DECISION **2022 NSUARB 74**
M10353

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE *HALIFAX REGIONAL MUNICIPALITY CHARTER*

-and-

IN THE MATTER OF AN APPEAL by SUNSET PLAZA INC. from a Decision of North West Community Council to refuse to amend a Development Agreement for Sunset Ridge subdivision for a property located at the corner of Hanwell Drive and Swindon Drive, Middle Sackville, Nova Scotia

BEFORE:	Roberta J. Clarke, Q.C., Member
APPELLANT:	**SUNSET PLAZA INC.** Nancy G. Rubin, Q.C.
RESPONDENT:	**HALIFAX REGIONAL MUNICIPALITY** E. Roxanne MacLaurin, Counsel
INTERVENOR:	**KEIR DABORN** On his own behalf
HEARING DATE:	**March 14 and 15, 2022**
FINAL SUBMISSIONS:	**March 15, 2022**
DECISION DATE:	**May 4, 2022**
DECISION:	**Appeal is allowed.**

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1.0 INTRODUCTION

[1] Halifax Regional Municipality approved a development agreement with Armco Capital Incorporated for lands in Middle Sackville between Highway 101 and Sackville Drive, which became known as Sunset Ridge in 2008. The development agreement stated the permitted uses of the lands as 128 single unit dwellings, 108 semi-detached dwelling units, 55 townhouse units, two multi-unit buildings containing a maximum of 128 dwelling units, and a commercial building.

[2] The last remaining undeveloped parcel covered under the development agreement is bounded by Margeson Drive, Swindon Drive, and Hanwell Drive. Sunset Plaza Inc. now owns this parcel. The parcel was originally proposed to be developed as a commercial site. Sunset Plaza applied to HRM in March 2020, to amend the development agreement to allow the parcel to be developed as multi-unit residential. During the review of the amendment application, Sunset Plaza made certain changes in its plans to include three units of commercial development on the ground floor of the proposed building. In addition, the proposal includes 52 apartment units, 25% of which are one-bedroom, and the remainder are two-bedroom or two-bedroom plus den, with 50 parking spaces underground and 12 surface parking spaces.

[3] HRM staff recommended approval of the amending agreement, after reviewing the Municipal Planning Strategies applicable to the development. North West Community Council Planning Advisory Committee (PAC) recommended refusal based on "traffic concerns, incompatibility with the existing neighbourhood, the development goes against the original intent of the neighbourhood and it is not a complete community," but said that if the applicant wanted to modify the application, it should consider that all the ground floor be commercial space.

[4] HRM received communications from members of the public living in the general area of the proposed development who were opposed to the change from commercial to multi-residential development. Several residents spoke at the public information session. North West Community Council (NWCC) refused the application after a public hearing on November 8, 2020, where Council heard from members of the public. The reason for the refusal identified in a letter to Sunset Plaza was NWCC's agreement with the PAC reasons. The refusal letter also noted "concerns with the substantive change of the proposal from a commercial development to a substantial residential development from a complete community perspective" and that Council had discussed the impact of "a large residential project on the subject property… on the local school system."

[5] Sunset Plaza appealed the decision of NWCC to the Nova Scotia Utility and Review Board under s. 265(1)(c) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (*HRM Charter*).

[6] Keir Daborn, a resident of Hanwell Drive, applied for and was granted Intervenor status in the appeal. He supported Council's decision to refuse the amendment, as did his witnesses at the hearing, along with members of the public who provided letters of comment to the Board, and two public speakers.

[7] The Board's role is to decide whether Council's decision to refuse the amendment of the development agreement, in the words of s. 267(2) of the *HRM Charter* "does not reasonably carry out the intent of the municipal planning strategy."

[8] In this case, the Board finds that Council's decision does not reasonably carry out the intent of the municipal planning strategy (MPS) because NWCC refused the

application for the amending development agreement for reasons that are not supported by the nature of the proposal in the context of the MPS policies. As a result, the Board allows the appeal.

2.0 ISSUE

[9] The Board must decide whether NWCC's decision to refuse to approve the agreement, which would amend the 2008 development agreement to permit a multi-unit dwelling with some ground floor commercial space, reasonably carries out the intent of the relevant Municipal Planning Strategies.

[10] For the reasons which follow, the Board concludes that Council's decision fails to reasonably carry out the intent of the Sackville and the Regional MPS. The Board allows the appeal and orders the amending agreement as submitted to Council be approved.

3.0 BACKGROUND

3.1 Board Jurisdiction

[11] The Board notes that the *HRM Charter* establishes that the Municipality has the primary authority for planning (s. 208). Under s. 31 of the *HRM Charter*, a community council stands in the place of HRM Council where the MPS provides for development by agreement, and Part VIII - Planning and Development applies to decisions of the community council.

[12] An applicant may appeal the refusal of an amendment to a development agreement by a community council to the Board (s. 262(2)). The grounds for an appeal

of a community council's decision to refuse approval of an amendment of a development agreement are set out in s. 265(1)(c) of the *HRM Charter*:

> 265 (1) An aggrieved person or an applicant may only appeal
> ...
> (c) the refusal of an amendment to a development agreement, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy and the intent of the development agreement; [Emphasis added]

[13] The Board's remedial powers, and the restrictions on the exercise of these powers, are prescribed by s. 267 of the *HRM Charter* which provides:

> **267** **(1)** The Board may
>
> (a) confirm the decision appealed from;
>
> (b) allow the appeal by reversing the decision of the Council to amend the land-use by-law or to approve or amend a development agreement;
>
> (c) allow the appeal and order the Council to amend the land-use by-law in the manner prescribed by the Board or order the Council to approve the development agreement, approve the development agreement with the changes required by the Board or amend the development agreement in the manner prescribed by the Board;
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> ...
>
> **(2)** The Board may not allow an appeal unless it determines that the decision of the 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. [Emphasis added]

[14] Thus, the Board must not interfere with the decision of the community council unless the Board determines that the decision does not reasonably carry out the intent of the MPS. In appeals under the *HRM Charter*, the burden of proof is on the appellant. To be successful, the appellant must establish, on the balance of probabilities, that the decision of council does not reasonably carry out the intent of the MPS. If the appellant fails, then the Board must defer to the decision of council.

[15] Most planning decisions of the Board over many years have set out the history of the decisions of the Court of Appeal surrounding the standards by which the

Board should review a council's decision. The Board notes that these standards or principles are condensed and set out most succinctly in the decision of Fichaud, J.A., in *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, which is the most recent comprehensive statement by the Court of Appeal. The Board notes that the Court of Appeal endorsed these principles most recently in *Heritage Trust of Nova Scotia v. AMK Barrett Investments Inc.*, 2021 NSCA 42, which affirmed the Board's decision in *Re Heritage Trust of Nova Scotia*, 2020 NSUARB 73.

[16] In *Archibald*, Fichaud, J.A., said:

> [24] The Board then (¶ 51-62) recounted the provisions of the MGA and passages from decisions of this court that state the principles to govern the Board's treatment of an appealed planning decision. I will summarize my view of the applicable principles:
>
> **(1)** The Board usually is the first tribunal to hear sworn testimony with cross-examination respecting the proposal. The Board should undertake a thorough factual analysis to determine the nature of the proposal in the context of the MPS and any applicable land use by-law.
>
> **(2)** The appellant to the Board bears the onus to prove the facts that establish, on a balance of probabilities, that the Council's decision does not reasonably carry out the intent of the MPS.
>
> **(3)** The premise, stated in s. 190(b) of the *MGA*, for the formulation and application of planning policies is that the municipality be the primary steward of planning, through municipal planning strategies and land use by-laws.
>
> **(4)** The Board's role is to decide an appeal from the Council's decision. So the Board should not just launch its own detached planning analysis that disregards the Council's view. Rather, the Board should address the Council's conclusion and reasons and ask whether the Council's decision does or does not reasonably carry out the intent of the MPS. Later (¶ 30) I will elaborate on the treatment of the Council's reasons.
>
> **(5)** There may be more than one conclusion that reasonably carries out the intent of the MPS. If so, the consistency of the proposed development with the MPS does not automatically establish the converse proposition, that the Council's refusal is inconsistent with the MPS.
>
> **(6)** The Board should not interpret the MPS formalistically, but pragmatically and purposively, to make the MPS work as a whole. From this vantage, the Board should gather the MPS' intent on the relevant issue, then determine whether the Council's decision reasonably carries out that intent.
>
> **(7)** When planning perspectives in the MPS intersect, the elected and democratically accountable Council may be expected to make a value judgment. Accordingly, barring an error of fact or principle, the Board should defer

> to the Council's compromises of conflicting intentions in the MPS and to the Council's choices on question begging terms such as "appropriate" development or "undue" impact. By this, I do not suggest that the Board should apply a different standard of review for such matters. The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. But the intent of the MPS may be that the Council, and nobody else, choose between conflicting policies that appear in the MPS. This deference to Council's difficult choices between conflicting policies is not a license for Council to make ad hoc decisions unguided by principle. As Justice Cromwell said, the "purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council's authority should be exercised" (*Lewis v. North West Community Council of HRM*, 2001 NSCA 98 (CanLII), ¶ 19). So, if the MPS' intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council's decision reasonably bears that intent.
>
> **(8)** The intent of the MPS is ascertained primarily from the wording of the written strategy. The search for intent also may be assisted by the enabling legislation that defines the municipality's mandate in the formulation of planning strategy. For instance, ss. 219(1) and (3) of the *MGA* direct the municipality to adopt a land use by-law "to carry out the intent of the municipal planning strategy" at "the same time" as the municipality adopts the MPS. The reflexivity between the MPS and a concurrently adopted land use by-law means the contemporaneous land use by-law may assist the Board to deduce the intent of the MPS. A land use by-law enacted after the MPS may offer little to the interpretation of the MPS.
>
> [25] These principles are extracted from the decisions of this court in: *Heritage Trust,* ¶ 77-79, 94-103, 164; *Lewis v. North West* ¶ 19-21; *Midtown Tavern*, ¶ 46-58, 81, 85; *Can-Euro Investments*, ¶ 26-28, 88-95; *Kynock v. Bennett* (1994), 1994 NSCA 114 (CanLII), 1994 CanLII 4008 (NS CA), 131 N.S.R. (2d) 334, ¶ 37-61; *Tsimiklis v. Halifax (Regional Municipality)*, 2003 NSCA 30 (CanLII) ¶ 24-27, 54-59, 63-64; 3012543 *Nova Scotia Limited v. Mahone Bay Heritage and Cultural Society*, 2000 NSCA 93 (CanLII), ¶ 9-10, 61-64, 66, 84, 86, 89, 91-97; *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality)*, 2004 NSCA 59 (CanLII), ¶ 26. [Emphasis added]

[17] Clearly, the Board is not permitted to substitute its own decision for that of council but must review the decision of council to determine if the decision can be said to reasonably carry out the intent of the MPS. In determining the intent of the MPS, the Board considers it should apply the principles of statutory interpretation which have been adopted by the Court of Appeal, as well as the provisions of s. 9(1) and s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

3.2 Witnesses

[18] Sunset Plaza called three witnesses: Cesar Saleh, a professional civil engineer, engaged by Sunset Plaza to make the application to Council; Jacob Ritchie,

the former Director of Operation Services with the Halifax Regional Centre for Education (and a professional engineer with a post-graduate degree in urban planning); and Paul Sampson, the HRM planner responsible for processing the application for the amendment to the 2008 development agreement. Notably, Counsel for the Appellant did not seek to have any of these witnesses qualified to give opinion evidence as experts.

