NOVA SCOTIA COURT OF APPEAL

Citation: Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation, 2010 NSCA 38

Date: 20100504
Docket: CA 319426
Registry: Halifax

Between:

The Halifax Regional Municipality

Appellant

v.

Anglican Diocesan Centre Corporation,
The Dean and Chapter of Cathedral Church of All Saints, Halifax
and The Diocesan Synod of Nova Scotia and Prince Edward Island

Respondents

Judges:	Saunders, Hamilton and Fichaud, JJ.A.
Appeal Heard:	April 6, 2010, in Halifax, Nova Scotia
Held:	Appeal is dismissed without costs per reasons for judgment of Fichaud, J.A.; Saunders and Hamilton, JJ.A. concurring
Counsel:	Karen Brown, for the appellant Robert G. Grant, Q.C. and Joshua E. Bearden, Articled Clerk, for the respondent, Anglican Diocesan Centre Corporation Edward Gores, Q.C., for the respondent, the Attorney General of Nova Scotia (not participating)

Reasons for judgment:

[1] The All Saints Cathedral in Halifax is a stately edifice. But the Anglican Church can no longer afford all its facilities. The Church decided to replace its accessory structures with a new eight story building to have 150 units for seniors' care. Halifax's land use by-law zones the property as Park and Institutional. The Municipality denied the Church a development permit because, in the municipal development officer's view, the top five floors of the proposed seniors' care facility would be too residential and impermissible in that zone. The Utility and Review Board allowed the Church's appeal, and ordered issuance of the development permit. The Board said the development was a "hospital ... church ... or other institution of a similar type, either public or private" in the permitted uses for the Park and Institutional Zone.

[2] The Municipality appeals and asks the Court of Appeal to reinstate the development officer's denial of the permit. Interestingly, the Municipality's submission in the Court of Appeal rejects a central feature of its development officer's reasons.

Background

[3] I will paraphrase the Board's findings from the decision under appeal (2009 NSUARB 154).

[4] The three respondents have legal interests in the Cathedral property. I will refer to them jointly as the Church.

[5] The Cathedral Church of All Saints opened in 1910. It stands on a large lot (Cathedral Campus) in Halifax, near the City's hospitals, Dalhousie University, the Sacred Heart School, several apartment buildings and residential homes. It is the largest Anglican Cathedral in Canada. The planning expert described it as an "architectural treasure and one of Canada's finest examples of perpendicular gothic style". It houses a grand pipe organ and exquisite stained glass.

[6] South of the Cathedral, still on the Campus, is an apartment building. To the north on the Campus are three houses, two garages and the Anglican Diocesan Centre. The houses, including the Bishop's, were built for the clergy. Just one

remains occupied. The Anglican Diocesan Centre is the administrative capital of the Diocese of Nova Scotia and Prince Edward Island. It has offices for the clergy, archives, meeting rooms, an auditorium, a Sunday School, choir room, church hall and kitchen.

[7] The Diocesan Centre is over fifty years old, with maintenance problems and functional obsolescence because, as the Board said, “its spaces do not match up with the current needs of the Church”.

[8] The Board described the financial pressures that affected the Church's decision on the future use of its Campus properties:

> [18] Basic maintenance of the three houses and the Diocesan Centre – exclusive of the Cathedral itself – now amounts to $300,000 per year. The work associated with this expense does not include work on such things as the leaking roof of the Diocesan Centre, or upgrades to the Centre, which have been estimated at $1 Million. If the houses were renovated and brought up to Code, in order to meet new Church uses, the estimated cost is in excess of $1.6 Million. This cost is exclusive of any interior alterations to convert them from their current residential uses into offices or other spaces required by the Church.
>
> [19] According to the unrebutted evidence of the Church, it does not have the financial capacity to continue absorbing a $300,000 per year maintenance bill (for the buildings on the Campus other than the Cathedral), much less capital expenses of at least $2.6 Million (a minimum $1 Million for the Diocesan Centre, and a minimum of $1.6 Million for the houses). Compounding these financial pressures, 70% of the congregation of All Saints Cathedral is 65 years of age and over.
>
> [20] In deciding what to do about the problem, the Church engaged for the past several years in extensive internal consultation, which included the parishes in the Diocese across Nova Scotia and Prince Edward Island. Ultimately, the Church concluded that, if the maintenance and capital expenses associated with the Diocesan Centre alone (ignoring the challenges presented by the three houses), remained unchecked, this:
>
> > ...will threaten the role of the Diocese to sustain its operations for the benefit of parishes across Nova Scotia and Prince Edward Island.
>
> [21] In the view of the Church, the maintenance and capital issues associated with these buildings restrict its ability:

> ...to preserve the future integrity of the Cathedral as well as the Church's ability to continue its outreach to the poor, its hospital chaplaincy programs, its support of the Mission to Seafarers and St. Mark's Food Bank, and to refugees, the homeless, shut-ins and many others in our community.

[22] Bishop Moxley's testimony bluntly expressed the Church's attitude towards the three houses and the Diocesan Centre:

> We're not interested in keeping them up. And we're not interested in spending the money on those facilities that we could be using for ministry. So, no we've made a decision not to keep the properties up because it doesn't make sense to spend money on something that doesn't meet the goals of the church.

