DECISION **2022 NSUARB 82**
M10426

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **REBECCA RITCHIE** from a Decision of a Development Officer of the Municipality of the County of Annapolis to Refuse a Subdivision Located at Victoria Vale, Nova Scotia and identified as PID 05022322

BEFORE: Stephen T. McGrath, LL.B., Chair

APPELLANT: **REBECCA RITCHIE**
Arthur Backman, N.S.L.S.
(Appearing as Agent for the Appellant)

RESPONDENT: **MUNICIPALITY OF THE COUNTY OF ANNAPOLIS**
Linda Bent
Manager of Development Services and Development Officer

Victoria Hamilton
Planner

Brandon Lamb
Planner

HEARING DATE: April 4, 2022

FINAL SUBMISSIONS: April 4, 2022

DECISION DATE: **May 24, 2021**

DECISION: **The appeal is dismissed.**

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1.0 INTRODUCTION

[1] The Appellant, Rebecca Ritchie, applied to the Municipality of the County of Annapolis for approval of a final plan of subdivision for property located at Victoria Vale, Nova Scotia. The application was submitted through her agent, Arthur C. Backman. Mr. Backman has been a certified land surveyor in Nova Scotia since 1977 and had prepared the proposed final plan of subdivision for Ms. Ritchie.

[2] Ms. Ritchie proposed to subdivide the property to create two residential lots fronting on Route 362, with the remainder of the property reserved as woodland. The subdivision plan proposed that the two residential lots would be accessed from Route 362 using an existing driveway on the property. The driveway served a building that used to stand on the property, although all that remains of the building now is an old foundation.

[3] Route 362 is a provincial public highway. As such, the subdivision application was required to include stopping sight distance information in a specified form to be completed by a surveyor or by the authority having jurisdiction for the public street. Mr. Backman completed the specified form and included it on the proposed final plan of subdivision. Based on his training and experience, Mr. Backman understood existing driveways serving not more than three residential dwellings were deemed to meet stopping sight distance requirements and this information was noted on the form.

[4] The Municipality, following its usual practices, forwarded Ms. Ritchie's subdivision application to the Middleton Area Office of the Nova Scotia Department of Transportation and Infrastructure Renewal (now called the Department of Public Works but referred to in this decision as the "Department of Transportation"). The department's Area Manager sent a letter to the Municipality's Development Officer advising that stopping sight distances had been assessed and that the entire frontage of one of the

proposed residential lots, including the location of the existing driveway, did not meet residential stopping sight distance requirements. The Area Manager said access to that proposed lot was not granted and could not be approved. The second residential lot could be approved for access, but only at a location some distance south of the existing driveway.

[5] The Municipality advised Mr. Backman about the comments it received from the Department of Transportation and suggested he make contact to discuss it with them. Mr. Backman asked that the subdivision application be put on hold while he sorted out this issue.

[6] Mr. Backman was not able to sort the issue out with the Department of Transportation and, after some time, advised the Municipality to take the application off hold and proceed with the subdivision approval. He provided the Municipality with additional information supporting the use of the existing driveway and submitted the Municipality should disregard the comments it had received from the Department of Transportation Area Manager.

[7] The Municipality sent the additional information to the Department of Transportation; however, the Municipality did not receive anything from the Area Manager indicating he had changed his view. Eventually, the Municipality's Development Officer advised Ms. Ritchie that her application was deemed to be refused due to the amount of time that had passed. She was advised she could appeal to the Nova Scotia Utility and Review Board within 14 days.

[8] Mr. Backman filed an appeal with the Board on Ms. Ritchie's behalf on January 21, 2022. The Appellant's Notice of Appeal alleged that the Municipality failed

to follow its Subdivision By-law because it refused to approve the subdivision application based on comments from the Department of Transportation's Area Manager, even though the subdivision application was not contrary to any municipal by-law or provincial law or regulation.