[19] HRM called no witnesses.

[20] Mr. Daborn called David Pinsent and Alexander Millette, two residents of Hanwell Drive, as his witnesses. Following them, Mr. Daborn testified on his own behalf.

3.3 The Development

[21] The 2008 development agreement covered several parcels of land, bounded generally by Margeson Drive and Sackville Drive, to allow for subdivision and development. The agreement provided in Section 1.1 that the lands "shall be developed and used only in accordance with and subject to the terms and conditions" of the agreement. The Concept Plan (Schedule B to the agreement) identified the parcel at the intersection of what is now Swindon Drive and Hanwell Drive as "Commercial." One of the permitted uses in the general description of the land use in Section 3.4 is "a commercial development." All other uses are residential.

[22] Section 3.5.5 of the development agreement provides:

> 3.5.5 Any commercial development shown on Schedule B shall conform with the provisions and requirements of the C-2 (Community Commercial) Zone of the Land Use By-law except that uses shall be restricted to the following: retail stores; food stores; service and personal service uses; offices; commercial schools; banks and financial institutions; restaurants and take-out restaurants but shall not include drive-in restaurants; or re-cycling depots. A walkway shall extend from all public entrances of any building to a public sidewalk in front of the building.
>
> [Exhibit S-2, p. 131]

[23] The development agreement contemplated that it might be amended by providing a process for substantive and non-substantive matters. There was common agreement in this appeal that the amendments sought by Sunset Plaza are substantive and therefore, according to s. 6.2 of the development agreement may only be made "in accordance with the approval requirements of the Municipal Government Act."

[24] According to the Staff Report to the NWCC, an amending development agreement was approved by NWCC in 2011 regarding side yard setbacks, which did not affect the subject property.

[25] According to Mr. Saleh, initial inquiries were made to HRM about subdividing the subject property to allow for two or more commercial buildings. HRM responded positively, but Sunset Plaza was unable to successfully market that concept. Subsequently, Sunset Plaza engaged Mr. Saleh's employer to make an application for an amending development agreement, initially to allow for multi-unit residential use. After HRM's public consultation process, Sunset Plaza amended the application to allow for a 52-unit, four-storey residential apartment building with 2,760 ft.^{2} of ground floor commercial space, a total of 62 parking spaces, landscaping, and amenity space, with a driveway off Hanwell Drive. The commercial uses would be the same as those permitted in the existing development agreement. Fifty parking spaces would be underground, with the remainder as surface parking. The setbacks of the proposed building would exceed the LUB requirements, and the exterior design of the building would be subject to new schedules.

3.4 Municipal Planning Strategies

[26] There are two municipal planning strategies which are relevant to this appeal: the Regional MPS and the Sackville MPS. The Board will outline the applicable sections below.

3.4.1 Regional MPS

[27] The Regional MPS (RMPS) was adopted in 2014 and is a successor to the 2006 Regional Plan. It recognizes secondary municipal planning strategies throughout various areas of HRM. Appendix B of the RMPS filed in this matter lists the Sackville MPS as one of such strategies which remains in effect. (See Exhibit S-9, p. 13, and p. 114.)

[28] The initial application made by Mr. Saleh on behalf of Sunset Plaza referred to Policy SU-6 of the RMPS. The preamble to Policy SU-6 states:

> Due to constraints in the Sackville wastewater collection system, there are properties in Middle Sackville which are within the Urban Service Area but cannot be developed until capacity becomes available. ...
>
> [Exhibit S-9, p.94]

[29] Policy SU-6 refers to the parcels which make up the Sunset Ridge development and provides:

> SU-6 HRM shall, through the Sackville Land Use By-law, establish a CDD (Comprehensive Development District) Zone over a portion of PID No. 41071069 and the whole of PID No's. 40281479, 40875346, 41093733, 40695504, 41089012 and 41089004 located in Middle Sackville. HRM shall consider the extension of municipal wastewater and water distribution services to these properties to allow for a residential subdivision by development agreement subject to the following criteria:
>
> (a) the types of land uses to be included in the development and that, where the development provides for a mix of housing types, it does not detract from the general residential character of the community;
> (b) that adequate and useable lands for community facilities are provided;
> (c) any specific land use elements which characterize the development;
> (d) the general phasing of the development relative to the distribution of specific housing types or other uses;

(e) that the development is capable of utilizing existing municipal trunk sewer and water services without exceeding capacity of these systems;
(f) for any lands outside the Urban Settlement Designation, as shown on Map 2 of this Plan, or outside the Urban Service Area of the Regional Subdivision By-law, the requirements of Policies S-1 and SU-4;
(g) that, if required by Halifax Water, a sewage flow monitoring program is established for the development and that provisions are made for its phasing in relation to achieving sewage flow targets;
(h) that the sewage flow monitoring program proposed by the developer for implementation under clause (g) addresses, in a form acceptable to Halifax Water, target sewage flows to be achieved in relation to development phasing and the method, duration, frequency and location of monitoring needed to verify that target sewage flows have been achieved;
(i) provisions for the proper handling of stormwater and general drainage within and from the development; and
(j) any applicable matter as set out in Policy G-14 [sic] of this Plan.

[Exhibit S-9, p.94]

[30] Ms. MacLaurin confirmed to the Board in her submissions that the reference to G-14 should in fact be G-15, the implementation policies under the RMPS. Policy G-15 provides:

G-15 In considering development agreement applications pursuant to the provisions of this Plan, in addition to all other criteria as set out in various policies of this Plan, HRM shall consider the following:

(a) that the proposal is not premature or inappropriate by reason of:
  (i) the financial capability of HRM to absorb any costs relating to the development;
  (ii) the adequacy of municipal wastewater facilities, stormwater systems or water distribution systems;
  (iii) the proximity of the proposed development to schools, recreation or other community facilities and the capability of these services to absorb any additional demands;
  (iv) the adequacy of road networks leading to or within the development; and
  (v) the potential for damage to or for destruction of designated historic buildings and sites;
(b) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:
  (i) type of use;
  (ii) height, bulk and lot coverage of any proposed building;
  (iii) traffic generation, access to and egress from the site, and parking;
  (iv) open storage; and
  (v) signs;
(c) that the proposed development is suitable in terms of the steepness of grades, soil and geological conditions, locations of watercourses, marshes or bogs and susceptibility to flooding; and
(d) if applicable, the requirements of policies E-10, T-3, T-9. EC-14, CH-14 and CH-16.

[Exhibit S-9, pp.107-108]

[31] Mr. Sampson testified that the provisions of G-15 in the RMPS are similar to the provisions of the Sackville MPS Implementation Policy IM-13. The Board discusses this topic later in this decision.

[32] The map attached as Schedule A to the Sackville Land Use By-Law (LUB) shows the Sunset Ridge subdivision zoned as Comprehensive Development District (CDD). This is, therefore, consistent with the intent of RMPS Policy SU-6.

3.4.2 Sackville MPS

[33] As noted above, the Sackville MPS, adopted in 1994, is a secondary planning strategy which predates the RMPS filed in this matter. According to the Generalized Future Land Use Map of the Sackville MPS, Sunset Ridge, and thus the subject property, is designated Rural Residential.

[34] The Sackville MPS acknowledges that in some areas of the Rural Residential Designation there are areas which receive central municipal sewer and water services. As a result, Policy RR-3 provides:

> RR-3 Notwithstanding Policy RR-2, any portion of the Rural Residential Designation, in which municipal central services are available, it shall be the intention of Council to consider permitting two unit dwellings, t**ownhouse dwellings**, multiple unit dwellings, **and comprehensive residential developments** according to Policies UR-4, UR-5 or UR-6, UR-7 or UR-8, and **UR-9, UR-10 and UR-11** respectively. It shall further be the intention of Council to consider mobile homes on individual lots and local commercial developments within the Rural Residential Designation according to Policies UR-26 and UR-18, respectively. [Emphasis in original]
>
> [Exhibit S-3, Tab 1, p.66]

[35] The UR policies referred to in Policy RR-3 relate to lands which are under the Urban Residential designation. Specifically, of the policies listed in RR-3, the applicable policies for Sunset Ridge and the subject property are UR- 9 and UR-10:

> UR-9 It shall be the intention of Council to establish a comprehensive development district within the land use by-law which permits any residential use and community

facility use, in association with such residential uses. A comprehensive development district shall specifically prohibit any industrial or general commercial development, except local commercial uses which are intended to service households within the district on a daily basis.

