

NOVA SCOTIA COURT OF APPEAL

Citation: *BM Halifax Holding Ltd. v. Nova Scotia (Attorney General)*,
2015 NSCA 89

Date: 20151006

Docket: CA 435638

Registry: Halifax

Between:

BM Halifax Holding Limited, TDB Halifax Holdings Limited and
Robin Halifax Holdings Limited

Appellants

v.

The Attorney General of Nova Scotia, Representing Her Majesty the Queen
in Right of the Province of Nova Scotia

Respondent

Judges: MacDonald, C.J.N.S., Fichaud and Van den Eynden, J.J.A.

Appeal Heard: June 1, 2015, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of
Fichaud, J.A.; MacDonald, C.J.N.S. and Van den Eynden,
J.A., concurring

Counsel: Victor J. Goldberg and Ezra B. van Gelder, for the Appellants
Adriana L. Meloni, for the Respondent

Reasons for judgment:

[1] The Province and Halifax Regional Municipality jointly promoted the construction of a premier class convention centre and associated commercial complex in downtown Halifax. The Nova Centre, as it is called, involves substantial financial support from three levels of government. The view is that the project would bring significant economic benefits to Halifax and the Province.

[2] The developer circulated an initial concept, and invited public consultation on its design. Then the developer sought to amend its initial design to incorporate above-grade features that had arisen from these consultations. The municipal process to consider these amendments was expected to take eight months. Sub-grade work had begun. The developer, Municipality and Province were concerned that the momentum of construction would suffer if sub-grade work stopped in the meantime. At the Municipality's request, the Province issued a Statement of Provincial Interest and Interim Planning Area Order, under the *Municipal Government Act* and *Halifax Regional Municipality Charter*, to allow the continuation of Nova Centre's sub-grade work during the municipal consideration of the above-grade design changes.

[3] Owners of other office buildings in Halifax challenged the validity of the Statement of Provincial Interest and Interim Planning Area Order. A judge of the Supreme Court of Nova Scotia dismissed their challenge. The other owners appealed to the Court of Appeal.

[4] Are the Statement of Provincial Interest and Interim Planning Area Order *ultra vires* the *Municipal Government Act* and *Halifax Regional Municipality Charter*? The answer turns on the Legislature's objective with Statements of Provincial Interest and Interim Planning Areas.

Background

[5] In 2008 and 2009, the Province of Nova Scotia ("Province") and the Halifax Regional Municipality ("Halifax") collaborated to consider options for the development of a new convention centre in downtown Halifax. The initiative was seen as economically beneficial for both Halifax and the Province. On March 25, 2008, the Province, with Halifax's support, issued a news release outlining an

expression of interest in the development. In autumn 2009, the Province's Department of Transportation and Infrastructure Renewal prepared a Request for Proposals.

[6] Meanwhile, in the summer of 2008, the Province retained experts to provide an economic impact assessment of the proposed development. In December 2009, the experts' final report projected that the development, its operations and spin offs would have a significant positive impact on the municipal and provincial economies. The development would affect tourism, Halifax's hotel industry, municipal and provincial tax revenues, and act as a local and regional economic catalyst.

[7] In July 2010, Argyle Developments Inc. ("Argyle") submitted a proposed design for the convention centre and multipurpose development. In December 2010, the Province announced that, if financial support was forthcoming from Halifax and the Federal Government, the Province would support Argyle's proposal.

[8] In August 2011, the Federal Government announced that it would provide substantial financial assistance for the development.

[9] On July 11, 2012, the Province and Halifax signed a Memorandum of Agreement that set out the financial, construction and operational parameters for the development. Article 1(a)(i) provided for cost-sharing of the convention centre's construction:

Equal Cost Sharing by Province and HRM

- (a) Subject to the Government of Canada agreeing to contribute 1/3 of the eligible capital construction costs of the Facility, the Province and HRM shall each contribute equally, on a 50/50 basis, to:
 - (i) the capital construction costs of the Facility, net of the Government of Canada's 1/3 contribution referred to above, in the amount of \$164.2 million which amount is based on the Developer's indicative financing costs as of the date of this Agreement, and based on the foregoing the contribution by each of HRM and the Province will be \$56.4 million;

...

[10] The development is known as the Nova Centre. It occupies a city block in downtown Halifax.

