

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER



-and-

IN THE MATTER OF an Appeal by **KIANN MANAGEMENT LIMITED** to the Decision of a Development Officer which refused a Development Permit Application to establish a used building material retail outlet for property identified as PID 40740276, Highway 7, Porters Lake, Halifax Regional Municipality

BEFORE: Roberta J. Clarke, Q.C, Panel Chair
David J. Almon, LL.B., Member
Jennifer L. Nicholson, CPA, CA, Member

APPELLANT: **KIANN MANAGEMENT LIMITED**
Dennis J. James, Q.C.
Anna-Marie Manley, Counsel

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
E. Roxanne MacLaurin, Counsel

HEARING DATE: January 6, 2020

FINAL SUBMISSIONS: January 28, 2020

DECISION DATE: **March 23, 2020**

DECISION: **Appeal is allowed.**

TABLE OF CONTENTS

I INTRODUCTION3

II ISSUE3

III BACKGROUND4

IV LETTERS OF COMMENT5

V EVENING/PUBLIC SESSION SPEAKERS5

VI SITE VISIT6

VII SCOPE OF BOARD’S REVIEW7

VIII ANALYSIS AND FINDINGS13

 The LUB Requirements19

 i) Land and/or Building or Part of Building19

 ii) C&D Sorting Materials Defined.....22

 iii) Available for Resale with Minimal Alteration.....25

 iv) Activity Primarily in a Building.....28

 Relationship to C&D Strategy34

 Relationship to Other Regulatory Processes38

 i) C&D Re-Zoning38

 ii) Site Plan Approval.....39

 iii) By law L-200.....40

 iv) HRM Administrative Order 27.....42

IX CONCLUSION42

I INTRODUCTION

[1] Kiann Management Limited (Kiann) applied to Halifax Regional Municipality (HRM) for a development permit for a used building material retail outlet on a part of its property on Highway 7 between Lake Echo and Porters Lake. The currently vacant land is in the Rural Enterprise (RE) Zone under the Land Use By-law for Planning Districts 8 and 9 (LUB).

[2] Sean Audas, a Development Officer with HRM, refused the permit application because it did not meet the definition of a used building material retail outlet. Mr. Audas likened the proposed use to a Construction and Demolition (C&D) facility based on his understanding of where activities were to occur, the types of equipment to be used, and the presence of a weigh scale. A C&D use is not permitted in the RE Zone.

[3] Kiann appealed Mr. Audas' decision to the Nova Scotia Utility and Review Board pursuant to s. 265(2) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (*HRM Charter*). Kiann claimed Mr. Audas' decision does not comply with the LUB and should be overturned.

[4] The Board heard the appeal on January 6, 2020. The Board finds that Mr. Audas was incorrect in his decision to refuse the development permit because he misinterpreted the proposed use as a C&D facility, rather than a used building material retail outlet which is permitted as of right in the RE Zone.

II ISSUE

[5] Does the decision of the Development Officer to refuse the development permit comply with the LUB?

III BACKGROUND

[6] Lawrence Bellefontaine, the principal of Kiann, applied to HRM for a permit for a used building material retail outlet on January 25, 2017. His application stated that this outlet would not operate inside a building.

[7] The LUB for Planning Districts 8 & 9 (Lake Echo/Porters Lake) section 2.62A states:

USED BUILDING MATERIAL RETAIL OUTLET means land and/or buildings or part of a building where C&D Materials are sorted and available for resale with incidental and minimal alteration of the materials and where activity primarily occurs inside a building.

[Exhibit K-2, LUB, p.10]

[8] Based on the requirement that the activity occur primarily inside a building, Kiann's application was put on hold until Mr. Bellefontaine could submit a revised application. After several follow up emails from HRM planning staff, this was submitted in January 2018.

[9] After significant email exchanges between Mr. Bellefontaine and HRM planning staff, Mr. Audas cancelled Kiann's application in March 2018 "due to the uncertainty of the information provided."

[10] Jenifer Tsang, MCIP, of Sunrose Land Use Consulting, was retained by Mr. Bellefontaine to help provide clarity and details to answer HRM planning staff questions and deal with their concerns. Correspondence continued for more than a year until the application was refused in May 2019 because Mr. Audas concluded that the proposed use did not meet the definition of a "used building material retail outlet."

IV LETTERS OF COMMENT

[11] Interested persons were invited, in the Board's advertisement of the Notice of Public Hearing, to submit letters of comment to the Board by November 7, 2019. The Board received two letters of comment from individuals who expressed their opposition to allowing a Development Permit to establish a used building material retail outlet. Their main concerns may be described as:

- Traffic volumes and impact on local businesses;
- Increase in noise and traffic on Hwy 7 and in the community;
- Potential environmental pollution, particularly the impact on well water; and
- Unsuitable location for a retail outlet.

V EVENING/PUBLIC SESSION SPEAKERS

[12] An evening session was held on January 6, 2020. In response to the Notice of Hearing, 11 persons registered to speak at the session. Two persons did not appear at the evening session, leaving the Board to hear from nine members of the public. The speakers resided in Lake Echo, Mineville, Portland Hills, Fall River and Porters Lake, and all were familiar with the location of the proposed used building material retail outlet. One speaker presented a number of photographs, none of which were authenticated, purporting to show partly buried and visibly dumped materials on the proposed site, as well as photos depicting a watercourse and wetlands.

[13] Two speakers expressed concern about trucks loaded with debris, travelling through their communities, leaving behind an increase in litter and garbage. They pointed to a Litter Abatement Order issued to the Appellant on July 26, 2016, by Nova Scotia Environment, for burying materials at the property which were not processed and disposed of in accordance with the law. Pointing to concerns about the proposed

development, one of the speakers cited the maxim “the best prediction of future behaviour is past behaviour.”

[14] Another speaker questioned the wisdom of locating the retail outlet "in the middle of nowhere." More than one speaker expressed concern about the impossibility of mitigating noise and physical pollution the site would generate and the effects on neighbouring property values. The remaining speakers focused on the potential for serious contamination of the groundwater, increased truck traffic, and the safety of pedestrians. None of the information was tested through cross-examination.

VI SITE VISIT

[15] The Board conducted a site visit on December 18, 2019, accompanied by representatives of each party. The proposed site was accessed from Exit 17 to Trunk 7 and is located between the communities of Lake Echo and Porters Lake. The parties agreed to meet at the Lake Echo Community Center, subsequently proceeding, by car, to Parker Lane. From there, the parties walked back to the proposed site, westward, observing the full extent of the property along Highway 7.

[16] The area in the vicinity of the proposed used building material retail outlet site, while snow covered, is characterized by vacant, open and undeveloped land which appears to be relatively flat. The parties walked onto the property, approximately 30 feet in from Highway 7, over gravel remnants and observed mature vegetation and trees on the boundaries of the site, and the absence of similar mature vegetation and trees on the proposed site due to a forest fire in the summer of 2008. The Board then returned to the parked cars, eastward, observing that the road has two paved travel lanes, one each for

eastbound and westbound traffic, with a combination of paved and gravel shoulders. The posted speed limit is 80 km/h and there are no sidewalks.

[17] The Board then travelled along Highway 7 observing Exits 17 through 19 over which the trucks will pass.

VII SCOPE OF BOARD'S REVIEW

[18] The burden of proof is on the Appellant to show, on the balance of probabilities, that the Development Officer's decision to refuse to issue a development permit for a used building material retail outlet does not comply with the LUB.

[19] Under s. 265(2) of the *HRM Charter*, the grounds for appealing such a decision are limited:

265 (2) An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land-use by-law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area.

[20] The powers of the Board are similarly limited on such an appeal:

267 (1) The Board may

(a) confirm the decision appealed from;

...

(d) allow the appeal and order that the development permit be granted;

...

(2) The Board may not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

[21] Thus, the Board must not interfere with the decision of the Development Officer unless it determines that his refusal conflicts or does not comply with the provisions of the LUB. The Board concludes this is two ways of stating the same test.

[22] The Nova Scotia Court of Appeal has considered the standard by which this Board must review a development officer's decision. The Board's mandate is restricted to the jurisdiction conferred upon it by the *HRM Charter*.

