

NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax (Regional Municipality) v. Hazelview Investments Inc.*,
2026 NSCA 27

Date: 20260326

Docket: CA 544850

Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Hazelview Investments Inc., the Attorney General of Nova Scotia,
and the Nova Scotia Regulatory and Appeals Board

Respondents

Judges: Bryson, Beaton and Gogan, JJ.A.

Appeal Heard: December 2, 2025 in Halifax, Nova Scotia

Written Release: March 26, 2026

Held: Appeal dismissed with costs, per reasons for judgment of
Bryson, J.A.; Beaton and Gogan, JJ.A. concurring

Counsel: Ted Murphy and Meg MacDougall, for the appellant
Sarah Dobson and D. Kevin Latimer, K.C. for the respondent,
Hazelview Investments Inc.

Facts: Hazelview Investments Inc. plans to construct two 8-storey
apartment towers behind an existing 11-storey building on
Cowie Hill Drive, Halifax. The Halifax Regional
Municipality (HRM) had approved planning changes to boost
housing supply, designating Hazelview's property as an
"opportunity site" under a new Secondary Municipal
Planning Strategy (SMPS). However, Hazelview sought a
variance from a six-metre stepback requirement, which was

initially denied by a development officer for conflicting with the Municipal Planning Strategy (MPS) (paras [1-5](#)).

Procedural History:• Hazelview Investments Inc. (Re), 2025 NSRAB 32: The Nova Scotia Regulatory Appeals Board ruled in favor of Hazelview, ordering the variance to be granted after finding no material conflict with the MPS (para [5](#)).

**Parties’
Submissions:**

- Appellant (Halifax Regional Municipality): Argued that the Board erred in law by not finding a material conflict between the proposed variance and the MPS. HRM contended that the Board misinterpreted the role of the MPS and the Land Use By-law, and that the variance conflicted with the MPS's intent (paras [6](#), [13-14](#), [22-27](#)).
- Respondent (Hazelview Investments Inc.): Argued that the Board correctly found no material conflict with the MPS, emphasizing that the legislative intent was to facilitate housing development and that the variance did not contradict any specific MPS policies (paras [37-39](#)).

Legal Issues:

- Did the Board err in its consideration of the role of the MPS when interpreting s. 250A (1)?
- Did the Board err in its consideration of the role of the Land Use By-law when interpreting s. 250A (1)?
- Did the Board err in finding no material conflict between the requested variance and the MPS?

Disposition:

- The appeal was dismissed with costs.

Reasons:

Per Bryson J.A. (Beaton and Gogan JJ.A. concurring):

The Court found that the Board correctly interpreted s. 250A (1) of the Charter, which requires a development officer to grant a variance unless it materially conflicts with the MPS. The Board's decision to focus on policy rather than preamble language was appropriate, as the MPS is about policy

guidance. The Board did not err in disregarding the Land Use By-law when assessing material conflict, as s. 250A (1) explicitly states that the by-law should be ignored in this context (paras [15-59](#)).

Reasons for judgment:

Introduction

[1] Hazelview intends to build an apartment building on property it owns on Cowie Hill Drive, Halifax. Presently there is an 11-storey apartment building on the property, abutting the road. Hazelview plans to add two 8-storey towers behind the existing apartment building. These new buildings would back on a 20-foot buffer adjacent to a low-rise residential area.

[2] In 2023-24 the Municipality (“HRM”) approved planning changes to accelerate the supply of housing in HRM’s Urban Service Area. In September, 2024, the Municipal Planning Strategy (“MPS”) was augmented by a Secondary Municipal Planning Strategy¹ (“SMPS”) and accompanying Land Use By-law. Hazelview’s property is one of 28 “opportunity sites” to which the new SMPS and accompanying by-law apply.²

[3] The applicable Land Use By-law requires Hazelview’s proposed buildings to have a six-metre setback³ from a transition line at the rear of the property closest to the residential area.⁴

[4] Hazelview sought a variance from the development officer excusing compliance with the six-metre setback. Recent statutory changes require a development officer to grant a setback variance, “notwithstanding any land-use by-law [...] unless the variance would materially conflict with the municipal planning strategy.” (“MPS”)

[5] The variance was rejected by the development officer because he decided it materially conflicted with the MPS. He did not say how. Hazelview appealed to the Nova Scotia Regulatory Appeals Board. The Board agreed with Hazelview, ruling the development officer failed to prove that the variance “materially conflicted” with the MPS.⁵ The Board ordered that the variance be granted.

