

DECISION

**2021 NSUARB 125
M10069**

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

-and-

IN THE MATTER OF AN APPEAL by **HALIFAX REGIONAL WATER COMMISSION**
from a decision of the Halifax Water Dispute Resolution Officer dated March 8, 2021,
respecting stormwater charges for property located at 265 Holland Road, Fletcher Lake,
Nova Scotia

BEFORE: Roberta J. Clarke, Q.C., Member

APPLICANT: **HALIFAX REGIONAL WATER COMMISSION**
John C. MacPherson, Q.C.
Heidi Schedler, Counsel

RESPONDENT: **JOANNE PULLIN**
On her own behalf

HEARING DATE: July 14, 2021

FINAL SUBMISSIONS: August 10, 2021

DECISION DATE: **October 12, 2021**

DECISION: **Appeal is allowed. Directions given to Halifax Water at Paragraph 63.**

Table of Contents

I	INTRODUCTION	3
II	BACKGROUND	4
	History of Stormwater Charges by Halifax Water.....	4
	Assessment of the Pullin Property	9
	Stormwater Charges to Ms. Pullin.....	10
III	ISSUE	11
IV	ANALYSIS AND FINDINGS.....	12
V	CONCLUSION	23

I INTRODUCTION

[1] Joanne Pullin, the owner of a property in Fletchers Lake, Halifax Regional Municipality, filed an appeal of stormwater charges from the Halifax Regional Water Commission (Halifax Water) to the Dispute Resolution Officer (DRO) of Halifax Water. Ms. Pullin's property is assessed by the Property Valuation Services Corporation (PVSC) as partly residential and partly commercial. It is, therefore, considered a mixed-use property.

[2] Halifax Water uses the PVSC assessment classification as the basis for determining the rate for stormwater charges. Ms. Pullin has been billed at the non-residential rate effective July 1, 2017. Previously, she was billed at the residential rate. Ms. Pullin's charges at the non-residential rate were substantially higher. The DRO allowed the appeal and directed Halifax Water to "calculate the Stormwater Charge bill separately for the residential and non-residential portions of the property."

[3] Halifax Water appealed the DRO's decision to the Nova Scotia Utility and Review Board, claiming the DRO had incorrectly interpreted Halifax Water's *Regulations*.

[4] The Board understood from Halifax Water's Notice of Appeal that about 3,800 customers could be impacted if the DRO's decision is upheld. Therefore, the Board decided to proceed with a public hearing of the appeal. Notice of the hearing was published in the Halifax Chronicle Herald; however, no persons intervened in the proceeding.

[5] At the hearing on July 14, 2021, the Board heard evidence from a panel of witnesses for Halifax Water as well as Ms. Pullin. At the close of the hearing, the Board

set a timeline for the filing of closing and reply submissions. Halifax Water filed the only submission.

[6] Under s. 78J of the Halifax Water *Schedule of Rates, Rules and Regulations (Regulations)*, approved by the Board, the appeal of a decision of the Halifax Water DRO is a *de novo* hearing. However, the complete DRO file was provided to the Board as an exhibit.

[7] The Board concludes that under Halifax Water's *Regulations* as amended effective July 1, 2017, two classes of properties are to be billed for stormwater service: residential and non-residential, and properties with both commercial and residential assessment are to be treated as non-residential. Applying the provisions of the Halifax Water *Regulations* and the principles of the *Interpretation Act*, the Board finds that Ms. Pullin was properly charged as a non-residential customer due to her property being assessed with a commercial as well as a residential component. The Board therefore allows the appeal. However, the Board directs that Halifax Water is to provide greater clarity on its website regarding the definition of these two classes and how stormwater charges are determined for mixed-use properties. Further, the Board observes that in the next rate application by Halifax Water, it would be useful to engage in discussion of the policies which have given rise to this system, with input from all stakeholders.

