SUPREME COURT OF NOVA SCOTIA

Citation: *Schwartz v HRM et al*, 2024 NSSC 69

Date: 20240307
Docket: 530222
Registry: Halifax

Between:

David Schwartz

Applicant

v.

The Halifax Regional Municipality, a body corporate
pursuant to the Municipal Government Act of 1998
and Canadian International Capital Inc.

Respondents

Decision

Judge:	The Honourable Justice Darlene Jamieson
Heard:	February 22, 2024, in Halifax, Nova Scotia
Final Written:	March 7, 2024
Counsel:	Mr. David Schwartz, self-represented Mr. Edward Murphy and Ms. Meg MacDougall, for the Respondent, Halifax Regional Municipality Mr. Robert Grant, K.C. and Ms. Folu Adesanya, for the Respondent, Canadian International Capital Inc.

By the Court:

[1] The Applicant, Mr. David Schwartz, filed a Notice of Motion on January 29, 2024 seeking an extension of the time period for filing two Notices for Judicial Review. At Exhibits A and B to Mr. Schwartz's affidavit is a copy of each of the proposed Notices for Judicial Review. The Notice found at Exhibit A seeks judicial review of a decision of Halifax Regional Municipality Development Officer, Trevor Creaser dated September 7, 2023, approving an Amending Development Agreement to allow for a multiple unit dwelling at Amalfi Way, Timberlea. The Notice found at Exhibit B seeks judicial review of a decision of Halifax Regional Municipality Development Officer, Trevor Creaser dated August 30, 2023, approving an Amending Development Agreement to allow for a commercial use on lands at Marketway Lane, Timberlea to enable a new Mayflower Curling Club.

[2] Mr. Schwartz is self represented. He resides in Timberlea and opposes the above two developments planned for the area. Mr. Schwartz's residential property shares a common boundary with the property where the residential building is planned.

[3] *Civil Procedure Rule* 7.05(1)(a) requires filing of a judicial review application within 25 days of the decision being communicated to Mr. Schwartz.

> 7.05 Judicial review application
>
> (1) A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
>
> (a) twenty-five days after the day the decision is communicated to the person;
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> (b) six months after the day the decision is made.

[4] There is no dispute that the 25 day time period for filing each of the Notices for Judicial Review has expired.

[5] Mr. Schwartz filed an affidavit in support of this motion which is sworn on January 29, 2024 and a rebuttal affidavit sworn on February 20, 2024. The Respondent, Halifax Regional Municipality ("HRM") filed the affidavit of Mr. Dean MacDougall, a Land Use Planner employed by HRM and sworn on February 13, 2024 and an affidavit of Ms. Kim Oickle, a Legal Assistant employed by the Legal Services Department of HRM and sworn on February 13, 2024. The Respondent,

Canadian International Capital Inc ("Canadian International") filed the affidavit of Mr. Andrew Giles, Vice President of Development for the Links at Brunello, a land development project undertaken by Canadian International. His affidavit was sworn on February 13, 2024. It also filed a solicitor's affidavit of Ms. Folu Adesanya sworn on February 13, 2024. All parties filed briefs. Mr. Schwartz cross examined both Mr. MacDougall and Mr. Giles.

[6] In HRM's late filed brief it stated "HRM would also be likely to file motions to strike the judicial review on the basis that the Applicant lacks standing…" After discussion concerning HRM's intention in this regard, including whether an adjournment was necessary to allow Mr. Schwartz an appropriate time to respond, counsel for HRM confirmed he did not have instructions to challenge standing and indicated for the purposes of this motion to extend time, he would not be raising standing and any such reference in the brief should be disregarded. Canadian International did not challenge standing and agreed that the motion should proceed without consideration of standing. Mr. Schwartz also took the position the motion should proceed. Therefore, in the circumstances described above and in fairness to Mr. Schwartz, who is self represented, if there is any issue of standing, it is for another day when Mr. Schwartz is accorded proper time to respond.

Background Facts

[7] There are two decisions of the Development Officer that are the subject of Mr. Schwartz's proposed Notices for Judicial Review. It is helpful to provide some background to each.

[8] The evidence indicates that both decisions relate to Planning Applications to amend a Development Agreement, a 2002 Agreement between HRM and Nine Mile Investments Limited ("Brunello DA"). The 2002 Brunello DA approved, in principle, the development of a mixed residential and commercial community surrounding the Brunello Golf Course. Both of the Planning Applications in issue were processed by HRM as applications for non-substantive amendments to the Brunello DA.

