NOVA SCOTIA COURT OF APPEAL

Citation: *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90

Date: 20161214
Docket: CA 453799
Registry: Halifax

Between:

John Ghosn and Esther Ghosn

Appellants

v.

Halifax Regional Municipality, the Nova Scotia Utility and Review Board, and the Attorney General of Nova Scotia

Respondents

Judges:	Fichaud, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	November 29, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Fichaud, J.A., Scanlan and Van den Eynden, JJ.A. concurring
Counsel:	Richard W. Norman for the Appellants E. Roxanne Maclaurin for the Respondent Halifax Regional Municipality The Respondents Nova Scotia Utility and Review Board and Attorney General of Nova Scotia not appearing

Reasons for judgment:

[1] Mr. and Mrs. Ghosn would like a swimming pool in their yard. The yard borders Halifax's Northwest Arm. The pool would satisfy the setback requirement in the Municipality's Swimming Pool By-law. Nonetheless, the Municipality's Development Officer refused the permit. His reason was that the swimming pool would be closer than the minimum setback from the Arm under the Municipality's Land-Use By-law. The two by-laws measure the setback differently.

[2] Mr. and Mrs. Ghosn appealed to the Nova Scotia Utility and Review Board. The *Halifax Regional Municipality Charter* says that the Utility and Review Board "may not allow an appeal unless it determines that the decision of … the development officer … does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law". Despite the Swimming Pool By-law, the Board dismissed the Ghosns' appeal. The Board said the Land-Use By-law governed, and the Development Officer's refusal was consistent with it and the Municipal Planning Strategy.

[3] Mr. and Mrs. Ghosn appealed to the Court of Appeal. The point is: Did the Board unreasonably resolve the conflict between the Municipality's Land-Use By-law and Swimming Pool By-law?

Background

[4] In August 2013, John and Esther Ghosn acquired a property at 6980 Armview Avenue in Halifax. Their property includes a land lot and an adjacent water lot on the Northwest Arm. The Arm is a narrow inlet that branches inland from Halifax Harbour. It's a lovely spot. The Arm's properties roll down to saltwater that laps on a sheltered shore just a stroll from the City's amenities.

[5] Mr. and Mrs. Ghosn picture a swimming pool overlooking the Arm. On February 10, 2014, they applied to Halifax Regional Municipality ("Municipality") for a permit. By emails in mid-February and March 2014, the Municipality's Development Officer informed Mr. Ghosn that the Land-Use By-law did not permit the pool to be installed within 30 feet of the Northwest Arm.

[6] Mr. and Mrs. Ghosn were undeterred. In the Decision under appeal, the Utility and Review Board found:

> [54] At this point, it seems the Ghosns decided that if HRM thought the shoreline was too close to their proposed pool, they would solve the problem by moving the shoreline farther away.
>
> [55] The way to do this, of course, was by way of infilling a part of their Water Lot with rock, thereby creating an Infilled Water Lot, which would have a shoreline further out in the Northwest Arm.

[7] On August 21, 2014, Mr. and Mrs. Ghosn applied to Transport Canada for permission to infill outward into the Northwest Arm. The Federal Government has jurisdiction over navigation. On October 31, 2014, Mr. and Mrs. Ghosn obtained permission from Transport Canada to infill part of their water lot. Transport Canada's letter said that the infill "is not likely to substantially interfere with navigation", and authorized the work under s. 9(1) of the *Navigation Protection Act*, R.S.C. 1985, c. N-22. The letter also said:

> Please note that permission relates only to the effect of your work on navigation under the NPA. It is the owner's responsibility to comply with any other applicable laws and regulations.

[8] Mr. and Mrs. Ghosn then infilled with rock and soil, and bounded the projection with a retaining wall. This extended their yard outward into the Northwest Arm. The work was done by April 2015.