II BACKGROUND

History of Stormwater Charges by Halifax Water

[8] Prior to 2007, the Board regulated Halifax Water as a utility providing only water service. Up until that time, Halifax Regional Municipality (HRM) constructed and

maintained the sewage system (wastewater and stormwater) and sewage treatment facilities throughout the Municipality. HRM paid for the necessary expenditures to construct and maintain this infrastructure. Subsequently, HRM Council decided to transfer the responsibility for this infrastructure to Halifax Water, as was outlined in an agreement dated June 12, 2007. Halifax Water applied to the Board for approval of the transfer, and requested that the sewage rates, as approved by HRM, be approved by the Board as interim rates. The transfer and interim rates were approved by the Board, effective August 1, 2007. The interim rates included a combined rate for wastewater and stormwater.

[9] In 2012, Halifax Water submitted a Cost of Service (COS) Manual for water, wastewater, and stormwater service, as directed by the Board in a 2011 cost of service proceeding. One of the major differences from the current practice, as proposed in the 2012 COS Manual, was the introduction of a separate stormwater charge. At that time Halifax Water's costs to operate the stormwater system were recovered by a combined wastewater/stormwater rate that included a volumetric charge based upon water consumption. The COS Manual noted that this current methodology does not provide a direct relationship between the amount of stormwater entering the system and the recovery of costs to operate the system.

[10] Halifax Water submitted a rate application to increase rates for water, wastewater, and stormwater service in 2013, based upon the 2012 COS Manual. The COS Manual proposed a new charge for stormwater, based upon the impervious area of a property. It was noted that the impervious surface reduces the natural infiltration of water and therefore is used as a billing determinant for the quantity of stormwater entering

the system. As a part of the application, Halifax Water noted that while other utilities base stormwater charges on both pervious and impervious area, this is significantly more complex and costly to implement. The measured impervious area is based upon satellite imagery. The 2012 COS Manual noted that as there are large numbers of residential properties, with relatively small variations in impervious area, a system wide average residential impervious area would apply to these properties, while all other properties (non-residential) would be charged based upon actual impervious area.

[11] As a part of its decision in the 2013 matter, the Board approved Halifax Water's *Schedule of Rates, Rules and Regulations for Water, Wastewater and Stormwater Services* (Schedule), effective July 1, 2013, with a second rate increase approved effective April 1, 2014. The rates approved included separate rates for each of water, wastewater, and stormwater service, with stormwater rates based upon impervious area, as described above. All residential customers paid a uniform charge, which was based upon the average impervious area for residential properties, as calculated from satellite imagery. non-residential customers paid a charge based upon a site generated flow rate per square metre of impervious area on the property. While not specifically set out in the Schedule, for the purpose of stormwater billing, Halifax Water classified a property as residential or non-residential based upon the property's highest assessment value completed by PVSC.

[12] After a couple of years of experience in implementing and administering the new stormwater rates, Halifax Water conducted a review of the 2012 COS Manual and rate design methodology for stormwater service, which included a comparison to industry norms and best practice. Based upon the results of the review, Halifax Water proposed

modifications to the COS Manual and rate design in 2016, which were reviewed by the Board and approved after the submission of a compliance filing, in September 2016. At the time of the application, Halifax Water raised the possibility of billing residential customers on a “tiered” basis, which the Board considered as a more equitable way to bill residential customers, than the current uniform charge applied to all residential stormwater customers.

[13] In October 2016, Halifax Water applied to the Board for approval of adjustments to its rates for stormwater service and to its rules and regulations pertaining to stormwater service (M07731). Included in the proposed rate changes was the introduction of a tiered rate structure for residential customers. Five tiered rates were proposed, based upon the amount of impervious area on a property, with the properties with more impervious area (higher tier), paying more than those with less impervious area. It was further proposed that the rate for non-residential customers include the clause “...provided that where a part of a property is located outside the Commission’s Stormwater Service boundary, that part of the property located outside the boundary is exempt from the charge.” As a part of the application, Halifax Water filed its COS Manual with proposed changes because of updated stormwater data and customer numbers collected since the previous version was approved by the Board, as well as a few minor changes.