¹ A secondary planning strategy addresses issues with respect to a particular part of the planning area that may not, in the opinion of council, be adequately addressed in the Municipal Planning Strategy above, *Halifax Regional Municipal Charter*, s. 231(2) [*Halifax Charter*].

² Secondary Municipal Strategies are captured in the statutory language of a Municipal Planning Strategy, per *Halifax Charter*, s. 209(h).

³ A setback is a horizontal recess that breaks the vertical plane of an exterior building wall on a main building, per s. 155 (183) of the Suburban Housing Accelerator Land Use By-law [Land Use By-law].

⁴ Land Use By-law, s. 146(3)(c).

⁵ *Hazelview Investments Inc. (Re)*, 2025 NSRAB 32 [Decision].

[6] HRM now appeals, arguing that the Board erred in law by not finding a material conflict.

[7] For reasons developed below, the appeal should be dismissed.

Appealing to the Board

[8] A development officer's refusal to grant a variance may be appealed to the Board. The appeal hearing is *de novo*, meaning "anew". No deference is owed to the development officer's decision. This differs from the deference accorded decisions by the democratically elected council.⁶

[9] On appeal, the development officer has an onus to prove how the variance materially conflicts with the MPS:

250A (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.

Appealing to the Court of Appeal

[10] A decision of the Board may be appealed to the Court of Appeal on questions of law or jurisdiction:

36 (1) An appeal lies to the Court of Appeal from an order of a Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within 30 days after the issuance of the order.⁷

[11] Issues of fact are not appealable to this Court,⁸ unless without evidentiary foundation, thereby resulting in an error of law.⁹

[12] The interpretation of s. 250A is on a standard of correctness.

⁶ *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at para 29.

⁷ *Energy and Regulatory Boards Act*, S.N.S 2024 c. 2, s. 36.

⁸ *Heritage Trust of Nova Scotia v. AMK Barrett Investments Inc.*, 2021 NSCA 42, para. 20 [AMK].

⁹ *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6.

Issue: Does Hazelview’s proposed variance materially conflict with the Municipal Planning Strategy?

[13] HRM lists seven issues in its Notice of Appeal. In the “Issues” section of its factum, HRM identifies one issue and four sub-issues. HRM then proceeds in its “Argument” to discuss three issues and six sub-issues, many of which do not match the “issues” in its “Issues” section. This variety and inconsistency of issues is unhelpful to the parties and the Court.

[14] The primary issue is whether the Board legally erred in its interpretation of s. 250A (1) of the *Charter* by finding that Hazelview’s proposed variance did not materially conflict with the MPS. In light of the grounds of appeal and submissions of counsel, the primary issue will be addressed by considering these sub-issues:

1. Did the Board err in its consideration of the role of the MPS when interpreting s. 250A (1)?
2. Did the Board err in its consideration of the role of the Land Use By-law when interpreting s. 250A (1)?
3. Did the Board err in finding no material conflict between the requested variance and the MPS?

Did the Board err in its consideration of the role of the MPS when interpreting s. 250A (1)?

[15] Section 250A (1) of the *Charter* describes when a setback variance may be granted:

Variance respecting setback or street wall

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.*

[Emphasis added]

[16] The parties agree that the Board correctly identified the applicable principles of statutory interpretation:

[117] 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”: [...] Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations:¹⁰

[Citations omitted]

[17] The Supreme Court has elaborated on the interpretative exercise in an administrative context:¹¹

[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. Where, for example, the words used are “precise and unequivocal”, their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[Emphasis added]

[18] No guidance is provided for what “materially conflicts” means. No indication is given concerning what parts of the MPS may be used as a standard against which to measure a conflict with a variance. By way of contrast, s. 250 of the *Charter* permits a development officer to grant variances provided they do not, among other things, violate the intent of a development agreement or land-use by-law. Other types of appeal require assessing whether a decision reasonably carried out the intent of a municipal planning strategy.¹²

[19] HRM argues by analogy that the interpretation task is discern council intent from the MPS and assess material conflict of a proposed variance against that intent.

[20] HRM’s interpretation of the MPS and SMPS was supported by the evidence of two employees: development officer, Trevor Creaser and manager of community planning, Kasia Tota. Their evidence respecting the meaning of s.