Mayflower Curling Club Development

[9] On August 30, 2023, the Development Officer approved an application by Canadian International for an amendment to the Development Agreement to enable the development of a commercial recreation use, being for the Mayflower Curling

Club. After the approval, on August 31, 2023, a HRM Planning Processing Coordinator posted a public approval notice for the curling club application on the HRM website. The Notice of Approval, stated in part:

> TAKE NOTICE THAT a Development Officer of Halifax Regional Municipality did, on Wednesday, August 30, 2023, approve the Amending Development Agreement to allow for a commercial use on lands at Marketway Lane, Timberlea.
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> Any aggrieved person, the Provincial Director of Planning, or the Council of any adjoining municipality may, within fourteen days of the publishing of this notice on the HRM website, appeal to the Nova Scotia Utility and Review Board (902-424-4448), in accordance with the provisions of the Halifax Regional Municipality Charter.
>
> [Emphasis added]

[10] Mr. Schwartz attached to his affidavit the outline of the Planning Applications Approval Process-Non Substantive Amendment to Development Agreement that was posted on the HRM website. It similarly states "14 day appeal period for amending agreement - NS Utility and Review Board." Further, Mr. Schwartz stated in his rebuttal affidavit that he received similar appeal information by telephone from HRM Planner, Ms. Faith Ford.

[11] On September 5, 2023, Mr. Schwartz appealed the Development Officer's decision to the Nova Scotia Utility and Review Board (the "Board"). In Mr. Schwartz's Notice of Planning Appeal, he acknowledged receiving written notice of the decision on August 31, 2023.

Residential Building (Amalfi Way)

[12] On September 7, 2023, the Development Officer approved an application by Canadian International to allow for the construction of a nine-storey residential building on the lands located between Amalfi Way and Merlot Court, east of Timberlea Village Parkway. Prior to the approval, Mr. Schwartz provided written comments on the residential building application and had discussions with HRM employees, including Land Use Planner, Mr. MacDougall.

[13] After the approval, on September 11, 2023, a HRM Planning Processing Coordinator posted a public approval notice for the multiple unit dwelling application on the HRM website. The Notice of Approval, stated in part:

> TAKE NOTICE THAT a Development Officer of Halifax Regional Municipality did, on Thursday, September 7, 2023, approve the Amending Development Agreement to allow for a multiple unit dwelling use on lands at Amalfi Way, Timberlea.
>
> Any aggrieved person, the Provincial Director of Planning, or the Council of any adjoining municipality may, within fourteen days of the publishing of this notice on the HRM website, appeal to the Nova Scotia Utility and Review Board (902-424-4448), in accordance with the provisions of the Halifax Regional Municipality Charter.
>
> [Emphasis added]

[14] On September 20, 2023, Mr. Schwartz appealed the Development Officer's decision to the Board. In Mr. Schwartz's Notice of Planning Appeal, he acknowledged receiving written notice of the decision on September 11, 2023.

Nova Scotia Utility and Review Board

[15] On September 29, 2023, the Board conducted a preliminary hearing in relation to both Appeals. Despite the guidance provided to the public on the HRM website, HRM and Canadian International indicated they would be filing preliminary motions raising the issue that the Board did not have jurisdiction to hear an appeal of a Development Officer's decision. Filing timelines for the preliminary motion were set and the hearing of the motion scheduled for October 30, 2023. Subject to the outcome, the hearing of the merits of the appeals was tentatively set for March 18-22, 2024.

[16] The parties each filed legal submissions in advance of the hearing of the preliminary jurisdictional issue. On October 30, 2023, the Board heard oral argument. On December 28, 2023, the Board released decisions in relation to each of the two appeals filed by Mr. Schwartz. The Board decided it did not have jurisdiction to hear the two appeals and dismissed each appeal.

[17] The two decisions of the Board state the following:

> 35. This is the first time that the Board is considering whether it has the authority to hear and allow an appeal from an aggrieved person of a development officer's decision made under s. 245(3A) of the *HRM Charter*, to approve a non-substantive amendment to a development agreement.
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> …
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> 40. When the legislature amended the *HRM Charter* to give authority to a development officer, under s. 245(3A), it did not amend s. 265 to permit an appeal to the Board from the

> development officer's decision to approve a non-substantive amendment to a development agreement. Also, the legislature did not amend s. 267 to give authority to the Board to allow an appeal from the development officer's decision. The Board can only conclude, in giving a broad and liberal interpretation to the statutory scheme, that it was the legislature's intent not to permit an appeal to the Board from a development officer's decision …
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> …
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> 50. The Board does, however, understand how the information given on HRM website could have suggested to Mr. Schwartz that he had a right to appeal the development officer's decision to the Board. To avoid future misunderstandings, the Board would recommend that HRM reconsider and perhaps adapt the information that it has on its website about the right to appeal to the Board a development officer's decision to approve non-substantive amendments to a development agreement.
>
> …
>
> 53. The motions of HRM and Canadian International Capital are granted, and the appeal is dismissed.
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> [Emphasis added]

Post - Utility and Review Board Decision

[18] On December 28, 2023, Mr. Schwartz advised HRM and Canadian International that he was considering his "options to appeal the decision to the Nova Scotia Court of Appeal". Mr. Schwartz did not appeal the Board's two decisions.