[14] The 2016 application included a Parcel Classification Decision Model (PCDM) that outlined a revision in the approach that Halifax Water proposed to use in the determination of whether the stormwater charge should be applied to a land parcel, and if so, the basis of the charge. The parcel data used in the PCDM comes from assessment

data from the PVSC and HRM billing data. In response to an information request during the review of the application, Halifax Water provided an explanation as to how it uses the PCDM for various land parcel classifications, which included the following, relating a land parcel with any assessed commercial value:

If a parcel has any commercial assessed value, it is coded "MICI" (Multi-Unit, Institutional, Commercial, Industrial) and for stormwater billing purposes is treated as a Non-Residential Customer, and billed for service if the stormwater service criteria are met.

[Exhibit H-3, IR-18, M07731]

[15] This represented a change from the practice of classifying a property for the purpose of stormwater billing based upon the property's highest assessment value from PVSC.

[16] The Board approved the 2016 rate application in a decision dated April 12, 2017. The Board's findings included the following:

The Board finds that the proposed HRWC rates (and the methodology for determining these rates) for Site Related Flow Charges for residential and non-residential customers are reasonable and appropriately address the related revenue requirements, and orders that they be implemented.

[2017 NSUARB 53, para. 179]

[17] The *Rates, Rules, and Regulations* for the provision of stormwater service were approved effective July 1, 2017. The PCDM, and definitions for residential and non-residential customers, pertaining to stormwater service, were not included in these approved rates, rules, and regulations. While there have been revisions to the Schedule pertaining to water and wastewater service since that time, the rates, rules, and regulations currently in place for the provision of stormwater service are essentially what was approved effective July 1, 2017.

Assessment of the Pullin Property

[18] Ms. Pullin's property is a large parcel fronting on Holland Road and extending about 5700 ft. in depth to the east. Ms. Pullin confirmed that she has operated a "doggy daycare" on the property, although this has now ceased. From time to time, she also bred dogs as a hobby. In addition to her main profession, she undertakes some home-based businesses.

[19] Ms. Pullin leased a portion of her property to allow the installation of a cell or telecommunications tower. Ms. Pullin filed a partially redacted copy of the lease agreement to satisfy Undertaking U-3 given at the hearing. The agreement is dated June 21, 2011, and covers 10,000 sq. ft. of land, together with an access road which the lease says is "to be constructed by the Tenant" and the space for cables and wires. Ms. Pullin testified that the lease has been renewed and is in place. She also said that she had constructed the road.

[20] Ms. Pullin said the tower is on a concrete pad and is located uphill from her home, but not near the rear of her property. The sketch which she provided in response to Board IR-3 only shows the extent of her property as far as the tower's location. Photographs attached to email correspondence from PVSC to Ms. Pullin provided in response to Board IR-1 show a large, wooded, area beyond the tower.

[21] The email from PVSC to Ms. Pullin states "...the commercial component relating to the assessment record for ([her civic address]) is there to identify the telecommunication tower that is located on your property." It shows the commercial value to be a relatively small component of her assessment.

[22] The lease for the tower provides that the tenant will pay any difference in property taxes resulting from the placement of the tower, and any electric utility charges which may be incurred. It contains no reference to stormwater charges.

Stormwater Charges to Ms. Pullin

[23] Ms. Pullin was originally charged for stormwater service at the residential rate beginning in 2013. In 2017, she received a bill showing a significantly higher charge. This resulted from the change which Halifax Water says was approved by the Board in its 2016 decision. Once Ms. Pullin became aware of the amount being billed by Halifax Water, she contacted the utility. The record shows that she contacted Halifax Water's customer service on March 27, 2018, and queried the change. The notes from the customer service representative indicate:

Joanne wondering why her bill went from \$33.85 to \$820 - this property is her house which she runs a dog daycare out of, not a commercial property. Said there is a cell phone tower on the prop that was put in by Eastlink, wondering if that is the cost of the increase? Please contact her at [phone number]

[Exhibit H-3, pp. 2-3]

[24] The record also shows that Ms. Pullin contacted Halifax Water's customer service line in March 2019 with the same query when the balance owing had increased. It appears that Ms. Pullin was not receiving a satisfactory response to her complaints, as on May 19, 2020, another customer service note indicates:

Appeal originally submitted in March 2018. She was disputing the increase - from \$33.85 to \$820, now \$1063.30. This is [sic] property is her house which she runs a dog daycare out of, not a commercial property. Said there is a cell phone tower on the prop that was put in by Eastlink, wondering if that is the cause of the increase? Exp HRM has prop registered as commercial. She is not disputing the charge altogether. She advised she had culvert and ditch but has not been maintained by HW. She also advised no SW runs from her prop into HW infrastructure, rather water runs into her property. Please contact her at [phone number].