[23] Historically, the Court of Appeal has said that the Board should apply the standard of correctness when reviewing the decision of a development officer to refuse to issue a development permit.

[24] In *Re Bay Haven Beach Villas Inc.*, 2004 NSCA 59, the Court stated:

[23] ...the applicable standard is one of correctness...little deference is owed to the Development Officer's decision.

[25] In *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78, the Court of Appeal held:

[43] ...the Board was right to apply a correctness standard to the Development Officer's refusal to issue a development permit...

[44] Given its expertise in planning matters, the Board is well qualified to review decisions of a development officer on a correctness standard.

[26] More recently, the Court of Appeal has somewhat modified the concept of the standard of review, while still maintaining a close approximation of the traditional correctness standard. In *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 [affirming *Anglican Diocesan Centre Corporation v. Halifax (Regional Municipality)*, 2009 NSUAR 154], the Court again referred to the standard of correctness, but went on to say that the Board, as an administrative tribunal constituted by statute:

[23] ...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] ...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.

[27] This approach appeared later in *Royal Environmental Inc. v. Halifax (Regional Municipality)*, 2012 NSCA 62, at para. 41.

[28] The Board will apply the same standard it applied in *Anglican Diocesan* and *Royal Environmental*, which it has adopted in subsequent cases (see for example, *Re Ghosn*, 2016 NSUARB 110, affirmed at 2016 NSCA 90; *Re Tasty Budds Compassion Club Inc.*, 2016 NSUARB 128, affirmed at 2017 NSC422; *Re Skinner*, 2017 NSUARB 62, and *Re Jazz Vape and Nova Buds*, 2018 NSUARB 28).

[29] Section 234 of the *HRM Charter* describes the relationship between a Municipal Planning Strategy (MPS) and an LUB:

234 (1) Where the Council adopts a municipal planning strategy or a municipal planning strategy amendment that contains policies about regulating land use and development, the Council shall, at the same time, adopt a land-use by-law or land-use by-law amendment that enables the policies to be carried out.

(2) The Council may amend a land-use by-law in accordance with policies contained in the municipal planning strategy on a motion of the Council or on application.

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

[30] In *J & A Investments Ltd. v. Halifax (Regional Municipality)*, [2000] N.S.J. 92 (S.C.), where the meaning of an LUB was in issue, Justice Davison reasoned that s. 219(1) of the *Municipal Government Act*, which mirrors s. 234 of the *HRM Charter*, means that an MPS may be used to help determine the intent of the LUB.

[31] The language of s. 219(1) of the *MGA*, and thus s. 234 of the *HRM Charter*, is similar to, but not identical to, that which appeared in s. 51(1) of the *Planning Act*, which required council to "concurrently" adopt or amend the LUB. Referring to s. 51(1) of the *Planning Act*, the Court of Appeal in *3012543 Nova Scotia Limited v. Mahone Bay et al.*, 2000 NSCA 93, stated that a review of the LUB may assist in "throwing light on the intent"

of the MPS, and therefore used a provision of Mahone Bay's LUB to assist in interpreting the MPS:

A search for the intent of a municipal planning strategy requires a careful review of the strategy represented by the policies of the municipality and, very often, a review of the By-laws implementing the strategy as the by-laws adopted concurrently with the MPS may assist in throwing light on the intent of the strategy. [para. 95]

[32] Thus, according to Nova Scotia's present case law, the Board considers one may use the MPS to help determine the intent of the LUB (*J & A Investments*), and use the LUB to help determine the intent of the MPS (*Mahone Bay*).

[33] The principles of statutory interpretation apply when interpreting an LUB. In a recent judgment, the Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation in *Sparks v. Holland*, 2019 NSCA 3. Farrar, J.A., stated:

[27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).

[28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.

[29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:

1. What is the meaning of the legislative text?
2. What did the Legislature intend?
3. What are the consequences of adopting a proposed interpretation?
(*Sullivan*, pp. 9-10)

[*Sparks*, 2019 NSCA 3, paras. 27-29]

[34] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

9(1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[35] In *Anglican Diocesan*, the Court of Appeal, in expanding upon its reasoning in an earlier decision, *Archibald v. Nova Scotia*, 2010 NSCA 27, outlined an approach the Board should follow in exercising its appellate jurisdiction in this matter. The Court said:

[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.

(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.

(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. [Emphasis added]

[36] The Court of Appeal remarked, at paragraph 47 of *Anglican Diocesan*, that:

...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 (CanLII), para. 26; *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* (1994), 1994 CanLII 4114 (NSCA), 128 N.S.R. (2d) 5 (CA), at para. 123; *Archibald*, para. 24(8).

[37] *Archibald* indicates that the impact of the MPS as an interpretive tool to “elicit meaning from ambiguity” is more pronounced when the MPS and LUB are enacted concurrently. In this case, while there have been some amendments to the LUB, the LUB provisions which give rise to interpretation issues were enacted at the same time as the MPS.

VIII ANALYSIS AND FINDINGS

[38] The subject property is located within the community of Porters Lake and near the community of Lake Echo.

[39] The property, comprising approximately 38 acres, has two zones: RE which covers most of the property, and a smaller portion in the eastern section which is zoned RA (Residential (A)).

[40] The RE Zone allows a broad range of uses, other than a defined list of exceptions:

PART 14: RE (RURAL ENTERPRISE) ZONE

14.1 RE USES PERMITTED

A development permit shall be issued for all uses in an RE (Rural Enterprise) Zone except for the following:

Fish waste processing plants;
Salvage Yards;
Adult entertainment uses;
Beverage rooms and lounges over one thousand and five hundred (1,500) sq. ft. (139.4 m²); Mobile home parks; and
Any industrial or commercial use which is obnoxious.
**Composting operations (refer to Section 4.26) (MC-Feb 26/96; Minister-Mar 28/96)
C&D Materials Transfer Stations, C&D Materials Processing Facilities and C&D
Materials Disposal Sites (RC-Sep 10/02; E-Nov 9/02)**

[Exhibit K-2, Tab 2, p.55]

[41] On January 25, 2017, Kiann applied for a development permit from HRM for a used building material retail outlet. As a used building material retail outlet is not on the list of exceptions, such a use would be permitted on the lands.

[42] By way of background, in 2001, HRM passed a By-Law, L-200 *Respecting Licensing of Construction and Demolition Materials Recycling and Disposal Operations* (C&D Materials Recycling and Disposal License By-Law).

[43] The intent of the By-Law lists several goals:

WHEREAS it is the desire of the Halifax Regional Municipality to:

- a) Maximize diversion from landfill through recycling of construction and demolition debris in keeping with the Halifax Regional Municipality Solid Waste Resources Strategy;
- b) Increase economic activity and value added processing through recovery of construction and demolition debris;
- c) Provide an opportunity to properly dispose of construction and demolition debris that cannot be recycled;
- d) Ensure minimal environmental, land use and nuisance impacts from the operation of construction and demolition debris processing and disposal operation.

[Exhibit K-12]

[44] As well, amendments were introduced to the LUB and the Districts 8 and 9 MPS in 2002. A section entitled "Construction and Demolition Waste Management Strategy" was added to the MPS which cites the same four goals as set out in the above preamble to By-Law L-200. Amendments were introduced to the LUB and the Districts 8 and 9 MPS with a new section added, entitled "Construction and Demolition Waste Management Strategy."

[45] The following municipal planning policies are intended to support and/or implement key components of HRM's C&D Waste Management Strategy focused on reuse, recycling and diversion:

- P-46A It shall be the intention of Council to initiate an education and public awareness program for builders, home renovators and developers describing best practices for maximizing the amount of C&D materials recycled, reused and/or diverted from municipal landfill.
- P-46B It shall be the intent of Council to review its construction and procurement practices to ensure that C&D debris materials resulting from municipal construction projects are diverted to appropriate reuse and recycling facilities.
- P-46C Further to Policy P-46B, Council shall encourage provincial and federal agencies working within HRM to also review their construction and procurement practices to support recycling / reuse of C&D materials.

[Exhibit K-2, Tab 1, MPS Districts 8 & 9]

[46] Operational aspects of the C&D industry were also classified into two categories: operations where materials are transferred and/or processed; and, operations which dispose of materials.