[9] The Church decided to redevelop its north campus as a seniors' care facility, and approached Shannex Incorporated to assist. Shannex owns and operates many facilities that provide a continuum of elderly care. The most independent service is the self-contained "lifestyle product", with larger units, full kitchen and laundry in the unit and no services or staff, no housekeeping or administration of medications. Next in the progression is the "hospitality product" and then "assisted living", which include increasing levels of staff care. The proposed facility here would have assisted living units throughout its seniors' care floors.

[10] In autumn 2008, Shannex and the Church agreed to the demolition of all the Campus structures north of the Cathedral and their replacement with an eight story seniors' care building. The Church would own the land, on which Shannex would build and operate the facility for 75 years with an option for 40 years more, and then the building would revert to the Church. The project also would include 15,000 sq. ft. of new space custom designed for Church operations. Shannex would maintain this space, to include offices for the Bishop, clergy, dean, assistant priest and support staff, archives, library, workroom, music room, space for nursery and Sunday School, and meeting rooms. There would be a "Great Hall" available to the Church (for congregational use, weddings, funerals, ordinations, receptions and community outreach) and to the seniors' care facility. The Church would exclusively use the surface parking, while underground parking would be shared between the Church and the resident seniors.

[11] The residents of the seniors' care facility typically would be in their 80's or older. All 150 units would be built to the National Building Code's B2 occupancy requirements, directed to persons "having cognitive or physical limitations requiring special care or treatment". The building and its leaseholds would include many design features, listed in the Board's decision (¶ 41-43), that would not exist in a normal apartment building, and which would address the cognitive and physical needs of the residents.

[12] Seniors on floors two and three would receive intensive services, but residents on all the floors, including four through eight, would receive minimum services including: two meals a day, managed health care from a nursing team, administration of medications, emergency call and supervision, assistance with dressing and bandages etc, assisted showering if needed, linen and laundry, security, maintenance, housekeeping, transportation and escort to the dining room if needed, and daily therapeutic recreational programming. Residents of floors two and three would receive an average of two and four hours attendant time a day respectively, and residents of floors four through eight an average of one hour per day. Shannex' Mr. Jason Shannon said:

> [21] ...Floors four through eight are deliberately designed so that they can be converted to deliver the same level of services as offered on floors two and three. Our experience in other facilities offering aging in place has been that we are required to deliver increasingly higher levels of assistance to our seniors over time.

[13] The monthly rate for floors 2 through 8 would be at least $4,000 per month for a single, or $5,000 per month for a two bedroom unit. This significantly exceeds the market rent for residential apartments without the assisted living features of this project.

[14] The property is zoned P (Park and Institutional) under the municipal Land Use By-law (LUB). According to Mr. Shannon's evidence, Shannex' previous developments have all involved land use approvals which "have been in the form of either an 'institutional' designation or by development agreement for seniors care facilities", and there "are no facilities owned by Shannex which are being operated under a land use designation of 'residential', 'multi unit residential' or R3".

[15] In April 2009, the Church applied for a building permit. Mr. Andrew Faulkner, a development officer with Halifax Regional Municipality (HRM), reviewed and rejected the application. Mr. Faulkner's letter of May 6 stated his reasons:

> ***The following uses are permitted in the P zone***:
>
> (a) public park;
>
> (b) recreation field, sports club, and community facilities;
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> (c) a cemetery;
>
> (d) ***a hospital***, school, college, university, monastery, ***church***, library, museum, court of law, ***or other institution of a similar type***, either public or private;
>
> (da) day care facility; (RC- Mar 3/09; E - Mar 21/09)
>
> (e) uses accessory to any of the above uses.
>
> ***The first three floors of the development*** as detailed in your letter (undated) in support of the application ***would be considered an "institutional" use and permitted in the P Zone. The use would be classified as other institution of a similar type (hospital) and church.***
>
> However, ***floors four through eight are residential units which are not permitted in the P Zone***. The portion of the "seniors care facility" consisting of dwelling units for assisted living is not a hospital or a similar use nor a church.
>
> As the seniors care facility does not meet the above definition, it can only be defined as an "apartment house". As an "apartment house" is not a permitted use in the Park and Institutional Zone, I have no alternative but to refuse this application. [emphasis added]

I have emphasized the passages that focused the later proceeding before the Board. The list of permitted uses for the P Zone, items (a) through (e) in Mr. Faulkner's letter, is taken from s. 67(1) of Halifax's LUB.

[16] On May 20, 2009, the Church appealed to the Utility and Review Board (Board) under the *Halifax Regional Municipality Charter* S.N.S. 2008, c. 39 (*HRM Charter)*. Sections 262(3)(a), 265(2) and 267(2) of the *HRM Charter* permit an appeal to the Board on the ground that the development officer's refusal of the permit did not comply, or conflicts with the LUB.