[Exhibit H-3, pp. 7-8]

[25] By letter dated July 17, 2020, Halifax Water responded to Ms. Pullin. The letter stated that the investigation by Halifax Water confirmed that she receives

stormwater service from the utility. The letter also stated that as the property has both commercial and residential assessment, it is considered non-residential for stormwater purposes. A map showing "the general path of stormwater from [your] property to the Halifax Water stormwater system" was attached.

[26] The July 17, 2020, letter went on to state:

To further address your question pertaining to the cell tower located on your property, it would appear that the access road and cell tower site do make up a considerable portion of impervious area located on your property. We have attached the impervious area mapping for your property for your reference.

[Exhibit H-4, Attachment B, p. 1]

[27] Shiju Mathew, the Director of Metering and Billing at Halifax Water, testified that, because of Ms. Pullin's contact, in 2020 a review was done to determine the correct amount of impervious area for which she was charged. Review of the extent of impervious area resulted in a reduction of the area based on which Ms. Pullin was charged. As a result, Ms. Pullin was charged a lower amount, which she continued to dispute.

[28] By that time, Ms. Pullin's stormwater charges amounted to over \$2,900 including arrears. The July 17, 2020 letter advised her of the route to appeal through the DRO, which she subsequently did.

III ISSUE

[29] The issue before the Board is the same issue that was before the DRO, i.e., is Halifax Water correct in charging Ms. Pullin for stormwater service at the non-residential rate? For the reasons discussed below, the Board finds the answer is yes.

IV ANALYSIS AND FINDINGS

[30] The DRO considered Ms. Pullin's complaint. He concluded that her property "is draining to the HRWC system" and decided that Halifax Water had not followed its *Regulations*. The DRO ordered that "HRWC is to calculate the Stormwater Charge bill separately for the residential and non-residential portion of the property." This would result in an adjustment to Ms. Pullin's billing. Halifax Water appealed that decision.

[31] The Board's role in this appeal is to determine whether Halifax Water is acting in compliance with its approved *Regulations* regarding charges for stormwater service by billing Ms. Pullin as a non-residential customer. Because s. 78J of the Halifax Water *Regulations* provides that the appeal of a DRO decision is a *de novo* appeal, the Board hears the matter anew and is not bound by any findings of the DRO. Thus, both Halifax Water and Ms. Pullin were entitled to bring the same evidence or new evidence before the Board in this proceeding.

[32] The burden of proof to satisfy the Board is on Halifax Water. The Board must be satisfied on the balance of probabilities, which means that it is more probable than not, that Halifax Water was following its *Regulations* in billing Ms. Pullin as it did. If the Board is satisfied, then the DRO decision falls; if the Board is not persuaded, the DRO decision stands.

[33] The Board notes that under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended, a public utility must submit its regulations to the Board for approval (s. 65) and may only charge the rates or other charges that are set out in schedules approved by the Board (s. 71). Halifax Water is such a utility for the provision of stormwater

according to s. 19 of the *Halifax Regional Water Commission Act*, S.N.S. 2007, c. 55, as amended.

