PRELIMINARY DECISION **2024 NSUARB 174**
M11816

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

-and-

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

BEFORE: Roland A. Deveau, K.C., Vice Chair
Bruce H. Fisher, MPA, CPA, CMA, Member
Julia E. Clark, LL.B., Member

APPELLANT: **HAZELVIEW INVESTMENTS**
Kevin Latimer, K.C.
Sarah Dobson, Counsel

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
Kelsey Nearing, Counsel
Meg MacDougall, Counsel

FINAL SUBMISSIONS: October 4, 2024

DECISION DATE: **October 23, 2024**

DECISION: **Board has jurisdiction to hear the appeal.**

1.0 SUMMARY

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

[2] The relevant sections of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (*HRM Charter*) dealing with the consideration of variances by development officers are sections 250 and 250A. Section 250A appears to allow development officers to consider variances from stepbacks, provided the variance does not "materially conflict with the municipal planning strategy". In this matter, the development officer refused the stepback variance and the developer, Hazelview Investments, appealed to the Board.

[3] HRM's counsel wrote to the Board, stating that it had identified a jurisdictional issue about the Board's authority to consider the appeal. HRM submitted that the development officer had no authority under the *HRM Charter* to approve a stepback variance in this matter. Therefore, in its view, no appeal lies to the Board from the development officer's decision. Hazelview's counsel submitted that the development officer did indeed have the authority to consider the variance and that the Board has the jurisdiction to hear the appeal.

[4] The Board reviewed the provisions of the *HRM Charter*, along with the applicable legal interpretation principles. The Board concludes that the development officer had the authority under the *HRM Charter* to consider the request for a stepback variance and that the Board has the jurisdiction to hear this appeal.

2.0 BACKGROUND

[5] On June 26, 2024, Hazelview applied to HRM for a “stepback” variance to the requirements of the Suburban Housing Accelerator Land Use By-Law (SHA LUB) for a proposed development at 41 Cowie Hill Road, Halifax, Nova Scotia. This location was identified as an Opportunity Site under the recently completed Suburban Housing Accelerator planning process. The applicable municipal planning strategy is the Suburban Housing Accelerator Secondary Municipal Planning Strategy (SHA SMPS). Hazelview Investments appealed to the Board on July 24, 2024, from the development officer’s refusal of the variance.

[6] A “stepback” is defined in the SHA LUB, along with the accompanying diagram, as follows:

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

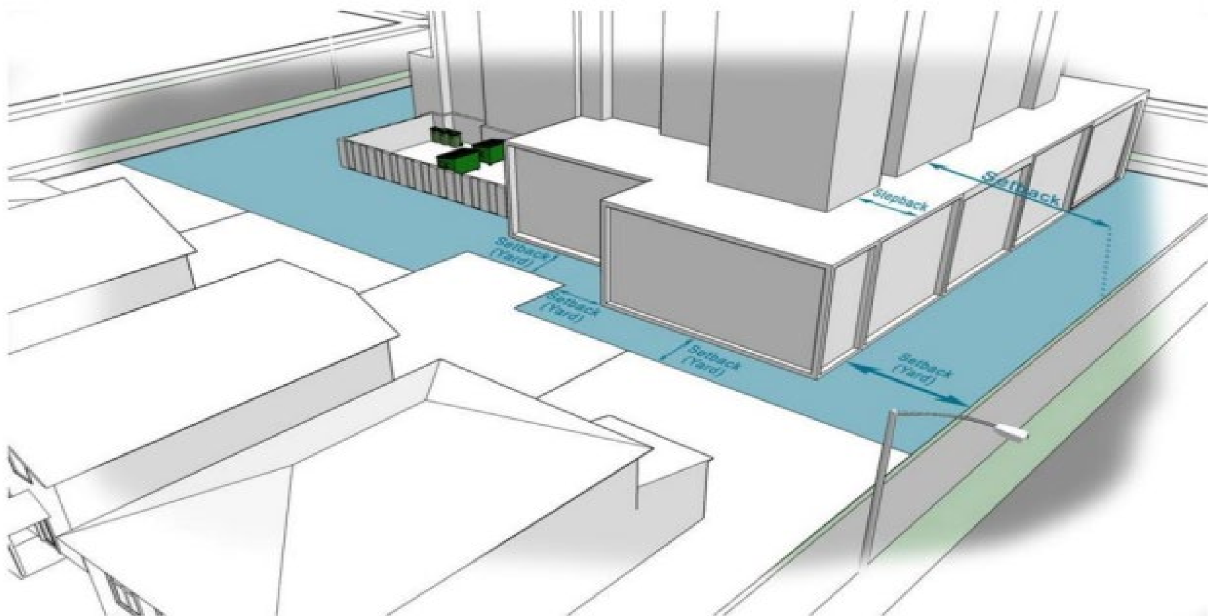


Diagram 15: Setback and stepback, per subsections 155(165) and 155(183)

[HRM Submission, September 26, 2024, pp. 2-3]

[7] On September 6, 2024, after it conducted a preliminary telephone conference with counsel, the Board issued a Hearing Order setting out a timeline for the disclosure of evidence by both parties and scheduling the hearing of the appeal starting November 6, 2024. On September 16, 2024, HRM filed its Appeal Record and HRM's counsel wrote to the Board, stating that she identified a jurisdictional issue about the Board's authority to consider the appeal. The Board wrote to the parties on September 19, 2024, allowing both parties to file written submissions on the jurisdictional issue. The written submissions were completed on October 4, 2024.

[8] In summary, HRM's counsel argued that sections 250 and 250A of the *HRM Charter* do not provide for stepback variances for developments like this one, that are subject to the Suburban Housing Accelerator Land Use By-law. Thus, HRM said that the development officer had no authority under the *HRM Charter* to approve a stepback variance in this matter. In its view, no appeal lies to the Board from the development officer's decision and HRM asked that the appeal be dismissed. Hazelview's counsel submitted that HRM's position was inconsistent with the modern principle of interpretation that the words of a statute should be "read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the [Legislature]". It added that HRM's interpretation would lead to an absurd result. It submitted that the development officer did indeed have the authority to consider and approve the variance and that the Board has the jurisdiction to hear the appeal.

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

development officer's refusal under s. 250 can only be appealed to Council. There is no appeal to the Board. Section 250 provides:

> **Variance**
> **250 (1)** A development officer may grant a variance in one or more of the following terms in a development agreement, if provided for by the development agreement, or in land-use by-law requirements:
>
> (a) percentage of land that may be built upon;
>
> (b) size or other requirements relating to yards;
>
> (c) lot frontage or lot area, or both, if
>
> (i) the lot existed on the effective date of the by-law, or
>
> (ii) a variance was granted for the lot at the time of subdivision approval.
>
> **(2)** Where a municipal planning strategy and land-use by-law so provide, a development officer may grant a variance in one or more of the following terms in a development agreement, if provided for by the development agreement, or in land-use by-law requirements:
>
> (a) number of parking spaces and loading spaces required;
>
> (b) ground area and height of a structure;
>
> (c) floor area occupied by a home-based business;
>
> (d) external appearances of structures in the HRM by Design Downtown Plan Area and the Centre Plan Area;
>
> (e) height and area of a sign.
>
> **(3)** A variance may not be granted if
>
> (a) the variance violates the intent of the development agreement or land-use by-law;
>
> (b) the difficulty experienced is general to properties in the area; or
>
> (c) the difficulty experienced results from an intentional disregard for the requirements of the development agreement or land-use by-law. [Emphasis added]

[10] Subsection 209(ea) of the *HRM Charter* defines the "external appearances of structures" mentioned in s. 250(2)(d) as:

> "external appearances of structures" includes the exterior design of structures, the design features of structures and the facade of structure