¹⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The Board also cited *Interpretation Act*, R.S.N.S. 1989 c.235, s.1.

¹¹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

¹² *Lewis v. North West Community Council of Halifax Regional Municipality*, 2001 NSCA 98, para. 10.

250A of the *Charter* and the SMPS was replicated in HRM’s legal submissions, discussed below, and will not be repeated here.

[21] The Board did not accept the evidence of HRM’s witnesses or HRM’s submissions concerning the interpretation of s. 250A. The Board summarized its conclusion at the beginning of its decision:

[3] While there is broad policy direction and preamble text in the Suburban Housing Accelerator Secondary Municipal Planning Strategy (SMPS) that would encourage pedestrian-level and human-scale experience, including in the Vision and Core Concepts outlined in the introductory parts of the SMPS, an overarching objective of the SMPS is to provide housing in the designated Housing Accelerator Zone. The SMPS and LUB identified 28 opportunity sites “to prioritize the removal of barriers to housing”. The site of the proposed 8-storey building is one of the “opportunity sites”. ***There is nothing in the words of s. 250A that provides, whether expressly or impliedly, that the review in an appeal under that section requires a policy choice or a balancing of policies under the SMPS by the development officer, or by the Board on an appeal. The Board’s task in this appeal is to determine whether the requested variance materially conflicts with the SMPS notwithstanding any land use by-law. The Board finds that there is no policy direction in the SMPS that would limit a setback variance “abutting a transition line”, or any other setback variance that is not a “streetwall setback”.***

[Emphasis added]

[22] HRM argues that the Board misinterpreted and misapplied s. 250A (1) by misapprehending the nature and function of the MPS.¹³

[23] HRM maintains that the Board applied too narrow a standard to what “materially conflicts” with the MPS:¹⁴

52. The Board’s approach incorrectly reduces the function of the MPS to a catalogue of explicit and specific regulatory controls (which is properly the role of the LUB). ...

[24] HRM explains that the correct approach is to consider the meaning of “any potentially relevant sections” of the MPS – regardless of whether the language is general or specific – and then apply the “materially conflicts” test to determine whether the variance is allowable in light of those potentially relevant sections.

¹³ Appellant’s Factum, para. 42.

¹⁴ Appellant’s factum.

[25] HRM says a conflict arises between the proposed variance and the MPS when there is “an apparent contradiction between the variance and an “express goal, objective or policy direction of the MPS”:¹⁵

[26] HRM insists that a single conflict between a proposed variance and any part of the MPS is sufficient to meet s. 250A (1), even when the variance may be consistent with other parts of the MPS.

[27] HRM’s fundamental submission is that s.250A (1) requires the development officer to ascertain the *intent* of council as expressed in the MPS to determine any material conflict with a proposed variance.¹⁶

[28] HRM’s submissions largely employ the “intent” standard. But s. 250A (1) is silent on intent, when it could so easily have been mentioned, as it is in surrounding sections.

[29] HRM’s interpretation of s. 250A (1) is problematic because:

1. The word intent does not appear in s. 250A (1).
2. It is notoriously difficult to determine MPS intent,¹⁷ because an MPS may have disparate objectives.¹⁸
3. Interpreting the MPS is typically the role of the democratically elected council.¹⁹
4. The legislative choice of the development officer to ascertain a conflict favours an administrative, rather than a policy interpreting process.
5. Appeals lie to the Board, not the council which is typically tasked with interpreting and applying the intent of the MPS.

[30] The Board properly rejected HRM’s “intent” analysis.²⁰

¹⁵ Appellant’s Factum, para. 43.

¹⁶ Appellant’s Factum, para. 47.

¹⁷ *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, 1994 128 N.S.R. (2d) 5, para. 100. Although, unlike here “intent” was the legislatively mandated interpretive principle.

¹⁸ *Cornwallis Farms Limited v. Nova Scotia (Attorney General)*, 2025 NSCA 9, para. 80. [Cornwallis]

¹⁹ *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, para. 7 [Archibald]; *Cornwallis*, paras. 49-50

²⁰ Decision, para. 43.