[19] Mr. Schwartz gave evidence that after the Board's decision was released he attended at the Law Courts several times including in early January. For example, he states "Additionally, I spoke directly, by phone, to the Prothonotary's office on January 12th, 2023, seeking additional advice regarding required forms and procedures so I could properly prepare, as best I could, for my meeting at the HFX Free Legal Clinic on the 25th of January."

[20] On January 25, 2024, Mr. Schwartz sent further e-mail correspondence to HRM and Canadian International advising that he intended "to file a Notice of Judicial Review of both PLANAPP2023-00371(Curling Club) and PLANAPP 2023-00338 APT BLDG (Amalfi)"...

[21] As noted above, Mr. Schwartz filed a Notice of Motion to extend time on January 29, 2024.

Law and Analysis

[22] This Court has general discretionary power under *Civil Procedure Rule* 2.03 to allow an extension to the time limit for filing a notice for judicial review. *Rule* 2.03 states:

> **2.03 - General judicial discretions**
> (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>> (a) give directions for the conduct of a proceeding before the trial or hearing;
>> (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
>> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.
>
> (2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:
>> (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
>> (b) require an excused person to do anything in substitution for compliance;
>> (c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.
>
> [Emphasis added]

[23] The Nova Scotia Court of Appeal in *Farrell v. Casavant*, 2010 NSCA 71 said at paragraph 13, in relation to an extension of time for filing an appeal, that “the power to grant an extension of time has been described as one that should only be exercised if ‘exceptional’ or ‘special’ circumstances have been shown…”

[24] In determining whether to extend the time limit the Court of Appeal has said that the following three part test should be considered: (1) whether the applicant had a bona fide intention to appeal when the right to appeal existed; (2) whether the applicant had a reasonable excuse for the delay in not having launched the appeal within this prescribed time; and (3) whether there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellant intervention. (*Jollymore Estate v. Jollymore Estate*, 2001 NSCA 116; *Bellefontaine v. Schneiderman*, 2006 NSCA 96; *Farrell, supra*; *Osif v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 46).

[25] Bateman, JA in *Bellefontaine v. Schneiderman, supra* said that there is a further consideration to the three part test and it is whether justice requires that the application be granted:

> [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met.

[26] Beveridge, JA expanded on this in *Farrell, supra* saying that the three-part test had appropriately morphed into being more properly considered as guidelines or factors to determine the ultimate question of whether or not justice requires an extension of time. He said at paragraph 17:

> 17 Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278 (N.S. C.A. [In Chambers]); *Robert Hatch Retail Inc. v. CAW-Canada, Local 4624*, 1999 NSCA 107 (N.S. C.A. [In Chambers]).) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.
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> [Emphasis added]

[27] Similarly, in *Raymond v. Brauer,* 2014 NSCA 43, Bryson, JA wrote:

> 10. The three-part test described in *Schneiderman* is not conclusive. Residuary discretion remains in the Court to extend time where it would be just to do so:
>
> > [5] Although courts most commonly allude to the three-part test in *Jollymore, supra,* the ultimate question is whether justice requires that an extension be granted: *Farrell v. Casavant,* 2010 NSCA 71, at para. 17 and *Cummings v. Nova Scotia (Community Services),* 2011 NSCA 2, at para. 19. Accordingly, the three-part *Jollymore* test is an appropriate guide for the exercise of the court's discretion but it is not an exhaustive description of that discretion. *(Brooks v. Soto,* 2013 NSCA 7)
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> 11. In *Farrell,* Justice Beveridge carefully considered the history of jurisprudence respecting extensions of time to appeal and emphasized-- as a number of the cases do -- that exercising discretion to extend the time to appeal must ultimately be required in the interests of justice, (paras. 14, 16). The analysis is highly contextual.

[28] Recognizing the test is a flexible one, I will proceed to consider the various factors that have been accepted as appropriate considerations in determining whether to exercise the Courts discretion to grant an extension. These factors are as follows:

(1) the length of the delay;

(2) whether Mr. Schwartz had a bona fide intention to seek judicial review during the 25 day time limit;

(3) whether Mr. Schwartz had a reasonable excuse for the delay;

(4) the apparent strength or merit of Mr. Schwartz's proposed grounds for judicial review;

(5) and, the presence or absence of prejudice.

[29] Each case must be considered individually. The importance of the above factors can vary from case to case. In addition, other factors or circumstances could be relevant to a determination of the ultimate question as to whether or not justice requires that an extension of time be granted.

