles of statutory interpretation apply in determining the scope of the powers conferred upon the Board in the *HRM Charter*. The “modern rule” of statutory interpretation has been affirmed many times in Nova Scotia. In *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82, the Court of Appeal reviewed the law and

added comments about the importance of the *Interpretation Act*, R.S.N.S 1989, c. 235 (*Interpretation Act*), as follows:

> [24] The Supreme Court of Canada has reminded us time and time again that we are to take a pragmatic approach to statutory interpretation. Our approach must be both purposive and contextual. For example, in *Bell ExpressVu Ltd. v. Rex*, 2022 SCC 42 (S.C.C.) at ¶ 26 Justice Iacobucci describes this "modern approach":
>
> > [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
> >
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretative settings: [cites omitted]
> >
> > …
>
> [27] As well, Section 9(5) of the *Nova Scotia Interpretation Act*, R.S., c. 235, s. 1, holds that all enactments shall be deemed remedial, and interpreted to insure the attainment of their objects by considering among other matters:
>
> > (a) the occasion and necessity for the enactment;
> > (b) the circumstances existing at the time it was passed;
> > (c) the mischief to be remedied;
> > (d) the object to be attained;
> > (e) the former law, including other enactments upon the same or similar subjects;
> > (f) the consequences of a particular interpretation; and
> > (g) the history of legislation on the subject.
> >
> > …
>
> [31] All that said, at the end of the day, we should interpret legislation in a manner that is both reasonable and just. Ruth Sullivan in *Sullivan on the Construction of Statutes*, *supra*, explains at §2.9:
>
> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. **An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotions of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.** [Emphasis added]
>
> [32] This passage has been recently endorsed by a majority of the Supreme Court of Canada in *R. v. Alex*, 2017 SCC 37 (S.C.C.) ¶32…

[29] In *Sparks* v. *Holland*, 2019 NSCA 3, the Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation and stated the three questions it typically asks when applying the modern principle:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Slauenwhite* v. *Keizer*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
> 2. What did the Legislature intend?
> 3. What are the consequences of adopting a proposed interpretation?

[30] These principles also apply to administrative decision makers to require that legislation be interpreted consistent with its text, context, and purpose. However, the form of analysis may look different than one undertaken by a court and may be enriched by the specialized expertise and the experience of the decision maker (*Canada (Minister of Citizenship and Immigration* v. *Vavilov*, 2019 SCC 65, paras. 117-121).

Positions of the Parties

[31] HRM and Canadian International Capital assert that the Board has no jurisdiction to hear this appeal. HRM and Canadian International Capital state there is no statutory provision that permits an aggrieved person to appeal the decision of a development officer to approve a non-substantive amendment to a development agreement. Similarly, there is no statutory provision which gives the Board authority to hear and allow such an appeal.

[32] In support of their argument, HRM and Canadian International Capital refer to several provisions in the *HRM Charter*: s. 265(1)(b), which states an aggrieved person can only appeal a decision of Council to amend the development agreement; s. 267(1)(b) that gives the Board the authority to allow an appeal only from a decision of Council to amend a development agreement; and, s. 262(3), which only allows an appeal from a decision of a development officer for refusing to issue a development permit or for refusing to approve a plan of subdivision or concept plan.

[33] HRM stated that if the legislature had intended that an aggrieved person could appeal a decision of a development officer to approve a non-substantive amendment to a development agreement, then the legislature would have given the Board the authority to appeal and allow such an appeal by amending the *HRM Charter*. HRM also referred to an extract from the Hansard debates to understand the purpose for Bill 137. HRM referenced two statements made by the Minister of Municipal Affairs and Housing that the amendments were intended to "streamline the development approval process" to address Nova Scotia's housing crisis. Referring specifically to s. 235(3A) amendment at third reading of the Bill, the Minister stated:

> […] A development officer could approve non-substantive amendments if the development agreement itself has already been approved by council. These changes would see the development agreement become more effective when it is signed by the municipality and the property owner rather than waiting for up to five days to be filed with the Land Registry. This will allow the municipality to issue permits more quickly.
>
> […]
>
> I believe that these amendments will streamline processes, both HRM's and our own, and make the development approval process faster while still allowing the public to have its say.
>
> [HRM Submissions on Motion to Dismiss, para. 10]

[34] Finally, HRM stated that Mr. Schwartz could challenge the development officer's decision by way of judicial review in the Nova Scotia Supreme Court, so he had legal recourse but not by way of appeal to the Board.