[11] Argyle publicized an initial design. Then during the latter half of 2012, Argyle engaged in extensive public consultation for input into the ultimate design. As a consequence, Argyle revised some above-grade design features. The design changes would require amendments to the Downtown Halifax Secondary Municipal Planning Strategy and Downtown Halifax Land Use By-law.

[12] Normally these amendments would take about eight months. Excavation of the Nova Centre already was underway. Argyle was concerned that waiting would jeopardize the momentum of ongoing construction. On July 3, 2013, Argyle wrote to Halifax's Urban Design Project Manager. Argyle's letter requested permission to continue the sub-grade work, while the amendment process for the above-grade levels of the project followed the usual course. The letter said:

Further to our ongoing discussions, we are writing to update you on the status of the Nova Centre project and to seek your guidance with a matter of timing of construction.

The scale and complexity of this project is unprecedented in our Province's history. It is a huge undertaking that we believe will transform our downtown, serve as catalyst for new economic opportunities, and connect Nova Scotians to each other and the world.

...

The scheduling issues we face arise directly as a result of the design changes to reflect the public input, and difficulty of advancing construction while accommodating the design changes.

...

In summary, we do not think it is in either the public interest or our own interest to have construction of the project stalled for a period of months. We understand, of course, that if we were permitted to proceed with the subgrade work this would not provide us with any assurance regarding the approval of the portion of the Nova Centre which would be placed above ground. This portion of the project would require site plan approval. As developer, we would entirely assume the risk associated with approval of this portion of the project.

The underground portion which we wish to continue to construct pending site plan approval for the above ground portion can be adapted to support buildings consistent with the mass and scale permitted in the Land Use By Law. This request arises as a result of our response to the public consultation process and our attempt to meet the public's aspirations and vision for this project. ...

[13] On July 19, 2013, Argyle applied to Halifax for amendments of the Downtown Halifax Secondary Municipal Planning Strategy and Downtown Halifax Land Use By-law to incorporate the design changes.

[14] On July 23, 2013, Halifax's Municipal Council discussed the matter, then passed a resolution to:

Authorize a request to the Province of Nova Scotia (the Province) for consideration of a Statement of Provincial Interest and the creation of an Interim Planning Area Order to facilitate the timely construction of the underground parts of the Nova Centre building located below the elevation of Argyle Street that may include two levels of underground parking and the commencement of the lowest floor of the convention centre;

...

[15] I will explain the terms "Statement of Provincial Interest" and "Interim Planning Area Order", cited in this resolution.

[16] The *Municipal Government Act*, S.N.S. 1998, c. 18, as amended ("*MGA*"), says:

193 The Governor in Council, on the recommendation of the Minister, may adopt or amend a statement of provincial interest necessary to protect the provincial interest in the use and development of land.

Section 194(5) provides that statements of provincial interest are "regulations within the meaning of the *Regulations Act*", R.S.N.S. 1989, c. 393, as amended. Section 2(g) of the *Regulations Act* says that a "regulation" is the exercise of a "legislative" power. Effectively, the *MGA* allows the Province to trump municipally-sourced planning with a properly framed statement of provincial interest, having the status of subordinate legislation.

[17] The statement of provincial interest may be enforced with an "interim planning area order". The *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, as amended ("*HRM Charter*"), s. 214, permits the provincial Minister of Service Nova Scotia and Municipal Relations ("Minister") to order the establishment of an "interim planning area" within which the Province may administer a statement of provincial interest. Section 214 is quoted below (para. 43).

[18] On July 26, 2013, Halifax's Chief Administrative Officer, Mr. Richard Butts, wrote to the Deputy Minister of the Province's Department of Service Nova Scotia and Municipal Relations to request that the Province issue a statement of provincial interest, so that Nova Centre's sub-grade work could proceed.

[19] On August 6, 2013, the Province announced that it would accede to Halifax's request, and issue a statement of provincial interest. The Province's press release quoted the Minister as saying:

The Nova Centre is important to the entire province, ... We are ensuring initial work can move forward while revised plans for upper floors go through municipal approval and consultations.

The province is giving HRM the flexibility to avoid a delay in the project, so it can provide growth for the province and ensure we remains (*sic*) competitive. It's important for all Nova Scotias (*sic*) that the three levels of government work together to create new jobs and grow a strong economy.