[47] A C&D materials processing facility is defined in the LUB as:

2.11D CONSTRUCTION AND DEMOLITION MATERIALS PROCESSING FACILITY, hereinafter referred to as a C&D Processing Facility, means lands and/or buildings or part of a building used to sort, alter, grind, or otherwise process, C&D Materials for reuse or recycling into new products, and shall not include a Used Building Material Retail Outlet, an operation that processes inert C&D Materials on the site of generation and the material processed does not leave the site except for inert C&D Materials described in Sub-Section 9(3) of HRM C&D License By-law (L-200 and L-201), de-construction of a building on site, a municipal processing facility for used asphalt and concrete, or facilities associated with reclamation of a gravel pit or quarry operations licensed by the Province of Nova Scotia or forestry manufacturing processes. (RC-Sep 10/02; E-Nov 9/02) [Emphasis added.]

[Exhibit K-2, Tab 2]

[48] As the definition clearly exempts a used building material retail outlet, a definition for a "Used Building Material Retail Outlet" was inserted into the LUB, as follows:

2.62A USED BUILDING MATERIAL RETAIL OUTLET means land and/or buildings or part of a building where C&D Materials are sorted and available for resale with incidental and minimal alteration of the materials and where activity primarily occurs inside a building. (RC-Sep 10/02; E-Nov 9/02)

[Exhibit K-2, Tab 2]

Used building material retail outlets are not governed by By-Law L-200.

[49] A Retail Store is defined as:

2.52 RETAIL STORE means a building or part of a building in which goods, wares, merchandise, substances, articles or things are offered for sale directly to the public at retail value.

[50] A review of the Appeal Record indicates the efforts made by the Appellant in pursuing the application with HRM and his attempt to secure approval. The original permit application made no mention of a building as part of the proposal. In fact, attached to the application was a handwritten note dated January 25, 2017, "requesting approval

for a used building material outlet...without the operation inside a building..." and another notation, "C&D Retail building outlet without a building."

[51] For several months HRM requested revisions to the application to include a building as part of the proposal on the portion of the property. The application languished for almost a year.

[52] On January 10, 2018, a revised plan showing the building and assorted uses on the property was forwarded to HRM by the Appellant.

[53] Email correspondence indicates some confusion on the part of HRM planners who felt that some aspects of the proposed building could be considered as uses, other than a used building material retail outlet, i.e., salvage yard; construction and demolition materials disposal site; construction and demolition materials processing facility; and, a construction and demolition materials transfer station.

[54] As well, HRM expressed reservations on the proposed scale house shown on the plan.

[55] In a letter dated August 22, 2018, Ms. Tsang gave assurances to HRM on why and how the proposal is not the same as a salvage yard, C&D transfer station or a C&D processing facility. She distinguished the proposal from a C&D transfer station:

The proposal differs from a C&D transfer station because materials that go to a C&D transfer station can only be directed to one of two places: a waste disposal site or a processing facility. Materials for the "used building material retail outlet" will be directed to retail customers primarily, with some expected incidental residual waste going to a waste disposal site. Materials that should go to a C&D transfer station, a C&D processing facility, or to a waste disposal site will not be accepted at the proposed "used building material retail outlet". [Emphasis added]

[Exhibit K-4, Tab 15, p.38]

[56] She further distinguished the proposal from a C&D processing facility:

...it will not have machinery on site that is typically used for processing at a C&D processing facility which uses grinders, crushers and processors. The proposed "used building

material retail outlet" will have equipment such as: excavators, loaders, shears, and forklifts.

[Exhibit K-4, Tab 15, p.38]

[57] While Ms. Tsang's explanation satisfied the Development Officer's concerns that there will not be any salvage items and the facility will not be a salvage yard, he was not convinced that the proposal was in keeping with the definition of a used building material retail outlet. Mr. Audas reasoned that as retail operations are commercial uses, where the general public are invited to a building to purchase items for sale, it was more akin to a "Retail Store" as defined in the LUB.

[58] Mr. Audas also questioned why there was a weigh scale on site, suggesting that typical retail operations, such as Kent Building Supplies or Home Depot, do not have a weigh scale. Mr. Audas' evidence was that C&D processing facilities, which he has visited, have weigh scales typical of such operations, while retail outlets do not. Mr. Audas also questioned the use of excavators, loaders, shears and forklifts. The use of such equipment, in his opinion, seemed outside the scope of "incidental and minimal alteration." He suggested this equipment is typically associated with C&D facilities used to sort, alter and otherwise process C&D materials.

[59] Mr. Bellefontaine and Ms. Tsang provided evidence in their testimony to support the requirement for the weigh scale. They explained that it is industry practice to sell many types of reused C&D materials by weight, rather than by unit. They provided many examples where this was plausible including large steel beams and pre-cast concrete panels. Ms. Tsang also suggested that the weigh scale would allow departing purchasers to ensure that larger and heavier purchases have their weight appropriately distributed and that they do not exceed vehicle weight restrictions.

[60] In his May 18, 2019, refusal letter to the Appellant, the Development Officer wrote:

...The proposed use does not meet the definition of a "used building material retail outlet", which is defined as:

2.62A USED BUILDING MATERIAL RETAIL OUTLET means land and/or buildings or part of a building where C&D Materials are sorted and available for resale with incidental and minimal alteration of the materials and where activity primarily occurs inside a building.

The letter from Sunrose Land Use Consulting, dated August 22, 2018, indicates that minimal alteration could occur indoors and outdoors and that there is also a large fenced yard used for the storage of various materials. Information submitted confirms that excavators, loaders, shears and forklifts will be used. Excavators and loaders are generally used outside, and forklifts are used both within a building and outside. The large fenced yard, along with the use of excavators and loaders, does not support the operation primarily occurring inside a building.

The facility will also include a weigh scale, and vehicles will be inspected as they enter the facility. Existing used building material outlets or retail stores specializing in the sale of building materials do not have weigh scales as you enter the property. Construction and Demolition (C&D) facilities, such as processing and disposal sites, have a weigh scale at the entrance. The scale operator inspects the materials and directs you to a specific area based on the inspection of the material. What you have outlined outside of the retail component, is similar in many aspects to a C&D materials processing facility. Excavators and loaders are used at C&D materials processing facilities to sort and/or alter C&D material for reuse or recycling into new products. This is not a permitted use in the RE Zone. See the definition of a C&D materials processing facility below:

CONSTRUCTION AND DEMOLITION MATERIALS PROCESSING FACILITY, hereinafter referred to as a C&D Processing Facility, means lands and/or buildings or part of a building used to sort, alter, grind, or otherwise process, C&D Materials for reuse or recycling into new products, and shall not include a Used Building Material Retail Outlet, an operation that processes inert C&D Materials on the site of generation and the material processed does not leave the site except for inert C&D Materials described in Sub-Section 9(3) of HRM C&D License By-law (L-200 and L-201), deconstruction of a building on site, a municipal processing facility for used asphalt and concrete, or facilities associated with reclamation of a gravel pit or quarry operations licensed by the Province of Nova Scotia or forestry manufacturing processes. (RC. Sep 10/02;E-Nov 9/02)

This proposal does not meet the definition of a "used building material retail outlet" and the application is refused.

[Exhibit K-4, Tab 15, pp.62-63]

[61] As confirmed by Mr. Audas' testimony, he determined that the proposal is not a retail store, but seems to be like many aspects of a C&D processing facility.

[62] The Appellant argues that the proposal has to be viewed as a land use on its own – a used building material retail outlet, as set out in s. 2.62A of the LUB that contains components of both retail and C&D land uses – because it is the resale of C&D materials after incidental and minimal alteration.

[63] In reviewing the Development Officer’s decision, as suggested by Counsel for the Appellant in his submissions, it is helpful to examine the key components to a used building material retail outlet, defined in s. 2.62(a) of the LUB.

The LUB Requirements

i) Land and/or Building or Part of Building

[64] The first component is that it must be composed of land and/or buildings. Mr. Bellefontaine’s evidence was that on January 10, 2018, he submitted a revised plan to HRM (Appeal Record, p. 33) showing the building and associated uses on the property.