[35] In response, Mr. Schwartz stated the *HRM Charter* does not differentiate between a decision of Council, and one made by a development officer. By way of example, he referred to s. 262(2) which permits an appeal of an amendment to a development agreement to the Board without differentiating between who the decision maker was, Council or a development officer. He referenced other provisions of the *HRM Charter*, such as s. 245(4) and (6) which state how the clerk provides notice of approval or rejections of a development agreement or amendments to it. Mr. Schwartz stated these notices do not differentiate between a decision of Council and one made by a development officer. Mr. Schwartz also argued that it is implicit the *HRM Charter* permits an appeal of a development officer's decision to approve a non-substantive amendment to a development agreement. He stated this was the only possible interpretation, as it made no sense that "lesser" decisions of development officers about permits and subdivision plans can be appealed to the Board, but a "significant" decision to approve a non-substantive amendment to a development agreement cannot be appealed to the Board. He stated that if he cannot appeal then he has no legal recourse to challenge the approval of the development officer.

Analysis

[36] This is the first time that the Board is considering whether it has the authority to hear and allow an appeal from an aggrieved person of a development officer's decision,

made under s. 245(3A) of the *HRM Charter*, to approve a non-substantive amendment to a development agreement.

[37] As discussed above, the Board is a statutory creature who can only exercise the authority that it has been given by statute. The *HRM Charter* establishes the scope of the Board's authority to hear and allow an appeal of a development officer's decision to approve a non-substantive amendment to a development agreement.

[38] Sections 262 and 265 of the *HRM Charter* establish what matters can be appealed to the Board and work together with s. 267, which sets out what power the Board has on appeal. These sections must be read together, because if the legislature intended the Board to have jurisdiction over an appeal, then the Board would have both the authority to hear the appeal and to allow the appeal if it deemed it appropriate.

[39] The Board does not agree with Mr. Schwartz that s. 262(2)(a) of the *HRM Charter* gives him the stand-alone right, as an aggrieved person, to file an appeal with the Board regarding the approval of an amendment to a development agreement. This right to appeal is subject to restrictions set out in s. 265, which states an aggrieved person may only appeal the approval of an amendment to a development agreement, on the grounds that the decision of Council does not reasonably carry out the intent of the municipal planning strategy. When the Board reads these sections together, it finds that Mr. Schwartz can only appeal a decision of Council to amend a development agreement. This interpretation is supported by the power of the Board, as stated in s. 267(1)(b), to allow an appeal from a decision of Council to amend a development agreement.

[40] Section 262(3) permits an appeal to the Board of a development officer's decision to refuse a development permit or refuse to approve a plan of subdivision or a

concept plan. Similarly, s. 267(1)(d) gives the Board the authority to allow an appeal by directing that the development officer issue the development permit or, under s. 267(1)(e), the Board can allow an appeal and direct the development officer to approve the plan of subdivision or concept plan.

[41] When the legislature amended the *HRM Charter* to give authority to a development officer, under s. 245(3A), it did not amend s. 265 to permit an appeal to the Board from the development officer's decision to approve a non-substantive amendment to a development agreement. Also, the legislature did not amend s. 267 to give authority to the Board to allow an appeal from the development officer's decision. The Board can only conclude, in giving a broad and liberal interpretation to the statutory scheme, that it was the legislature's intent not to permit an appeal to the Board from a development officer's decision to approve a non-substantive amendment to a development agreement.

Other Grounds Argued to Establish the Board's Jurisdiction

[42] Mr. Schwartz made additional arguments to establish that the Board had jurisdiction to hear his appeal. While these arguments are discussed below, as will be explained, the Board does not accept these arguments.

***Carltona* Doctrine Does Not Apply**

[43] Mr. Schwartz argued that the Board has the jurisdiction to hear his appeal because of the operation of the *Carltona* doctrine.

[44] The Board notes that the *Carltona* doctrine, which comes from the English Court of Appeal's decision in *Carltona* v. *Commissioner of Works*, [1943] 2 All E.R. 560 (C.A.), arises in the specific context of "responsible officials" in a department exercising, on behalf of their minister, the discretionary legal powers given to the minister of that

department. The application of the *Carltona* doctrine allows the decisions of these responsible officials to be lawful. The Supreme Court of Canada adopted and explained the *Carltona* doctrine in *R.* v. *Harrison*, [1977] 1 S.C.R. 238 as follows:

> Thus, where the exercise of a discretionary power is entrusted to a minister of the Crown it may be presumed that the acts will be performed not by the Minister in person but by responsible officials in his department: *Carltona Ltd*. v. *Commrs. of Works*, [1943] 2 All E.R. 560. The tasks of a minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the minister will select deputies and departmental officials of experience and competence, and that such appointees…will act on behalf of the minister…in discharge of ministerial responsibilities. Any other approach would lead to administrative chaos and inefficiency.
>
> [pp. 235-46]

[45] Mr. Schwartz argued that the *Carltona* doctrine applies to the decision of the development officer in this appeal and establishes Mr. Creaser was acting as a delegate of Council when he approved the non-substantive amendment to the Development Agreement. Mr. Schwartz stated that, as this is in fact a decision of Council, the Board has jurisdiction to hear his appeal.