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

> **250A (1)** A development officer shall grant under Section 250 a variance respecting a step back or a street wall notwithstanding any land-use by-law or development agreement unless the variance would materially conflict with the municipal planning strategy.
>
> **(2)** A decision to reject a variance under subsection (1) may be appealed to the Board, with the onus on the development officer to prove to the Board how the variance materially conflicts with the municipal planning strategy.
>
> **(3)** Sections 264 to 269 apply, with necessary changes, to an appeal under this Section. [Emphasis added]

[12] Section 265 of the *HRM Charter* sets out restrictions on planning appeals to the Board. Subsections 265 (2) and (3) limit the scope of an appeal to the Board from a development officer's decision, but these provisions were enacted before s. 250A, which also allow an applicant to appeal certain variance decisions to the Board:

> **Restrictions on Appeals**
> **265 (2)** An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land-use by-law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area.
>
> **(3)** An applicant may only appeal a refusal to approve a concept plan or a tentative or final plan of subdivision on the grounds that the decision of the development officer does not comply with the subdivision by-law. [Emphasis added]

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

Powers of Board on appeal
267 **(1)** The Board may

(a) confirm the decision appealed from;

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

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

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

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

(2) The Board may not allow an appeal unless it determines that the decision of the Council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

Restrictions on powers of Board
268 **(1)** The Board may not order the granting of a development permit, the approval of a plan of subdivision, a land-use by-law amendment, a development agreement or an amendment to a development agreement that

(a) is not reasonably consistent with a statement of provincial interest;

(b) conflicts with an order made by the Minister establishing an interim planning area or regulating or prohibiting development in an interim planning area.

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

[14] However, as noted above in the recently added s. 250A(3), sections 264 to 269 of the *HRM Charter* apply, with necessary changes, to an appeal under s. 250A.

[15] Further, when s. 250A was initially added to the *HRM Charter*, the Legislature also added a provision allowing the Board to order costs against HRM when the Board overturns a decision of a development officer under Section 250A:

266 **(6A)** Notwithstanding subsection 28(1) of the Utility and Review Board Act, the Board shall, by order, impose costs on the Municipality if

(a) the Board overturns a decision of a of development officer under Section 250A; and

(b) the Board determines that the awarding of costs is in the interests of justice.

[16] It is against the above statutory context that the parties differ about the authority of the development officer to consider the requested variance in this matter, and whether an appeal from his refusal can be made to the Board.

3.0 INTERPRETATION PRINCIPLES

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

[18] The Board is mindful of *Verdun v. Toronto Dominion Bank,* [1996] 3 S.C.R. 550, and cases following it (see, for example, *Chartier v. Chartier,* [1998] S.C.J. No. 79; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), which make it clear that the Supreme Court of Canada has adopted what it calls the "modern contextual approach" to legislative interpretation, supplanting earlier rules it has supported, such as the "equitable construction approach", the "plain meaning rule", and the "golden rule".

[19] In *Re Rizzo & Rizzo Shoes Ltd.*, Mr. Justice Iacobucci said:

> ...Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p.87, he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[20] On the matter of the purpose of legislation, *Nova Scotia (Crop and Livestock Insurance Commission) v. DeWitt,* [1996] N.S.J. No. 566 (S.C.), is of interest. Goodfellow, J., quotes Driedger (3rd ed.) at pages 38 - 39:

> ... Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews, J.A. recently wrote in *R. v. Moore* [(1985), 67 N.S.R. (2d) 241, at 244 (C.A.)]:
>
> > From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.
>
> ...in *Thomson v. Canada* (Minister of Agriculture), [1992] 1 S.C.R. 385, at 416, where L'Heureux-Dubé, J., wrote:
>
> > [A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.