Length of the delay

[30] As Robertson, J said in *Eco Awareness Society v. Municipality of the County of Antigonish et al***,** 2010 NSSC 461, *Rule* 7.05 shortened the timeline for initiation of judicial review from six months to 25 days so that challenges to statutory decision-makers would be expeditiously heard. This court has typically found delays of months or years to be undue. In the present case, the delay, if measured from the decision dates of the Development Officer, is significant, being from August 30 and September 7, 2023 to January 29, 2024.

[31] Canadian International says, at the latest, Mr. Schwartz should have filed his Notice for Judicial Review immediately after October 30, 2023 when he clearly knew that Canadian International and HRM were taking the position the Board was without jurisdiction. Using this date still represents a significant delay.

[32] This factor of delay considered on its face weighs against Mr. Schwartz. However, the delay must be considered in the context of the factual background that I have noted above and discuss below.

Whether Mr. Schwartz had a bona fide intention to seek judicial review during the 25 day time limit

[33] HRM says Mr. Schwartz's case must fail on this very factor as "he intended to do something from the time that he learned of the Mayflower Decision and the Amalfi Way Decision, but he has not demonstrated that his intent was to bring an application for judicial review."

[34] There is no question that Mr. Schwartz took issue with the two decisions of the Development Officer and took action immediately to appeal each decision. He had a bone fide intention to have the decisions reviewed. Because the information set out in the HRM Notices of Approval advised all concerned that an appeal of the Development Officer's decision was to the Board within 14 days, he took this information at face value and appealed to the Board within the stated timeframe.

[35] Section 245(3A) of the *Halifax Regional Municipality Charter*, SNS 2008, c.39 became law in April of 2022. HRM gave guidance to 'aggrieved persons' in August and September of 2023 that the path for review of a development officers decision in this context was an appeal to the Board. The Board said in its decision that the jurisdiction issue raised by HRM and Canadian International in relation to the appeals advanced by Mr. Schwartz was the first occasion it had to consider whether it had authority to hear and allow an appeal from an aggrieved person of a development officer's decision made under s. 245(3A) of the *HRM Charter*.

[36] Canadian International says that the incorrect information provided to Mr Schwartz does not avail him of an extension of time for bringing judicial review. It says that any complaint Mr. Schwartz may have about information from HRM misleading him as to the appropriate way for him to challenge the development agreement approvals, must expire as of October 30, 2023, when he was advised of HRM's and the Canadian International's positions that his remedy was to seek judicial review.

[37] However, Mr Schwartz says he considered it prudent to await the decision of the Board regarding jurisdiction before seeking judicial review. He says as soon as he learned of the Board's decision, he immediately took further action including notifying the parties of his intent to further pursue the matter. Given that the Board notes this was the first time it considered this issue, and HRM acknowledges the issue before the Board was novel, I cannot, in these unusual circumstances, fault Mr. Schwartz for awaiting the Board's decision.

[38] I do not agree that Mr. Schwartz, in these circumstances should have abandoned his appeals to the Board and filed a Notice for Judicial Review. Nor would it have been appropriate for him to file a Notice for Judicial Review while the jurisdictional issue was being dealt with by the Board. Whether the Board had jurisdiction was a live issue until it's decision was rendered.

[39] While I cannot conclude that Mr Schwartz had the intention to specifically seek judicial review within the 25 day period, he certainly had the intention to seek review of the Development Officer's decisions and did so within 14 days of receipt of each decision and according to the guidance posted on HRM's website and specifically contained within the Notice of Approval of the applications.

[40] The above are highly unusual circumstances and I conclude that this factor weighs in favour of Mr. Schwartz's motion for an extension.

Whether Mr. Schwartz had a reasonable excuse for the delay

[41] I am of the view that in the circumstances of this matter, as outlined above, Mr. Schwartz had a reasonable excuse for the delay. HRM does not appear to strongly dispute this. HRM conceded that public notices posted following approval of the non-substantive amendments "appeared to suggest" that the decision of the Development Officer could be appealed to the Board. HRM further conceded that the issue of whether the NSUARB had jurisdiction to hear an appeal of the decision of a development officer to approve a non-substantive amendment was novel. HRM stated in its brief "To the best of our knowledge, the language in the public notice was simply an error of omission. This is unfortunately one of the consequences of the failure to consult with the Municipality prior to enacting legislative changes to the planning regime."

[42] Canadian International says Mr Schwartz does not explain in any way how awaiting the Board decision was prudent. It says it was anything but. It says he was informed he was in the wrong venue to challenge the decisions of the Development Officer. Rather than file his application for judicial review as soon as he could, he delayed doing so until after the Board dismissed his appeals on the basis that it had no jurisdiction to hear them. Canadian International says having courted this outcome, he cannot explain this as being anything other than hoping the outcome of his appeals would be something different from what the Board ordered. It further says Mr. Schwartz alone decided to wait, which pulled his current motion further

away from the permitted time to bring judicial review. It says the case law is very clear that pursuing full particulars is not reason enough to grant an extension.