When considering an amendment to the schedules of the land use by-law to establish a comprehensive development district, Council shall have regard to the following:

(a) that the development is within the Urban Residential Designation;
(b) that the development includes a minimum land area of five acres to be so zoned and will not entail the substantive removal or replacement of existing single or two unit housing stock;
(c) that, where the development provides for a mix of housing types, it does not detract from the general residential character of the community;
(d) that adequate and useable lands for community facilities are provided;
(e) that the development is capable of utilizing existing municipal sewer and water services; and
(f) that the development is consistent with the general policies of this planning strategy and furthers its intent.

UR-10 With reference to Policy UR-9, and as provided for by the Planning Act, the development of any comprehensive development district shall only be considered by Council through a development agreement or agreements which shall specify the following:

(a) the types of land uses to be included in the development;
(b) the general phasing of the development relative to the distribution of specific housing types or other uses;
(c) the distribution and function of proposed public lands and community facilities;
(d) any specific land use elements which characterize the development;
(e) matters relating to the provision of central sewer and water services to the development;
(f) provisions for the proper handling of stormwater and general drainage within and from the development;
(g) any other matter relating to the impact of the development upon surrounding uses or upon the general community, as contained in Policy IM-13; and
(h) furthermore, the elements of (a) through (g) and other matters related to the provision of central services and the proper handling of storm water and general drainage shall additionally be considered by Council according to the development agreement provisions of the Planning Act.

[Exhibit S-3, Tab 1, pp.54-55]

[36] Policy UR-9 describes factors to be considered by Council in relation to the amendment of land use by-laws.

[37] Policy UR-10(g) requires a development agreement for a Comprehensive Development District to specify any matter relating to the impact of the development on "surrounding uses or upon the general community, as contained in Policy IM-13."

[38] Policy IM-13 is one of the implementation policies in the Sackville MPS and sets out criteria to be considered for development agreements by the community council in addition to any other applicable policies:

> IM-13 In considering amendments to the land use by-law or development agreements, in addition to all other criteria as set out in various policies of this planning strategy, the Sackville Community Council shall have appropriate regard to the following matters:
>
> (a) that the proposal is in conformity with the intent of this planning strategy and with the requirements of all other municipal by-laws and regulations;
>
> (b) that the proposal is not premature or inappropriate by reason of:
>
> (i) the financial capability of the Municipality to absorb any costs relating to the development;
>
> (ii) the adequacy of sewer and water services;
>
> (iii) the adequacy or proximity of school, recreation and other community facilities;
>
> (iv) the adequacy of road networks leading or adjacent to, or within the development; and
>
> (v) the potential for damage to or for destruction of designated historic buildings and sites.
>
> (c) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:
>
> (i) type of use;
>
> (ii) height, bulk and lot coverage of any proposed building;
>
> (iii) traffic generation, access to and egress from the site, and parking;
>
> (iv) open storage;
>
> (v) signs; and
>
> (vi) any other relevant matter of planning concern.
>
> (d) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding;
>
> (e) any other relevant matter of planning concern; and
>
> **(f) Within any designation, where a holding zone has been established pursuant to "Infrastructure Charges - Policy IC-6", Subdivision Approval shall be subject to the provisions of the Subdivision By-law respecting the maximum number of lots created per year, except in accordance with the development agreement provisions of the MGA and the "Infrastructure Charges" Policies of this MPS.** [Emphasis in the original]
>
> [Exhibit S-3, Tab 1, pp.87-88]

3.4.3 Sackville Land Use By-Law

[39] The Sackville LUB is the instrument by which the MPS policies are carried out. Part 23 of the LUB addresses the uses permitted in, and the requirements for, the

CDD zone. Part 23 states:

> PART 23: CDD (COMPREHENSIVE DEVELOPMENT DISTRICT)
> 23.1 CDD USES PERMITTED
> No development permit shall be issued in any CDD (Comprehensive Development District) within a Residential Designation except for residential uses, or local commercial uses, community facilities and/or parks in association with residential uses, which comprise a comprehensive development of five (5) or more acres (2 or more hectares). Major commercial uses and any industrial uses are specifically prohibited within any Residential CDD.
> ...
> 23.3 CDD REQUIREMENTS
> In any CDD (Comprehensive Development District) no development permit shall be issued except in conformity with the development agreement provisions of the Planning Act.
>
> **23.4 Notwithstanding sections 23.1 through 23.3, the lots shown on approved final plan of subdivision file no. 19980686-16-F of the Sunset Ridge Subdivision shall be developed subject to the permitted uses and requirements of the R-6 (Rural Residential) Zone.** [Emphasis in the original]
>
> [Exhibit S-3, Tab 1, p. 91]

[40] Section 23.4 of the LUB specifically refers to the Sunset Ridge subdivision, which includes the subject property, and applies the requirements of the R-6 (Rural Residential) Zone to developments there. Part 12 of the LUB addresses the R-6 zone. The relevant requirements of the zone are set out in Sections 12.2 and 12.3 of Part 12:

> 12.2 R-6 ZONE REQUIREMENTS: RESIDENTIAL AND RESOURCE USES
>
> In any R-6 Zone, where uses are permitted as residential uses or Resource Uses, no development permit shall be issued except in conformity with the following:

Minimum Lot Area:	central services	6,000 square feet (558 m2)
	on-site services	20,000 square feet (1858.1m2)
Minimum Frontage:	central services	60 feet (18.3 m) on-site services 100 feet (30.5 m)
Minimum Front or Flankage Yard		20 feet (6.1 m)
Minimum Rear or Side Yard		8 feet (2.4 m)
Maximum Lot Coverage		35 per cent
Maximum Height of Main Building		35 feet (10.7 m)

> 12.3 OTHER REQUIREMENTS: BUSINESS USES
>
> (a) Any business shall be wholly contained within the dwelling which is the principal residence of the operator of the business.
> (b) No more than twenty-five (25) per cent of gross floor area shall be devoted to any business use, and in no case shall any business use occupy more than three hundred (300) square feet (27.9 m2).

(c) No mechanical equipment shall be used except that which is reasonably consistent with the use of a dwelling and which does not create a nuisance by virtue of noise, vibration, glare, odour or dust which is obnoxious.
(d) No open storage or outdoor display of materials, goods, supplies, or equipment related to the operation of the business use shall be permitted.
(e) No more than (1) sign shall be permitted for any business and no such sign shall exceed two (2) square feet (0.2 m2) in area.
(f) One (1) off-street parking space, other than that required for the dwelling, shall be provided for every one hundred and fifty (150) square feet (14 m2) of floor area devoted to any business.
(g) No exterior alterations to the dwelling related to the business use shall be permitted except to meet fire safety, structural safety, or health regulations.
(h) No retail operation shall be permitted except where retail is accessory to a business use which involves the production of goods or crafts or the provision of a service.

[Exhibit S-3, Tab 2, p. 61]

3.5 Site Visit

[41] The Board consulted with counsel for the parties and Mr. Daborn at the conclusion of the hearing. They all agreed that they need not accompany the Board on a site visit. The Board made that visit during the late weekday morning approximately one week after the hearing and approached Margeson Drive toward Middle Sackville from Highway 101. The top floors of one of the apartment buildings adjacent to the subject property was visible. Swindon Drive is a short distance from the roundabout. Swindon Drive is very short, leading to Hanwell Drive. The Board travelled along Hanwell, observing first the barriers at the termination of Hanwell, Barnsley Court, and the bus stop near the development site.

[42] The Board was able to observe the variety of housing forms along Hanwell, Barnsley, all of Darlington, and Beaconsfield, and travelled down Beaconsfield to Sackville Drive. The Board then travelled to the Sackville Heights Elementary School site and returned, via the Beaconsfield route, to the subject property. The Board also drove up the adjacent private roadway to view the two apartment buildings on Hanwell which appear to be at a higher elevation than the subject property and the houses on Hanwell.

At the time of the Board's visit, there was little vehicular, or pedestrian, traffic in the area. The Board noted the small park/play area near the intersection of Hanwell Drive and Darlington, at some distance from the subject property.

4.0 ANALYSIS AND FINDINGS

[43] To be successful in this appeal, the burden is on the appellant, Sunset Plaza, to show that the decision of NWCC does not reasonably carry out the intent of the MPS. Sunset Plaza must do so on the balance of probabilities, which means the appellant must show that it is more likely than not that NWCC's decision fails to reasonably carry out the intent of the MPS.

[44] The Board must be mindful, as *Archibald* states, that there may be more than one conclusion which is consistent with the intent of the MPS. Further, the Board must consider the MPS as a whole when reviewing Council's decision.

[45] While Mr. Daborn referred to provisions of the LUB during the hearing, the Board must also acknowledge that a development agreement is a contract which can legitimately exempt a developer from the application of certain provisions of an LUB. As the 2008 development agreement and the proposed amending agreement anticipate, only those LUB provisions, which are not varied, remain in full force and effect. Thus, where the proposed development does not comply with LUB provisions Mr. Daborn identified, the development agreement overrides the LUB.

4.1 Nature of Amendment

[46] As noted earlier in this decision, the amending agreement will change the proposed development of the subject property from commercial to multi-unit residential

with some ground floor commercial space and mostly underground parking. As a substantive matter, to be approved, this change must still be consistent with the policies of the MPS.

[47] The Board questioned Mr. Sampson about the difference in the wording of s. 265(1)(c) of the *HRM Charter*, allowing an appellant to appeal the refusal to amend a development agreement, which refers to the "intent of the development agreement" as well as the intent of the MPS, and the wording in s. 267(2), which restricts when the Board may allow an appeal, and makes no reference to the "intent of the development agreement." The Board asked counsel to address this question in their submissions because it was clear from the comments expressed in letters of comment, and from speakers at the Council meeting, as well, perhaps, as Council members themselves, that some believed that the proposed development was inconsistent with the intent of the 2008 development agreement.

[48] Ms. MacLaurin, on behalf of HRM, referred to the Board's decision in *Re Cresco Holdings,* 2021 NSUARB 34, where the Board said it must also consider the intent of the development agreement. She went on to distinguish that case from the present appeal because that development agreement specifically provided for an overall maximum density which could be transferred between lots. She submitted that ultimately the Board can only allow the appeal if Council's decision does not reasonably carry out the intent of the MPS.