[21] The Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation in *Sparks v. Holland*, 2019 NSCA 3. Farrar, J.A., stated:

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

[22] The modern rule of statutory interpretation was recently reiterated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65:

> A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [*Vavilov*, para. 117]

[23] The Court went on to elaborate on this concept in the specific context of administrative tribunals:

> [119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.
>
> [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. [Emphasis added]
>
> [*Vavilov*, paras. 119-120]

[24] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

> **9 (1)** The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> **9 (5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

4.0 SUBMISSIONS OF THE PARTIES

[25] Both counsel noted the distinction between the different types of variances that can be considered under s. 250(1) and s. 250(2). Section 250(1) lists types of

applications for variances that can generally be considered by development officers as long as the development agreement or land use by-law allows for it:

- percentage of land that may be built upon;
- size or other requirements relating to yards;
- lot frontage or lot area, or both, if
  - the lot existed on the effective date of the by-law, or
  - a variance was granted for the lot at the time of subdivision approval.

[26] Section 250(2) lists different types of applications for variances that can be considered by development officers, but only if provided for in a municipal planning strategy or a land use by-law:

- number of parking spaces and loading spaces required;
- ground area and height of a structure;
- floor area occupied by a home-based business;
- external appearances of structures in the HRM by Design Downtown Plan Area and the Centre Plan Area;
- height and area of a sign.

[27] However, the parties differ about the source of the authority under s. 250A to consider Hazelview's request for a variance in this case. While Hazelview's counsel argues that s. 250A is the only required source of authority to consider the stepback variance, HRM's counsel submits that any authority under s. 250A to consider a stepback variance depends on finding that authority under s. 250:

> **Charter Authority to Grant Variances**
>
> The Development Officer is a statutory decision maker whose authority is defined by the provisions of the Charter. Section 250 of the Charter provides the Development Officer the authority to grant variances to various specified types of land use by-law requirements.
>
> Section 250A of the Charter modifies the application of section 250 for variances respecting stepbacks and street walls. Subsection 250A(1) states:

> A development officer shall grant under Section 250 a variance respecting a step back or a street wall notwithstanding any land-use by-law or development agreement unless the variance would materially conflict with the municipal planning strategy.

> The wording of subsection 250A(1) reinforces section 250 as the sole source of authority under which a Development Officer may grant a variance to the requirements of a land use by-law: "A development officer **shall grant under Section 250** a variance respecting a step back or a street wall" [emphasis added in original]
>
> The function of subsection 250A(1), therefore, is that it modifies the test to be applied by the Development Officer under subsection 250(3) when considering variances respecting stepbacks and street walls under section 250. For such variances, subsection 250A(1) requires the Development Officer to determine whether the requested variance would "materially conflict with" the relevant municipal planning strategy. Only where such a material conflict exists may a variance otherwise available under section 250 be refused.
>
> [HRM Submission, September 26, 2024, pp. 3-4]

[28] HRM's counsel stated that the various categories listed in s. 250(1) or s. 250(2) did not provide the authority to consider the stepback variance under s. 250A. HRM said that the categories of variances under s. 250(1)(a)-(c) and s. 250(2)(a), (c) and (e) clearly do not apply to stepback requests.

[29] HRM counsel also eliminated s. 250(2)(b) as an option for a stepback variance. HRM said that a stepback variance has no bearing to the "ground area of a structure" because a stepback is, by definition, located above ground level and does not affect the area of a structure at ground level. It added that a stepback variance does not relate to the "height of a structure".

[30] Further, HRM counsel stated that stepback variances do not fall under s. 250(2)(d) because that subsection only applies to structures in the HRM by Design Downtown Plan Area and the Centre Plan Area. The site under appeal is located in a different area that falls under the Suburban Housing Accelerator designation under the SHA LUB.

[31] Interestingly, in its initial written submission, HRM said it was "unclear" whether stepbacks fall under the definition of the "external appearance of a structure" outlined under s. 250(2)(d). However, in her reply submission, HRM counsel made a somewhat contradictory submission when she asserted that "quite possibly stepback variances, fall under section 250(2)(d) of the *Charter* under the broad definition of 'external appearances of structures'". In any event, the subject site is not located in the HRM by Design Downtown or Centre Plan areas, so s. 250(2)(d) does not apply.