[43] I am of the view that Mr. Schwartz cannot be said to have been pursuing " full particulars." The exceptional circumstances here can be distinguished from those cases where the applicants occupied themselves with other avenues of complaint or awaited further particulars, rather than filing a Notice for Judicial Review. This court has found that waiting for legal opinions, choosing to seek more information and more opinion is not a reasonable excuse (see paragraph 24 of *Eco Awareness, supra*). Similarly, pursuing complaints through other administrative or political channels instead of filing a Notice for Judicial Review has been held not to be a sufficient excuse. In *Ward Dicks, et al v The Chief Inspector appointed pursuant to the Elevator and Lifts Act et al*, 2015 NSSC 362, where the Applicant chose to seek more information and wait for legal opinions rather than filing a Notice for Judicial review, the Court said:

> 28 The reason for the delay is somewhat related to the question whether the applicant has a true intention to appeal during the 25 day time period. I've already mentioned that the only thing done by the applicant during that period, according to the evidence, was to contact the government minister and seek her intervention. There does not appear to have been any intention shown to appeal the decision through the courts. The applicant acknowledges that it chose to try and address the matter, in its words, "administratively", or as described by the respondents, through political channels.
>
> 29 I do not consider this reason to be a good excuse for having missed this deadline so significantly…
>
> [Emphasis added]

[44] Further, seeking additional information or particulars from the decision-maker or attempting to have them change their decision has been found not to represent a reasonable excuse (see paragraphs 44-48 of *Rockwood Community Association Limited et al. v. Halifax Regional Municipality, et al*, 2011 NSSC 91).

[45] The situation in the present matter is clearly distinguishable. Mr. Schwartz did not put his appeal or review rights on the back burner while pursuing other avenues of recourse that he personally felt were more appropriate than filing a Notice for Judicial Review. He immediately pursued review of the Development Officer's decisions by filing two appeals to the Board, as HRM directed in the very Notices of Approval that advised the public the applications had been approved. Neither HRM, Canadian International nor Mr. Schwartz knew for certain what the Board would decide concerning jurisdiction until the decision was released. Simply

because HRM had changed its position between the date of posting the Notice of Approval (in August and September) and its oral submissions in October of 2023, does not mean Mr. Schwartz should have immediately abandoned the appeals in favour of judicial review, without receipt of the Board's decision.

[46] The appeals were filed on September 5, 2023 (curling club) and September 20, 2023 (multi-unit dwelling) at a time when it would seem clear that all were of the view there was a right of appeal to the Board. When HRM and Canadian International took the position the Board lacked jurisdiction, this was contrary to what HRM had indicated in the Notices of Approval. Again, in these highly unusual circumstances, I cannot fault Mr. Schwartz for awaiting the Board's decision.

[47] Displacing the 25 day time limit requires an appropriate excuse for the delay. In my view, Mr. Schwartz has an appropriate and compelling excuse for the delay. This factor weighs in his favour.

The apparent strength or merit of Mr. Schwartz's proposed grounds for judicial review

[48] Mr. Schwartz's proposed Notices for Judicial Review appear at Exhibits A and B to his affidavit. In relation to the multi unit building decision of the Development Officer, Mr. Schwartz raises four grounds of review. The grounds for review state:

> 1. The D.O erred, and acted unreasonably, by unlawfully approving the non substantive amendment in contravention of s 1.1, s.1.5 and s.3.1(c) & (1), of the D.A. which set out that the "Lands shall be developed…in accordance with and subject to the terms and conditions of this Agreement" and in the event of conflict between provisions of the Agreement and any by-law of the Municipality or provincial statute "the higher or more stringent requirements shall prevail." In this instance the higher or more stringent requirement is found in s. 3.1 (c) and (l) of the DA that states that ONLY Community Council can approve such non-substantive amendments. These provisions, therefore, take precedent over s.245 (3)(A) of the HRM Charter that allows a D.O. to otherwise, generally, approve non-substantive amendments.
> 2. The D.O. erred and acted unreasonably, by unlawfully granting a variance to allow for the reduction in minimum lot area, set out in s.2.4.4(1) of the DA for multi unit buildings, by failing to adhere to the "higher or more stringent" requirements set out in s.250 (1) (c) & (3) of the HRM Charter that only allow a D.O. to approve such variances if the lot "existed on the effective date of the by-law" or "a variance was granted for the lot at the time of sub-division approval" and the "difficulty experienced" doesn't result "from an intentional disregard for the requirements of

the development agreement or land-use by-law”. In so far as the D.O. may have relied on the wording of s.2.4.4(i), which states that “consideration may be given for reduction in this figure where underground parking is provided”, to ignore the “higher or more stringent requirements of the above-noted sections of the HRM charter in contravention of s.1.5 of the DA, those words should be struck from s.2.4.4. (1) in any event, as being void for uncertainty. If those words are deemed void for uncertainty the D.O.’s granting of the variance would also contravene s.245 (3)(b) of the HRM charter which prescribes a D.O. from approving a non-substantive amendment to a DA that “are a combination of substantive and non-substantive amendments”.