[9] On April 24, 2015, Mr. Ghosn re-applied to the Municipality for a swimming pool permit. Emails and communications followed. The Municipality informed Mr. Ghosn that, under the Municipality's Land-Use By-law, the minimum 30-foot setback for swimming pools on the Northwest Arm is calculated from the Arm's shoreline *as it existed in 2007*, when the Land-Use By-law was amended to include that deeming measurement, and not from any shoreline that was extended after 2007. The provision with this measurement stemmed from an advertent policy in the Municipality's Municipal Planning Strategy, implemented in the Land-Use By-law, to discourage infilling of the Northwest Arm. Later I will discuss the Municipal Planning Strategy and Land-Use By-law. On July 30, 2015, the Municipality formally refused the permit.

[10] On August 13, 2015, Mr. and Mrs. Ghosn appealed to the Nova Scotia Utility and Review Board.

[11] Then, on October 9, 2015, Mr. and Mrs. Ghosn withdrew their appeal and tried a new approach. On October 14, 2015, they applied a third time for a swimming pool permit. This time, they cited By-law S-700, the Municipality's Swimming Pool By-law that the Halifax Regional Municipal Council had adopted in 2002. Later I will discuss By-law S-700. The Ghosns pointed out that: (1) under By-law S-700, the 30-foot setback is measured from the shoreline at the date of the application, meaning their *infilled 2015 shoreline*, and (2) By-law S-700 said it prevailed over a conflicting provision in the Land-Use By-law. Their letter of October 14, 2015 to the Municipality included:

> The Swimming Pool By-law indicates that a swimming pool must be constructed at least 30 feet from a "watercourse". The "watercourse" is where the waters of the Northwest Arm meet the retaining wall at the end of the infill, as indicated on our plan. The plan shows the pool to be 30 feet from the retaining wall (and at least 30 feet from where the water meets neighbouring lots). We therefore believe this new application is compliant with the applicable by-laws.
>
> We recognize the restrictions imposed under the LUB against erecting structures on the Arm. In this case, however, By-law S-700 expressly authorizes the development and, to the extent any conflict exists between the two by-laws, S-700 expressly states that the provisions of S-700 prevail.

[12] The accompanying plan showed the proposed pool outside 30 feet from the retaining wall for the infilled boundary. But it remained inside 30 feet from the former boundary before the infill.

[13] The Municipality's Development Officer, Mr. Sean Audas, rejected the Ghosns' application yet again. Mr. Audas' letter of December 10, 2015 explained:

> The above noted application proposes to install an in-ground swimming [pool] at 6980 Armview Avenue. This property is regulated by the R-1 (Single Family) Zone, Halifax Peninsula Land Use By-Law, Peninsula Centre Secondary Plan Area, Northwest Arm Sub-Area, and HRM By-Law S-700 Respecting Swimming Pools.
>
> Section 5(3) of By-Law S-700 refers to the applicable Land Use By-Law for the setback requirements from watercourses:
>
> > *(3) No portion of a swimming pool, pumps, fillers or pool water disinfection equipment installation, shall be located closer to any watercourse than the distance applicable to a main building or accessory building, whichever is less, as set out in the land use by-law for the area in which the pool is located.*

Section 16L(b) of the Halifax Peninsula Land Use By-Law identifies the requirements for Development and Subdivision on the Northwest Arm":

> *(b) In addition to all other applicable requirements of this by-law:*
>
> *(i) No structure, with the exception of boathouses, public works and utilities, ferry terminal facilities, parks on public lands, wharves, docks, gazebos, municipal, provincial and national historic sites and monuments, and existing structures may be located within 9 metres (30 feet) of the Shoreline of the Northwest Arm; and*
>
> *(ii) Where boathouses and gazebos are to be located within 9 metres (30 feet) of the Shoreline of the Northwest Arm, they shall be limited to one boathouse and one gazebo per lot and each structure may have a maximum area of 121.92 square metres (400 square feet), a maximum width of 6 metres (20 feet) on the side that is most parallel to the Shoreline, a maximum depth of 7.8 metres (26 feet), a minimum roof pitch of 5/12 and a maximum height of 4.2 metres (14 feet).*

A swimming pool is not listed in Section 16L(b)(i) as being exempt from the 9 metre setback from the shoreline of the Northwest Arm.