[49] Ms. Rubin urged the Board to focus on the power conferred on it by s. 267(2). She submitted that consistency or inconsistency with the intent of a development agreement is not grounds for the Board's interference with a Council decision.

[50] While Mr. Daborn did not expressly address this issue in his oral submission, in his testimony and written materials (Exhibit S-8), he referred to keeping the original design for a commercial development.

[51] Section 241(3) of the *HRM Charter* provides that where Council establishes a Comprehensive Development District as occurred with the Sunset Ridge Subdivision, "no development may occur" in such a district "unless it is consistent with the development agreement." However, the subsequent sections of the *HRM Charter* which address the requirements of development agreements clearly recognize that a development agreement may be amended, as set out in s. 245(2) to 245(7) in particular.

[52] The Board is persuaded, despite the apparent anomaly in the wording of the section granting the right to appeal, that its decision must be rooted in the intent of the MPS. The Board distinguishes the 2008 development agreement from the agreement in *Cresco Holdings*, as there is nothing which specifically addresses the kinds of changes which can or cannot be made unlike the *Cresco* agreement.

[53] If there is any intent to be derived from the 2008 development agreement, the Board considers it to be the intent of s. 6.2 which requires substantive amendments to be made in accordance with the applicable legislation and not any general intent that land uses must be restricted to those listed in s. 3.5.5. Therefore, the Board is only authorized to allow an appeal if Council's decision does not reasonably carry out the intent of the MPS. The Board considers that there is no basis to refuse the application on the grounds that it does not comply with the original intent of the development agreement as that concept was apparently identified by the NWCC and various members of the public.

[54] Further, the consistency with the development agreement referenced in s. 241(3), in the view of the Board, does not mean that, in this instance, the kind of substantive agreement sought by the Appellant cannot be considered. It cannot be said that changing one of the general uses outlined in the development agreement is inconsistent where substantive changes are permitted, provided the intent of the MPS permits them.

4.2 Council Reasons

[55] In the refusal letter, Council set out its reasons:

> North West Community Council expressed concerns with the substantive change of the proposal from a commercial development to a substantial residential development from a complete community perspective. North West Community Council discussed the impact that a large residential project on the subject property will have on the local school system, which is currently exceeding capacity with no concrete plans for the adjustments of school boundaries or a new school from the provincial government in the immediate future. North West Community Council agreed with the recommendation of the North West Planning Advisory Committee to refuse the application based on concerns related to traffic, incompatibility with the existing neighborhood and the original intent of the neighborhood.
>
> [Exhibit S-2, p. 217]

[56] The letter stated that the NWCC agreed with the recommendation of the PAC, which stated:

> The North West Planning Advisory Committee received information from staff regarding Case 22820 at their December 2, 2020 meeting. The following recommendation to North West Community Council was approved:
>
> THAT the North West Planning Advisory Committee has reviewed the application for Case 22820 and recommends rejection of the application due to traffic concerns, incompatibility with the existing neighborhood, the development goes against the original intent of the neighborhood and it is not a complete community. The Committee further suggests that should the applicant choose to make modifications to the application, that it considers proposing the entirety of the first floor of the apartment building as commercial space.
>
> This recommendation has been provided to HRM planning staff for review and consideration and will be addressed in their staff report to the North West Community Council.
>
> [Exhibit S-2, p. 177]

[57] In *Archibald,* Fichaud, J.A., discussed the requirement for council to give reasons for the refusal to approve a development agreement (or an amendment to a development agreement) at paragraph 30, referring to provisions of the *MGA,* which are mirrored in s. 245(6) of the *HRM Charter*:

> [30] These reasons are to appear in the notice setting out the right of appeal. So the *MGA* intends that the municipality's stated reasons be pivotal to the appeal. Section 230(6) invites the appellant to address the Municipality's stated reasons in his grounds of appeal and beckons the Board to address them in the Board's analysis. I do not suggest the Board is confined to those stated reasons. The ultimate question – whether the Council's decision reasonably carried out the intent of the MPS – may propel the Board to other issues. See *Lewis*, ¶ 9, 22; *United Gulf*, ¶ 15, 72-74; *Midtown Tavern*, ¶ 52-53, 79. But the focus on the municipality's written reasons prompts the Board to respect its appellate role that I discussed earlier. [Emphasis added]

[58] The Appellant filed in evidence a YouTube video of the NWCC meeting on November 8, 2021. The Board observed that several councillors expressed views opposing the application; however, the Board is not concerned with the views of individual councillors, as it considers that Council speaks with one voice by its vote. The Board discussed this issue recently in *Re Hatchet Lake Plaza Ltd.*, 2021 NSUARB 11 and elaborated on it in *Cresco Holdings* where, like the NWCC decision in this case, Council did not indicate which MPS policies were a concern. The PAC also did not identify MPS policies in this matter.

[59] In *Cresco Holdings,* after discussing the *Hatchet Lake Plaza* decision (where a video of the Council meeting was also in evidence), the Board said at paragraphs 59 - 63:

> [59] The Board continues to be of the view that, as a general proposition, the comments of individual members of a council are of limited assistance in the task of applying the statutory test to the written reasons provided by a municipal council. Council meetings are not courtrooms, and while councils perform a type of adjudicative role when determining applications, they are not courts. As *Archibald* stresses, the written reasons are important in framing the issues before the Board so that it respects its appellate role. That said, council members do not sit as a panel to formulate written reasons. They may disagree with one another and may have different reasons for approving or rejecting a particular application. Therefore, as discussed in *Hatchet Lake*, the Board considers that a council

> speaks with one voice and generally does not parse the comments of individual members of council.
>
> [60] Despite the foregoing, some of the comments made during these deliberations, in the particular circumstances of this case, provide some insight into the concerns expressed in HRM's decision letter. They provide context for the ultimate reasons provided in the written decision under appeal. The overall impression left with the Board is that those opposed to the amendments were generally opposed to the type of development already authorized, by the MPS and the development agreement, in Sub Area 9. This was then reflected in the written reasons, which were primarily expressed as broad concerns which shed no light on how the proposed narrow amendments would provide cause for the concerns raised.
>
> [61] What was before the Community Councils was not whether the approved development was consistent with the MPS. That was determined when the original development was approved.
>
> ...
>
> [62] The issue before the Community Councils was the impact, if any, the proposed amendments related to the reallocation or transfer of density from commercial to residential would have when assessed against the relevant MPS policies. Staff's presentation appropriately focused on this issue. The Community Councils' deliberations appear to have gone considerably beyond the matter before it. While, as expressed in *Hatchet Lake*, this Board does not act as a court reviewing a council's process, the foregoing might explain why the Community Councils ended up making the decision they did. As Mr. Grant observed, it would have been somewhat difficult for Cresco to respond to the points raised in the denial letter without addressing some of the comments made during the Council deliberations.
>
> [63] HRM provided no evidence, expert or otherwise, in support of the proposition that the two Community Councils' reasons were consistent with the intent of the MPS or the development agreement. HRM did not challenge or contradict the evidence introduced by Cresco to show that the decision was inconsistent with the intent of the MPS. As indicated by Mr. Grant, this was essentially an uncontested appeal. While the Board must still apply the statutory test in making a determination in this appeal, the fact-finding mission discussed in *Archibald* did not uncover facts or opinion evidence supporting the reasons provided in the denial letter or the rationales expressed during the deliberations which could be tied to relevant MPS policies.

[60] With these comments in mind, the Board will address below the concerns raised by Council, and of necessity, by the PAC, i.e., traffic, compatibility with the existing neighbourhood, that it is "not a complete community," and impact on the school system, as well as parking and water issues raised by Mr. Daborn and members of the public. The Board has already discussed, and dismissed, the issue of the original intent of the development agreement in this decision.

[61] Before addressing the concerns, the Board makes one other observation. In refusing the Sunset Plaza application, Council did not accept the recommendation of the HRM planning staff. The Board has said in its decisions on other planning appeals that while it is open to Council to reject staff recommendations, there must be "good planning reasons" to do so. Those reasons must be rooted in the MPS. (See for example, *Re Bona Investments,* 2009 NSUARB 58; *Re Griff Construction Limited*, 2011 NSUARB 51; *Re Armco Capital Inc.*, 2021 NSUARB 147.)

4.3 Letters of Comment and Public Speakers

[62] The Board received 24 letters of comment from individuals, most of whom identified as residents of streets near the proposed development. None of the writers supported the development, and all outlined their reasons for the lack of support, including concerns about:

- Pedestrian safety due to increased traffic and speeding
- Insufficient parking space
- Inconsistency with the original development agreement and the reasons for their original purchase in the subdivision
- Inconsistency with development guidelines or policies for multi-unit dwellings
- Density
- Potential increase in property damage and theft from vehicles
- Negative impact on property values
- Privacy
- Incompatibility with the surrounding neighbourhood
- Loss of potential commercial services such as banks and retail/small business
- School overcrowding from additional residential units
- Litter
- Loss of sunset views
- Impact on water services.

[63] Many of the writers stated that they supported commercial development at the site, as contemplated in the original development agreement. They said they purchased their properties understanding that would occur and were disappointed it has not yet happened.

[64] The Board also heard from two public speakers during the hearing. Both speakers referred to most of the same concerns identified by the letter writers. Both spoke of their experiences of living in the subdivision as it currently exists. Kevin Albert, who lives on the corner of the cul-de-sac opposite the proposed development, said that the two existing apartment buildings had brought changes to the neighbourhood. While he said he would like to see something developed at the vacant site, he does not want what is proposed. He concluded his remarks by saying:

> I understand everybody wants to maximize their profits, but they came up with a master plan 10 years ago and -- and this was not the master plan. So why not stick to the master plan, come up with a commercial building, bring up a daycare, bring in little restaurants, bring up lawyer's office or something or a chiropractor's office or at least propose something that is decent and that suits the neighbourhood.
>
> [Transcript, p. 182]

[65] Mr. Albert also mentioned the difficulty in accessing Margeson Drive at peak traffic hours, which he said would only increase with the addition of new residents.