[17] The Board, sitting by its member Mr. Wayne Cochrane, Q.C., heard the appeal on July 23, 2009. The Church and HRM each were represented by counsel. Giving evidence for the Church were The Right Reverend Sue Moxley, Bishop of Nova Scotia, Mr. Jason Shannon, Chief Operating Officer of Shannex, and Mr. David Harrison, whom the Board qualified as an expert in land use planning. Mr. Faulkner, HRM's development officer, testified for HRM. Further to the Board's practice, the witnesses had filed written summaries of their evidence which they supplemented orally at the hearing by direct and cross examination.

[18] The Board issued its written decision on October 9, 2009. The Board held that the development officer's refusal of the permit did not comply with s. 67(1)(d) of Halifax's LUB, allowed the Church's appeal, and ordered HRM to issue the development permit. Section 67(1) (d) says that the P Zone permitted a "hospital ... church ... or other institution of a similar type, either public or private". The Board concluded that the proposed development was an "other institution of a similar type." Later I will discuss the Board's reasons.

[19] HRM appealed the Board's decision to the Court of Appeal under the *Utility and Review Board Act* S.N.S. 1992, c. 11 (*URB Act*), s. 30(1). Section 30(1) permits an appeal on grounds of jurisdiction or law.

Issues

[20] I will sort HRM's argument into four submissions. First, HRM contends that the Board erred in its interpretation or application of "other institution of a similar type" in s. 67(1)(d) of the LUB. Second, HRM says the Board erred by failing to rule that the development was outside the LUB's definition of "institution". Third, HRM submits that the Board erred by relying on irrelevant evidence of the Church's economic circumstances and on Halifax's Municipal Planning Strategy (MPS). Fourth, HRM submits that the Board erred by not ruling

that the development was an “apartment house” or a “special care home” either of which, HRM says, is excluded from the P Zone.

Standard of Review

[21] As noted in *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, ¶ 18, before considering the standard of review, the reviewing court isolates the threshold grounds of appeal that are permitted by the statute. *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, ¶ 36; *Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 35, ¶ 15-20. Sections 26 and 30(1) of the *Utility and Review Board Act* S.N.S. 1992, c. 11 state that the Board's findings of fact made within its jurisdiction are binding and conclusive, and that an appeal lies to the Court of Appeal only on questions of jurisdiction or law. See *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board*) (N.S.C.A.) (1994), 128 N.S.R. (2d) 5, ¶ 101, and *Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board)*, 2008 NSCA 123, ¶ 24.

[22] HRM's grounds of appeal do not challenge the Board's jurisdiction. The question is whether the Board erred in law.

[23] This court applies correctness to the Board's selection of the Board’s standard of review: *Archibald*, ¶ 19 and authorities there cited. 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.

[24] Sections 265(2) and 267(2) of the *HRM Charter* allow the Board to overturn a development officer's refusal of a development permit only on the grounds that the development officer's decision “does not comply with the land-use by-law” [or with a development agreement or order – which are irrelevant here] or “conflicts with the provisions of the land-use by-law” [or with a subdivision by-law – irrelevant here]. The Board said (¶ 62) that it “may only allow this appeal if it determines that the Development Officer's decision 'conflicts with' or 'does not comply' with the provisions of the Land-Use By-Law”. After its analysis, the Board concluded (¶ 109) that the development officer's “decision to refuse conflicts with, and does not comply with, the LUB”, namely s. 67(1)(d) which permits an “other institution of a similar type” in the P Zone. The Board correctly

identified its standard of review, i.e. that prescribed by the *HRM Charter*, to the decision of the development officer.

[25] The issue in this court is whether the Board's application of that standard involved an error of law in the Board's interpretation of s. 67(1)(d) and related provisions of the LUB.

[26] In *United Gulf*, ¶ 45-56, this court considered the factors from *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and concluded that reasonableness governed this court on appeal from the Board's decision respecting a development officer's refusal of a development permit. See also *Archibald*, ¶ 21. I adopt Justice Hamilton's standard of review analysis from *United Gulf*, and will apply reasonableness respecting whether the Board erred in its application of its standard of review or the interpretation of s. 67(1)(d) and related provisions of the LUB.

[27] I reiterate *Archibald*'s description of "reasonableness":

> [22] I will add a few words on the meaning of "reasonableness" for a reviewing court. In *Dunsmuir*, Justices Bastarache and LeBel said "reasonableness" has components of process and outcome.
>
> > (a) For process, the reviewing court considers whether the decision under review expresses a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion. This is not a correctness analysis in disguise. Rather, the reviewing court determines whether it can understand how the tribunal reached its outcome, and whether the tribunal's reasons afford to the reviewing court the raw material for the reviewing court to perform its next task of assessing whether the tribunal's conclusion inhabits the range of acceptable outcomes.
> >
> > (b) The court then assesses the outcome's acceptability through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime". This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. The reviewing court does not ask whether the tribunal's conclusion is right or preferred. Rather the court tracks the tribunal's reasoning path, and asks whether the tribunal's conclusion is one of what may be several acceptable outcomes.

Dunsmuir, ¶ 47-49; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at ¶ 47-55; *Canada v. Khosa*, ¶ 59. *Lake v. Canada*, [2008] 1 S.C.R. 761, at ¶ 41; *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Limited*, 2009 NSCA 60, ¶ 22-24, 34-35; *Casino Nova Scotia v. NSLRB*, 2009 NSCA 4, ¶ 29-31; *Midtown Tavern*, [2006 NSCA 115] ¶ 42.