[32] Having submitted that the development officer could not consider the stepback request under any of the enumerated categories of s. 250(1) or (2), HRM counsel argued that there was no authority under s. 250A to consider the stepback request in this case. HRM stated that since no stepback variance is available under s. 250, no appeal lies to the Board.

[33] Moreover, HRM counsel referred to the appeal provisions of the *HRM Charter* under sections 264 to 269, which apply, according to s. 250A(3), "with necessary changes". HRM noted that under s. 265 of the *HRM Charter*, which sets out the restrictions on appeals to the Board, appeals from a development officer's decision are only available on the grounds that the development officer failed to administer the relevant planning documents correctly (e.g., such as a land use by-law, subdivision by-law, development agreement, or an order establishing an interim planning area). By analogy to s. 265(2) and (3), HRM submitted that there is no authority to review the development officer's decision where the *HRM Charter* or the planning documents do not provide the development officer with the power to grant such a variance. HRM concluded that if the development officer does not have the power to grant the requested stepback variance,

"the only correct ground for refusal must be that the variance is not available in law" and, therefore, no appeal lies to the Board.

[34] Hazelview's counsel took the opposite view of the effect of s. 250A, submitting that s. 250A itself provides development officers with the only authority they require to consider requests for variances relating to stepbacks and street walls:

> Interpreting s. 250A using Driedger's modern principle leads to a clear conclusion. S. 250A itself confers authority on development officers to grant variances for two types of applications — step backs and street walls. In fact, the clear language of the section compels development officers to approve such variance applications unless they materially conflict with the municipal planning strategy.
>
> …
>
> HRM submits that s. 250 is the "sole source of authority under which a Development Officer may grant a variance to the requirements of a land use bylaw". However, the plain language of the provisions run contrary to this assertion. Both s. 250(1) and (2) and 250A use the same structure to vest authority in development officers to grant variances:
>
> - S.250(1): A development officer may grant variances…
> - S.250(2): … A development officer may grant variances…
> - S.250A: A development officer shall grant… a variance…
>
> Each of these provisions vest authority in development officers to grant variances for particular applications. S. 250(1) and (2) are separated because s. 250(1) lists applications where variances can be granted as of right, while s.250(2) requires authority from planning documents.
>
> The difference between s. 250A and s. 250(1) is that granting variances under s.250A is mandatory, while the other variances are permissive (i.e. "shall" is used instead of "may"). For this reason, variances for step backs and street walls could not have been added as an additional subsection under s. 250(1). Instead, the Legislature added a new section with a new test for these types of variances. They are also not subject to s. 250(3).
>
> The language of s. 250A is not vague. In fact, it is narrow and specific. It clearly references variances for two types of applications — step backs and street walls. There appears to be no dispute that the Application dealt with a request for a variance to step back requirements.
>
> HRM offers no authority or support for its proposition that s.250 is the sole source of authority to grant variances other than noting the inclusion of the words "under section 250" in the language of s.250A. This reference does not nullify the authority flowing from s.250A, but, rather, makes general reference to the provision on variances which s.250A adds to. HRM cites no case law or legal authority for the argument that s.250A cannot itself grant authority to development officers.
>
> [Hazelview Submissions, October 2, 2024, pp. 3-4]

[35] Hazelview's counsel submitted that HRM's interpretation ignores the modern principle of statutory interpretation applied by the Courts and would result in an absurd interpretation:

> Courts will prefer an interpretation that avoids an absurd result even where such an interpretation is not the one supported by an ordinary reading of a provision. In this case, the Appellant says the plain language of s.250A(1) is clear — however, even if it were not, a court would be urged to avoid the interpretation set forth by HRM to avoid an absurd result.
>
> A construction of a statute that would make a section absurd or unreasonable will not be adopted where there is another available interpretation.
>
> It is a recognized category of absurdity for an interpretation to frustrate the purpose of a provision or render a provision null. In particular, it is a "well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage" (*R v Proulx*, 2000 SCC 5, at para 28 [BOA, Tab 4]).
>
> Under HRM's interpretation, s.250A has no force and effect. Not only would it not apply in this case, but it would never apply to vest any development officer with authority to grant variances for step backs or street walls. It is unreasonable to conclude that the legislature amended the *Charter* to add s. 250A but intended for it to have no effect.
>
> [Hazelview Submissions, October 2, 2024, pp. 6-7]