[20] On August 6, 2013, further to s. 193 of the *MGA*, the Lieutenant Governor in Council adopted a Statement of Provincial Interest respecting the Nova Centre by Order in Council 2013-258, filed as N.S. Regulation 272-2013 on August 7, 2013 ("SPI"):

Schedule "A"

Statement of Provincial Interest Regarding the Development of the Nova Centre

GOAL

To recognize that the timely construction of the subgrade portion of the proposed development complex by Argyle Developments Inc. in the site bounded by Argyle, Sackville, Market and Prince Street in Halifax Regional Municipality is a matter of provincial interest and therefore warrants special planning policies and regulations.

BASIS

The proposed development complex by Argyle Development Inc. consists of office towers, a hotel, retail shops and underground parking as well as a convention centre. It is referred to, in its entirety and for the purposes of this Statement of Provincial Interest, as the "Nova Centre". All levels of government have an interest in the development of the convention centre and as a consequence have an interest in the construction of the Nova Centre (of which the convention centre forms part).

The Governor in Council is satisfied that the adoption of a statement of provincial interest is necessary to protect the provincial interest in promoting economic growth and employment opportunities through the timely development of the Nova Centre.

APPLICATION

The area bounded by Argyle, Sackville, Market and Prince Streets in Halifax Regional Municipality.

PROVISIONS

The planning documents of Halifax Regional Municipality must contain specific policies and regulation for the timely development and construction of the subgrade portion of the Nova Centre.

[21] On September 6, 2013, the Minister issued an Interim Planning Area Order, filed as N.S. Reg. 310/2013 (“IPA Order”), for the Nova Centre. After recitals of the facts that I have summarized above, the IPA Order continued:

...

AND WHEREAS the Municipality has advised that should it receive a request from me to adopt or amend its planning documents so that they are reasonably consistent with the SPI, it could not comply with the request in a manner that would permit the timely development and construction of the subgrade portion of the Nova Centre site, as is required in the SPI;

AND WHEREAS I am satisfied that there are necessary and compelling reasons to establish and regulate the Nova Centre Subgrade Portion as an interim planning area pursuant to Section 214 of the *Halifax Regional Municipality Charter* to protect the provincial interest;

NOW THEREFORE, I order the following:

1. The Nova Centre Subgrade Portion shall be established as an Interim Planning Area.
2. The LUB is amended by adding to subsection 10 of section 5 the following clause:
 - (j) development of the Nova Centre Subgrade Construction pursuant to subsection 15BA of section 7 of this By-law.
3. The LUB is further amended by adding Subsection 15BA of section 7 as follows:
 - (15BA) The Nova Centre Subgrade Construction may be developed in the Nova Centre Subgrade Portion;

4. In addition to the requirements of the LUB, the following additional conditions and requirements shall apply for the issuance of a development permit:
 - (a) Development of the Nova Centre Subgrade Construction shall be built so as to structurally support the reinstatement of Grafton Street pursuant to municipal requirements; and
 - (b) Vehicular access to and from the parking levels shall meet all municipal requirements and shall not be from Argyle Street.
5. Nothing in this Order shall:
 - (a) prevent the closure, sale, or lease of lands owned by the Halifax Regional Municipality, including Grafton Street; and
 - (b) exempt the development of the Nova Centre, other than to the extent prescribed in this Order, from complying with the requirements of any other By-law of the Municipality or from obtaining any license, permission, permit, authority, or approval required by any other By-law of the Municipality or any regulation or other enactment of the Province of Nova Scotia or the Government of Canada.

[22] This IPA Order permitted the sub-grade work to continue without delay.

[23] The sub-grade portion was completed in the summer of 2014. In August 2014, Halifax issued the necessary permits for the above-grade construction. That work is now well underway.

[24] BM Halifax Holding Limited, TDB Halifax Holdings Limited and Robin Halifax Holdings Limited (“Thiel Companies”) own office buildings in downtown Halifax. These companies are controlled by Mr. Wolfgang Thiel, who is president of each. Mr. Thiel filed an affidavit. Mr. Thiel holds the view that the process by which the Nova Centre was permitted to complete its sub-grade work was unauthorized by the *MGA* and *HRM Charter*.

[25] On May 22, 2014, the Thiel Companies filed a Notice of Application for a declaration that the SPI and IPA Order were *ultra vires* the *MGA* and *HRM Charter*. The only respondent was the Province. Mr. Thiel and a legal assistant with his law firm each filed affidavits, as did representatives of the provincial Departments of Transportation and Infrastructure Renewal, and Service Nova Scotia and Municipal Relations.