[66] Holly Clarke, a resident of Hanwell Drive, is involved in several committees relating to the elementary school where children in the neighbourhood attend. She noted concerns about getting the children safely to the school, as well as the overcrowding which has necessitated portable classrooms. She described both the school and the community as overburdened. Like Mr. Albert and many of the letter writers, she supports 'business opportunities, with small business, local businesses" at the development site, suggesting there is a "really deep need" for them.

[67] The Board notes that many of those who wrote to the Board also wrote to, or spoke in opposition to the proposed development at, Council. The Board appreciates that these persons have taken the time and effort to make their views known and has no doubt about their sincerity.

4.4 Traffic

[68] One of the reasons identified by NWCC for refusing to approve the amendment of the development agreement was agreement with the PAC's "concerns related to traffic." Council did not identify particular traffic concerns; however, the Board notes that many communications to Council from residents, as well as letters of comment to the Board, the public speakers at the hearing, and the testimony of Mr. Daborn and his witnesses did identify traffic concerns. Those concerns included an expected increased volume of traffic from the residents of the proposed multi-unit building resulting in more vehicles on Hanwell Drive, as well as delays accessing Margeson Drive from Swindon; pedestrian safety, citing "near-misses" especially related to children crossing or playing near the streets; and speeding.

[69] The Sackville MPS Policy IM-13 includes two traffic-related matters for Council to consider: the first is IM-13(b)(iv) which says that the proposal is not "premature or inappropriate by reason of…the adequacy of road networks leading or adjacent to, or within the development…" and the second in IM-13(c)(iii) requires controls "…so as to reduce conflict with any adjacent or nearby land uses by reason of: "…traffic generation, access to and egress from the site, and parking…." These considerations are mirrored in Policy G-15(a)(iv) and (b)(iii) of the RMPS.

[70] To address these issues, Sunset Plaza engaged Harbourside Transportation Consultants. Harbourside prepared a Traffic Impact Statement (TIS) dated January 22, 2020, which was filed with the initial application to HRM. That application proposed entrance to the proposed building underground parking spaces and to the surface parking area via two driveways located off Swindon Drive. The report addressed sighting distance as well as site generated traffic.

[71] Harbourside concluded that:

- Sight distance could not be met due to the length of the roadway.
- The intersections are clearly visible from the driveway location areas.
- The multi-unit building would generate 19 vehicles in the morning peak (14 exiting the site) and 24 in the evening peak (15 entering the site).
- The majority of the site-generated traffic would travel on Margeson Drive.
- There would be a "negligible increase in traffic volumes" on Margeson.

[72] In the HRM planning team's initial review, the HRM Engineering Department did not support the access from Swindon Drive, but otherwise had no concerns regarding traffic. In May 2020, Mr. Sampson communicated with HRM Engineering Staff and the provincial Department of Transportation and Infrastructure (TIR) to confirm that the Swindon Drive access was not permissible. This was communicated to Mr. Saleh, and revised plans were provided showing the access from one driveway off Hanwell Drive.

[73] A second TIS was prepared by Harbourside, dated October 22, 2020, taking the new driveway location into account. Harbourside's conclusions did not change. Mr. Saleh testified he understood that the TIS was acceptable.

[74] The second HRM planning Team Review dated November 27, 2020, included a matrix which showed the MPS policy requirements and staff comments on

each. The staff comments referred to the relocation of the driveways off Swindon to Hanwell stating it "may be acceptable" and noting the revised TIS.

[75] In response to communication from HRM to individuals who had made comments on the application, Mr. Daborn wrote to Mr. Sampson, outlining his concerns about the proposed development, and challenging the TIS conclusions. On December 1, 2020, Mr. Sampson then sent an email to Sarah Rodger of the HRM Engineering department requesting her comments on the issues raised by Mr. Daborn:

> Hi Sarah,
>
> It looks to me that the first issue, about the SSD along Hanwell, is talking about where Hanwell comes to a dead end, past Swindon, so I think that is irrelevant. Agree?
>
> Secondly, about the increase in traffic volume, as TIS only accounts for the proposed development, not the existing volume of traffic: This is typical of most TIS's that we receive, correct? Also, do you have any comment about the TIS not comparing the existing DA which allows commercial development to the new apartment building with ground-floor commercial?
>
> Thirdly, the issue of left turns from Swindon onto Margeson, I would say, is a larger issue not necessarily relevant to this application? In other words, more about the lack of traffic signals at that location?
>
> Finally, that there are no analytical capacity calculations and the TIS was based on a high-level qualitative assessment doesn't pose any concern?
>
> Please let me know your thoughts. Thanks!
>
> [Exhibit S-2, p.77]

[76] Ms. Rodger replied to Mr. Sampson by email on December 2, 2020, saying:

> Hi Paul,
>
> I've had a look at this and had traffic review it too.
>
> We agree with you on the first point; the inadequate SSD on Hanwell is not actually relevant in this case. The SSD is not met because the road ends, not due to a lack of actual sight lines.
>
> On the second point, the TIS has been prepared according to HRM's standard practices. With a minimal number of new trips generated (approximately 1 new vehicle every 3 minutes in peak hours, and fewer outside of these hours), there is not expected to be a significant impact on the network, therefore we do not require existing traffic counts. The total traffic volumes will fluctuate more than the number of new trips on a daily basis, so little would be gained by looking at the existing volumes in this case. Due to the scale of

development and number of trips generated, we also would only look for a qualitative assessment without analytical capacity calculations. This is the accepted practice by HRM.

We did check the published trip generation rates, and depending on the type of commercial use that was proposed before, the number of new trips may be more, but the new number of trips is still not a cause for concern to us. I will note that the TIS was prepared for 52 units in a mid-rise type building only, with no mention of ground floor commercial. We checked how the rates would change for the mixed use however and there was no cause for concern there.

To your third point, any existing traffic issues in the neighborhood are not caused by this development, and we haven't identified any upgrades for which this development may be a "tipping point", so these issues should not be used as a justification to reject this proposal. It is possible that there could be future intersection upgrades at Swindon and Margeson as the lands to the south are developed.

I also had traffic check to see if Hanwell was on the list for traffic calming, which seems to be another concern this resident is bringing forward. Again, this concern is regarding an existing issue and not one caused by the proposed development. Hanwell is on the list for a traffic calming assessment, which means we are awaiting data collection on that street. Our seasonal data collection program is expected to resume in 2021. After data is collected from Hanwell, if it meets the criteria for traffic calming it will be put into a ranked queue for design and construction.

Please let me know if you have any more questions on this!

[Exhibit S-2, p.76]

[77] As noted earlier in this decision, the PAC meeting held on December 7, 2020, recommended against approval of the amending agreement, noting unspecified 'traffic concerns." A Staff Report, dated September 21, 2021, for NWCC noted "Concerns regarding traffic, speeding and pedestrian safety" as a topic from community engagement and included the statement of the PAC. The Staff Report addressed traffic and driveways, stating:

Traffic and Driveways

A Traffic Impact Statement (TIS) from January of 2020 proposed two driveways off Swindon Drive. Based on the review of this first statement, an updated TIS from October 2020 was submitted, which proposed one driveway off Hanwell Drive. This amended proposal satisfied HRM Development Engineering where siting distances are adequate and took into account the termination of Hanwell Drive at Swindon Drive. There will be a minimal number of new trips generated as compared to the uses allowed in the existing agreement. Therefore, no significant impact on the road network is expected. The updated TIS has been reviewed by HRM Traffic and Development Engineering, was found to be acceptable and no concerns were raised. The TIS meets HRM's standard requirements and analytical capacity calculations were not required.

> There have been some traffic concerns raised by residents through the public consultation process, such as excessive speeds. However, these concerns relate to the overall subdivision and are not caused or affected by the proposed change to the site. These issues could potentially be partly alleviated in the future by traffic calming measures. Beaconsfield Way, between Darlington and Sackville Drive, is on the list of ranked streets for traffic calming. Hanwell Drive and Darlington Drive are currently in the data collection phase and could be added to the list in the future.
>
> [Exhibit S-2, p.113]

[78] The Staff Report also included a matrix outlining the policies to be considered and the staff comments. The Staff report, a staff presentation, a presentation by Mr. Saleh, the PAC memo and letters from a number of residents were all before the NWCC at the November 8, 2021, meeting where Council refused the application. The Council minutes reflect that there were several public speakers who mentioned traffic concerns.

[79] Mr. Sampson testified that other than the driveway location, there were no concerns about the adequacy of the road networks. He agreed with the conclusions reached by Ms. Rodger, and said that if Engineering had any concerns, the department would have asked for a more detailed study. In response to Ms. Rubin, he said that he agreed with Ms. Rodger's statement that this development would not be a "tipping point" and that traffic issues "should not be used as a justification to reject this proposal." Mr. Sampson also said that he understood that Ms. Rodger had checked whether the commercial component of the proposed development would make any difference to the traffic generation and had determined it would not.

[80] As for speed, Mr. Sampson said this is a larger issue for the subdivision, and not caused by the proposed development whether commercial or residential, or a combination of the two.

[81] In response to a question from the Board regarding the references in the TIS to the impact on Margeson Drive and not on Hanwell, he said that this related to site-

generated traffic which is different from sight distancing. He relied on the views of Engineering and Traffic departments of HRM and described the TIS as typical of what HRM receives in such applications.

[82] Although Mr. Daborn did not cross-examine Mr. Sampson regarding traffic concerns, in his own evidence he noted a marked increase in both the volume and speed of vehicles on Hanwell since the two existing apartment buildings were constructed. Mr. Daborn stated that the volume of traffic would rise dramatically at peak times.

[83] In her closing submissions, Ms. Rubin said that "...traffic is a fairly broad concept." The Board agrees. The Board also agrees that Council's consideration of traffic must relate to the MPS policies, in this instance, the adequacy of road networks, and traffic generation. While the TIS was premised on a solely residential building, the evidence is that HRM staff checked whether the commercial component would change the impact of traffic generation and determined it would not materially change the conclusion.