[34] The current schedule of *Regulations* for Halifax Water includes the following provisions regarding stormwater, based on the Board's decision on the utility's 2016 application (2017 NSUARB 53):

Rates for Stormwater Service

- 7.(1) Bills for Stormwater Service, other than those charges for a specific one-time Service, shall be issued on a semi-annual or annual basis, and levied based on Impervious Area calculated and rounded to the nearest 10m².
- (2) Effective April 1, 2018 HRM shall pay annually to the Commission for Stormwater Service associated with the HRM owned Street Right of Way (ROW) the amount of \$3,835,012 calculated based on the Impervious Area within the HRM owned ROW.
- (3) Non-Residential Customers shall pay a Site Related Flow Rate of \$0.135 per m² of Impervious Area on and after July 1, 2017, Impervious Area being measured through satellite imagery, provided that where a part of a property is located outside the Commission's Stormwater Service Boundary, that part of the property located outside the Boundary is exempt from the charge.
- (4) Residential Customers shall pay a Site Related Flow Charge which shall be based on the impervious area of their property, provided that properties with impervious area falling within a tier set out in this subsection shall be subject to the Standard Annual Charge for that tier, billed at such frequency as HRWC may determine.

Table 4A. Rates for Stormwater Service

Tier	Tier Parameters (Based on Impervious Area m2)		Rate
	From	To	
1		Less than 50	\$0
2	50	200	\$14
3	210	400	\$27
4	410	800	\$54
5	810	Or more	\$81

- (5) Properties that are within the Commission's service boundary and do not receive Stormwater Service from the Commission are exempt from the Site Related Flow Charge.

- (6) Properties that have impervious area less than 50 m² are exempt from the Site Related Flow Charge.
- (7) Notwithstanding (5) and (6), a Residential or Non-residential property that has a Driveway Culvert, is deemed to be receiving stormwater service and will be charged therefor in accordance with Tier 2 as set out in subsection (4).

[Exhibit H-4, pp. 13-14]

[35] The first question the Board addresses is whether Ms. Pullin is receiving stormwater service from Halifax Water. While this was apparently not an issue in the DRO appeal, at the hearing, Ms. Pullin appeared to suggest in her opening statement that she receives only partial stormwater service. She said:

...I guess my issue is they say they give me stormwater services. They are only prepared to give me stormwater services on any culverts at the frontage of the property of 100 feet. It doesn't give me any services beyond that so if there is a blockage in the rivers in any culverts further up on the property they don't service that.

[Transcript, p. 14, lines 8-13]

[36] In her testimony, Ms. Pullin described a situation regarding the properties to the rear, and possibly the west of hers, where beavers have dams which cause stormwater runoff onto her property and into the culvert under her driveway which causes flooding. The Board understood her to imply that she had to deal with this, and that Halifax Water did not provide any service.

[37] Halifax Water's evidence included a copy of a letter to Ms. Pullin dated June 6, 2014, in which the utility stated:

We have investigated the issue you have raised and determined that stormwater from your property flows to a stream which flows in a southerly then westerly direction into a Halifax Water culvert under Holland Road. This confirms that you are receiving stormwater service from Halifax Water and are therefore required to pay the Stormwater Charge for Site Generated Flow.

[Exhibit H-3, p. 1]

[38] In the absence of any persuasive evidence to the contrary, the Board finds that Ms. Pullin's property is receiving stormwater service from Halifax Water.

[39] The Board considers the evidence is clear that Ms. Pullin's property is classified for PVSC assessment purposes as both commercial and residential. The existence of the daycare for dogs, the breeding of dogs, and the other home-based occupations of Ms. Pullin at the property is irrelevant. The Board finds, based on the communication between PVSC and Ms. Pullin, that the reason for the commercial element of her assessment is the existence of the cell tower. Whether the assessment is correct is not an issue for the Board in this proceeding.

[40] Ms. Pullin was originally charged for stormwater service as a residential customer. Mr. Mathew explained that in the 2013 application, the decision was made to use the highest value component of a property's PVSC assessment as the basis for determining whether it is residential or non-residential. At that time, and even currently as the Board observes, the residential component of Ms. Pullin's assessment was higher. Mr. Mathew said that a change was proposed in the 2016 application so that if a property had any commercial assessment value it would be treated as non-residential.

[41] Kenda MacKenzie, the Director of Regulatory Services for Halifax Water, explained the reason for the change:

Yes and for the rationalization and the purpose around making that change as we were in the process of reviewing everything that was in place in 2013 and going forward to the Board with our application update, one of the things that was highlighted was on a property that would have a portion of non-residential and that would be commercial and industrial institution [sic] uses on it, generally those properties would generate more peak stormwater flow and therefore have a higher impact on the downstream stormwater system.