3. The D.O. erred, and acted unreasonably, by unlawfully approving a design with “front yard” parking contrary to s.10.3 of the LUB and 2.4.4(v) of the DA.

4. The D.O. erred, and acted unreasonably, by unlawfully approving the non-substantive amendment to the DA because it was not in conformity with the “requirements of all other municipal bylaws and regulations”, as noted above, and/or the intent of Policy IM-12 of the Municipal Planning Strategy (MPS). The D.O., in making his decision, relied on a Traffic Impact Statement (TIS) that did not adhere to HRM’s guidelines for the Preparation of Transportation Impact Studies (Guidelines) as required by policy IM-12 (c) (3) “traffic generation, access to and egress from the site, and parking“. The D.O., furthermore, failed to consider “any other relevant matter of planning concern” as required by policy IM-12 (c)(6). Relevant matters that should have been considered, or required, were Wind and Shadow Studies, the requirement that there should be” no portion of any parking space… within the required front yard”, and the fact that the construction of the building would result in the complete removal of a 6m vegetative buffer that the D.O. knew or should have known, was fraudulently represented by Brunello to be a permanent non-disturbance area. The removal of this 6m vegetative buffer was also not in conformity with the intent of s. 2.7.8 of the DA to facilitate tree retention where “lots back onto other lots”. This section has been amended and interpreted in a manner that renders it a non-sensical nullity.

…

[49] It is obvious that Mr. Schwartz has intermingled issues he has with the developer concerning his property with ground of review number four, which clearly would not be part of any judicial review.

[50] In relation to the curling club decision of the Development Officer, Mr. Schwartz raises two grounds of appeal. They are essentially the same as grounds of appeal one and four above. They state as follows:

1. The D.O. erred, and acted unreasonably, by unlawfully approving the non-substantive amendment in contravention of s.1.1, s.1.5 and s.3.1 (c)&(l), of the DA which set out that the “Lands shall be developed… In accordance with and

> subject to the terms and conditions of this agreement" and in the event of conflict between provisions of the agreement and any bylaw of the Municipality or provincial statute "the higher more stringent requirements shall prevail". In this instance the higher or more stringent requirement is found in s.3.1 (c) & (l) of the DA that states that ONLY Community Council can approve such non-substantive amendments. These provisions therefore, take precedent over s. 245(3)(A) of the HRM charter that allows a D.O. to otherwise, generally, approve non-substantive amendments.
>
> 2. The D.O. erred, and acted unreasonably, by unlawfully approving the non-substantive amendment to the DA because it was not in conformity with the "requirements of all other municipal by-laws and regulations", as noted above, and/or the intent of Policy IM-12 of the Municipal Planning Strategy (MPS). The D.O., in making his decision, relied on a Traffic Impact Statement (TIS) that did not adhere to HRM's Guidelines for the Preparation of Transportation Impact Studies (Guidelines) as required by Policy IM-12 (c) (3) "traffic generation, access to and egress from the site, and parking".
>
> …

[51] With respect to the strength or merit of the proposed grounds of appeal HRM says Mr. Schwartz has provided extensive arguments detailing the nature of his case on this motion but none represent a compelling case that is likely to find success on judicial review. It says that Mr. Schwartz seeks to extensively relitigate the matters before the Development Officer, seemingly on a correctness standard. It says that according to the Supreme Court in *Vavilov v Minister of Citizenship and Immigration*, 2019 SCC 6, any review of the Development Officer's decision will be conducted on a standard of reasonableness. HRM further says the minute and specific problems pointed to by Mr. Schwartz are unlikely to demonstrate an overall unreasonable decision.

[52] HRM says the question of how much consideration the Development Officer should give to one factor or another falls squarely within his authority and the proper exercise of his judgment. It says that Mr. Schwartz seeks to avoid this issue by instead arguing that the degree of consideration to be applied is a contractual matter and will be unsuccessful. It further says that the argument that only Community Council could approve these non-substantive amendments is wrong in law and directly contrary to the intent of the Legislature when passing Bill 137.

[53] Canadian International says there is no argument to be made here that the Development Officer exceeded his authority or considered irrelevant matters in making his decisions. It says the evidence before this Court describes a development officer carrying out his usual duties, pursuant to his recognized expertise. Canadian

International highlights that the amendments were non-substantial amendments, the approval of which was delegated by Council and by statute to the Development Officer.