[84] The change in access from Swindon to Hanwell was done in response to HRM and TIR requirements. Ms. Rubin submitted that the statement that the stopping sight distance is not met is due to the length of the roadway and "...not because of any shortfall in the configuration" and had been dismissed as not relevant by Ms. Rodger. Ms. Rubin also submitted that the concerns around speeding and pedestrian safety already exist in the neighbourhood, and are separate and apart from the proposed development.

[85] Like Ms. Rubin, Ms. MacLaurin noted that there is no traffic report or study which was contrary to the conclusions of Harbourside's TIS or the HRM engineers. However, Ms. MacLaurin suggested that the Board could consider the evidence before

Council and the evidence at the hearing and determine whether it outweighs the professional analysis and conclusions.

[86] What is before the Board, and indeed what was before both the PAC, and the NWCC, is professional opinion about the very issues about roads and traffic, and access to the site, which the MPS directs Council to have appropriate regard to in making its decision. The Board acknowledges that Council read and heard many anecdotal accounts of the volume and speed of traffic, as did the Board. However, the Board concludes that it must give due weight to the professionals' evidence. The anecdotal information does not, in the Board's view, outweigh the evidence of Harbourside and Ms. Rodger as contained in the Appeal Record, and confirmed in the hearing.

[87] The Board concludes that there is nothing in the policies relating to road networks, traffic generation, or site access which gives rise to the exercise of judgement on the part of Council. These are questions of fact, and the Board concludes that Council's decision to reject the amending development agreement based on "traffic concerns" does not reasonably carry out the intent of the Sackville MPS or the RMPS.

4.5 Parking

[88] The issue of parking arose in two discrete, but connected, ways in this proceeding. The first was in relation to the required parking spaces for the proposed building, and the second was concerned with on-street parking and the hazards it presents. Parking was not an issue expressly referred to by Council; however, it was raised by Mr. Daborn and his witnesses, as well as members of the public. Nevertheless, to consider Council's decision in light of all MPS policies, the Board will explore the parking issues.

[89] Sackville MPS Policy IM-13(c)(iii) and RMPS Policy G-15(b)(iii) both refer to controls on the proposed development to reduce conflict with adjacent or nearby land uses by reason of parking. The 2008 development agreement provided in Section 3.5.4 that for the multi-unit buildings shown on Schedule B (which does not include the proposed development) a minimum of 50% of the required parking spaces are to be underground. Under Section 3.5.5, any commercial development area on Schedule B was to comply with the requirements of the C-2 (Community Commercial) Zone of the LUB. No requirements for parking are set out in the C-2 Zone provisions of the LUB; however, Section 4.24(a) of the LUB sets out parking requirements for multi-unit dwellings of 1.5 spaces per dwelling unit, and for retail stores, service and personal service shops not exceeding 5,000 ft.^{2}, 3.3 spaces per 1,000 ft.^{2} of gross floor area. Section 4.24(b) of the LUB contains provisions for parking spaces for the mobility disabled in addition to those basic requirements.

[90] Under s. 23.4 of the LUB, the subject property is zoned CDD, and falls under the requirements for the R-6 Zone which is covered in Section 12 of the LUB. Section 12.3(f) requires one off-street parking space for every 150 ft.^{2} of floor area devoted to any business.

[91] The proposed development agreement amendment would allow a maximum of 52 residential units, and a minimum of 2,500 ft.^{2} commercial space. The parking spaces to be provided included 50 interior spaces and 12 exterior spaces as shown on Schedule J.

[92] Mr. Daborn's evidence and that of his witnesses was that the number of parking spaces was insufficient for the number of units, and would lead to residents of the

building parking on the street. On-street parking will, in their view, result in increased difficulty navigating the street, accessing the street, snow removal, and emergency vehicle response.

[93] Mr. Saleh testified that a one-to-one ratio had been established for parking which he said is reasonable where there is access to public transit. He said there is a bus stop near the property. He further noted that the developer could choose to increase the parking if it wishes, as the amending agreement sets only a minimum.

[94] Mr. Daborn called Mr. Saleh's attention to the provisions of Section 4.24 of the LUB and suggested that more parking spaces were required for both the residential and commercial components of the proposed building based on those provisions. However, Mr. Saleh testified that having a development agreement did not require compliance with the LUB.

[95] Mr. Sampson testified that the HRM planning team felt that the parking provisions of the amending agreement were adequate for the development. He agreed that they prescribe a minimum, and the number of spaces could not be reduced. Mr. Sampson said that the 1.5 spaces referred to in the LUB is often excessive, noting that for many years, in suburban areas of HRM, one space per unit has worked well.

[96] Mr. Sampson also testified about on-street parking, saying:

> …I mean, the streets are owned by HRM, not the residents, and the -- it's -- you know, on-street parking happens. And in this case, it could on occasion.
>
> It may not necessarily exist all the time, but that's something staff looked at as well in terms of, you know, there's the ability to park, you know. And obviously, the parking rules have to be followed. If there's no parking on one side, for example, then those rules have to be followed. Same with overnight parking in the winter when there's a snowstorm. So all of these types of things get factored in.
>
> The Applicant -- part of the onus is on the Applicant to manage that on a site like this. And obviously, if someone wants to rent a unit and requires two parking spaces, they're probably going to look elsewhere, so that's the -- kind of the simple, basic answer on -- you

> know, in terms of the number of spaces. If someone needs two, they're likely not going to rent in this building, so.
>
> [Transcript, pp.197-198]

[97] In response to Mr. Daborn, Mr. Sampson acknowledged that the matrix providing staff comments in the second team review stated in error that the parking will comply with the LUB except that 50% would be underground. Mr. Sampson clarified, however, that Sunset Plaza would not have to comply with the LUB parking requirements, but rather with the requirements in the proposed amendment.

[98] The Board observes that the current proposal has 50 underground parking spaces, for a 52-unit building. While this is less than the LUB requirement of 1.5 spaces per unit, it significantly exceeds the multi-unit dwelling requirement in the 2008 development agreement. There are 12 exterior parking spaces. Based on the proposed minimum of 2,500 ft.^{2} of commercial space, the LUB provisions of the R-6 zone, which apply to the CDD zone, would require 1.5 spaces per 150 ft.^{2}, so this LUB requirement would not be met. The general requirements of section 4.24(a) would be met, however.

[99] In claiming the parking is inadequate, Mr. Daborn focused on the LUB requirements, and did not take into account the fact that the provisions of a development agreement or amendment can vary the LUB requirements. In this case, both Mr. Saleh and Mr. Sampson testified that the number of spaces is adequate, based on their experience. The Board finds their evidence persuasive.

[100] With respect to concerns about on-street parking, again the evidence was anecdotal and does not persuade the Board to reject Mr. Sampson's evidence. The Board agrees with Ms. Rubin's submission that the streets are HRM property and those who park on them must abide by the parking rules and restrictions in force.

[101] Parking related to the development is adequately controlled by the amending agreement provisions in the Board's view. The Board finds no evidentiary basis, and no policy basis, with respect to parking, which would lead it to conclude that Council's decision to reject the amendment reasonably carries out the intent of the MPS.

4.6 Water

[102] Like parking issues, concerns about water were not expressed by Council in its decision, but they were raised by Mr. Daborn and members of the public. Sunset Ridge is serviced by central water and sewer. However, Mr. Daborn testified that he and other residents have encountered significant water pressure and supply issues. His evidence included a copy of a letter from the Halifax Regional Water Commission prior to the construction of his home stating that a domestic booster pump is required for water service. Mr. Daborn said because of the frequency of running the pump, he is now on his second such pump. He said each house in the neighbourhood is required to have such a booster pump.

[103] Mr. Daborn included the 2018 and 2020 editions of Halifax Water's "Design Specification & Supplementary Standard Specification for Water, Wastewater & Stormwater Systems" (Design Specifications). By his calculations, using these specifications, the additional demand for the proposed 52 units is higher than Sunset Plaza's consultant had determined, and cannot be met through the existing services.

[104] Mr. Daborn also took exception to comparisons used by Mr. Saleh in communications with HRM, using a laundromat as a hypothetical commercial space as one of the possible businesses, because such a use would not be needed in the subdivision. Mr. Saleh said he had done that to provide an example of the capacity of

what a currently permitted use of the property might be, and agreed that other uses, such as offices or a bank, would change the comparison. He maintained that the drawings submitted with the application show that there is capacity for the proposed development.

[105] Policy UR-10(e) of the Sackville MPS requires the development agreement for a CDD to specify matters relating to the provision of central sewer and water services in the development. Policy IM-13(b)(ii) requires Council to have regard to the proposal not being premature or inappropriate by reason of the adequacy of sewer and water services. The RMPS, which specifically addresses the Sunset Ridge subdivision in Policy SU-6(e), requires as one of the criteria of the development agreement that "the development is capable of utilizing existing municipal trunk sewer and water services without exceeding capacity of these systems." RMPS Policy G-15(a)(ii) is similar to Sackville MPS Policy IM-13(b)(ii).

[106] Sunset Plaza included a report from Servant, Dunbrack, McKenzie & MacDonald Ltd. (SDMM), dated December 16, 2019, addressed to Halifax Water. The report referred to the sanitary lateral size proposed for a 51-unit dwelling at the subject property and stated there would be sufficient flow capacity. This was considered by HRM planning staff in its initial review of the application. The team review noted that "the detailed servicing plan will be reviewed by Halifax Water at the Building Permit stage" in response to Policy UR-10(e), and "Existing municipal services are adequate to service the proposal" with the same comment about Halifax Water review in response to Policy IM-13(b)(ii).

[107] Mr. Saleh testified that the SDMM drawings were preliminary and that more detailed drawings would be prepared for a more comprehensive review by Halifax Water

when the building permit application would be made. He acknowledged that, as part of the HRM planning team review, Halifax Water had made comments about the requirements at that stage.

[108] Mr. Daborn had expressed concerns about the sufficiency of the water pressure in written comments to HRM. As a result, Mr. Sampson communicated with Sanjoli Tagra, a development engineer with Halifax Water in November, 2020. Ms. Tagra advised there were no concerns and confirmed the requirement to comply with the 2020 edition of the Design Specifications. Ms. Tagra had already advised Mr. Sampson in October, 2020 that the change for ground floor commercial space did not pose concerns.