And therefore result in Halifax Water incurring additional or increased operation maintenance costs and having to require higher capacity infrastructure downstream. And so to provide more equity in assigning the charges it was determined and proposed that any property in a mixed assessment...would be assigned a non-residential charge to recover and address the increased costs for operating and maintaining those systems.

[Transcript, p. 29, lines 1-17]

[42] Ms. MacKenzie went on to explain that this change was brought to the Board in a two-step process; the first step was a 2015 application which addressed the Cost of Service Manual changes using the policy changes and the assignment of impervious area to residential and non-residential properties. She said that application based the revenue to Halifax Water on what was anticipated from non-residential properties. The second step was in the subsequent application in 2016 where the PCDM or decision model or matrix was submitted to the Board.

[43] In responses to IRs in this matter, Halifax Water referred to its responses to IRs in the 2016 application which explained the change in approach to the treatment of mixed assessed properties. In its response to Board IR-17 in the 2016 application (M07731), Halifax Water said:

The reasoning behind this being infrastructure (including water and wastewater) is sized for its highest and best use and therefore properties with mixed use should therefore be treated as a non-residential use and billed accordingly. This allows for a more equitable division of charges among the users of the infrastructure within any given property.

[44] In IRs to Halifax Water in this matter, the Board asked whether this change in approach had been specifically identified, whether the *Regulations* had been amended, and where the Board had specifically approved the methodology. In response, Halifax Water said:

- b) The application proposed using the Decision Matrix to determine whether a property was considered residential or non-residential for stormwater billing purposes. Halifax Water's response to IR-17NSUARB in M07731, identified the Decision Matrix and the resultant increases to billable non-residential area. The application as a whole was presented as changes to the manner in which Halifax Water billed customers for stormwater service and resulted in the changes described in response to IR-1NSUARB.
- c) The Halifax Water Regulations contain the rates for the provision of stormwater service and do not typically contain billing methodologies for any of the services provided by Halifax Water. It is the Cost of Service Manual and stormwater rate applications that would contain methodologies of how rates are established. In M07731, Halifax Water did not propose and was not directed to include changes in the Cost of Service Manual

regarding the background methodology for stormwater billing. Halifax Water addressed the proposed methodology in IR-18 NSUARB of M07731.

- d) The methodology for classifying properties as non-residential and the application of the associated impervious areas was described in the Application and associated IRs. Halifax Water assumed acceptance of this methodology by the Board based on the finding noted at paragraph 50 of the M07731 decision:

[50] The Board finds that the proposed HRWC rate (and the methodology for determining this rate) for Site Related Flow Charges for non-residential customers is reasonable and appropriately addresses related revenue requirements, and orders that it be implemented.

[Exhibit H-5, IR-2, p. 2]

[45] Mr. Mathew confirmed that the decision model or matrix was reflective of the *Regulations* approved by the Board. Ms. MacKenzie confirmed that the model was submitted with the 2016 application.

[46] Ms. MacKenzie testified that Halifax Water accepts the assessment values from the PVSC records. A property which has both residential and commercial assessment components is then investigated by Halifax Water to determine if it receives stormwater service, which means whether the property has impervious area which drains into the Halifax Water system. According to Ms. MacKenzie, however, there is no correlation between the extent of impervious area and the percentage of assessed value which is non-residential. Halifax Water is unable to determine what portions of impervious area support each component of the property as assessed. As a result, Halifax Water is not able to allocate the stormwater charge as directed by the DRO in his decision on Ms. Pullin's complaint.

[47] The Board pauses to note here that it has accepted impervious area as the basis for the calculation of stormwater charges in earlier decisions. The determination of impervious areas is based on satellite imagery. (See for example the decision letter in M08728, dated October 30, 2018.)

[48] Mr. Mathew explained that once a complaint is made to the DRO, Halifax Water's internal practice is to review the satellite imagery to ensure it is accurate. As a result of this review, in Ms. Pullin's case, the impervious area was reduced, which meant a reduction in the charge to her.