[54] Canadian International further says that Mr. Schwartz also alleges numerous other causes of action relating to procedural fairness, unreasonableness of Mr. Creaser's decisions, fraud and negligence, which is says have no merit. It says there is no basis upon which to argue that the Development Officer failed to exercise his jurisdiction or acted illegally, either procedurally, or on the merits of the applications to amend the development agreements in granting the amendments to the development agreements.

[55] There is no dispute that reasonableness is the presumed standard of review, and I see no basis to depart from that in the present case. The court in *Vavilov, supra* said that decisions must be based on reasoning that is rational and logical and that is justified in light of the relevant factual and legal constraints (paras. 78 and 101). Even where decision makers are not required to give reasons, the reviewing court looks to the record as a whole to understand the decision (paras. 137 and 138). Administrative decision makers are accorded a great deal of deference and this includes a Development Officer carrying out his or her duties.

[56] There are a number of allegations set out in the two proposed Notices for Judicial Review, for example the allegation that the Development Officer relied on a Traffic Impact Statement that was not in compliance with HRM's guidelines for Transportation Impact studies or the allegation that the Development Officer failed to consider other relevant matters including wind and shadow studies, etc., when required to do so; the allegation that the Development Officer acted unreasonably in approving an amendment where there was removal of a 6m vegetative buffer, resulting in non conformity with s. 2.7.8 of the Brunello DA; and the allegation for example that the Development Officer acted unreasonably by approving a design with front yard parking contrary to s.10.3 of the LUB and 2.4.4 (v) of the DA.

[57] In relation to the ground of review concerning the Traffic Impact Study, I note that Mr. MacDougall in cross examination, when referencing Exhibit E to his affidavit, confirmed that NS Transportation (Department of Public Works) had concerns about the Traffic Impact Statement. Canadian International said the reference to the traffic study enhances the Development Officer's decision in that there was evidence before him supportive of the traffic authorities' approval. I also note that HRM does not dispute that Mr. Schwartz's allegations about the adequacy

of the traffic study relate to the reasonableness of the Development Officer's decision. In other words, the allegations are not outside what a reviewing court would consider on a judicial review. I raise the above not to comment on the strength, or lack thereof, of Mr. Schwartz's ground of review but simply to indicate that he takes issue with the reasonableness of the Development Officer's decision in this regard.

[58] There is evidence that Mr. Schwartz, in or around May 2023, exchanged correspondence with HRM staff relating to the issue he raises concerning non-disturbance area requirements of the Brunello DA. It would appear from correspondence that he was told at that time "the development officers have confirmed their interpretation of the applicable sections of the development agreement-that both conditions set out in subsections (i) and (ii) of section 2.7.8 must be present in order for the 9 m non-disturbance area to be required. The conditions set out in subsection (i) (… Where lots back on to other lots) is present, but the conditions set out in subsection (ii) (where residential uses will abut non-residential uses…) is not. On that basis alone the non-disturbance areas of the development agreement did not apply at this location." Mr. Schwartz alleges the Development Officer's decision or interpretation is unreasonable in this regard. Again, I am not in a position to opine on the level of strength this argument should be accorded. In short, I am not able to conclude whether any of these proposed grounds of review have a significant chance of success.

[59] It is often difficult to assess whether there is a strong case at this point. I do not have written submissions and full argument on the grounds of review, nor do I have the full record before me. The standard of review is reasonableness for the Development Officer's decision and decisions of specialized decision-makers are accorded a high degree of deference. However, I do not have before me all of the information that was before the decision-maker. I am unable to fully assess the chances of success of the various grounds of review to any significant degree.

[60] While, I am of the view it is not possible at this early stage to assess Mr. Schwartz's chances of success on the proposed grounds of review to any significant degree, I cannot say they are frivolous. I am of the view that the merits of a judicial review of this Development Officer's decisions should be left for another day.

[61] Regardless of the above, this factor of strength or merit is not dispositive of the issue because it is simply one factor in a flexible test, uninhibited by rigid guidelines. As the Beveridge, JA said in *Farrell, supra* :

> …From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.
>
> [Emphasis added]

The presence or absence of prejudice

[62] Canadian International says there is no injustice in denying an extension for bringing applications for judicial review when the applications are without merit and the inordinate delay in bringing the applications rests entirely in the Applicant. It says the only outcome of granting an extension of time will be to delay transactions and cause it unrecoverable financial injury.

[63] Mr. Giles, in his affidavit, stated that the subject properties are currently both under agreements of purchase and sale. He said that Canadian International and its purchasers have been waiting over five months for the disposition of these appeals and the purchasers are not willing to complete the transactions until the applications for judicial review have been disposed of. Canadian International says that the *HRM Charter* prohibits HRM from signing a development agreement until all appeals have been disposed of. Mr. Giles said that the delay in closing the transactions is causing additional costs and interest carrying charges and is delaying its recovery of its investment in the properties.