[65] In describing the property, Ms. Tsang noted:

If a person were to drive to this proposed “used building material retail outlet” he/she would see a main building with a large fenced yard and scale house. At the entrance would be a scale for the purpose of weighing each truck as they enter and leave the site. In some cases, passenger vehicles will also be weighed. The reason for the scale, is because all vehicle operators are responsible to be sure that their vehicle does not exceed its safety standards for weight. Trucks have to have their load distributed properly between its axels. Once the truck (or passenger vehicle) are on the public roads and highways, police and “vehicle compliance officers” make random stops to check the weight of vehicles. The purpose of the compliance check is for the safety of the public from potential vehicle accidents and to prevent damage to the road.

...

Inside the large fenced yard would be areas divided off for the storage of various materials. There would be a garbage container for residual waste that is sometimes created during the minimal alteration, as well as areas where some of the minimal alteration takes place. The main building where most of the activity takes place, will have an area for storage of C&D items, an area for minimal alteration, an area for the business office, an area for files, an area for customer sales and service, an area for staff, and washrooms.

All arriving customers would have to stop at the scale house to speak with a trained employee to check in. The employee will determine if items being brought in, meet the definition of C&D Material and deemed to be acceptable for a “used building material retail outlet”. Examples of loads that would be turned away are those that: contain a mix of

items, that contain a majority of non-reusable materials, broken materials, waste or garbage; or random materials that appear to have not come from a demolition site, etc.

...

[Exhibit K-7, pp.38-39]

[66] In his November 19, 2019, expert's report, Mr. Audas introduced additional reasons why he refused the development permit. The Board notes that these reasons do not form part of the Appeal Record and were not previously given as reasons for the refusal.

[67] One of the reasons cited was, "lack of building details," where Mr. Audas wrote:

...

A typical building material outlet offers item for sale at a noted price. There may be larger items such as windows, doors, appliances and landscaping material which are heavy and awkward. These may need to be ordered or require delivery to get the merchandise to the intended destination. At a used building material retail outlet, one would typically expect to find an inventory of used building materials such as doors, windows, plumbing fixtures, light fixtures, cabinets, hardware, banister rails and spindles, fireplace mantels, and flooring. These materials would most likely be salvaged from dismantling or renovations. Renovators Resource Inc. in Halifax would be an example of a used building material retail outlet. This retail operation is within a building and has used building material available for sale to the public. There is not a weigh scale, or a large storage yard associated with this operation.

...

[Exhibit K-9, Tab 3, p.2]

[68] He also noted:

...

The details of the building are also very limited. There is not an elevation drawing which outlines the height and design of the building. Retail operations generally strive for an **inviting**, visible building which **showcases** items for sale. **Large windows**, signage and display areas support retail operations. The site plan does not note any signage, the building design is unknown, the orientation of the building seems to be towards the scale and scale house and not the street, there is not a pedestrian connection between the parking and the building, such as a sidewalk or a walkway. There is also a 6-foot high fence with privacy slats along with vegetation proposed at the front of the property to further impede the view of the retail operation from the street. It should be noted that fencing along with vegetation along the street is one of the general requirements for C & D materials operations that is required under the C & D zones. [Emphasis added]

...

[Exhibit K-9, Tab 3, p.3]

[69] A retail store is defined in section 2.52 of the LUB as “a building or part of a building in which goods, wares, merchandise, substances, articles or things are offered for sale directly to the public at retail value.”

[70] Mr. Audas’ report states that “retail operations generally strive for an inviting, visible building which showcases items for sale. Large windows, signage and display areas support retail operations.”

[71] He went on to say that “The site plan does not note any signage, the building design is unknown, the orientation of the building seems to be towards the scale and scale house and not the street, there is not a pedestrian connection between the parking and the building, such as a sidewalk or walkway.” He also expressed concerns about the fence and vegetative buffer that were included in the site plan, features that would, in his opinion, impede the view of the retail operation from the street. Mr. Bellefontaine testified that these features were specifically requested by Erin MacIntyre of HRM staff.

[72] The Board considers that customers would come specifically to this outlet to look for particular items. Curb appeal is not a requirement for a used building material retail outlet.

[73] In her submissions, HRM Counsel appears to suggest that the proposed use, that of a used building material retail outlet, must meet the definition of a retail store, and if it does not, it must therefore be a C&D processing facility. Further, the Development Officer was of the view that the permitted use should more closely resemble that of a retail use rather than a C&D facility use. A review of the Appeal Record indicates no reference to this in the email correspondence between the parties, and Mr. Audas’

testimony centred on his opinion that the proposed facility did not meet the definition of a used building material retail outlet.

[74] The Board notes that Mr. Bellefontaine testified he is familiar with Renovators Resource referred to by Mr. Audas. In response to questions from the Board, he confirmed that it would sell products which are different than what he proposes, and that their clientele would be different.

[75] Counsel for the Appellant submits the only logical conclusion to be reached is that Mr. Audas determined that Kiann's proposed facility did not meet the definition of a retail store, because he felt that it more closely resembled a C&D processing facility.

[76] Upon reviewing Mr. Audas' analysis, the Board is not persuaded by his reasoning and prefers the arguments of the Appellant. The task in a development permit application is to determine if a proposal generally meets the requirements of the LUB. A site plan was submitted showing the location of the various buildings and structures with frontage, areas and setbacks. The RE Zone and the definition of a used building material retail outlet do not address or regulate such descriptives as "inviting," "showcasing," and display areas and large windows; these items might be more illustrative of a retail store. To address these items was outside the scope of his authority. In the Board's view, Mr. Audas should have considered a used building material retail outlet as its own use.

ii) C&D Sorting Materials Defined

[77] The second component of a used building material retail outlet is that it must receive and sort C&D materials, which is a defined term in the LUB:

2.11B CONSTRUCTION AND DEMOLITION MATERIALS, hereinafter referred to as C&D Materials, means materials which are normally used in the construction of buildings, structures, roadways, walls and landscaping features, and includes, but is not limited to, soil, asphalt, brick, concrete, ceramics, porcelain, window glass, mortar, drywall, plaster,

cellulose, fiberglass fibres, lumber, wood, asphalt shingles and metals. (RC-Sep 10/02;E-Nov 9/02)

[Exhibit K-2, Tab 2, LUB, p.2]

[78] Mr. Bellefontaine testified that Kiann will receive materials from all sources and that it was irrelevant to his permit application to identify where materials come from. He testified that he will only accept materials that are appropriate for a used building materials retail outlet.

[79] Some C&D materials were identified in photographs of used building materials taken from a demolition Kiann had done at CFB Stadacona in Halifax and included mats, lockers, roof trusses and flooring, which had to be sent to a C&D disposal site. As Mr. Bellefontaine testified, these are the type of materials suitable for a used building material retail outlet, which he is proposing.

[80] To ensure that he accepts materials that are appropriate, he testified that Kiann will have to work within industry to ensure that they are “onside with what their operation is all about.”

[81] He referred to a request for information from Planner, Shilo Gempton, who posed the following questions, with his responses:

Are you receiving C&D materials from a transfer station (which one)?

Not expecting to because these materials are only permitted to go to a Processing facility or a Disposal Facility.

Are you receiving C&D materials from a processing site (which one)?

Not expecting to because these materials delivered to a processing Facility can only be used to alter, grind, or otherwise Process, C&D Materials for reuse or recycling into new products.

Can you provide a list of all materials you plan to sell?

It is impossible to list all materials. The materials will be typical of what is provided in the definition of C&D materials that can be minimally altered and sold.

[Exhibit K-4, Tab 12, p.26]

[82] Mr. Audas' evidence is that the definition of "used building material retail outlet" does not provide the ability for a retail outlet to receive mixed loads of C&D materials such as those that would be permitted at a C&D processing facility or transfer station.

[83] In her report, Ms. Tsang also reiterated what would be acceptable at the retail outlet:

The proposed "used building material retail outlet" will only be handling C&D materials and will not be handling scrap household items like rags, bones, bicycles, and tires. It will comply with its definition quoted below in italics:

...