In addition to the requirements, the definition of shoreline is included in Section 16L(a)(iii) which states:

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

The effective date of Section 16L is July 21, 2007.

It is our understanding that infill at the shoreline has taken place at this location. Given the requirements above and the definition of "shoreline", all structures, including swimming pools, must be set back 9 metres from the shoreline as it existed on July 21, 2007.

Development Permit Application #144844 for a swimming pool was refused on July 30, 2015, as plans were not submitted which demonstrated that the 9 metre shoreline setback requirement could be met.

This continues to be an outstanding issue and we have not received plans which demonstrate that the 9 metre shoreline setback requirement can be met. Therefore, the above noted application must be *refused*.

Pursuant to Section 262(3) of the *Halifax Regional Municipal Charter*, this refusal may be appealed to the Nova Scotia Utility and Review Board ….

[14] On December 29, 2015, Mr. and Mrs. Ghosn appealed to the Nova Scotia Utility and Review Board ("Board"). Their Notice of Planning Appeal described the Development Officer's error:

> Describe how the decision of the development officer fails to comply with the land-use by-law or the development agreement:
>
> > The Development Officer failed to recognize and apply the requirements of By-Law S-700 (the "Swimming Pool By-law"), including the setback from a watercourse, in interpreting the Land-Use By-law.

[15] On March 10, 2016, the Board, constituted by Mr. Wayne Cochrane, Q.C., heard the appeal. The Ghosns and the Municipality each had counsel. There was an agreed statement of facts. The Ghosns called no witnesses. The Municipality's witnesses were Mr. Audas, the Development Officer, and Mr. Luc Ouellet, a senior municipal planner. The Board qualified both as experts in land use planning.

[16] On June 27, 2016, the Board issued a Decision that dismissed Mr. and Mrs. Ghosn's appeal (2016 NSUARB 110). Later I will discuss the Board's reasons.

[17] On July 22, 2016, Mr. and Mrs. Ghosn appealed the Board's Decision to the Court of Appeal.

Issue

[18] The appeal is under s. 30 of the *Utility and Review Board Act*, S.N.S. 1992, c. 11. Section 30(1) permits an appeal from an order of the Board "upon any question as to its jurisdiction or upon any question of law".

[19] The Ghosns' factum states one issue:

> Did the Board err in failing to give effect to the conflict provision in the *Swimming Pool By-law* to resolve the conflict between the *Swimming Pool By-law* and the *LUB*?

Appellate Standard of Review

[20] The parties agree that this Court should apply the standard of reasonableness to review the Board's decision.

[21] This Court has repeatedly said that its standard to review the Utility and Review Board's interpretation of its home legislation, which on planning issues includes the planning provisions of the *Halifax Regional Municipality Charter*, is reasonableness: *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78, paras. 44-56; *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, para. 21; *Halifax (Regional Municipality) v. Anglican*

Diocesan Centre Corp., 2010 NSCA 38, para. 26; *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 43, para. 27; *Martell v. Halifax (Regional Municipality)*, 2015 NSCA 101, paras. 12-13.

[22] In *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, Justice Moldaver, for the majority, explained reasonableness:

> [20] … However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.
>
> …
>
> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. … The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
>
> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. This is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. …
>
> [38] … Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance [citations omitted]
>
> …
>
> [40] The bottom line here, then, is that the Commission holds the interpretive upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. …
>
> [Justice Moldaver's italics]

[23] Similarly, in *Egg Films Inc. v. Nova Scotia (Labour Relations Board)*, 2014 NSCA 33, leave to appeal denied September 25, 2014 (S.C.C.), the majority said:

> [26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analyzing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does

> the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one, and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. [citations omitted]
>
> …
>
> [30] Reasonableness isn't the judge's quest for truth with a margin for tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan*, *supra*, at paras. 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras. 11-17.

[24] I will apply reasonableness as described in *McLean* and *Egg Films.*

The Swimming Pool By-law

[25] First, the genealogy of Halifax's Swimming Pool By-law S-700.