[46] In response, HRM and Canadian International Capital stated that the *Carltona* doctrine does not apply. They argued that a development officer is a statutory officer under the *HRM Charter* and not a delegate of Council. They stated that this appeal concerned a decision of the development officer made under s. 245(3A), which is not a decision of Council.

[47] The Board finds that the *Carltona* doctrine has no application in this matter. When the development officer decided to approve the non-substantive amendment to the Development Agreement, he did so with statutory authority given expressly to him under s. 245(3A) of the *HRM Charter*. The development officer did not act as a delegate of Council. Accordingly, Mr. Schwartz is incorrect in saying that the Board has the jurisdiction to hear his appeal because the development officer was really acting as

Council, whose decisions to amend development agreements can be appealed to the Board.

Postings on HRM's Website Does Not Give the Board Jurisdiction to Hear an Appeal

[48] Mr. Schwartz argued that the notice of the development officer's decision, which was posted on the HRM website on August 31, 2023 (Exhibit S-2, Appeal Record, p. 76), stated that an aggrieved person could appeal to the Board.

[49] The Board does not accept that it has jurisdiction to hear Mr. Schwartz's appeal of the development officer's decision because the notice of the approval posted on HRM website stated that it could be appealed to the Board. The Board can only exercise the powers conferred by statute. It should be noted that the notice of approval posted on HRM website stated:

> **Any aggrieved person, the Provincial Director of Planning, or the Council of any adjoining municipality may, with fourteen days of the publishing of this notice on the HRM website, appeal to the Nova Scotia Utility and Review Board (902.424.4448), in accordance with the provisions of the Halifax Regional Municipality Charter.** [Emphasis added]
>
> [Exhibit S-4, HRM Appeal Record, p. 76]

[50] As determined above, the provisions of *HRM Charter* do not permit an appeal of the development officer's approval of a non-substantive amendment to the Development Agreement.

[51] The Board does, however, understand how the information given on HRM website could have suggested to Mr. Schwartz that he had a right to appeal the development officer's decision to the Board. To avoid future misunderstandings, the Board would recommend that HRM reconsider and perhaps adapt the information that it

has on its website about the right to appeal to the Board a development officer's decision to approve non-substantive amendments to a development agreement.

Board Has No Jurisdiction to Review an Allegation of Procedural Error Made by the Development Officer

[52] In his Notice of Appeal, Mr. Schwartz stated that the development officer made a procedural error in processing Canadian International Capital's application as a non-substantive amendment to the Development Agreement and with the process followed by the development officer in reaching his decision. The Board has no jurisdiction over the process followed by the development officer. The Nova Scotia Court of Appeal's decision in *Halifax (County)* v. *Maskine*, (1992) N.S.J. No. 292, held that it was not a concern of the Board whether due process was followed by a Council or a development officer.

V CONCLUSION

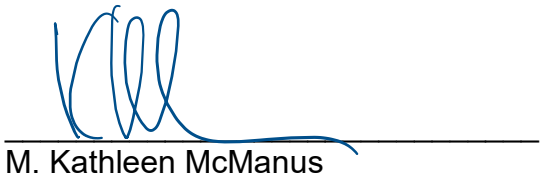
[53] The Board is without jurisdiction to hear and allow an appeal from a development officer's decision, made under s. 245(3A) of the *HRM Charter*, to approve the non-substantive amendment to a development agreement. Accordingly, the Board has no jurisdiction to hear Mr. Schwartz's appeal of the development officer's decision dated August 30, 2023, to approve a non-substantive amendment to the Development Agreement.

[54] Having made this determination, it is unnecessary to consider the second issue raised by Canadian International Capital, whether the appeal should be dismissed as the notice of appeal and the 21-page attachment do not disclose any case to be answered.

[55] The motions of HRM and Canadian International Capital are granted, and the appeal is dismissed.

[56] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 28th day of December, 2023.



M. Kathleen McManus