[26] On November 27, 2014, Justice Frank Edwards of the Supreme Court of Nova Scotia heard the matter. The deponents were cross-examined. On December 17, 2014, Justice Edwards issued a decision (2014 NSSC 430), followed by an Order on January 26, 2015. The judge dismissed the Thiel Companies' application with costs. The judge's reasons simply incorporated the Province's written submission *verbatim* and in its entirety.

[27] On January 22, 2015, the Thiel Companies appealed to the Court of Appeal.

Issues

[28] The Notice of Appeal states two issues:

1. The Nova Scotia Supreme Court erred in law in its interpretation of the *Municipal Government Act*, SNS 1998, c. 18, by finding the Statement of Provincial Interest Regarding the Development of the Nova Centre, NS Reg 272/2013 (August 6, 2013), to be within the powers conferred upon the Governor in Council; and
2. The Nova Scotia Supreme Court erred in law in its interpretation of the *Halifax Regional Municipality Charter*, SNS 2008, c. 39, by finding the Interim Planning Area Order – Nova Centre Subgrade Portion, NS Reg 310/2013 (September 6, 2013), to be within the powers conferred upon the Minister of Service Nova Scotia and Municipal Relations.

Standard of Review

[29] The issues are legal. The appellate standard of review is correctness.

First Issue – Statement of Provincial Interest

[30] The SPI is subordinate legislation, enacted under the *MGA*, s. 193. The Thiel Companies submit that the SPI is *ultra vires*.

[31] In *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, [2013] 3 S.C.R. 810, Justice Abella for the Court set out the principles to assess the *vires* of subordinate legislation:

[24] A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of

the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk, J.:

In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or object(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.

(*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292)

[25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible* [Justice Abella's emphasis], the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[26] Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach . . . consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 64).

[27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):

... the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

[28] It is not an inquiry into the underlying “political, economic, social or partisan considerations” (*Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court’s view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; *Keyes*, at p. 266). They must be “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; *Brown and Evans*, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson, J. observed, “it would take an egregious case to warrant such action” (*Thorne’s Hardware*, at p. 111).

[32] The Thiel Companies say that s. 193 authorizes an SPI which acts as a shield, not a sword. Their factum puts it this way:

26. The Appellants submit that the province may only adopt or amend a statement of provincial interest to prevent use and development of land contrary to the provincial interest. They see this provision as a measure by which the Province can control or restrict development that would be contrary to the broader provincial interest.

...

33. Section 193 must be interpreted consistently with the stated objective of Part VIII and the *MGA* more generally – giving to municipalities the primary authority for controlling their own affairs

...

40. In the Applicants’ submission, the Legislature never intended Section 193 to provide a means by which the Province could fast-track projects that do not comply with municipal planning documents or the amendment regime mandated by the statute. ...

[33] The *HRM Charter* mirrors much of the *MGA*. Section 4(2) of the *HRM Charter* says that “[s]ubject to this Act”, the *MGA* does not apply to Halifax. But s. 209(p) of the *HRM Charter* states that an SPI “means a statement of provincial interest under the *Municipal Government Act*”. Hence both statutes pertain to the topic of this appeal. The pertinent provisions are:

(a) The *MGA* says:

Purpose of Act

2 The purpose of this Act is to

(a) give *broad authority* to councils, including broad authority to pass by-laws, and to respect their right to govern municipalities in whatever ways the councils consider appropriate *within the jurisdiction given to them*;

[Emphasis added]

(b) Similarly, the *HRM Charter* states:

Purpose of Act

2 The purpose of this Act is to

(a) give *broad authority* to the Council, including broad authority to pass by-laws, and respect its right to govern the Municipality in whatever ways the Council considers appropriate *within the jurisdiction given to it; ...*

[Emphasis added]

(c) The *MGA* and *HRM Charter* each deal with “Planning and Development” in Part VIII. That Part is the source of the Legislature’s jurisdictional restrictions on the municipality’s “broad authority” over planning and development.