[109] Mr. Sampson testified that Halifax Water could have asked for a capacity analysis at any time and had indicated that such an analysis might be required at the permitting stage.

[110] The requirement for the water distribution system in the Sunset Ridge subdivision to comply with Halifax Water's Design Specifications was included in the 2008 development agreement. This was confirmed by Mr. Sampson who said that these requirements are typical in this sort of development agreement. Nothing in the proposed amendment changes those requirements. The Board observes, as Ms. Rubin submitted, that if the requirements cannot be met, the development cannot proceed.

[111] The Board finds that the anecdotal evidence of poor water pressure does not outweigh the fact that Halifax Water was satisfied with the capacity of the system and, as already required in the development agreement, will require complete compliance with the specifications when the building permit stage is reached. Accordingly, the Board

concludes that there is no policy basis on which Council's decision could be said to reasonably carry out the intent of the MPS regarding the adequacy of the water system.

4.7 Schools

[112] The refusal letter from NWCC said in part:

> North West Community Council discussed the impact that a large residential project on the subject property will have on the local school system, which is currently exceeding capacity with no concrete plans for the adjustments of school boundaries or a new school from the provincial government in the immediate future.
>
> [Exhibit S-2, p. 217]

[113] Current overcrowding in Sackville Heights Elementary School was a significant focus of the comments of the two public speakers, Mr. Albert and Ms. Clarke, as well as Mr. Pinsent and Mr. Millette, who testified on behalf of the intervenor. This was also true of some members of the public who either wrote to Council, spoke at the Council meeting, or sent letters of comment to the Board. The use of portable classrooms has caused concern. Busing and transportation problems were noted, as well as classroom size. The concerned parents believe that adding a multi-unit residential building will increase the student population materially and negatively impact the quality of education their children will receive.

[114] Mr. Daborn filed a Class Cap Report from the Halifax Regional Centre for Education (HRCE), dated October 12, 2021. The report shows the number of classes over defined provincial cap guidelines for all public schools in the province. The report shows that Sackville Heights Elementary School had 11 classes from Grades P-2, six of which were within the cap, and five of which exceeded it. In Grades 3-5, five of the eight classes were within the cap and three were not. For Sackville Heights Junior High School, Sackville High, and Millwood High School, which the Board understands are the schools which the elementary school feeds into, all classes were within the cap.

[115] The Class Cap Report also notes for the elementary school, except for Grade 1, which was two students over the cap, all other grades exceeded the cap by only one student. The reasons were attributed to "School Capacity" and the procedures for exceeding the hard caps were followed.

[116] While he acknowledged that the junior high and high schools were not over capacity according to his evidence, Mr. Daborn testified that initially it will be the elementary school which will be stressed due to the proposed development as the neighbourhood has younger children. Mr. Daborn said that the Sackville Heights Elementary School is "so far over capacity, it cannot take any more students." He does not have any students at that school and is not part of the group which is apparently raising issues about the class sizes there. Mr. Daborn was not aware of an additional teacher having joined the school, or the principal's message contained in the February 2020 newsletter, put to him in Ms. Rubin's cross-examination, which addressed what is being done to address the "growing student population."

[117] Jacob Ritchie, the former Director of Operation Services for HRCE, testified on behalf of the appellant. In his position, he was responsible for directing information technology, student transportation, custodial, maintenance, and capital construction. He testified that the provincial Department of Education and Early Childhood Development (EECD) has the ultimate responsibility for education. HRCE is the administrative body for one of seven geographic regions in the province to which that responsibility is delegated.

[118] Mr. Ritchie stated that the capital planning group of HRCE has a good relationship with HRM's planning and development group, and is regularly advised of

large development agreements in HRM. He identified a letter which he had written to Carl Purvis, Planning Applications Program Manager of HRM, on February 20, 2020, discussing consideration of school capacity and the communication of relevant information between HRM and HRCE. The letter stated:

> ...Projections are based on existing school populations, local births data, sub-division and development applications, private school and CSAP capture rates, as well as overall population trends through Halifax Regional Municipality.
>
> Development Impact
> When performing impact assessments we use the following housing yields, which may be adjusted from time to time to match local trends in development and housing (all yields are expressed in Children Aged 5-17 I Housing Unit).
>
> - Single Family Housing is estimated at a yield of 0.58
> - Town/ Row House Housing is estimated at a yield of 0.50
> - Apartment Housing is estimated at a yield of 0.16
>
> The Education Act mandates that every person over the age of five years and under the age of 21 years has the right to attend a public school serving the school region in which that person resides. While there may be operational challenges in some cases, the HRCE will work to ensure all students are provided with access.
>
> With respect to applications that have a physical impact on any particular school site (e.g. neighbouring property, road construction, large scale Development Agreements around schools, road closures, etc.) please continue to reach out to the HRCE for comment and input. [Emphasis added]
>
> [Exhibit S-6, p.1]

[119] Mr. Ritchie confirmed that HRCE must always accommodate students in its district because of the requirements of the *Education Act.* He described how HRCE plans for the number of students each year, and how it adapts space to accommodate them in various ways. When a new development is proposed, HRCE staff look at the number of units to determine how many children may live in the type of unit and thus how many will need to be accommodated in the schools. HRCE uses demographic data, from a company that operates nationally, to estimate the likely school population and considers how children age or progress through the school system.

[120] Based on the demographic data, Mr. Ritchie agreed that a 52-unit apartment building would have 8.3 children. He estimated that rounding to eight children, based on the 14 grades in the school system, this would result in four children in elementary school, two in middle or junior high school, and two in high school. He did not consider the proposed building to be a large development and would not have advised HRM that HRCE could not meet the capacity.

[121] In response to Mr. Daborn, Mr. Ritchie said he was aware that the Sackville Heights Elementary School was "filling up" and that portable classrooms had to be installed. In response to a question from the Board, Mr. Ritchie said that he was never asked about the proposed development while he was employed at HRCE.

[122] Mr. Sampson testified that, while HRM would discuss larger developments with HRCE, this did not happen with "individual building sites." He did not consider the proposed development to be a large site, but said "… if this had been an application for the entire Sunset Ridge subdivision, then that would be different." Mr. Sampson did not consider that there is any policy basis to refuse the amending agreement on the basis of inadequacy of schools. He did, however, acknowledge in response to Mr. Daborn that he had had no feedback of any kind from HRCE regarding the amending application, but he had not sought it.

[123] Sackville MPS Policy IM-13(b)(iii) requires the Council to have appropriate regard to "the adequacy or proximity of school, recreation and other community facilities." Policy G-15(a)(iii) of the RMPS refers to "the proximity of the proposed development to schools, recreation or other community facilities and the capability of these services to absorb any additional demands." Although Mr. Sampson had testified that Policies IM-

13 and G-15 were similar, he acknowledged in response to a question from the Board that the wording with respect to schools and other facilities is not exactly the same. The exchange continued:

> Q. Do you think there's any significance in that? As a planner, would you think that that was significantly different?
>
> A. I don't think it -- it's still factored into the recommendation in this case. If you're wondering about the specific wording, the -- you know, the -- we already had the process whereby HRCE would – you know, would comment if they had concerns with our – with our development proposals. And is this what you're referring to, is the school question?
>
> Q. Yes. Yes.
>
> A. Yes, yes. And the proposal itself, based on HRCE's own estimates, would only result in a few – you know, eight or nine children, so those two things combined, you know, we didn't get any concerns from them. And in my 21 years as a planner, I've never received any concerns by HRCE or the former School Board with regards to one building proposal as opposed to a -- you know, a larger project involving hundreds of -- hundreds of units, so I've never had any kind of concern raised with one building as part of -- as the application.
>
> [Transcript, pp. 238-239]

[124] Ms. Rubin's submissions on the issue of schools focused on the Sackville MPS Policy IM-13(b)(iii) provisions. She submitted that the evidence disclosed that the number of students, based on the HRCE projections, is small and would not cause HRCE a concern. Ms. Rubin pointed to Mr. Ritchie's letter to HRM confirming that HRCE "…will fulfill its mandated role to ensure all children have the right to attend public school in their region."

[125] Ms. MacLaurin said that Council is entitled to consider schools but agreed with Ms. Rubin's interpretation of the evidence from the Class Cap Report and the formula used by HRCE. She noted the evidence of Mr. Pinsent and Mr. Millette which indicated dissatisfaction with the way the province is carrying out its mandate to educate students. In reply to a question from the Board during her submissions, Ms. MacLaurin addressed the requirement of Policy IM-13(b)(iii) for Council to consider whether the development is

premature or inappropriate regarding the adequacy and proximity of schools. She suggested it is a question of whether the policy is speaking objectively or subjectively. Ms. MacLaurin indicated that RMPS Policy G-15(a)(iii) could provide guidance with the additional wording about the capacity to absorb additional demands. In her submission, this is more of an objective test.

[126] Because the wording of the two MPS policies regarding schools is different, the Board questioned the hierarchy between the two. Ms. MacLaurin confirmed that the RMPS identifies that where there is a conflict between the RMPS and, in this case, the Sackville MPS, the stricter of the two applies. She identified the RMPS as the stricter.

[127] The Board considers, that despite the difference in wording, there is no conflict between the provisions of the two policies which reference schools which would lead the Board to defer to Council's decision. The Board recognizes that many residents of the Sunset Ridge subdivision have concerns about the current situation at Sackville Heights Elementary School. These residents expressed their views clearly and, undoubtedly sincerely, in letters to Council, letters to the Board and in public presentations both at Council and before the Board. However, the Board agrees with Ms. MacLaurin that the proximity and adequacy of schools must be considered objectively.

[128] Proximity of schools is not an issue. The subdivision is already served by local schools. The Board is persuaded by the evidence of Mr. Ritchie and Mr. Sampson that, based on demographic data, the number of children who may live in the proposed building can be adequately accommodated in the existing schools. There was no objective evidence to the contrary before the Board. The Board concludes that Council's

reasons relating to schools, as stated in the refusal letter, do not reasonably carry out the intent of the MPS policies.