The proposal differs from a C&D transfer station because materials that go to a C&D transfer station can only be directed to one of two places: a waste disposal site or a processing facility. Materials for the "used building material retail outlet" will be directed to retail customers primarily, with some expected incidental residual waste going to a waste disposal site.

Materials that should go to a C&D transfer station, a C&D processing facility, or to a waste disposal site will not be accepted at the proposed "used building material retail outlet."

[Exhibit K-4, Tab 15, pp.37-38]

She said that such things that would be unacceptable are loads with a mix of items that contain a majority of non-reusable materials, broken materials, waste or garbage; or random materials that appear to have not come from a demolition site.

[84] While Mr. Audas reasoned that the arrival of mixed loads was characteristic of a C&D transfer or processing facility, the Board finds that both Mr. Bellefontaine and Ms. Tsang satisfactorily explained what type of loads they anticipated receiving. They were not the same type of loads typical of other C&D operations. The use of the excavator was necessary for sorting and lifting heavy materials, the loaders for cleanup and snow removal and the shears for trimming beams and other materials. The Board is persuaded by the evidence of the Appellant over that of the Development Officer who, clearly,

disregarded the information provided by the Appellant and based his decision on conjecture, and is not supported in the LUB.

iii) Available for Resale with Minimal Alteration

[85] The third component is the C&D materials must be available for resale with incidental and minimal alteration. In his testimony, Mr. Bellefontaine understood this to mean:

A. That you're really just adjusting the ... the item at hand so it becomes a ... a proper item for resale.

[Transcript, p.20]

[86] He contrasted this with the definition of a C&D material processing facility where a new product is created through the recycling process with what he plans to do which is, simply, creating a reusable product:

Q. ...So in your understanding, how is that different from minimal alteration that we saw in the earlier definition?

A. Well, 2.11D clearly tells you that when you take materials into this facility, under this heading, that you're creating a new product through the recycling process.

Q. Right.

A. What we're doing is creating a reusable product.

Q. Right.

A. And they have to use grinders and blenders and conveyors and things of that nature in order to make various products ...

Q. Right.

A. ... or separate or whatever.

Q. Under which ...

A. Under 2.11D.

Q. Okay, and how does that contrast with the used building material again? This ... when you talked about incidental minimal alteration?

A. It's just totally different, and you know, our material is really coming to a site and it just needs slight adjustments in order to make it a retail product ... or a reusable product.

[Transcript, p.21]

[87] Mr. Bellefontaine described several photos of used building materials (see para. 79) showing floor mats, metal lockers, hardwood flooring and trusses. He was asked what would be done with the building materials and responded:

...

A. Page 4 is showing hardwood flooring that's ... would be removed and ... you know, try to find a reuse life for sure, yeah.

Q. Okay, and page 5?

A. Page 5 is again more hardwood. It's a little different hardwood. It's ... it's a very unique and old type floor, flooring system.

Q. Right.

A. It ... it's different than the regular hardwood flooring. It's on its edge. So it's quite thick. So it's ... it's very high demand for flooring on removing.

Q. And what would have to be done to prepare, from your perspective, this material for used retail sale?

A. The material would have to be taken away in ... in sections and pieces so that you can salvage this, and when you get hardwood flooring you can't just put this outside in a storage. It's got to be in a container or a building and, you know, cleaned up and trimmed up in sections, or whatever the case is, for retail.

Q. Okay, and then we see on page 6 ... what's that?

A. These are trusses. They're an arched truss and they could very easily be removed and ... and used, you know, for a new building.

Q. Okay.

A. Yeah.

Q. What would have to be done to these arched trusses to make them ready for used retail?

A. They would have to be ... on site they're just basically handled in a different manner and disassembled, basically, instead of demolishing and then you just basically segregate them in sections for ... and tag them and ... and then that's it. The ...

Q. Okay.

A. ... more careful you are with them, the more, you know, you can salvage these.

Q. Okay, and page 7?

A. Page 7 is kind of ... yeah, that ... if you look at it with the 7 to your right hand up in the corner it's ... it's just the underside of ... of a roof, the arched roof of this gymnasium on this building.

Q. Okay.

A. And in this particular project it was a quarter-million lineal feet of two-by-six ...

Q. On the roof.

A. ... and just ... yes, and they were just spanning from truss to truss. So ...

Q. Okay, and is the two-by-six on the roof ... is that also something that could be incorporated in your used retail?

A. Oh, yes, yeah.

Q. Okay, and what would have to be done to that?

A. Again, the same way you'd ... you'd carefully dismantle your ... your sections of roof and other ... other than just taking it apart, trimming up the damaged ends, you really ... there's not much alteration needed to make a product out of it.

[Transcript, pp.24-26]

[88] Other items that Mr. Bellefontaine intended to minimally alter and sell included fiberglass insulation, drywall, metal beams, flagstones, pre-cast concrete panels, stair treads, and iron radiators.

[89] In her August 22, 2018, letter to Mr. Audas, Ms. Tsang wrote:

An example of minimal alteration that could take place indoors or outdoors is; if a 35-foot long steel beam needs to have two feet of its end cut off because it is twisted or damaged there would be an industrial saw and supporting equipment. The end piece of the steel beam would become a waste material and the beam itself would become an item for retail sale. In another example, if some lumber needs to have nails removed, there would be an area for nail removal.

[Exhibit K-4, Tab 15, p.38]

[90] In his evidence, Mr. Audas clearly had concerns about the weigh scales, which he deemed similar to what he found at C&D processing facilities. He said that excavators, loaders and shears are typical equipment associated with C&D facilities used to sort, alter and process C&D materials.

[91] In her submission, HRM Counsel referred to photos of, among other things, loaders and shears, taken and filed with the Board by Linda Mosher, a resident of the community, during the evening session of the hearing. Counsel submitted that the photos, purportedly, depict heavy industrial equipment most often associated with C&D

operations and other intensive industrial uses, and not with retail uses. As Ms. Mosher was not qualified as an expert witness, able to give opinion evidence, nor was she made available for cross-examination, the Board affords little, if any, weight to the photographs.

[92] Under cross-examination, Mr. Audas agreed that what Kiann is proposing in bringing in is small and large construction material that can be resold on the market and is encouraging the reuse of materials so that it does not get buried in the landfill and is consistent with HRM Policy.

[93] The Board has considered the evidence. Mr. Bellefontaine testified that he has over 30 years' experience as a demolition contractor. His evidence was that a used building material retail outlet does not recycle materials into new products. Instead, as set out in the definition, it is where C&D materials may be incidentally and minimally altered before resale. He is not intending to reuse or recycle to create a new product; for example, to chip up smaller wooden boards for biomass fuel, or to grind concrete for refabrication. He was clear in his understanding of minimal alteration which was to, for example, remove nails from larger wooden boards, or to cut a bent steel beam into two straight beams. He agreed that these were the types of actions that he proposed to perform at the used building material retail outlet. To the extent that the Development Officer may have relied on this component to refuse the development permit, his decision does not comply with the LUB.

iv) Activity Primarily in a Building

[94] The final component is that the activity must primarily occur inside a building.

[95] Mr. Bellefontaine reviewed Exhibit K-13, which was the site plan submitted for the permit application. He described it as a layout providing most of the information that HRM required in order to understand the activity more clearly. Mr. Bellefontaine's understanding of activity in the building meant:

A. ...if we were doing any modifications to a subject item, C and D, we would need to do that primarily into a building.

Q. Okay, and what does that mean to you?

A. It means that any activity that we're doing with, you know, our lumber, whatever the case is, mod- ... like, if we do slight modifications for ... to create a retail product we must do it inside of that building.

[Transcript, p.18]

[96] As well, Mr. Bellefontaine responded, in an e-mail, to a number of questions from Ms. Gempton, HRM Planner, requesting how the proposal meets the definition of used building material retail outlet:

The Business of a "Used Building Material Retail Outlet" will meet the LUB definition of "...land and/or buildings or part of a building where C&D are sorted and available for resale with incidental and minimal alteration of the materials and where activity primarily occurs inside building."

C&D materials will be brought into a receiving area of the business where they will be sorted by type of material. Because some of the materials are large in size and there are many types of products several outside storage areas will be constructed for material sorting. Materials that are ready for immediate retail sale will be separated from materials that need minimal alteration, some activity will take place inside the building and some will take place in the outdoor area. Many of the materials will be altered from inside the building, and all retail sales will be conducted from inside the building.