(d) The *MGA* says:

PART VIII

PLANNING AND DEVELOPMENT

Purpose of Part

190 The purpose of this Part is to

(a) enable the Province to *identify and protect its interests in the use and development of land*;

(b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character, through the adoption of municipal planning strategies and land-use by-laws *consistent with interests and regulations of the Province; ...*

[Emphasis added]

- (e) Similarly, the *HRM Charter* says:

PART VIII
PLANNING AND DEVELOPMENT

Purpose of Part

208 The purpose of this Part is to

(a) enable Her Majesty in right of the Province to *identify and protect its interests in the use and development of land*;

(b) enable the Municipality to assume the primary authority for planning within its jurisdiction, consistent with its urban or rural character, through the adoption of municipal planning strategies and land-use by-laws *consistent with interests and regulations of the Province*; ...

[Emphasis added]

- (f) To effect the legislative purpose stated in s. 190(a), the *MGA*, ss. 193 and 194(5) [quoted above, para. 16] authorize the Minister to issue a Statement of Provincial Interest “necessary to protect the provincial interest in the use and development of land”, having the status of subordinate legislation. The *HRM Charter*, s. 209(p) applies the SPI to Halifax.
- (g) Before acting on the SPI, the Province “shall consider the planning documents of the Municipality” [*HRM Charter*, s. 213; *MGA*, s. 197].
- (h) The Province’s planning activities “must be reasonably consistent with” the SPI [*HRM Charter*, s. 212; see also *MGA*, s. 198(1)].

[34] In *Elderkin v. Nova Scotia (Service Nova Scotia and Municipal Relations)*, 2013 NSCA 79, Justice Oland for the Court said, of the *MGA*, s. 190:

[34] The wording of s. 190 (a) and (b) demonstrates that the Legislature intended that the “primary authority” given to the municipalities would not be without limits. Instead, the *Act* expressly states that municipal planning decisions have to accord with provincial interests. As a result of how the Legislature described the proper roles of the municipalities and the Province, *the Province retains an overarching authority to protect provincial interests*.

[Emphasis added]

[35] In short, the *MGA* and the *HRM Charter* enunciate the Legislature's objective that the Province have overarching authority to "protect its interests in the use and development of land".

[36] The Thiel Companies' submission notionally would append to that phrase the qualification - "by preventing the development of land that offends the provincial interest, but not by encouraging a development that promotes the provincial interest".

[37] I respectfully disagree with that submission. Applying the comprehensive approach directed by *Katz*, in my view, the wording, context, objectives and scheme of the enabling legislation do not support the Thiel Companies' suggested qualification.

[38] The substance of the suggested qualification does not appear in the statutory text.

[39] The suggested qualification contradicts the statutory context. Sections 197 of the *MGA* and 213 of the *HRM Charter* say:

197 A department of the Province, before *carrying out or authorizing any development* in a municipality, shall consider the planning documents of the municipality.

213 A department of the Government of the Province, before *carrying out or authorizing any development* in the Municipality, shall consider the planning documents of the Municipality.

[Emphasis added]

Sections 197 and 213 each appear in the series of provisions that explain how an SPI would operate. The legislation entitles the Province to "carry out" or "authorize" a development that protects the provincial interest. It contemplates proactivity. The Province is not confined to just stopping a development that offends the provincial interest.

[40] The legislative objective is to protect the Province's interest in the development of land. The Thiel Companies' suggested qualification disregards the undeniable fact that the Province has an interest to promote a development, and to avoid the adverse consequences of a stalled development, in which the Province has a substantial investment.

[41] The legislative scheme is that: (1) the Province identify an objectively ascertainable provincial interest in the development of land, (2) the SPI focus on this interest, (3) before acting on the SPI, the Province shall consider the planning documents of the Municipality, and (4) the Province's activity must be reasonably consistent with that SPI. Those are the Legislature's contemplated safeguards against arbitrary provincial intrusion into municipal planning.

[42] Here, on points (1) and (2) - the Province clearly had an ascertainable interest in the timely development of the Nova Centre, the interest identified by the SPI. The SPI is *intra vires*.

[43] The Province considered Halifax's planning documents.

[44] Whether the Province's activities were reasonably consistent with the SPI pertains to the next issue.

Second Issue – Interim Planning Area Order

[45] The legislation provides several mechanisms by which the Province may effectuate or administer the SPI. One is an interim planning area order. Section 214 of the *HRM Charter* governs interim planning areas:

214 (1) Planning documents adopted after the adoption of a statement of provincial interest that applies within the Municipality must be reasonably consistent with the statement.

(2) The Minister may request that the Council, within a prescribed time, adopt or amend its planning documents so that they are reasonably consistent with a statement of provincial interest that applies within the Municipality.