[26] In 2002, the *Municipal Government Act*, S.N.S. 1998, c. 18, applied to Halifax Regional Municipality. That regime continued until the Legislature enacted the freestanding *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 ("*HRM Charter")* as the governing municipal statute for Halifax. See the transitional provisions in ss. 4 and 386-90 of the *HRM Charter*.

[27] Section 172(1) of the *Municipal Government Act*, enabled a municipal council to "make by-laws for municipal purposes" on various matters that would include swimming pools. Section 172(1) is in Part VII, entitled "By-laws".

[28] On January 22, 2002, under s. 172(1), the Halifax Regional Council adopted the Swimming Pool By-law. It says:

> **BE IT ENACTED** by the Council of the Halifax Regional Municipality, under the authority of Section 172(1) of the Municipal Government Act as follows:
>
> **…**
>
> 5(3) No portion of a swimming pool … shall be located closer to any watercourse than the distance applicable to a main building or accessory

> building, whichever is less, as set out in the land use by-law for the area in which the pool is located.
>
> …
>
> 8 In case of conflict between the provisions of this by-law and the provisions of any land use by-law, the provisions of this by-law shall prevail except where this by-law specifies that the provisions of the land use by-law apply.

[29] Section 5(3) of the Swimming Pool By-law adopts the 30-foot setback from the Land-Use By-law. But the Swimming Pool By-law measures that setback from a "watercourse". The *Municipal Government Act* defined "watercourse" as:

> 191 In this Part and Part IX, unless the context otherwise requires
>
> …
>
> (r) "watercourse" means a lake, river, stream, ocean or other body of water.

[30] Nothing in the *Municipal Government Act* or the 2008 *HRM Charter* has defined a "watercourse", generally in the Municipality, to be fixed by the shoreline as it existed in 2007 or at any other date.

[31] The *HRM Charter*, s. 386, says:

> 386 The by-laws, orders, policies and resolutions in force in the Municipality immediately prior to the coming into force of this Act continue in force to the extent that they are authorized by this Act or another Act of the Legislature until amended or repealed.

[32] The Municipality has not amended or repealed the Swimming Pool By-law under the concluding words of s. 386. Section 386 means that the Swimming Pool By-law today is authorized by the *HRM Charter*, s. 188(1), which is the counterpart to s. 172(1) in the *Municipal Government Act.* Section 188(1) says: "The Council may make by-laws, for municipal purposes" on various matters that would include swimming pools. Section 188(1) is in "Part VII By-laws" of the *HRM Charter*.

[33] Based on those provisions, Mr. and Mrs. Ghosn say the Swimming Pool By-law contemplates that the border of a "watercourse", from which the 30-foot minimum setback is measured, is not deemed to be frozen in its 2007 location. Rather, they submit, the border may change by infilling or for any other reason, and the border at the date of their application governs. They add that, if the Land-

Use By-law has a different approach, then s. 8 of the Swimming Pool By-law resolves the conflict by directing that the Swimming Pool By-law prevails.

[34] At first glance, their submission is attractive.

[35] But there is more to it. The Development Officer operated from the different perspective of the Halifax Peninsula Land-Use By-law ("Land-Use By-law").

The Land Use By-law

[36] The Board's decision described the events that, in 2007, led to the Land-Use By-law's restrictions on infilling along the Northwest Arm:

> [25] In 2002, Halifax Regional Municipality adopted By-Law S-700, a By-Law Respecting Swimming Pools. …
>
> [26] In the same year, increasing controversy became apparent in relation to how some waterfront property owners were developing their properties.
>
> [27] Water lots which have been transformed into Infilled Water Lots have been used for a variety of purposes, ranging from simply new and larger lawns through to the place where new, large, buildings have been constructed.
>
> [28] Based on the limited evidence before the Board, the Board concludes that such infilling occurred relatively rarely in past years, but in more recent decades has been perceived as occurring with increasing frequency.
>
> [29] From 2002 onward (the Board concludes from various documents and submissions in this proceeding), discussions about land use along the shore of the Northwest Arm occurred with increasing frequency, and intensity, each year thereafter.
>
> [30] Discussions became particularly frequent and intense in 2005. In August of that year, HRM's Regional Council agreed to initiate an amendment process for the MPS which related, in part, to development along the shore of the Arm. The amendment process for the MPS was a long one, involving repeated and extensive discussions. In 2007, these culminated with Council's adopting amendments to the MPS and LUB.
>
> …
>
> [33] Owners of property along the Northwest Arm which included Water Lots could apply to the Federal Government to seek approval to develop the Water Lot in specific ways. One of the ways, and the one which is at the centre of the dispute in this proceeding, is the so-called "infilling" of all or a portion of a Water Lot. This involves filling it with rock until it is above the high-water mark and then, most commonly, placing earth to create what looks like a Land Lot, but which the Board will in this decision call an Infilled Water Lot.

[34] The Federal Government, which has charge of navigable waterways, could, if it chose, permit development to occur in the Water Lot portion of the property; in reaching such decisions, the Federal Government was necessarily principally focused upon issues of navigation. If Federal Government was agreeable, the owner of a Water Lot could – free of any municipal restriction, as the Municipality has no authority over Water Lots – proceed to develop it as authorized by the Federal Government, including infilling all or part of the Water Lot. Depending on the size of the pre-Confederation Water Lot granted by the Crown, the resulting Infilled Water Lot could, and sometimes did, project a significant distance into the Northwest Arm.

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

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

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

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

[39] For present purposes, however, the Board notes that Council's amendments are directed to limiting development possibilities on or near Infilled Water Lots, where those Water Lots were created after July 21, 2007, the effective date of the amendments. Calculation of distances from shorelines would not be from the shoreline of the Infilled Water Lot, but from the shoreline as it existed in 2007. Additionally, any new land area created with an Infilled Water Lot could not be included in, for example, calculations of lot area for development purposes.

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

[37] The Municipal Planning Strategy for Halifax, discussed in the Board's passage, includes the following policies:

> 8.12 The Northwest Arm is a narrow, recreational inlet characterized by major urban parks (Sir Sandford Fleming, Point Pleasant, Deadman's Island and Horseshoe Island Parks), historical assets and predominantly residential uses. The Northwest Arm is also home to a number of boat/sailing clubs which generate significant boating traffic in the Arm. **Consequently**, the Halifax Regional Municipality recognizes that subdivision, development and water lot **infilling activities along the Northwest Arm may result in undesirable impacts** on the aesthetic character and traditional built form of the Northwest Arm, on its recreational use and navigability and on its marine environment. As a means of protecting the character of the Northwest Arm, **the Municipality shall control development** and subdivision **on lots and water lots along the Northwest Arm.** Specific measures will include limiting the type of structures that will be allowed on both infilled and non-infilled water lots, **implementing a setback from the Northwest Arm**, limiting the type and size of structures to be built within the Northwest Arm setback, **and preventing infilled** and non-infilled **water lots from being used in lot area and setback calculations**.
>
> 8.12.1 In order to carry out the intentions described in 8.12, the Municipality **shall designate the seabed of the Northwest Arm seaward of the Ordinary High Water Mark, as it existed on the effective date of the adoption of this amendment** and as generally shown on Appendix A (Generalized Future Land Use Map) as Water Access. **Through the Land Use By-laws, the Municipality shall establish a corresponding Water Access Zone which shall apply to any new land created by infilling of the Northwest Arm.** Development within this Zone shall be limited to public works and utilities, ferry terminal facilities, municipal, provincial and national historic sites and monuments, passive recreation uses and wharves and docks.
>
> [emphasis added]

[38] The Land-Use By-law, as amended in 2007, includes:

> 1. In this by-law:
>
> …
>
> "Development" includes any erection, construction, addition, alteration, replacement or relocation of any building or structure and any change or alteration in the use made of land, buildings or structures.
>
> …
>
> "Structure" means everything that is built or constructed of parts joined together and includes "Building" and "Erected".