[49] Ms. Pullin asked the Halifax Water panel how customers had been notified of the change in the stormwater charge after the decision in 2017. In response, Ms. MacKenzie said:

So there was, upon the decision 2017 there was a letter sent to customers that were going to receive a change in their stormwater bill and so that was sent out to basically anybody that there was a change in the residential tier that they were going to be placed in and how that was going to be impacted. But it was a general letter that was sent out.

[Transcript, p. 51, lines 12-17]

[50] Ms. Pullin initially said she had not received such a letter and that she did not know of the change until 2020. The Board questioned the Halifax Water panel on this point, referring to a letter dated February 26, 2018, addressed to Ms. Pullin at her residence. Ms. MacKenzie confirmed it was the letter she had referred to and acknowledged that the letter was a general notification; she agreed that if a person did not believe she was a non-residential customer it would be a fair reading to think it did not apply to her.

[51] Ms. Pullin later acknowledged she had received the 2018 letter, but thought she was a residential customer. However, the Board observes that the records of the calls Ms. Pullin made to the Halifax Water customer service department in March, 2018, clearly show that she understood she was being billed as a "commercial" customer.

[52] Ms. MacKenzie confirmed, in response to questions from the Board at the hearing, that the model is not expressly set out in the COS Manual and is not part of the *Regulations*. In addition, the *Regulations* do not contain a definition of either "residential"

or “non-residential,” the terms which are used to describe the two classes of customer for the purposes of stormwater charges in the *Regulations* approved by the Board in its decision on the 2016 application. The Board observes, as well, that there is no definition of mixed use or mixed assessed properties in the *Regulations*.

[53] In the Board’s decision on the 2016 application, Halifax Water’s revenue requirements, and ultimately its approved rates, were based on the methodology set out in the decision model or matrix. In this matter, Halifax Water said that there were slightly more than 4,000 properties which were charged for stormwater service in the same way as Ms. Pullin. As a result, if the DRO’s decision were upheld, Halifax Water would have a revenue shortfall of more than \$850,000. The Board asked Halifax Water in an Undertaking to provide the rate implications on other customers if the mixed-use properties were all billed as residential. In its Undertaking U-2 response, Halifax Water stated that a change in the way it bills mixed-use customers “would result in an inequity and a significant decrease in revenue from properties having large impervious areas.” It concluded that while the mixed-use customers would see a decrease in rates, “offsetting rate increases will be required to cover the shortfall, impacting approximately 90,000 customers in all customer classes.”

[54] The Board must decide if Halifax Water was following its *Regulations* when Ms. Pullin was billed as a non-residential customer for stormwater service at her property. In doing so, the Board must interpret the *Regulations*. The Board notes the absence of express definitions of the terms “residential” and “non-residential” in the *Regulations*, as well as the absence of the decision matrix or model, or a written description of it in either the *Regulations* or the COS Manual.

[55] The Board also notes that the Halifax Water *Regulations* state in Section 4:

Interpretation

- 4.(1) These Regulations shall be interpreted in accordance with the principles for the interpretation of legislation.
- (2) The *Interpretation Act* (Nova Scotia) applies to these Regulations, except where a contrary intention appears.

[56] While, in the letter which formed Halifax Water's notice of appeal of the DRO decision, Halifax Water's counsel said that the *Interpretation Act* is irrelevant because there is no regulation to be interpreted, the Board takes a different approach. Here, the Board considers it must determine whether the provisions of *Regulation 7* were properly applied to Ms. Pullin. To do that, the Board must interpret the *Regulation*.

[57] The principles of statutory interpretation apply when interpreting a *Regulation* of Halifax Water as stated above. 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 CanLII 837 (SCC), [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?

[58] In this appeal, the Board considers it is Halifax Water's intention that must be considered in seeking approval of the *Regulation* in question – the *Regulation* is the "legislative text."