(3) Where

(a) the Council does not comply with a request pursuant to subsection (2); or

(b) development that is inconsistent with a statement of provincial interest that applies within the Municipality might occur and the Minister is satisfied that there are necessary and compelling reasons to establish an interim planning area to protect the provincial interest,

the Minister may, by order, establish an interim planning area for a prescribed area.

(4) Within an interim planning area subdivision, development, or certain classes of subdivision or development, may be regulated or limited or prohibited in whole or in part, as necessary, to protect the provincial interest.

(5) No permit or approval of any kind may be issued that is contrary to an order establishing an interim planning area or an order regulating or prohibiting development in the interim planning area.

...

[46] Here the Minister made no request under s. 214(2). That was because Halifax had already notified the Province that, if a request was made, Halifax could not comply in a timely manner. A provincial request would have been sterile. This fact was recited in the IPA Order (above, para. 21).

[47] Consequently, s. 214(3)(a) does not apply. The pertinent provision is s. 214(3)(b), which has two requirements.

[48] First: Without the IPA Order, “might” there have been a “development that is inconsistent with a statement of provincial interest”? The answer is Yes. The sub-grade work might have stalled for eight months, causing interruption expense, fixed obligations during the inactive interval and the expense of re-marshalling work. The Province had a stake in construction costs. Further, the ultimate benefits of the development, in which the Province had a significant investment, would be delayed. Hence the SPI’s stated “Goal”: *i.e.* “the timely construction of the subgrade portion ... is a matter of provincial interest”.

[49] Second: The IPA Order recited that the Minister was “satisfied that there are necessary and compelling reasons to establish and regulate the Nova Centre Subgrade Portion as an interim planning area pursuant to Section 214 of the *Halifax Regional Municipality Charter* to protect the provincial interest” (above, para. 21). There is no evidence to challenge the Minister’s statement that he was “satisfied”.

[50] The IPA Order complies with s. 214(3)(b).

[51] The Thiel Companies submit that, even if s. 214(3)’s conditions for an IPA Order exist, the legislation does not permit the Province to include in the IPA Order an approval that does not follow the existing municipal planning process.

[52] In response, the Province cites ss. 214(4) and (5) of the *HRM Charter*:

214 (4) Within an interim planning area subdivision, development, or certain classes of subdivision or development, may be regulated or limited or prohibited in whole or in part, as necessary, to protect the provincial interest.

(5) No permit or approval of any kind may be issued that is contrary to an order establishing an interim planning area or an order regulating or prohibiting development in the interim planning area.

[53] The Thiel Companies' factum counters:

58. *Black's Law Dictionary* defines regulation as the "act or process of controlling by rule or restriction." "Regulate" does not connote the expansion of permissible activities. Put another way, the Province cannot regulate something that cannot be done. [citation omitted]

59. Section 214(4) is not designed to facilitate and approve development that is otherwise prohibited under municipal by-laws. After all, if a development cannot proceed under municipal by-laws, then the Province cannot regulate it. The Province cannot regulate that which is not first permitted.

[54] With respect, I am not persuaded by the Thiel Companies' submission.

[55] As discussed, an SPI may protect the Province's interest to avoid the adverse consequences of a stalled development in which the Province has a substantial investment. The IPA Order implements the SPI, and the Province's activity must be "reasonably consistent" with the SPI (*HRM Charter*, s. 212). As a mechanism of implementation, s. 214(4) says "development ... may be regulated ... to protect the provincial interest", and s. 214(5) speaks of an "order regulating ... development in the interim planning area". To protect the identified provincial interest, this regulatory order may reasonably include measures to maintain the timely construction of the Nova Centre. Hence the IPA Order could except the sub-grade work from the anticipated eight month approval process.

[56] The SPI and IPA Order were subordinate legislation. To the extent that their measures are inconsistent with general municipal planning rules, the Legislature intended that the SPI and IPA Order would prevail within the interim planning area. As stated in *Katz*, paras. 27-28, the Court does not sit on appeal from validly delegated policy choices in subordinate legislation.

[57] The IPA Order is *intra vires*.

Conclusion

[58] I would dismiss the appeal with appeal costs of \$2,000 all inclusive, payable by the Appellants to the Province.

Fichaud, J.A.

Concurred:

MacDonald, C.J.N.S.

Van den Eynden, J.A.