> "Watercourse" means a lake, river, stream, ocean or other natural body of water.
>
> …
>
> 16L **For any development** or subdivision **within the Northwest Arm Water Access Area**, in addition to all other applicable requirements of this By-law, the following requirements apply:
>
> (a) Definitions:
>
> …
>
> (iii) **"Shoreline" means** the Ordinary High Water Mark as defined under the Nova Scotia Land Surveyors Regulations and **as it existed on the effective date of this Section.**
>
> (iv) "Water Lot" means any part or parcel of land on the Northwest Arm located seaward of the Shoreline.
>
> (b) In addition to all other applicable requirements of this by-law:
>
> (i) **no structure,** with the exception of boathouses, public works and utilities, ferry terminal facilities, parks on public lands, wharves, docks, gazebos, municipal, provincial and national historic sites and monuments, and existing structures **may be located within 9 metres (30 feet) of the Shoreline of the Northwest Arm;**
>
> …
>
> (d) No portion of a Water Lot shall:
>
> (i) be included within the calculation of the minimum setback required by clause (b)(i);
>
> …
>
> [emphasis added]

The Board's Reasons

[39] The Board reasoned from the planning scheme in Part VIII of the *HRM Charter*. Part VIII is discussed below (paras. 51-53). Central to the statutory scheme, from the Board's perspective, were ss. 265(2) and 267(2) of the *HRM Charter*:

> 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.
>
> 267(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 provision of the land-use by-law or the subdivision by-law.
>
> [emphasis added]

[40] In Mr. and Mrs. Ghosn's case, there was neither a development agreement, an order establishing an interim planning area, an order regulating or prohibiting development in an interim planning area, nor a subdivision by-law. So, under ss. 265(2) and 267(2), the questions for the Board were whether the Development Officer's refusal of the permit (1) "does not reasonably carry out the intention of the municipal planning strategy", or (2) "does not comply with" or "conflicts with" a provision of the Land-Use By-law.

[41] The Board said:

> [80] In short, the test for an applicant to appeal a development officer's decision to refuse a development permit is that the decision "does not comply" with the LUB or the Subdivision By-Law: s. 265(2); for the Board to reverse a development officer's decision to refuse, it must find that the decision "conflicts with" the LUB or the Subdivision By-Law: s. 267(2). The Board sees no difficulty arising from this distinction, at least in the circumstances of the present appeal.

[42] To analyze that issue, the Board (paras. 81-85) adopted the standard of review to the Development Officer's decision that has been prescribed by several decisions of this Court on planning appeals: see *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38, paras. 23-24 and *Royal Environmental Inc. v. Halifax (Regional Municipality)*, 2012 NSCA 62, para. 41. In *Royal Environmental*, this Court summarized the approach:

> [41] What is the Board's standard of review? As stated in *Halifax Anglican Diocesan Centre*, para. 23:
>
> > The Board, itself an administrative tribunal under a statutory regime, does not immerse itself in *Dunsmuir*'s standard of review analysis that governs a court's judicial review. The Board should just do what the statute tells it to do.

[43] The Board (paras. 86-93) adopted a purposive approach to the legislation. In this respect, the Board (paras. 90-92) quoted the interpretive principles set out by this Court in *Anglican Diocesan* and *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, para. 24. Those include (*Anglican Diocesan*, paras. 29 and 47):

> [29] … (2) The legislation expects the Board to interpret the LUB. The Board should interpret the LUB not formalistically, but pragmatically and purposively, to make the LUB work as a whole. …
>
> (3) Subsections 234(1) and (3) of the *HRM Charter* direct that the LUB "enables" and "should carry out the intent" of the MPS. The MPS does not amend the LUB. But the LUB's interpretation may be assisted by the MPS, and the Board's purposive approach should encompass the LUB and MPS together. The Board here (para. 84) cited the interpretive reflexivity between the MPS and LUB ….
>
> [47] … Though the MPS does not amend the LUB, the MPS' intent should be the LUB's backbone. For that reason, the MPS may be an interpretive tool to elicit meaning from ambiguity in the LUB; [citations omitted]