[31] It is easy to see how HRM’s “intent” would render variances difficult to obtain, owing to the extensive and often conflicting goals of the MPS. HRM’s proposed test casts a wide net, threatening transparency and predictability. It would impair the legislative intention of increasing density in specially designated opportunity sites such as this one. More will be said about HRM’s interpretation of s. 250A under the “material conflict” analysis below.²¹

[32] The primary measure of materiality must depend on policy. Setting out policy is why the MPS exists:

Purpose of municipal planning strategy

228 *The purpose of a municipal planning strategy is to provide statements of policy consistent with the minimum planning requirements to guide the development and management of the Municipality and, to further this purpose, to establish*

- (a) *policies* that address problems and opportunities concerning the development of land and the effects of the development;
- (b) *policies* to provide a framework for the environmental, social and economic development within the Municipality;
- (c) *policies* that are reasonably consistent with the intent of statements of provincial interest; and
- (d) *specify programs* and actions necessary for implementing the municipal planning strategy. 2008, c. 39, s. 228; 2018, c. 39, s. 18.

[Emphasis added]

[33] The MPS is about policy. The first policy in the SMPS says:

Policy VCU-1

This Plan shall apply to the lands, as identified on Map 1. The Municipality *shall implement the Plan’s Vision and Core Concepts through the policies and maps contained in this Plan, the Suburban Housing Accelerator Land Use By-law, and the Regional Subdivision By-law.* Investments in public spaces and infrastructure to support current and future growth in the Suburban Area shall be guided by this Plan.

[Emphasis added]

²¹ Para. 48 below and following.

[34] Implementation of the Plan is by policy and land use by-laws. But s. 250A (1) says a land use by-law must be ignored²² when considering proposed stepback variances. So we are left with policy.

[35] It is an exaggeration for HRM to argue that the Board's interpretation would essentially require the MPS to have the specificity of a land use by-law. It is not an all or nothing proposition. The SMPS does give specific stepback and setback policy direction in certain instances.²³

[36] The focus of the MPS is to provide statements of policy to guide development²⁴ and the exercise of council's authority.²⁵ There is no suggestion that policy extends to "goals or objectives" as HRM would have it.

[37] As Hazelview argues, the legislature's choice of the MPS as the standard for assessing material conflict respects council's role in establishing policy. The exclusion of the Land Use By-law focuses the analysis on the MPS. The legislative choice of the development officer as the judge of material conflict with the MPS, rather than council, emphasises that the development officer should not be weighing policy. The development officer need only look for material conflict.

[38] HRM's proposed materiality test of inferring intent from the MPS as a whole, would not serve the purposes of s. 250A (1). Any materiality test should be easy for a development officer to identify and apply. A more subtle and nuanced interpretive exercise would not serve the purpose of promptly ameliorating the housing deficit that s. 250A (1) and the SMPS were enacted to address.

[39] The Board's decision, minimizing the materiality of preamble and focusing on policies, respects the language and purpose of s. 250A (1). The Board's interpretation will facilitate, rather than frustrate balanced development, as HRM's interpretation is likely to do.²⁶ Its decision properly considers the interpretive principles of text, legislative intention and consequences of interpretation.²⁷

²² See paras. 40-47 below.

²³ Policy UD-5 (c)(i), (iii), (iv), (viii); Policy UD-13(f); Policy M-5; Policy UD-6(b) Policy UD-9(a).

²⁴ *Halifax Charter*, s. 228, quoted in para. 32, above.

²⁵ *Lewis*, paras. 19 and 20; *AMK*, paras. 20 and 28.

²⁶ See para. 31 above.

²⁷ *Sparks v. Holland*, 2019 NSCA 3 at para. 29.

Did the Board err in its consideration of the role of the Land Use By-law?

[40] In contrast to the MPS, a land use by-law enables MPS policies to be carried out:

Adoption of land-use by-law or amendment

234 (1) Where the Council adopts a municipal planning strategy or a municipal planning strategy amendment that contains policies about regulating land use and development, *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*.

[emphasis added]

[41] HRM says it was wrong of the Board to ignore the Land Use By-law provision for setbacks that would ordinarily apply to Hazelview’s development. HRM argues that discarding the setback requirement in the Land Use By-law contradicts the “established principle” that a by-law enacted at the same time as the MPS can assist in determining the meaning of the MPS.²⁸

[42] That established principle must yield to the express statutory language in s. 250A (1):

Variance respecting setback or street wall

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*.