[64] Mr. Schwartz cross examined Mr. Giles on the above statements. He pointed to projects within the Brunello development that have not proceeded, despite approval, including one approved three years ago. There is simply insufficient evidence before me concerning the projects Mr. Schwartz referenced in cross examination to conclude they have been delayed inordinately, that nothing is happening in relation to those projects, nor to infer that the two projects in issue in this matter would follow a similar path, whatever that path might be.

[65] I certainly recognize there is prejudice to Canadian International given the resulting delay in completing the referenced agreements of purchase and sale. However, and as set out above, the significant delay in filing a Notice for Judicial Review cannot be fully placed at the feet of Mr. Schwartz. HRM played a substantial role in the path this matter ultimately took before a Notice of Motion to extend time was filed in this court. Further, and as an aside, if the appeals had proceeded before

the Board (as HRM originally anticipated) they would not have been heard until at least March 18-22, 2024. There would have been some measure of delay to Canadian International's plans in any event.

[66] I find it surprising, in the circumstances set out above, that HRM has so strongly opposed this motion to extend time. HRM's guidance indicating aggrieved persons were to appeal to the Board, understandably led Mr. Schwartz down the path he took. I concur with the words of the Board that it is understandable how the information on HRM's website could have suggested to Mr. Schwartz that he had a right to appeal the Development Officer's decision to the Board. I am of the view that this is what led to the delay. What I fail to understand is why HRM did not heed these words and recognize their part in causing the resulting delay.

[67] As noted above HRM in its own brief states "To the best of our knowledge, the language in the public notice was simply an error of omission. This is unfortunately one of the consequences of the failure to consult with the Municipality prior to enacting legislative changes to the planning regime." I further reference what the Board said was the position that HRM took before it:

> Finally, HRM stated that Mr. Schwartz could challenge the development officer's decision by way of judicial review in the Nova Scotia Supreme Court, so he had legal recourse but not by way of appeal to the Board.

[68] HRM did not say 'could have challenged' but said "could challenge." Clearly, in making this statement to the Board, HRM recognized there would be delay.

[69] Mr. Schwartz argued that denying his motion would represent prejudice to him because if the multi unit development proceeds he will suffer a loss of enjoyment of his property and points to the loss of a six metre vegetation buffer etc. I am of the view that denying the motion in the above detailed circumstances would be prejudicial to Mr. Schwartz, given his clearly expressed interest in the Planning Applications to amend the Development Agreement, and the quick action he took to pursue appeals to the Board after the Development Officer's decisions. In short, I am of the view that this factor of prejudice is present for both Canadian International and Mr. Schwartz. However, as noted above, HRM played a significant role in the delay that has ultimately unfolded.

[70] Finally, in considering the ultimate question for this court which is to ensure justice is done as between the parties, I am of the view the motion to extend time

should be granted. This is a clear and compelling case where justice requires that the motion be granted.

[71] I wish to state clearly that this case is being decided on the very unusual circumstances existing and it should not be taken as indicating that delays of this length should be condoned, without such exceptional and compelling circumstances. Nor should it be taken to indicate that pursuing other possible avenues of recourse will result in an extension. That is not what happened here.

Conclusion

[72] In conclusion, I find that the factors set out above weigh in favour of granting an extension in the present circumstances. Mr. Schwartz has demonstrated a compelling case for granting the motion to extend the time for filing a Notice of Judicial Review. For all of the reasons set out above the motion is granted.

[73] I must now consider *Rule* 2.03 (2), which provides that when exercising judicial discretion to excuse compliance with a Rule, I must consider doing each of the following:

> (2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:
>
> > (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
> > (b) require an excused person to do anything in substitution for compliance;
> > (c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.

[74] In the circumstances, I am of the view that the only step required is to set a deadline for filing the two proposed Notices for Judicial Review. **The time for Mr. Schwartz to file the two Notices for Judicial Review, contained in his affidavit, will be extended to March 28, 2024.**

[75] Whether the hearings in relation to the two Notices for Judicial Review should be heard together is something that can be discussed at the Motion for Directions that will be scheduled when the Notices for Judicial Review are filed.

[76] With respect to costs on the motion, HRM advised the court it was not seeking costs given the circumstances of this matter. Mr. Schwartz then confirmed to the court that because of HRM's stated position on costs, he would similarly not be

seeking costs against HRM. However, he did seek costs against Canadian International and indicated that he expended considerable disbursements in relation to the motion. As noted, Mr. Schwartz is self represented, however, the materials clearly indicate he has spent significant time preparing for this motion, including reviewing and citing many court decisions. He prepared several affidavits along with a brief and a rebuttal brief. Costs, inclusive of disbursements, are awarded against Canadian International in the amount of $500.

[77] I ask that Mr. Murphy prepare the Order.

Jamieson, J.