First Issue - Section 67(1)(d) of the LUB

[28] Did the Board unreasonably interpret or apply the term "other institution of a similar type" in s. 67(1)(d) of the LUB?

[29] In *Archibald*, ¶ 24, this court summarized the principles that govern the Board in deciding whether an elected municipal council carried out the intent of a municipal planning strategy. Similar principles, but with some adjustment noted below, apply to the Board's appellate role from a decision of a development officer. The authorities for these principles are cited in *Archibald*, ¶ 25.

> **(1)** The Board is the first tribunal to hear sworn and tested evidence. So the Board should undertake a thorough factual analysis of the proposal in the context of the LUB. The appellant bears the onus, on the balance of probabilities, to prove the facts that establish the conflict between the development officer's decision and the LUB. Here, the Board (¶ 57, 59) noted that the Church bore the onus on the balance of probabilities, and made determinative factual findings that I will discuss later.
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> **(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. The Board here (¶ 60) cited the purposive approach.
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> **(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 (¶ 84) cited the interpretive reflexivity between the MPS and LUB (discussed later ¶ 46-49).

> **(4)** The Board's deference to the elected municipal council's difficult choices among vague and intersecting intentions in the MPS, discussed in *Archibald* ¶ 24(7), does not apply to an unelected development officer who applies the LUB. This is apparent from the legislative mandates to the development officer and Board. Section 261(1) of the *HRM Charter* says that a "development permit must be issued if the development meets the requirements of the land-use by-law . . .." So a development officer with such a compliant application has an executory function. He holds no public hearing of objections as may occur before the council. At the appeal level, the legislation directs the Board to decide whether the council "reasonably carried out the intent of the municipal planning strategy" – a somewhat diffuse standard. But the Board's function with a development officer's decision – to determine whether that decision "conflicts with" the proper interpretation of the LUB – is more pointed. The Board here (¶ 62- 63) noted these principles.
>
> **(5)** The Board hears an appeal. It is not an initiating tribunal offering fresh direction on a planning issue. So the Board should focus on the development officer's decision and stated reasons. Section 260(2) of the *HRM Charter* says that, within 30 days from receipt of the application, the development officer "shall grant the development permit or inform the applicant of the reasons for not granting the permit". Then s. 264(e) states that notice of appeal to the Board must be filed within 14 days from the development officer's notice. Clearly the statute contemplates that the development officer's written reasons be central to the appeal, meaning the Board's decision should address those reasons. As stated in *Archibald*, ¶ 30, the Board is not confined to those reasons. The ultimate question - whether the development officer's refusal conflicts with the LUB - may involve other issues. But the focus on the development officer's stated reasons prompts the Board to respect its appellate role.

[30] The Board's analysis dissected the reasons of Mr. Faulkner, the development officer.

[31] The Board (¶ 68) referred to Mr. Faulkner's written reasons for refusing the permit. Mr. Faulkner's letter (above ¶15) said:

> The first three floors of the development ... would be considered an “institutional” use and permitted in the P Zone. The use would be classified as other institution of a similar type (hospital) and church.

Mr. Faulkner's letter said that only “floors four through eight are residential units which are not permitted in the P Zone”.

[32] Mr. Faulkner's written statement of evidence to the Board explained his distinction between floors 2-3 and 4-8.

> [7] ... Occupants of the second and third floors would *require* [Mr. Faulkner's italics] regular or constant medical service and the diligence required by staff on the 2nd floor (Cognitive Care) and 3rd floor (Enriched Assisted Living Care) is in my opinion similar to that required for patient care in a hospital. These uses were deemed to be similar to a hospital use and could be approved as of right as per section 67(1)(d) of the Land Use By-law.
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> [8] The 4th through 8th floors contain 100 residential units. The occupants ... can opt for assisted living services such as daily housekeeping and laundry, as well as medical supervision and advisory services.
>
> . . .
>
> [11] ... It is my understanding they [residents of floors 4 through 8] are not required to purchase these services. In my opinion the services offered are a convenience, however these same services are available to residents living in their own single unit dwellings or traditional apartments.
>
> . . .
>
> [13] ... Seniors residing on the top floors have the option of purchasing access to all amenities provided in the building.

[33] Mr. Faulkner's testimony to the Board reiterated his view of the distinction:

> In my mind, there were two very distinct uses proposed. Floors 1 to 3 were church support, a traditional use on this property, a permitted use on the property.
>
> . . .