[Emphasis added]

[43] “Notwithstanding” is an old word with enduring currency. It is probably a medieval adaption of the latin *non obstante* – a phrase that persists in canon law – literally meaning “not standing in the way”. In legal parlance it typically means “in spite of”; “regardless”; “without regard to”.²⁹ For practical purposes it means to ignore something – in this case, the Land Use By-law – when assessing conflict between the requested variance and the MPS.

[44] The *Archibald* principle of inferring intent from the by-law is unhelpful in the face of legislative direction to ignore the by-law. Moreover, the interpretive

²⁸ Citing *Archibald*, para. 24.

²⁹ Kevin McGuinness, (2021). *The Encyclopedic Dictionary of Canadian Law*. (Toronto: LexisNexis Canada, 2011), vol. 2, p. N-133.

task in *Archibald*, and cases relying on it, was to determine whether the decision under appeal reasonably carried out the intent of the MPS. That is not the task under s. 250A of the *Charter*, which considers conflict with the MPS.

[45] HRM contends that potentially relevant sections of the MPS should not be disregarded simply because the Land Use By-law implements MPS policy.³⁰ Exactly so. But that begs the question of whether the MPS actually expresses the policy argued for. That policy must be found in the MPS, not by inference from the bylaw.

[46] Respectfully, resuscitating a setback requirement in a land use by-law that must be ignored if the variance does not otherwise materially conflict with the MPS, would frustrate the purpose of s. 250A. The by-law itself cannot be the measure of whether a variance is in material conflict with the MPS because s. 250A (1) says it is to be ignored when making that assessment.³¹

[47] The Board did not err by disregarding the Land Use By-law when ascertaining material conflict with the MPS.

Did the Board err in finding no material conflict between the requested variance and the MPS?

[48] As earlier indicated, s. 250A (1) obliges a development officer to grant a variance in the absence of material conflict with the MPS:

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.

[49] After careful consideration of HRM’s submissions, the Board found that the development officer had not discharged his onus of proving how the variance materially conflicted with the MPS.

[50] HRM agreed with the Board that “material” in the context of the legislation means “significant, important or essential”. HRM faults the Board for claiming that the development officer must show that the conflict goes to the crux of a central issue to be decided by the development officer or the Board on appeal. This may

³⁰ Appellant’s Factum, para. 70.

³¹ The Board rejected much of the evidence of Mr. Creaser and Ms. Tota because they ignored this provision. Decision, paras. 94, 96, 100, 107.

be more a matter of semantics. In the end, a material conflict would require the requested variance to have a significant, important, or essential impact on policy in the MPS.

[51] HRM relies upon preamble in the SMPS which speaks of the “vision” that development on “opportunity sites” such as Hazelview’s should respect the character and vision of the communities in which they are located.³² HRM cites language that development be “compatible with surrounding neighbourhoods prioritizing a pedestrian and human-scale environment.”³³

[52] The SMPS also refers to other language counselling development that transitions between varying scale and intensity of use.³⁴

[53] In its decision, the Board counters these points by noting that the SMPS’s preamble is only context for the policies which guide council.³⁵ Even so, the Board rejected HRM’s criticism that the Board ignored preamble goals of ensuring high to low density transitions. Rather, the Board found that these concerns did not apply on the facts.³⁶

[54] HRM goes on to advance several discrete arguments in support of a material conflict between the proposed variance and the MPS:

- (a) General language in the preamble of the MPS speaks of “transitioning” between high rise large scale buildings and low rise residential areas through the use of side and rear setbacks and stepbacks.³⁷ The preamble also speaks of controls that reinforce “human scale” streetscapes and pedestrian traffic.
- (b) Intention to favour transitioning land use controls could be inferred from the Land Use By-law itself;
- (c) Policy UD-4 in the SMPS directs that the Land Use By-law shall establish building height and transition requirements for mid and high rise buildings abutting low rise residential areas. Transition “policy”

³² SMPS, s. 1.4.2..

³³ SMPS, s. 2. 2.2.

³⁴ SMPS, s. 3.2.

³⁵ Decision, para. 109 citing *Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board)*, 2008 NSCA 123, para. 47 [*Can-Euro*].

³⁶ See para. 58 below.

³⁷ SMPS, ss. 3.2.1 and 3.2.2

from high to low rise residential properties should be read together with the Land Use By-law so as to preclude a variance in this case;

- (d) Policy UD-5 dealing with building envelope provisions also talks of promoting human scale, pedestrian orientated environments providing minimum side and rear yard setbacks that transition from higher density zones to lower density zones.