[59] The Board considers that the “Sullivan questions” are reflected in Section 9(5) of the *Interpretation Act* which provides:

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. [Emphasis added]

[60] The Board concludes that Halifax Water intended, through the use of the decision model or matrix, that properties which had both residential and commercial assessment components would be treated as non-residential and subject to the non-residential stormwater charge. This was a change from the earlier treatment where the higher assessed value determined whether a property was residential or non-residential. The change is what Halifax Water proposed in its 2016 application and that is what the Board approved.

[61] The Board finds that the necessity of the change was to ensure equitable treatment of customers, based on impervious area. According to Ms. MacKenzie, the circumstances at the time were that properties with large impervious areas were not being properly charged the costs of the service. Further, the Board considers that the consequences of interpreting *Regulation 7* in any other way would result in a shortfall in revenue on which the stormwater rates charged by Halifax Water were determined, and an unfair burden would be placed on a significantly large number of its customers.

[62] The Board observes, and Halifax Water acknowledged, in this proceeding, the significance of the change in treatment of mixed-use, or more properly, mixed assessed properties, could have been made clearer. While Halifax Water suggested that an amendment including appropriate definitions in its *Regulations* and inclusion of the decision model could provide more clarity, it also suggested that this should wait until a Cost of Service hearing occurs. Ms. MacKenzie said that such an application might be a year or two away. The Board agrees with the closing submission of Halifax Water that if these changes are to be made, they would benefit from input from a wide range of stakeholders, as there may well be underlying policy considerations to be fully canvassed, which might not be fully addressed in a simple application to amend the *Regulations*. For example, for customers like Ms. Pullin, where the commercial component of her assessment is significantly less than her residential component, it may be appropriate to consider whether the charge could be calculated in some other way, as suggested by the DRO.

[63] The Board is aware that stormwater charges have been the subject of a number of appeals to the Board over several years, and these charges have not always been well understood. Indeed, the Halifax Water panel in this proceeding and Counsel for the utility conceded as much. The change could have been better communicated to customers. As a result, pending a future application which may more fully consider the appropriate method to determine charges for stormwater service, the Board directs Halifax Water to do as suggested in its closing submission, i.e., to “include the definition of residential and non-residential on its website together with an explanation of the way in which the Stormwater Charge is determined for mixed-use properties, based on the

current approved Cost of Service Manual for stormwater.” Halifax Water is to advise the Board no later than November 1, 2021, that this has been done.

[64] The Board also considers that Halifax Water should review its practices surrounding determination of the extent of impervious area. It was only when Ms. Pullin appealed to the DRO that her property was investigated. The Board understands that there is a cost to Halifax Water in confirming how much impervious area is receiving stormwater service, but suggests that the utility might examine if a project could be initiated to regularly review and confirm impervious area for mixed-use properties, rather than leaving the onus on the property owner to question this. Since Halifax Water has the satellite imagery available, it seems to the Board, that such a project is worthy of consideration.

[65] As for Ms. Pullin, the Board finds that Halifax Water has properly billed her for stormwater service and allows Halifax Water’s appeal of the DRO decision. The Board understands that she has not been charged interest on her account while the DRO appeal process was underway, and trusts that has not changed pending this appeal. The Board urges Halifax Water to discuss reasonable payment options with Ms. Pullin.

V CONCLUSION

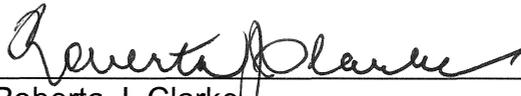
[66] The Board finds that Halifax Water has satisfied the burden of persuading the Board on a balance of probabilities that Halifax Water has properly followed its *Regulations* in charging Ms. Pullin for stormwater service. The Board finds Ms. Pullin is receiving stormwater service at her property, and that according to Halifax Water’s

Regulations, as approved by the Board, she is a non-residential customer. As a result, Halifax Water's appeal of the DRO decision is allowed.

[67] As directed in Paragraph 63 of this Decision, Halifax Water is to include explanatory information on its website to clarify how it defines residential and non-residential customers and how it charges for stormwater service to mixed-use properties. Further, the Board expects Halifax Water to take the issues raised in this appeal into consideration in its next Cost of Service hearing for stormwater.

[68] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 12th day of October, 2021.


Roberta J. Clarke