> I determined that the uses on that floor are accessory to the church use on the abutting property, and a hospital type of use of the second and third floors.
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> . . .
>
> . . . All those uses I determined to be -- especially the cognitive care and the enriched assisted living care, to be very similar to a hospital use where it's a convalescence or a transitory stay for care, for medical care.
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> . . .
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> There's floors 1 to 3 which have a significant level of care and supervision, a certain significant level of diligence required by staff. There's floors 4 through 8, which are very residential in nature, where you have additional services purchased.
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> In looking at "hospital or similar use", I felt that -- in looking at the submission from the Applicant, that these people who lived on the second and third floor were there for medical care. They were there for cognitive disabilities, or they were there for end-of-life care, enriched assisted living, again the assisted part of it. So there was a certain level of care for those floors.
>
> . . .
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> Simply that in that letter it seems -- what seems to be on floors 4 through 8 are additional services purchased. It seems to be a lifestyle choice to have your laundry service done, to have someone -- your transportation, serving the meals, medication, housekeeping and laundry, these are services and not -- again, they're not hospital-type uses, or any other use I could find within the P-Zone.

[34] The Board found that Mr. Faulkner's factual assumption respecting floors 4 through 8 was mistaken. The residents of floors 4 through 8 would not have a choice whether to purchase the assisted living services. Those services would be purchased perforce with the minimum fee for residence on those floors. The Board said:

> [72] I will here simply briefly note that all residents will have, at a minimum: two meals prepared for them in the production kitchen, and served in the main dining room on Level 1; managed healthcare records, and regular nursing assessments; administration of all medication by licensed nursing (with all residents, including those on Floors 4 through 8, having their medication stored

and administered through the Centre's licensed nursing staff, who will also directly communicate with other healthcare providers, such as physicians and pharmacists, about these individual residents); emergency call buttons on the unit walls, string pulls in washrooms and call buttons worn by residents on all floors; replacement linen services weekly, as well as weekly housekeeping; pickup and delivery of laundry; assistance with showering as needed; transportation; daily therapeutic recreational programming; and escorts to and from the dining room as needed. Moreover, as the Board reviewed in detail, the design and construction of the units themselves as well as the building's hallways and elevators meets the standards required under the *Homes for Special Care Act*, including the standards which would apply to nursing homes.

[73] Thus, when Mr. Faulkner reached his conclusion, it was, as he put it, his "understanding" that residents on Floors 4 through 8 were not required to purchase these services; the reality, on the other hand, is that such services are the minimum service package which is made available to residents in the building.

[74] The Board also notes here that Mr. Faulkner considered the services being rendered on the second floor to be similar to those found in a hospital, but these amount to, according to the evidence of the Appellants, an average of two hours of attendant time per day. On Floors 4 through 8, which he essentially regarded (the Board finds as fact), as entirely residential, the minimum average of attendant time per day would be one hour.

[75] Further, the Board finds, well beyond the balance of probabilities, on the evidence before it, that persons residing on Floors 4 through 8 (who are themselves likely to be 85 or over) are expected, in the main, to experience what Mr. Shannon referred to as "aging in place", using a number of different examples to illustrate his point. In brief, this means that most, if not all, of these persons can be expected to experience an increasing frequency of chronic problems.

[76] Having formed his view as to how Floors 4 through 8 were to be used, Mr. Harrison now looked at Section 67(1)(d), and asked himself whether or not the project fell within it. Mr. Faulkner then saw the uses on Floors 4 through 8 as purely residential, with services, if any, which their residents might choose themselves to avail themselves of, being chosen upon an optional basis. HRM, in its evidence and submissions, referred more than once to such "choosing" of services as being a "lifestyle", choice drawing a parallel with such amenities as exercise rooms in modern apartment buildings, commonly occupied by young professionals. In the view of the Board, the decision of such an apartment dweller to use a fitness room or swimming pool may well be characterized as a lifestyle choice, but the circumstances of residents on Level 4 through 8 of the proposed project are not, in any significant way, comparable. As described in the (again,

> unrebutted) evidence before the Board, residents not just of Floors 2 and 3, but of 4 and 8 as well, can be expected to be 85 or over, with a probability of gradually increasing impairments of their capacities, physical or mental or both.
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> . . .
>
> [105] While the evidence of Mr. Faulkner, the Development Officer, was not entirely consistent on this point, the Board finds, on the balance of probabilities, that he erroneously believed no services were to be received by seniors resident on Floors 4 through 8, unless they purchased them on an optional basis. This belief is entirely inconsistent with the evidence before the Board. That evidence shows that extensive services will be received by residents on Floors 4 through 8, ranging from the provision of meals (at a minimum of two per day) in a common dining room, the presence of an emergency call system, the management and administration of medications by professional staff for all residents on all floors, and a minimum of one hour of attendant services per day even for residents on Floors 4 through 8.

[35] The Board's findings of fact are not appealable to this court. HRM has not sought to challenge the Board's finding that residents of floors 4 through 8 have no option respecting the assisted care amenities. There was evidence from which the Board's finding reasonably could be made. So there is no issue of law involved. That evidence includes Mr. Faulkner's cross examination:

> Q. ...Did you interpret the statement about assisted living care being offered to all residents of the building as indicating a choice on the part of the residents whether or not to receive and pay for assistance?
>
> A. That’s what it says, yes, be offered.
>
> Q. Okay, but you interpreted that as meaning a choice on the part of the residents.
>
> A. The assistance -- yes, I did.
>
> Q. Okay. Do you understand now that all residents are required to pay a per diem and that they receive a base level of care in connection with that package?
>
> A. Yes.