[Exhibit K-4, p.32]

[97] This was followed up with a further question and Mr. Bellefontaine's subsequent response:

1. **Can you please confirm how the business activity "primarily occurs inside a building"? Where there is both an outdoor and indoor area for this business, it is not yet clear how the proposal meets that part of the definition.** A large amount of C&D materials are weather sensitive and must be protected from the elements. As a result these materials will be placed in the building area where they will be sorted and altered in creating a resale product. However, we may receive large heavy items which will require sorting and alterations to be completed in the outside area, We expect 70% to 80% of

sorting and altering will take place inside the building. Sales will also take place inside the building. [Emphasis added]

[Exhibit K-4, p.31]

[98] Further, Mr. Bellefontaine testified that insulation, drywall and ceiling tile are weather sensitive and could not be stored or altered outside, reemphasizing that 70% to 80% of that type of activity will take place inside the building. As for activity that would not take place in the building, Mr. Bellefontaine described it as:

A. If you got a large, large beam ... and I'm talking, you know, 30-foot beams. We do run them on ... we do run across them on occasion. These beams you'd need to maybe do a slight alteration outside. So, if you had a big steel beam and you had a bend into it you might want to cut it in two and make two ten-feet with it. Those are the kind of things that you would use the equipment and the shear to cut these outside.

Q. Okay.

A. Or to cut and torch or whatever the case is.

[Transcript, p.33]

[99] In his report, Mr. Audas expressed some skepticism on the percentage of items that will be sorted and altered inside the building, suggesting that it did not appear to be consistent with the site plan, which confirms that the areas for outside storage and sorting far exceed the 6000 square feet of indoor space. He also felt that the design of the building was very limited and that there were no elevation drawings which outlined the height and design of the building.

[100] Mr. Audas concluded that the combination of outdoor activity, such as the outside receiving/storage area, the weigh scale and the equipment used, did not support a retail outlet which primarily occurred inside the building:

...the equipment proposed and whether the activity would occur primarily inside a building. The proposal seemed to be similar (aside from a retail aspect) to that of a Construction and Demolition (C & D) processing facility. All arriving customers would have to stop at the scale house to speak to a trained employee at check in. This seems unusual for a retail enterprise and I am not aware of a retail operation which conducts a vehicle inspection prior to entering. C & D processing facilities do operate in this manner, have a weigh scale, a check in, and an inspection of the material prior to entering the site. A vehicle weigh scale is required at check in for a C & D processing facility because customers are charged a tipping fee based on the weight of the materials brought to the facility.

A typical building material outlet offers item for sale at a noted price. There may be larger items such as windows, doors, appliances and landscaping material which are heavy and awkward. These may need to be ordered or require delivery to get the merchandise to the intended destination. At a used building material retail outlet, one would typically expect to find an inventory of used building materials such as doors, windows, plumbing fixtures, light fixtures, cabinets, hardware, banister rails and spindles, fireplace mantels, and flooring. These materials would most likely be salvaged from dismantling or renovations. Renovators Resource Inc. in Halifax would be an example of a used building material retail outlet. This retail operation is within a building and has used building material available for sale to the public. There is not a weigh scale, or a large storage yard associated with this operation.

A vehicle weigh scale seems to be more of an industrial enterprise as opposed to a retail operation. At page 30 of the Record, the Applicant provides a list of examples were (sic) scales would be found. Most of the businesses on the list relate to industrial or scrap metal type uses. None of the examples provided were used building material retail outlets.

The definition of a used building material retail outlet allows for C & D materials to be sorted and minimally altered, this definition does not provide the ability for a retail outlet to receive mixed loads of C & D materials such as those that would be permitted at a C & D processing facility or transfer station. Used building material retail outlets do not sort retail loads of "construction and demolition debris" but rather focus on building materials that require only minimal alteration.

[Exhibit K-9, Tab 3, p.3]

[101] Mr. Audas' decision contrasts with the decision of Ms. Gempton, who stated in an email to Mr. Bellefontaine on February 7, 2018:

I've had a chance to review with Erin and Sean, and from your description, it appears that the business is primarily occurring within the building.

[Exhibit K-4, p.27]

[102] In her report, Ms. Tsang wrote that a proposed land use cannot be determined to occur inside or outside a building, based on a site plan alone. She stated:

...One must look at all the components of land-use activity. As I provided on page 2 and page 3 of my August 22, 2018 letter to HRM, I explained how and where the land use activities would occur. The building would contain the primary land use activities of: storage and display of items for sale, area for minimal alteration, business office, files, customer sales and service, staff area, and washrooms. The outdoor area is for parking, sorting, minimal alteration.

This land use involves items for sale that are very large in size. There may be 35 foot long metal beams that need a large outdoor area to maneuver. It is standard practice in retail sales to sort and transfer items that are for sale, thus the sorting area for selling large and heavy items and the parking and maneuvering area would require a larger than normal area than would a typical retail operation.

It is not uncommon for outdoor areas to be larger in area than a building footprint. This is very common with parking areas and outdoor storage and outdoor display areas for commercial buildings, or parking lots for multiple unit buildings. Sometimes outdoor

storage and outdoor display areas can be as large or larger than the buildings they are associated with. Parking, outdoor storage, and outdoor display are secondary components of a land use are not considered to be the primary land use. In this case, Kiann Management is proposing a land use that entails retail of C&D material and incidental and minimal alteration as its primary components. The retail and most of the alteration will be taking place indoors, along with other secondary components mentioned above. On the whole, more of the land use components are occurring indoors than those occurring outdoors.

[Exhibit K-10, p.4]

[103] Mr. Audas also reasoned that the equipment proposed, such as excavators and loaders, are generally used outside, in the fenced yard, which, in his opinion, means that the operation will not be occurring inside the building.

[104] Ms. Tsang explained that regardless of whether the excavators and loaders will be used indoors or outdoors, equipment is not the deciding factor of determining the land use.

[105] In the Appellant's submissions, basing the refusal on a belief that the activity would not primarily be occurring within the building was incorrect. The Development Officer's only stated basis for his belief was the presence of certain types of equipment and the size of the yard. Counsel further submitted that Mr. Bellefontaine had provided a credible and reasonable explanation for his assertions that 70% to 80% of the sorting and altering activity will take place inside a building, and for the large surface area required for passive storage of large pieces of building materials.

[106] On the other hand, in her submissions, Counsel for HRM disputed Mr. Bellefontaine's suggestion that 70% to 80% of the activity would take place inside a building, because several factors raised were "red flags" and suggested otherwise, including: weigh scales; outdoor receiving area; multiple outdoor storage areas; outdoor area for sorting and alteration; large equipment for outdoor use (excavators, loaders and

shears); overall size of the outdoor storage/receiving area; fencing; loading and weighing of vehicles outdoors.

[107] Further, in the Respondent's submissions, Counsel referred the Board to the comments of another one of the speakers at the evening session, Michael Thomas. Based on his professional experience as an oil heat system technician for 39 years, he echoed Mr. Audas' view that a retail store, such as Happy Harry's, was an example of a used building material retail outlet, and where one would not expect to see weigh scales, excavators, loaders and shears at such locations.

[108] Like Ms. Mosher, Mr. Thomas was not qualified as an expert witness able to give opinion evidence, nor was he made available for cross-examination. Accordingly, the Board affords little, if any, weight to his testimony.

[109] When looking at whether the activities are occurring primarily within a building, Counsel for HRM urged the Board to view the outdoor storage areas as an active, as opposed to a passive use. She said consideration needs to be given to the application as a whole, not just the assertions of the Appellant.

[110] Conversely, it is the Appellant's position that activity should be mainly occurring in the building – that somewhat more activity should be occurring within the building than not. While "activity" is not defined in the LUB, Counsel submitted, by definition, "activity" is defined as "the state or quality of being active." Further, Counsel submitted that it is the time spent on performing an action (in the state of being active), rather than the surface area of the space in which that action occurs, or the number of actions, that is determinative.