[36] Regarding HRM's submission that ss. 265(2) and (3) of the *HRM Charter's* appeal provisions did not contemplate appeals of the type outlined in s. 250A, Hazelview submitted such an interpretation would also lead to an absurd result. Hazelview submitted that it is "unreasonable and offends common sense" for HRM to suggest the Legislature added a provision specifically referencing a ground of appeal, and the test to be applied on an appeal, but still restricted its application such that no appeal could be made on that ground.

5.0 ANALYSIS AND FINDINGS

[37] The Board considers that the submissions in this matter raise two issues, namely, whether HRM's development officer has the authority to consider Hazelview's

request for a variance in the circumstances of the present case, and whether that refusal can be appealed to the Board.

[38] HRM development officers only have the authority to consider the types of variances allowed under the *HRM Charter*. The Board is created by statute. It too only has the powers the relevant statute gives it. Further, the *HRM Charter* sets out what matters can be appealed to the Board.

[39] The primary point of contention between the parties is the interpretation of sections 250 and 250A of the *HRM Charter*. Both parties agree that the request for a variance in this case does not fall under any of the enumerated categories of s. 250(1) or (2). However, the agreement ends there. HRM argues that s. 250A depends on s. 250 for its authority to allow the development officer to consider a variance. HRM submitted that since no stepback variance is available under s. 250, except “possibly” under s 250(2)(d) for the HRM by Design Downtown or Centre Plan areas, there is no authority under s. 250A to consider the stepback request, and no appeal lies to the Board. Hazelview‘s position is that s. 250A operates independently of s. 250 and that the language of s. 250A is clear to the effect that the requested stepback variance can be considered under s. 250A alone. Hazelview stated that the appeal is properly before the Board.

[40] Subsections 250(1) and (2) contemplate two distinct types of variances. Section 250(1) lists specific types of variances that can be considered by development officers, while s. 250(2) lists other types of variances that can be considered by development officers, but only if provided for in a municipal planning strategy or a land use by-law. As noted above, both parties agree that the request for a variance in this case does not fall under any of the enumerated categories of s. 250(1) or (2). The Board

agrees. While there appeared to be an evolution in HRM's submissions about whether the subject variance could theoretically fall under the point "external appearances of structures", the Board agrees that the subject location is not in the HRM by Design Downtown Plan Area and the Centre Plan Area. Thus, s. 250(2)(d) is not an option for the requested variance.

[41] The Board considers that HRM's attempt to interpret sections 250 and 250A was tortuous and did not give effect to the plain ordinary meaning of those provisions. It tried to impose interpretations on sections 250 and 250A that are not consistent with the overall framework of the *HRM Charter*. In the Board's view, s. 250A contains the authority for a development officer to consider a stepback variance within that very provision, which does not depend whatsoever on s. 250 as a source of authority to consider that request.

[42] Section s. 250A states:

> **250A (1)** A development officer shall grant under Section 250 a variance respecting a step back or a street wall notwithstanding any land-use by-law or development agreement unless the variance would materially conflict with the municipal planning strategy.
>
> **(2)** A decision to reject a variance under subsection (1) may be appealed to the Board, with the onus on the development officer to prove to the Board how the variance materially conflicts with the municipal planning strategy.
>
> **(3)** Sections 264 to 269 apply, with necessary changes, to an appeal under this Section. [Emphasis added]

[43] While s. 250A does make reference to s. 250, the Board sees this reference as simply meaning that a development officer can consider a stepback variance "in like manner" or "in addition to" the enumerated categories of variances listed in s. 250(1) and (2). If HRM's suggested interpretation was accepted, s. 250A would have no practical application, since it would not extend the types of variances that are available to developers. The addition of s. 250A to the statute was made to specify other types of

variances available to the development community that a development officer *must* consider. Otherwise, the amendment would not have been required. Indeed, s. 250A clearly states that a development officer “shall grant” a variance for a stepback or street wall, unless it would “materially conflict with the municipal planning strategy”. Sections 250 and 250A must be read contextually to give effect to each of them. The Board accepts Hazelview’s submission that to interpret these provisions in the manner argued by HRM would lead to an unreasonable and absurd result.