> Q. Right. So where you stated in your opinion that the residents have -- in paragraph 11 you say:
>
> "The residents can choose to pay a per diem fee . . ."
>
> You understand now that there's no choice about paying the per diem fee. They pay the per diem fee to receive a base level of services.
>
> A. Yes.

[36] Once the Board's unchallenged finding is substituted for Mr. Faulkner's mistaken factual assumption, floors 4 through 8 should be treated similarly to floors 2 and 3. According to Mr. Faulkner's written statement to the Board, ¶ 7, this would mean that floors 4 through 8 also would be "similar to a hospital use and could be approved as of right per section 67(1)(d) of the Land Use By-law".

[37] In the Court of Appeal, HRM jettisoned Mr. Faulkner's opinion and submitted that the entire project, including floors 2 and 3, was impermissible in the P Zone. HRM is entitled to make submissions that differ from the reasons stated by its development officer, and I will discuss the merits of those submissions later. But HRM's appellate strategy of distancing its development officer does not erase Mr. Faulkner's evidence from the record. Once Mr. Faulkner's erroneous assumption is replaced by the Board's unappealed finding respecting the assisted care amenities on floors 4 through 8, Mr. Faulkner's stated opinion would be that the entire building, including floors 4 through 8, should be approved as of right.

[38] Mr. Faulkner is the development officer who, under s. 258(1) of *the HRM Charter*, is "to administer [HRM's] land-use by-law". It was his decision and reasons that ss. 265(2) and 267(2) task the Board to assess for conflict with the LUB. The Board's treatment of the development officer's decision and reasons in turn is pivotal to this court's assessment of the Board's decision under the reasonableness standard.

[39] The Board (¶ 89) also referred to the evidence of Mr. Harrison, a planning expert, who said:

> [12] To appreciate the distinction between residential and institutional land use as related to seniors' facilities, it is important to consider the care continuum and how care services interrelate with accommodations. As the level of care

> progresses along the continuum, the nature of the accommodations changes in seniors' facilities in order to support the delivery of progressive levels of service. In seniors care facilities, the units are typically smaller than in apartment buildings, and there is an emphasis on communal spaces (dining) and other modifications (corridor widths) that also distinguish the two.
>
> [13] Multiple unit residential buildings ("apartment houses") do not typically include the type of services and spaces that will be developed as part of this project. Residential land uses do not typically include communal dining areas or production kitchens. They do not typically include nursing spaces or nurse call technologies. Apartment units are typically larger than those found in seniors' facilities and they usually include full kitchens, whereas in this project the seniors units will be provided with kitchenettes only. The reason apartment buildings do not include these types of spaces and services is that they are developed for the specific purpose of providing housing: they are not designed, developed or focused on the provision of care to individuals.
>
> [14] From the perspective of land use and planning context, the Anglican Diocesan Redevelopment and Seniors Care Centre is an institutional use of land. The provision of seniors care services is consistent with and similar to an institutional use, not a residential use of land.

The Board accepted Mr. Harrison's view:

> [91] Mr. Harrison considers, and the Board agrees, that the phrase other institution of a similar type, as found in s. 67(1)(d) was intended to expand the permissible uses within the P Zone to include, in addition to those institutions expressly identified in the provision, institutions which share characteristics common to those institutions.

[40] The Board concluded:

> [111] The uses which are proposed for all of the elderly persons, who may be resident upon all of the floors from Floors 2 through 8, are uses, which in the opinion of the Board, are "similar" within the meaning of s. 67(1)(d) of the LUB to certain identified uses therein (including hospitals).

[41] Applying the reasonableness standard, first to process, the Board's reasons are transparent and intelligible. I understand how and why the Board reached its conclusion. There is no chasm in the reasoning. The Board's reasons afford the raw material for the court to assess the acceptability of the Board's outcome.

[42] Respecting outcome, the Board considered the development officer's stated reasons and conclusion and explained why the development officer's pivotal factual assumption was erroneous. The Board reasonably interpreted “other institution of a similar type” to be an institution that shares key characteristics with the listed institutions in s. 67(1)(d). The key characteristic here is the health-centred care and attendance in a hospital that, to a modified degree, would obtain on floors 2 through 8 of this proposed facility. The rest of the development would include church facilities that either satisfy, or are “similar” to the “church” criterion of s. 67(1)(d). The Board's view was supported by both the evidence of the planning expert Mr. Harrison and the development officer's own opinion as I have discussed. The Board applied the appropriate legal principles set out earlier (¶ 29) that derive from the authorities in this court. With this solid foundation, the Board's conclusion is an acceptable outcome.

[43] Subject to the issues that I will address next, the Board's decision, including its interpretation of s. 67(1)(d), satisfies the reasonableness standard of review.

Second Issue - “Institution”

[44] HRM submits that the Board erred by failing to consider the LUB's definition of “institution”, namely:

> “Institution” means a building used by an organized body or society for promoting a particular object or objects, usually of a non-commercial nature.

HRM's factum says:

> It is submitted that the developer is not an “organized body or society” within the meaning of this definition.

HRM also submits that Shannex' private profit motive is not an “object” within the definition. HRM cites no authority for these propositions.