[111] The Board is persuaded by Mr. Bellefontaine's evidence and his logical explanation that Kiann intends to conduct activity primarily within a building. The Board is also persuaded that Mr. Audas was incorrect to consider that the presence of equipment such as excavators and loaders, along with the presence of a large outdoor yard, indicated that Kiann's proposal did not meet the definition of a used building material retail outlet.

Relationship to C&D Strategy

[112] In this section of its Decision, in determining whether Mr. Audas' permit refusal complies with the LUB, the Board explores where and how a used building material retail outlet fits in the HRM C&D Strategy.

[113] The LUB defines several terms that are relevant to this appeal:

2.11B CONSTRUCTION AND DEMOLITION MATERIALS, hereinafter referred to as C&D Materials, means materials which are normally used in the construction of buildings, structures, roadways, walls and landscaping features, and includes, but is not limited to, soil, asphalt, brick, concrete, ceramics, porcelain, window glass, mortar, drywall, plaster, cellulose, fiberglass fibres, lumber, wood, asphalt shingles and metals. (RC-Sep 10/02;E-Nov 9/02)

[Exhibit K-2, Tab 2, p.2]

2.11C CONSTRUCTION AND DEMOLITION MATERIALS DISPOSAL SITE, hereinafter referred to as a C&D Disposal Site, means land and /or buildings or part of a building where C&D Materials, or Residue remaining from C&D Processing Facilities, are disposed of by land application or burying, and shall not include the use of inert C&D materials, approved by Provincial Department of the Environment and Labour, for site rehabilitation within gravel pits and quarry operations licensed by the Province of Nova Scotia. (RC-Sep 10/02;E-Nov 9/02)

[Exhibit K-2, Tab 2, p.2]

2.11D CONSTRUCTION AND DEMOLITION MATERIALS PROCESSING FACILITY, hereinafter referred to as a C&D Processing Facility, means lands and/or buildings or part of a building used to sort, alter, grind, or otherwise process, C&D Materials for reuse or recycling into new products, and shall not include a Used Building Material Retail Outlet, an operation that processes inert C&D Materials on the site of generation and the material processed does not leave the site except for inert C&D Materials described in Sub-Section 9(3) of HRM C&D License By-law (L-200 and L-201), de construction of a building on site, a municipal processing facility for used asphalt and concrete, or facilities associated with reclamation of a gravel pit or quarry operations licensed by the Province of Nova Scotia or forestry manufacturing processes. (RC-Sep 10/02;E-Nov 9/02)

[Exhibit K-2, Tab 2, pp.2-3]

2.11E CONSTRUCTION AND DEMOLITION MATERIALS TRANSFER STATION, hereinafter referred to as a Transfer Station, means land and/or buildings or part of a building at which C&D Materials are received and sorted for subsequent transport to a C&D Disposal Site or a C&D Processing Facility. (RC-Sep 10/02;E Nov 9/02)

[Exhibit K-2, Tab 2, p.3]

2.62A USED BUILDING MATERIAL RETAIL OUTLET means land and/or buildings or part of a building where C&D Materials are sorted and available for resale with incidental and minimal alteration of the materials and where activity primarily occurs inside a building. (RC-Sep 10/02;E-Nov 9/02)

[Exhibit K-2, Tab 2, p.10]

[114] The Development Officer, Mr. Audas, concluded that the operation for which Kiann sought a development permit was a C&D materials processing facility. As noted earlier in this Decision, the definition of such a facility specifically excludes a used building material retail outlet, which the Board concludes must mean there is a difference between such uses.

[115] There are some common concepts in the two definitions that Mr. Audas considered, such as sorting and altering; the uses, by definition, deal with the same kind of materials; and, there is a reference in both to the reuse of products. The Board notes, however, that the evidence of Mr. Bellefontaine was clear that the operation would not be recycling materials and not creating new products. New products are only referred to in the definition of a C&D materials processing facility. The Board sees a material difference between recycling and reusing materials and notes that Mr. Bellefontaine described the minimal alteration of materials.

[116] Based on its interpretation of the LUB, the Board finds that Kiann intends to operate a used building materials retail outlet at the property. If, however, there is any ambiguity about what constitutes a used building material retail outlet, then the Board considers that, guided by the Court of Appeal, as noted earlier in this decision, it can look to the MPS for guidance in interpreting the LUB.

[117] Because the definitions referred to in Paragraph 113, including the definition of a used building material retail outlet in Section 2.62A of the LUB, were adopted at the same time as the MPS policies on the Construction & Demolition Waste Management Strategy, the Board can use the policies to inform its understanding of the intention of the LUB. Further, the Board finds that it can look to the preamble to the MPS policies in question to provide context for the policy. A preamble identifies a problem which the LUB is intended to solve, as stated by Oland, J.A., in *Can-Euro Investments Ltd. V. Nova Scotia (Utility and Review Board)*, 2008 NSCA 123:

[47] Moreover, the statement regarding access upon which Can-Euro relies is not found within Policy H-18 itself, but only in its preamble. A preamble to a policy may provide context for understanding the policy; however, it is the policy itself that guides council. In *Kynock v. Bennett*, 1994 CanLII 4008 (NS CA), [1994] N.S.J. No. 238 (Q.L.), 131 N.S.R. (2d) 334 (C.A.), the respondent referred to the preamble to a policy in arguing that the Board failed to consider a factor. This Court stated:

[43] With respect, the council was required to have regard to those matters set out in Policy P-24 in determining whether or not to approve a quarry operation in a mixed use area. The preamble merely identified what problems have given rise to the need for controls but it is Policy P-24 which spells out the matters that Council is to consider. ...

See also *King's (County) v. Lutz*, 2003 NSCA 26 at ¶ 50.

[48] In my view, in determining whether Council's approval of the Agreement reasonably carries out the intent of the MPS, the Board did not commit any error of law in its approach to the weight, if any, to be given to the preamble to Policy H-18.

[118] The Board has accepted this view of a preamble in *Re Rovers*, 2014 NSUARB 59, at paragraph 197.

[119] The goals of the waste management strategy adopted by Council in 2002 are set out in the MPS preamble, reflecting the earlier Integrated Waste/Resource Management Strategy:

On January, 1998 Regional Council approved the following objectives in support of implementing an HRM-wide C&D Waste Management Strategy:

(i) maximize diversion from landfill through recycling of construction and demolition debris in keeping with the Halifax Regional Municipality Solid Waste Resources Strategy;

(ii) increase economic activity and value added processing through recovery of construction and demolition debris;

(iii) provide an opportunity to properly dispose of construction and demolition debris that cannot be recycled; and

(iv) minimize environmental, land use and nuisance impacts from the operation of construction and demolition debris transfer, processing and disposal operations.

The C&D Strategy is in keeping with the overall objectives of the IWMS. Its implementation requires that municipal planning documents recognize the unique land use requirements of the C&D industry and that a specific Licensing By-law is required to address operational issues. The intent is to provide a comprehensive regulatory framework that is applied fairly and consistently throughout HRM.

[Exhibit K-2, Tab 1, p.34]

[120] The preamble of the MPS goes on to identify, at page 35, three types of C&D operations which must be accommodated through regulation, i.e., C&D transfer stations; C&D processing operations; and C&D disposal operations. Notably, this does not include a used building material retail outlet. The preamble indicates that the three forms of operations can only occur in certain areas:

Operational and compatibility considerations related to C&D facilities require they not be located within residential, community facility, or environmentally sensitive designated areas. To minimize compatibility concerns, the Land Use By-law will permit C&D facilities only in areas designated industrial or mixed use, where the density of residential development, types of uses permitted, and potential for land use conflicts is minimized. Further, as the potential impact of C&D operations on adjacent lands depends, to a degree, on the type of C&D operation, the Land Use By-law provisions will recognize individual characteristics of the three forms of C&D operations.