[55] Respectfully these submissions cannot prevail because:

- (a) Generic and aspirational language in the preamble that provides context for policy is not a substitute for a policy.³⁸ The MPS is about policy, not preamble. Policy choices are for the council which implement its preferences by enacting policies and a supportive land use by-law.³⁹
- (b) As previously indicated, inferring intent from setback requirements in the Land Use By-law ignores the statutory imperative to decide the variance question “notwithstanding” those requirements.
- (c) HRM’s reliance on policy UD-4 respecting transition is misplaced. That policy provides for transitions between mid and high rise buildings abutting residential low-rise buildings. In many instances, UD-4 may be relevant to a material conflict analysis respecting a requested setback variance. But in this case, there is a 20 foot buffer between the properties. The Board found the properties do not abut, so the policy does not apply.
- (d) Policy UD-5 describes exhaustive controls respecting the building envelope, but provides no policy direction regarding setbacks as opposed to setbacks. Stepbacks are excluded. Council could have added stepbacks to the Policy UD-5, but did not do so. That absence was a factor properly considered by the Board in determining that no material conflict arose in this case.
- (e) Policy UD-6 which deals with street wall requirements speaks of stepbacks for mid-rise and tall rise buildings from a street. But to repeat, there is no such policy requiring stepbacks for sidewalls, as in this case.

³⁸ *Can-Euro*, para. 47

³⁹ *Halifax Charter*, s. 234(1) quoted in para. 32 above.

[56] HRM submits that the Board placed too much emphasis on the specifics of policy direction in the MPS. HRM maintains that the absence of stepback requirements in the policy itself was neither determinative nor surprising. The search for conflict should transcend the actual policies and embrace other aspirational language in the SMPS’s preamble.

[57] Accordingly, HRM faults the Board for requiring “explicit references” to stepbacks in order to generate a conflict with the MPS. Obviously, any such explicit reference would constitute a conflict. But the Board did not confine its conflict analysis to explicit references. The Board considered the preamble language of the SMPS, as well as the policies raised by HRM to determine whether any material conflict arose.⁴⁰ For example, the Board acknowledged HRM’s arguments about transitioning between higher and lower density use. But the absence of stepbacks transitioning from policy statements, reduced the significance of transitioning language to context for policy.⁴¹

[58] The Board concluded there was no policy direction in the SMPS that would limit the side yard stepback variances in this appeal. Nor was there anything else in the SMPS that could overcome that policy absence. Although HRM takes issue with the word “limit”, it clearly refers to a lack of constraint on the ability of the development officer to grant a variance in the absence of materially conflicting policy.

[59] The Board also found that the factual context supported granting the variance by addressing the transitioning concerns raised by HRM. Applying HRM’s policy concerns to the facts, the Board found:

- (a) Hazelview’s property is one of the largest “opportunity sites” identified in the Land Use By-law which would tend to favour a development with greater density such as the new eight-storey multi-unit building contemplated in this case;
- (b) The eight-storey multi-unit building proposed by Hazelview represented a transition within the existing neighbourhood from the existing 11-storey multi-unit apartment building already situated on Hazelview’s property and the adjacent low rise residential dwellings.
- (c) The transition between the eight-storey multi-unit building and the low rise residences is mediated by the presence of a natural buffer

⁴⁰ Decision, paras. 104 – 114.

⁴¹ *Can-Euro*, para. 47; Decision, para. 109.

between the two – namely, the 20-foot strip of largely vacant unzoned land owned by the Province.

- (d) The 20-foot strip of land includes a rocky outcropping with treed vegetation sloping up from the proposed development site to the low rise residential properties, so that there is an elevation difference of up to 20-feet along much of the boundary between the two. Accordingly, this diminishes the impact of the proposed development on those residences which would have an effective height of only six or seven storeys from their perspective.⁴²

[60] Although these factual findings are beyond our reach under the standard of review, they are nevertheless supported by the evidence.

Disposition

[61] The appeal should be dismissed. This case is one of first instance before this Court. Costs should reflect that novelty and be limited to \$5,000.00, inclusive of disbursements.

Bryson, J.A.

Concurred in:

Beaton, J.A.

Gogan, J.A.

⁴² Decision, para. 114.