[45] I respectfully disagree. The development would be a partnership between the Church and Shannex. The Church appellants, the Anglican Diocesan Centre Corporation and The Diocesan Synod of Nova Scotia and Prince Edward Island, are statutory bodies corporate. The Church's mission clearly is an institutional

object within the LUB's definition. Shannex is a body corporate. The LUB's definition of "institution", that the objects "usually" are non-commercial, acknowledges that a commercial object is a possibility, though unusual. Further, s. 67(1)(d) permits the P Zone's "institutional" use to be "either public or private". Shannex's object would be to earn a profit while (a) satisfying a public need for seniors' care and (b) assisting the Church to attain an economic viability to perform the Church's institutional objects. The partners are an "organized body", whose "objects" satisfy the LUB's definition of "institution".

Third Issue - Church's Financial Circumstances and the MPS

[46] HRM submits that the Board erred by considering (a) evidence of the Church's economic circumstances and (b) whether the development was consistent with the MPS. HRM says that the issue was simply whether the project complied with s 67(1)(d) of the LUB, to which neither the Church's finances nor the MPS pertained.

[47] Again, I must disagree. Section 234(1) of the *HRM Charter* states that, when the municipal council adopts an MPS with planning policies, "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". Section 234(3) says:

> The Council may not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.

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: *Bay Haven Beach Villas Inc v. Halifax (Regional Municipality)*, 2004 NSCA 59, ¶ 26; *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* (1994), 128 N.S.R. (2d) 5 (CA), at ¶ 123; *Archibald*, ¶ 24(8).

[48] Halifax' MPS states policies to encourage the maintenance and growth of institutions at their current venues:

> ***Policy 5.1 of Section II (the "City-Wide" provisions) of the Halifax Peninsula MPS***

> 5. INSTITUTIONS
>
> Objective: The enhancement of employment opportunities by encouraging existing and potential institutional uses in appropriate locations.
>
> 5.1 Unless clearly inappropriate for the good development of the City existing regional and City-wide institutional facilities shall be encouraged to remain in their present locations and efforts shall be made to protect, maintain and upgrade them.

Policy 4.2 (in Section V of the MPS "South End").

> 4. INSTITUTIONS
>
> Objective: The encouragement of institutional uses in specified areas.
>
> ...
>
> 4.2 The city shall encourage existing institutional uses to remain in their present locations and shall encourage reuse of existing institutional areas where appropriate in preference to expanding areas where institutional uses may be permitted.

[49] Given the Church's financial circumstances, the Board found:

> 88 In short, the evidence before the Board is that the status quo is unsustainable.

This finding was well supported by Bishop Moxley's evidence (see above ¶ 8). The proposed seniors' care facility would enable the Church to maintain or grow its operations in its current location, consistent with MPS policies 5.1 and 4.2. The Board did not err by considering this factor in its interpretation of the ambiguous phrase, "other institution of a similar type", in s. 67(1)(d) of the LUB.

Fourth Issue-
"Apartment House" or "Special Care Home"

[50] HRM contends that the proposed seniors' facility satisfies the LUB's definition of “Apartment House” - a “dwelling...for the purpose of providing three or more self-contained dwelling units”. The LUB defines “dwelling” as a building “designed or used for residential purposes”.

[51] HRM also submits that the proposed seniors' care facility is a “Special Care Home” as defined in the LUB:

> **“Special Care Home”** means a building or part of a building in which accommodation, together with nursing, supervisory or personal care is provided or is available for four or more persons with social, health, emotional, mental, or physical handicaps or problems, and ***only such building or part thereof as is licensed by the Homes for Special Care Act***, or the Children’s Services Act, or operated as a community correctional centre under the provisions of the Penitentiary Act of Canada, but does not include a building or part thereof maintained by a person to whom the residents are related by blood or marriage, a public hospital, sanatorium, jail, prison, reformatory, hotel or hostel.

I have emphasized the key wording.

[52] The LUB specifically permits “apartment houses” and “special care homes” in the R-3 Zone:

R-3 ZONE

MULTIPLE DWELLING ZONE

44(1) The following uses shall be permitted in any R-3 Zone:

. . .

(d) apartment house;

. . .

(g) special care home.

For the P Zone, the LUB's section 67(1) permits various uses, including “hospital ... church ... or other institution of a similar type, either public or private” as

discussed earlier, but is silent respecting the inclusion or exclusion of “apartment houses”, “special care homes” or “R-3 uses”.

[53] HRM submits that “apartment houses” and “special care homes” are excluded from zones where they are not expressly permitted, and therefore are excluded from the P Zone.

[54] The Board rejected HRM's submissions.