[Exhibit K-2, Tab 1, p.35]

[121] MPS Policy 46-D specifically states that "...the Land Use By-law shall clearly define each type of operation..." (Emphasis added). The Board reads the definitions noted in Paragraph 113 of this Decision, and the provisions of the LUB in Parts 22A, 22B, and 22C, as referring only to the three types of C&D operations identified in the preamble. These do not include a used building material retail outlet, which the Board finds is not a C&D operation. The Board considers that HRM, in adopting the MPS and the LUB, which is to carry out the MPS, did not see a need to regulate a used building

material retail outlet in the same way as any of the three C&D operations. Parts 22A, 22B, and 22C of the LUB do not apply to the Appellant's proposed business, which is governed by Part 14 (RE Zone) of the LUB, in particular, sections 14.5, 14.6 and 14.7, which address specific requirements for lot size, frontage, side yards, and building height.

[122] There is no statement in the MPS which indicates that a used building material retail outlet can only exist in a specific zone. The preamble says that "...new C&D transfer and processing operations will be considered by rezoning." As a processing operation clearly excludes the used building material retail outlet, it is implicit that rezoning does not apply to such an operation. The Board concludes that in the RE Zone (which applies to the Appellant's property and proposed location), where the C&D operations are expressly excluded, a used building material retail outlet is a permitted use, pursuant to Section 3.5(b) of the LUB.

Relationship to Other Regulatory Processes

i) C&D Re-Zoning

[123] The MPS strategies and policies regarding C&D materials set out the scheme that was contemplated. The problem to be solved was the diversion of materials from landfill sites. The policies do that through provision for various types of diversion as described in Policies P-46F, P-46G, and P-46H. The LUB then sets out how this is to be accomplished, through Parts 22A, 22B and 22C. The used building material retail outlet is not excluded from the RE Zone as the C&D operations are. The policies require rezoning if such land uses are to occur in the zone. The Board considers this a recognition by HRM that the uses are different. After reviewing the evidence in this matter, the Board considers that there is a hierarchy of treatment for C&D materials, based on the intensity

of use. The used building material retail outlet is the lowest form – reuse of materials either directly or with minimal alteration. The next most intensive use is the transfer for sorting, after which the materials move on to either the next level, processing into new products or recycling, or at the most intense level, for disposal in the appropriate site. Because the used building material retail outlet is what the Board considers the least intensive form, it has the lightest regulatory requirements, based on the HRM planning documents.

ii) Site Plan Approval

[124] Ms. Tsang agreed on cross-examination that, in her opinion, because the operation proposed by Kiann is permitted “as of right” in the RE Zone, no site plan approval was required. In Section 22A.5, the LUB states that “All C&D operations are subject to approval of a site plan” and specific requirements are described. Similar provisions appear in Sections 22B.6 and 22C.6 of the LUB. In addition, Policy P-46I states:

P-46I Further to Policies P-46F to P-46H, inclusive, operations shall be regulated under a Site Plan Approval Process in order to minimize land use impacts. Siting standards shall be set out in the Land Use By-law to address such items as, but not limited to, screening, access, outdoor storage, maintenance, stormwater management, lighting, signage, and landscaping measures.

[Exhibit K-2, Tab 1, p.38]

[125] There is no such requirement in Part 14, which addresses the RE Zone. Policies P-46F to P-46H are specifically for the three identified types of C&D operations.

[126] Turning to the MPS for guidance, the Board observes that the preamble to Policies P-46F and P-46G states that “...the site plan approval process will be used for all C&D operations... .” While HRM acknowledges in its submissions that a used building material retail outlet does not require a site plan approval, the activities to be carried on

at the proposed location, which Mr. Audas interpreted as C&D materials processing, do not mean that site plan approval would be required as an added regulatory measure.

[127] The lack of such controls was a concern of some of the speakers at the evening session of the hearing. The Board, however, concludes that the requirement for the site plan approval process does not apply to the used building material retail outlet and that HRM did not consider it necessary to regulate such a use in that way. HRM imposed this requirement on C&D operations only.

iii) By law L-200

[128] The Board notes that HRM By-law L-200 *Respecting Licensing of Construction and Demolition Materials Recycling and Disposal Operations* includes the same definitions as in the LUB for the three types of C&D operations and for a used building material retail outlet. Ms. Tsang testified that the requirements of By-Law L-200 do not apply to such an outlet, although again, evening session speakers expressed concern about this lack of regulatory oversight or control.

[129] The Board observes that although there is a reference, by a definition, to a used building material retail outlet, there are no provisions in By-law L-200 directly applicable to such an outlet. Unlike the provisions for licensing, insurance and bonding of C&D operations, and the requirements for a site plan and an operational plan, HRM imposed no requirements on the outlet. This is so, even while the definition clearly recognizes that the outlet is dealing with C&D materials.

[130] While the Appellant's operation may have a scale, which, implicitly, in s. 8 of the By-law would allow for the weighing and recording of the weight of the materials arriving or leaving a C&D site, the existence of a scale for recordkeeping does not make

the Appellant's proposed operation a transfer, processing, or disposal operation as defined in the By-law.

[131] The Board concludes that HRM did not see the need for regulation of a used building material retail outlet in the same fashion as a C&D operation.

[132] Counsel for HRM explored by-law enforcement with Ms. Tsang:

Q. Okay. At page 7, again of your rebuttal report, the third paragraph down, the first sentence here. You say:

If HRM were concerned that the applicant was trying to use the development permit application as a way to illegally operate a C and D processing facility, they have the means to prevent that from happening through the by-law enforcement process.

A. I see that.

Q. You see that? Would you also agree that a way to prevent someone from illegally operating a C and D processing facility is for a development officer to do their due diligence to ensure that the requirements of the LUB are met so it's not a C and D facility from the get-go?

A. No, you don't use ... if the permit was for a processing facility, then yes, the development officer should refuse it. But you ...

Q. Mmm.

A. But ... but trying to assume it's not what the applicant has said it would be is not ... is not the development officer's job, to try to prevent ...

Q. Mm-hmm.

A. ... an ille- ... a potential illegal use later. The ... the Land Use By-law is not intended to preempt what may be illegal activity.

Q. Mm-hmm.

A. That's why there's an enforcement process after the fact. Illegal activity has to happen and then you enforce it.

Q. Mm-hmm. Those are my questions. Thank you.

[Transcript pp.120-121]

[133] On redirect examination, Mr. James followed up with Ms. Tsang:

Q. Okay. Now my friend in her closing question to you asked you whether the rejection of a development permit is an appropriate tool to prevent illegal behaviour, and you indicated it wasn't. Why do you say that?

A. Because it's a ... where do I begin? These by-laws are to lay out what you can do, and you apply and if you meet the rules you're supposed to get a permit and ... and the ... if you're ... if there's an illegal activity there's a whole separate process for dealing with illegal activities.

Now you know, the development officer's job ... if this application was a processing facility, then he'd have to say, No, it's a processing facility, you have to go through a re-zoning. Like, we've had ... you know, you don't assume that a person is going to break the law and then use this tool to prevent it. That's why there's a whole by-law enforcement section.

[Transcript, p.125]

[134] The Board agrees with Ms. Tsang's evidence. In dealing with a development permit application, it is not the role of a development officer to refuse an application which complies with the LUB to prevent the possibility of a breach of a by-law. Such an approach would be hypothetical at best.

iv) HRM Administrative Order 27

[135] Reference was made to an Administrative Order of HRM which enacts, as a policy of HRM, prohibition of certain materials which are banned from disposal in a C&D disposal site. It also provides for percentages of C&D materials to be recycled or diverted from disposal at increasing rates, starting in 2001.

[136] The Board sees nothing in the Administrative Order which impacts the granting of a development permit for a used building material retail outlet, except to the extent that materials coming to such an outlet would be thus diverted from disposal.

IX CONCLUSION

[137] After reviewing the evidence, the Board is persuaded that the Appellant has met the burden of proof on the balance of probabilities. The Board finds that the Development Officer's decision to refuse Kiann's application for a development permit for

a used building material retail outlet at its property does not comply with the LUB.
Therefore, the appeal is allowed, and the development permit is to be issued.

[138] An Order will issue accordingly.

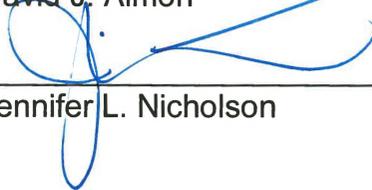
DATED at Halifax, Nova Scotia, this 23rd day of March, 2020.



Roberta J. Clarke



David J. Almon



Jennifer L. Nicholson