[44] Applying HRM’s proposed interpretation, no appeal would lie to the Board because the requested stepback variance is not contemplated under s. 250. This would effectively mean that no appeal lies to the Board even though s. 250A allows this type of variance, expressly provides for an appeal to the Board, and even sets out a different onus on HRM on appeal. Again, HRM applied a strained interpretation to the interaction of subsections 250A(2) and (3) with the original appeal provisions of the *HRM Charter* (i.e., sections 264 to 269) that apply to appeals under s. 250. Subsection 250A(3) states that these original appeal provisions apply to appeals under s. 250A(1), but <u>with necessary changes</u>. In that context, appeals under s. 250A are not limited to the types of appeals or Board powers enumerated in s. 250(2) and (3). Appeals are allowed, with necessary changes to the appeal provisions, to give full effect to the new type of variance contemplated under s. 250A. HRM’s interpretation would nullify the effect of s. 250A.

[45] In its submissions, Hazelview noted that s. 250A was added along with other amendments to the *HRM Charter* to address the housing crisis in the province, as confirmed by comments made by the Minister in the Legislature when he introduced Bill 329, in which he said the amendments would “remove barriers, increase density, and

ensure that housing remains a priority focus in our most urban centre". While the Board is mindful of the limited weight it can place on Hansard evidence (see *Rizzo*, paras. 34-35), Hazelview's interpretation of s. 250A is consistent with the description of the intent of the statutory amendments, as pronounced by the Minister responsible for introducing Bill 329.

[46] HRM's counsel also referred to the legislative history of the amendments, arguing that s. 250A was essentially added solely to modify the test to be met by HRM on appeal to show that the stepback variance, if approved, would "materially conflict with the municipal planning strategy". The Board does not accept this interpretation because, if that were the case, it would not have been necessary to add the appeal procedures in s. 250A(2) and (3). The Board finds that these appeal procedures were added because s. 250A is its own source of authority to consider stepback variances and the appeal procedures are needed to give full effect to that intent.

[47] The Board, considering the words of sections 250 and 250A, and other related provisions, and interpreting their grammatical and ordinary meaning harmoniously with the scheme of the *HRM Charter,* concludes that the development officer can consider the stepback variance in this matter, and that an appeal from his refusal lies to the Board.

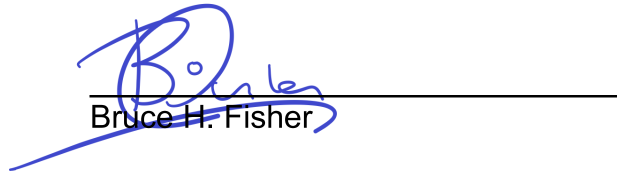
6.0 CONCLUSION

[48] The Board concludes that the development officer had the authority under the *HRM Charter* to consider the request for a stepback variance and that the Board has the jurisdiction to hear this appeal from the development officer's refusal of the variance.

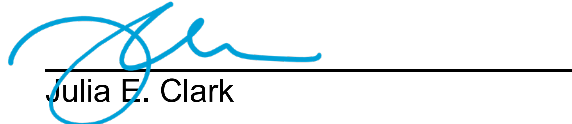
[49] The Clerk of the Board will contact counsel for the parties to schedule a revised timeline for the disclosure of evidence and the conduct of the hearing to consider the appeal.

DATED at Halifax, Nova Scotia, this 23rd day of October, 2024.

Roland A. Deveau



Bruce H. Fisher



Julia E. Clark