[55] Respecting “Apartment Houses”, the Board said:

> [93] In the view of the Board, it might well be possible for a project to both meet the definition of an “apartment house” within the LUB, and also be a use which meets the requirements of s. 67(1)(d). For example, a university residence might well contain apartments which are, by any definition, entirely self contained, and yet be “institutional” in that their residential function is subordinate to their actual purpose, which is the provision of education. Similar reasoning could be applied to a monastery.
>
> [94] The Board notes, and agrees with, the following passage appearing in one of the Appellant’s closing briefs:
>
> > ...that a more generalized feature of monasteries, (which they share with universities and hospitals) is that people who live there, do so for a purpose other than the mere fulfillment of residential needs. In other words, monasteries do not offer accommodations to any member of the public, but only to those who need or desire its particular services. Similarly, university residences are not open to the general public as places to reside indefinitely but only to students while in pursuit of an education. The proposed facility, similarly, is not offered to fulfill public demand for housing but provides accommodation only to better facilitate delivery of seniors care service to those who need it, for as long as they need it.
>
> [95] It might therefore be possible for the Board to, in certain circumstances, find that a particular building contained three or more self-contained dwelling units, thereby meeting the definition of an apartment house, but at the same time, meeting the requirements of s.67(1)(d).

The Board (¶ 96) then found alternatively that the proposed seniors' units were not "self-contained" within the LUB's definition of "Apartment House" because of their many assisted living features.

[56] Respecting "Special Care Homes", the Board (¶ 100-101) found, based on Mr. Shannon's evidence, that the proposed project would not be licensed under the *Homes for Special Care Act*. The LUB defines a "Special Care Home" as "only such building or part thereof as is licensed by the *Homes for Special Care Act*, or the *Children's Services Act*, or operated as community correctional centre". As none of these conditions applied, the Board found:

> [101] The project will not be licenced, and thus, is not a home for special care within the act.

The Board said (¶ 101) that "arguments could ... be made that, in certain circumstance[s] at least, such a licenced facility might qualify as an 'other institution of a similar type' within the P Zone".

[57] In my view, the Board's conclusions are reasonable.

[58] The point of assisted living is to attend the needs of persons who cannot manage in a "self contained" dwelling unit. The Board's conclusion that the assisted care units here would not be "self-contained", and therefore would be outside the LUB's definition of "Apartment House", was a reasonable deduction supported by evidence (see above ¶ 12-13, 34-35).

[59] Similarly, the Board's finding that the proposed development would not be licensed was supported by evidence. Mr. Shannon testified:

> Q. Okay. Does Shannex operate any licensed nursing homes or homes for special care?
>
> A. Yes. We have today in operation eight licensed nursing homes that are licensed under the **Homes for Special Care Act.** And we have seven nursing homes that are under construction that'll open in the next 12 months across the Province of Nova Scotia.
>
> Q. What's the difference between a licensed facility and an unlicensed facility?

> A. Well I think in the first instance when you read the legislation the first thing is to become a licensed nursing home or a licensed residential care facility it has to be designated by the Minister of Health to be a licensed nursing home.
>
> This is not being designated by the Minister. We're not asking him to -- or the Minister to designate this. . . .
>
> Once it becomes a licensed facility the -- essentially the -- the occupancy in the building is determined by the Department of Health. So they essentially will tell us who the next person that will move into the building.
>
> And they will essentially assess the person for nursing home care. And in addition to that -- to the Department of Health determining who the next occupant is, they will provide a subsidy to that person for the health care costs in the facility.
>
> So this facility is different from a licensed nursing home in that it's not being designated by the Minister as one. I think that's the most significant. The second is that the occupancy in this building will not be determined by the Department of Health.
>
> It will be determined by Shannex in the market. And there will be no subsidy available for people living in this building for the nursing care.

[60] The LUB's definition of “Special Care Homes” expressly excludes any facility not licensed under the *Homes for Special Care Act*. The Board made no error in its interpretation of the LUB.

[61] HRM’s version of an *expressio unius* submission is that, if a use is specifically permitted somewhere in the LUB (e.g. as an “Apartment House” or “Special Care Home”), it must be excluded from general words elsewhere (“other institutions of a similar type”) that do not incant the precise words of the specific permission. The Church’s counsel labels the submission, more disparagingly, a “silo” approach.

[62] It is unnecessary to formulate a broad proposition how *expressio unius* applies to zoning bylaws. HRM’s submission is unsupportable by a simple reading. For the reasons discussed earlier, this proposed development is an

"institution of similar type, either public or private" within s. 67(1)(d) of the LUB. Section 67(1) opens by saying such "uses are permitted in the P Zone". So the LUB affirmatively permits this use. This permission may be negated by exclusory wording. But there is none. There is, for example, nothing in the P Zone Section saying:

> Notwithstanding s. 67(1)(d), 'Apartment Houses', 'Special Care Homes' and 'R-3 Uses' are not permitted in the P Zone.

The Council could have enacted such a provision, but did not. Neither is there an implied exclusion. As discussed, an "Apartment House" must have "self-contained units" and a "Special Care Home" must be licensed under the *Homes for Special Care Act*. This proposed facility would not have self-contained units and would not be licensed. The LUB has no internal conflict to be resolved by canons of construction.

[63] The Board's rejection of HRM's submissions respecting the "Apartment House" and "Special Care Home" issues involved no reviewable error.

Conclusion

[64] I would dismiss the appeal. Both parties requested costs. Under Rule 90.51 the court does not usually grant costs in a tribunal appeal. In my view, this proceeding does not justify a departure from the norm, and each party should bear its own costs.

Fichaud, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.