4.8 Compatibility

[129] NWCC's refusal letter said Council agreed with the recommendation of the PAC. One of the concerns identified by the PAC was "incompatibility with the existing neighbourhood." The existing neighbourhood is a result of the general land uses identified in the 2008 development agreement for the Sunset Ridge subdivision which consisted of a mix of housing types, including multi-unit dwellings and commercial space. Sackville MPS Policy IM-13(c)(ii) requires Council to have regard to the controls on the development "so as to reduce conflict with any adjacent or nearby land uses by reason of…height, bulk and lot coverage of any proposed building." The Board considers the imposition of controls is what furthers compatibility, by reducing conflict.

[130] The staff report presented to NWCC addressed the compatibility of land use and said that the proposed change from commercial to multi-unit residential and some ground floor commercial space "…poses minimal compatibility concerns or land use impacts with adjacent residential development, when compared to the commercial uses permitted by the existing agreement, which include restaurants, retail stores and offices." The report went on to discuss the siting of the building, setbacks, landscaping, and building height. Mr. Sampson testified that the term "compatibility" is not contained in the MPS, but that it relates to controls for matters like bulk, lot coverage, height and similar matters. He said that low-density residential use is the most proximate to the subject, noting that there are two apartment buildings slightly removed, separated by a private

roadway. Mr. Sampson testified that staff had concluded that any compatibility concerns were satisfied in the proposed amendment.

[131] Both Mr. Saleh and Mr. Sampson testified about the height, lot coverage, side yards, setbacks, architectural features, and landscaping. They both noted the differences in what is proposed, compared to the potential commercial development of the property. The evidence is that the building will be four storeys high, which is one story higher than the 30 ft. height limit for a commercial building, but the same number of storeys as the two nearby multi-unit buildings. The lot coverage is 28% of the area. Drawings provided in the application for potentially two lots for commercial use would see a total of 33% coverage with greater areas for parking. There is more green space around the proposed building with landscaping proposed along all sides except along Hanwell Drive where the driveway entrance is located, as well as landscaping around the front door. According to Mr. Saleh, there is no specific requirement for landscaping in the LUB provisions.

[132] Regarding compatibility, Mr. Saleh said that the proposed development amounts to a "better scenario" than the potential commercial development which was permitted under the 2008 development agreement or the existing by-laws. He said that what is proposed is double or triple what the LUB requirements would provide. Architectural design is intended to soften the appearance of the building with quality materials. Because of the large outdoor space, he said there would be a tree buffer almost bordering the entire property, consisting of a mix of deciduous and coniferous trees.

[133] The setback provisions of the LUB for R-6 Zone for residential buildings (where Sunset Ridge is directed under the CDD Zone) are 20 feet, with a minimum side or rear yard of eight feet. According to Schedule J of the amending agreement, the minimum setback is 15 feet at the corner of Hanwell and Swindon, and the side and rear yards range from 15 feet at Swindon, 33 feet at the rear boundary near Margeson Drive, 35 feet on the boundary adjacent to the private roadway at the rear, and 48 feet at the commercial space entrance to that roadway.

[134] Mr. Sampson testified that the building setbacks are typical for a suburban development. The building must conform to the drawings. He said that through the combination of the position of the building on the site and its proposed height, staff concluded there would be minimal land use impacts.

[135] Members of the public, including Mr. Albert who spoke at the hearing, were concerned about having a multi-storey multi-unit building near their homes, as they feared a loss of privacy, a loss of sunset views, and generally did not like areas with many large apartment buildings, such as the Larry Uteck area of HRM. Some, like Mr. Millette, moved from there to Sunset Ridge to escape that kind of development.

[136] In her submissions, Ms. Rubin said this proposal is not for a high-rise building but a four-storey building. The controls provided in the amending agreement with larger setbacks, on a relatively flat site, and less lot coverage by the building mean it will have minimal compatibility impacts. She submitted that the controls improve the development compared to the potential commercial development. She noted that there is a small commercial component but said that nothing in the MPS policies requires a particular percentage of commercial and residential space.

[137] Mr. Daborn made submissions based on his calculation of the population density of the proposed building, saying it is twice that of the two existing apartment buildings, and much greater than the existing single-family homes, "regardless of setbacks." He concluded that the proposal does conflict with nearby land uses, and that any comparisons should be made to buildings in the area, rather than other areas of HRM.

[138] The 2008 development agreement allowed for a commercial development on the subject property. The Board notes Mr. Saleh's evidence that the owner has been unable to attract a commercial development to the site. A commercial development with large paved parking areas might be considered incompatible with the surrounding land uses as they have developed. The Board observes that the property is the last piece of the subdivision to be developed. The 2008 agreement also allows for two multi-unit buildings in the subdivision, close to the commercial site, and also close to single-family homes. The Board is unable to make any judgement about Council's consideration of compatibility in 2008. However, the Board is persuaded that the controls identified by Mr. Sampson and Mr. Saleh are designed to reduce conflict with adjacent or nearby land uses, as required under the MPS.

[139] These provisions of the MPS do not contain the kind of words which Fichaud, J.A., identified in *Archibald* which would lead the Board to defer to Council's decision, such as "undue" or "appropriate." The MPS directs that controls be placed on the development to reduce conflict; here there are controls set out in the amending agreement that will reduce conflict, and as a result, the Board concludes that Council's decision does not reasonably carry out the intent of the MPS.

4.9 A Complete Community

[140] In its recommendation to NWCC, the PAC said, as one of its reasons for rejection of the application, "...the development goes against the original intent of the neighbourhood and it is not a complete community...." As noted earlier in this decision, NWCC stated its agreement with the PAC. Council's refusal letter also referred to "...the substantive change of the proposal from a commercial development to a substantial residential development from a complete community perspective."

[141] As Mr. Sampson testified, the term "complete community" is not contained in the MPS policies, and it is not included in the 2008 development agreement. The Board inferred from comments by Mr. Albert, one of the public speakers, and Mr. Pinsent, as well as some of the letters of comment, that they believe that there should be commercial development on the site to accommodate small businesses, professional offices, or cafes, for example. This suggests a desire for the general needs of the subdivision to be satisfied in close proximity; however, there is nothing in the MPS which could inform Council's decision to require a "complete community."

[142] The subject property is in the CDD zone. The Board observes that, while Sackville MPS Policy UR-10(a) provides that a development agreement in a CDD "shall specify...the types of land uses to be included in the development," there is nothing which restricts land uses, and nothing which prohibits a change in land uses. Further, the preamble to the MPS policies regarding CDDs states:

> Comprehensive Development Districts
>
> The Planning Act permits the establishment of comprehensive development districts in the Plan Area and the use of contractual development agreements. The use of these agreements will be advantageous to the community by providing for the comprehensive planning of individual developments. Such a comprehensive approach will permit consideration of a wide range of development conditions including topographic conditions, housing mix including innovative housing forms, the scheduling of development, road

> layout, public land dedication, sidewalks, the location of school and other community facilities, provisions for storm drainage as well as the general effects of the development on the environment and adjacent land uses. Residential development, through comprehensive development districts, is in keeping with the intent of encouraging well-planned residential neighbourhoods. [Emphasis added]
>
> [Exhibit S-3, pp.53-54]

[143] To the extent that the Board can consider the preamble to an MPS policy in understanding the policy (as confirmed by the Board in several decisions, e.g., *Hatchet Lake, supra; Re Kiann Management Limited,* 2020 NSUARB 42), the Board concludes that the focus of a CDD is on residential neighbourhoods. The Board finds further confirmation of this in Policy UR-9 which limits general commercial development in a CDD, except for local uses "intended to service households within the district on a daily basis." Further support is found in both RMPS Policy SU-6 which specifically allows for "a residential subdivision" for Sunset Ridge, and refers to the general residential character of the community, and in Sackville MPS Policy RR-3, which identifies types of residential dwellings and only local commercial uses.

[144] The PAC recommendation suggested that the developer might consider making the entire ground floor of the development commercial space. Mr. Saleh explained that this recommendation was considered, and the application ultimately included some commercial space on the ground floor as a compromise.

[145] The Board will not speculate as to whether this compromise should satisfy the concerns expressed by Council about a "complete community," but as there is nothing in the MPS which considers this as a factor, the Board concludes that the decision by Council on the basis that the development is not a "complete community" cannot be considered to reasonably carry out the intent of the MPS.

5.0 CONCLUSION

[146] Sunset Plaza asked HRM to approve an amendment to a 2008 development agreement to allow a multi-unit residential building with some ground floor commercial space on the remaining undeveloped land in the Sunset Ridge subdivision instead of a solely commercial development. NWCC refused the application, against the recommendation of HRM planning staff.

[147] Sunset Plaza appealed NWCC's decision to the Board. HRM did not call any evidence and generally agreed with the position of the Appellant. Keir Daborn, a resident of the area, intervened in the proceeding and asked that Council's decision be upheld.

[148] The Board observes that NWCC was aware of considerable public opposition to the proposed change sought by Sunset Plaza. This opposition was also reflected in letters of comments to the Board, by the public speakers at the hearing, and the witnesses for the Intervenor. However, the degree of public support for, or opposition to, a proposal is not a factor for Council consideration under the MPS.

[149] The Board is required to consider whether Council's decision reasonably carries out the intent of the relevant MPS. The Board has considered, not only the express reasons contained in Council's refusal letter, but also the provisions of the Sackville MPS and the RMPS as a whole.

[150] The Board observes Council should have "good planning reasons" to disregard the recommendations of the planning staff. Neither HRM Counsel nor Mr. Daborn provided any evidence of good planning reasons for the refusal. Based on its analysis of the facts of the proposal in the context of both MPS, the Board concludes that the Appellant has met the burden of proof, on a balance of probabilities, and has

persuaded the Board that Council's decision is not rooted in the MPS policies, and therefore cannot be said to reasonably carry out their intent. As a result, the Board allows the appeal and orders Council to approve the proposed amendment agreement which was before it, as set out in the Appeal Record.

[151] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 4th day of May, 2022.

Roberta J. Clarke