[44] The Board (paras. 84-112) turned to the circumstances of this case. It was uncontested that the proposed swimming pool would be located within 30 feet of the Arm's shoreline as the shoreline existed in 2007. Section 16L(b) of the Land-Use By-law says that, with listed exceptions, no "structure" could be located within 30 feet of the 2007 shoreline. The Board found, reasonably in my view, that the pool would be a "structure". That finding is unchallenged on this appeal. Swimming pools were not a listed exception. So the Board concluded:

> [112] … Accordingly, in the view of the Board, if one looks at the LUB only, the decision of the development officer appears to be entirely consistent with it.

[45] The Board acknowledged that the Swimming Pool By-law conflicted with the Land-Use By-law:

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

[46] The Board resolved the conflict by giving precedence to the Land-Use By-law:

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

[47] The Board (para. 129) noted that the Swimming Pool By-law applied throughout the Municipality, while s. 16L of the Land-Use By-law applied only to the subset of properties that bordered the Northwest Arm. That distinction stemmed from the Municipal Planning Strategy's advertent policy to protect the Northwest Arm.

[48] The Board (para. 130) said the "decisive" factor, to support its resolution of the conflict between by-laws, was the Municipal Planning Strategy's expressed policy for the properties along the Arm. Citing policy 8.12 from the Municipal Planning Strategy (quoted above, para. 37), the Board found:

> [138] In the view of the Board, the intent of the MPS as demonstrated in this and other provisions includes three expressly stated key aspects:
>
> - the first is severe restrictions on types and size of structures which can be built;
>
> - the second is eliminating Infilled Water Lots from area and setback calculations;
>
> - the third is discouraging infilling of the Arm.
>
> …
>
> [143] … Thus, the LUB and MPS point to a very short list of structures that can be built on Infilled Water Lots or near the 2007 shoreline. Further, the language of the MPS and LUB point, in the judgement of the Board, to a conclusion that anything not on the list cannot be built.
>
> …
>
> [150] The 2007 amendments to the MPS and LUB also prohibit the use of Water Lots in doing lot area calculations (see MPS Policy 8.12 and LUB s. 16L(d)(ii)), as well as in relation to the calculation of setback. This means that adding land area to an existing property, through infilling a Water Lot, no longer increases the land available for the purposes of calculations related to - for example - the size and location of a house, or a garage, or other structure.

[49] The Board concluded by re-emphasizing its restricted appellate mandate from Part VIII of the *HRM Charter*:

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

> [175] Ultimately, the Board concluded that Appellants have failed to establish, on the balance of probabilities, and using a standard of review akin to correctness (as established by the Court of Appeal in *Anglican Diocesan* and affirmed in *Royal Environmental*), that the Development Officer's decision conflicts with or does not comply with the provisions of the LUB.
>
> [176] The 2007 shoreline governs.
>
> [177] The appeal is dismissed.

Is the Board's Decision Reasonable?

[50] The Board's reasoning was clearly expressed. Was the Board's conclusion a permissible interpretation of the by-laws and legislation?

[51] The *Municipal Government Act*, that governed Halifax until 2008, and the 2008 *HRM Charter* have the same structure and, for the most part, the same text. Part VII of each statute is titled "By-laws", and is the enabling source of the Swimming Pool By-law. Then each statute's Part VIII is titled "Planning and Development", which is the enabling source of land-use by-laws. Part VIII of the *Municipal Government Act* has provisions that correspond to those in the *HRM Charter* set out below.

[52] The following provisions in Part VIII of the *HRM Charter* governed Mr. Ghosn's application for the swimming pool permit under appeal:

1. The purpose of Part VIII includes:

> 208 The purpose of this Part is to:
>
> …
>
> (b) enable the Municipality to assume the primary authority for **planning** within the 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;

2. Section 220(1) says the Municipal Council "**shall adopt,** by by-law, planning documents", defined by s. 209(m) to mean "a municipal planning strategy and a land-use by-law adopted to carry out the municipal planning strategy".

3. Public hearings consider the proposed elements of a municipal planning strategy and land-use by-law: ss. 220-21 and 230-31.

4. The municipal planning strategy includes the Municipality's planning objectives for the "protection, use and development of lands", the "placement of fill", "policies governing … land-use by-law matters", and "any other matter relating to the physical, social or economic environment of the Municipality": s. 229(1).

5. Section 232(1) says: "The Municipality **may not act in a manner that is inconsistent** with a municipal planning strategy."

6. Section 234(1) says that, when the Municipality adopts a municipal planning strategy, "the Council **shall**, at the same time, **adopt a land-use by-law** or land-use by-law amendment **that enables the policies to be carried out**". To emphasize the point, s. 234(3) adds: "The Council **may not** adopt or amend a land-use by-law **except to carry out** the intent of a municipal planning strategy."

7. Section 235 then sets out the functions of a land-use by-law. These include the authority to "regulate the location of a structure on a lot": s. 235(4)(d).

8. Section 258(1) says: "The Council **shall appoint** a development officer **to administer its land-use by-law** and subdivision by-law." Section 261(1) says the development permit "must be issued for a proposed development if the development meets the requirements of the land-use by-law"

9. Sections 263-268 govern appeals to the Utility and Review Board. Under the heading, "Restrictions on appeals", section 265(2) says:

> 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.

10. Under the heading "Power of Board on appeal", s. 267(2) says:

> **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 intention of the **municipal**

> **planning strategy** or **conflicts** with the provisions of the **land-use by-law** or the subdivision by-law.

11. Section 272 of the *HRM Charter* deals with statutory conflicts on planning matters:

> **Conflict**
>
> 272 In the event of a conflict **between this Part and this Act** or another Act of the Legislature, **this Part prevails**.

The words "this Part" refer to "Part VIII – Planning and Development" which includes the foregoing provisions relating to the municipal planning strategy and land-use by-law. The Swimming Pool By-law was enacted further to "Part VII – Bylaws".

[emphasis added throughout]

[53] Part VIII of the *HRM Charter* establishes a continuum for "Planning and Development" comprising: (1) policies that, after public input, embody the Council's municipal planning strategy, (2) to be implemented by standards in Council's land-use by-law, (3) which is then administered by the Development Officer, and (4) interpreted by the Utility and Review Board in its rulings on appeal from the Development Officer. The Legislature has enacted an integrated circuit of policies and standards, administration and appeal, and has mandated the Municipal Council, Development Officer and Board to play complementary roles in this process. By s. 272, a "planning and development" policy in the Municipal Planning Strategy with its derivative standard in the Land-Use By-law, both adopted under Part VIII, "prevails" over an inconsistent standard in a Part VII by-law, such as the Swimming Pool By-law S-700.

[54] The issue is not simply a choice between two orphaned by-laws of the Municipal Council. The Legislature is the Council's enabling authority for both by-laws. The Legislature's intent is the telling factor.

[55] The Board applied the Municipal Planning Strategy's clear intention that was explicitly adopted by the Land-Use By-law. That was the Board's explicit statutory mandate under s. 267(2) of the *HRM Charter*. The Board's reasoning and conclusion applied the Legislature's advertent approach that Part VIII be a streamlined and self-sufficient code for "Planning and Development". This approach means that, where there is an inconsistency, the clear planning standards in a land-use by-law under Part VIII take precedence over the incidental planning

aspects of a by-law, such as the Swimming Pool By-law, that derives from Part VII.

[56] The Board's decision was reasonable under this Court's standard of review.

Conclusion

[57] I would dismiss the appeal.

[58] HRM requested costs. I respectfully disagree. There is no reason to depart from the Court's normal practice in Utility and Review Board planning appeals, that there should be no award of costs.

Fichaud, J.A.

Concurred: Scanlan, J.A.

Van den Eynden, J.A.