[9] Although Mr. Backman presented a strong case to the Board that the existing driveway satisfied the requirements for access from the public highway, the Board concludes that the subdivision could not be approved if the proposed access to a street does not meet the Province's requirements. The Municipality was entitled to rely on the Department of Transportation's assessment of whether the application met those requirements when considering whether to approve the final plan of subdivision. As a result, this appeal is dismissed.

2.0 ISSUE

[10] In this appeal, the Board must determine whether the Appellant has demonstrated, on a balance of probabilities, that the Municipality's refusal to approve the final plan of subdivision conflicts with the provisions of the land-use by-law or the subdivision by-law.

3.0 BACKGROUND

3.1 Board Jurisdiction

[11] Municipalities in the Province of Nova Scotia, through the adoption of municipal planning strategies and land-use by-laws, are the primary authorities for planning within their boundaries. In certain circumstances, municipal planning decisions may be appealed to the Board. However, planning decisions made by municipal councils are entitled to a degree of deference from the Board when they are appealed.

[12] In such appeals, the Board follows statutory requirements and guiding principles identified in various Nova Scotia Court of Appeal decisions. These principles were summarized in *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27 and, more recently, *Heritage Trust of Nova Scotia v. AMK Barrett Investments Inc.*, 2021 NSCA 42.

[13] Some decisions made by municipal development officers under a municipality's planning documents may also be appealed to the Board. Specifically, an applicant may appeal a development officer's refusal to issue a development permit or a refusal to approve a tentative or final plan of subdivision to the Board. In such appeals, similar principles guide the Board, but there are some notable differences.

[14] In *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corp.*, 2010 NSCA 38, the Court of Appeal said:

> 29 In Archibald, ¶ 24, this court summarized the principles that govern the Board in deciding whether an elected municipal council carried out the intent of a municipal planning strategy. Similar principles, but with some adjustment noted below, apply to the Board's appellate role from a decision of a development officer. The authorities for these principles are cited in Archibald, ¶ 25.
>
> > (1) The Board is the first tribunal to hear sworn and tested evidence. So the Board should undertake a thorough factual analysis of the proposal in the context of the LUB. The appellant bears the onus, on the balance of probabilities, to prove the facts that establish the conflict between the development officer's decision and the LUB….
> >
> > (2) The legislation expects the Board to interpret the LUB. The Board should interpret the LUB not formalistically, but pragmatically and purposively, to make the LUB work as a whole….
> >
> > (3) Subsections 234(1) and of the HRM Charter direct that the LUB "enables" and should "carry out the intent" of the MPS. The MPS does not amend the LUB. But the LUB's interpretation may be assisted by the MPS, and the Board's purposive approach should encompass the LUB and MPS together….
> >
> > (4) The Board's deference to the elected municipal council's difficult choices among vague and intersecting intentions in the MPS, discussed in Archibald ¶ 24(7), does not apply to an unelected development officer who applies the LUB. This is apparent from the legislative mandates to the development officer and Board. Section 261(1) of the HRM Charter says that a

> "development permit must be issued if the development meets the requirements of the land-use by-law . . .." So a development officer with such a compliant application has an executory function. He holds no public hearing of objections as may occur before the council. At the appeal level, the legislation directs the Board to decide whether the council "reasonably carried out the intent of the municipal planning strategy" - a somewhat diffuse standard. But the Board's function with a development officer's decision - to determine whether that decision "conflicts with" the proper interpretation of the LUB - is more pointed….
>
> (5) The Board hears an appeal. It is not an initiating tribunal offering fresh direction on a planning issue. So the Board should focus on the development officer's decision and stated reasons. Section 260(2) of the HRM Charter says that, within 30 days from receipt of the application, the development officer "shall grant the development permit or inform the applicant of the reasons for not granting the permit". Then s. 264(e) states that notice of appeal to the Board must be filed within 14 days from the development officer's notice. Clearly the statute contemplates that the development officer's written reasons be central to the appeal, meaning the Board's decision should address those reasons. As stated in Archibald, ¶ 30, the Board is not confined to those reasons. The ultimate question - whether the development officer's refusal conflicts with the LUB - may involve other issues. But the focus on the development officer's stated reasons prompts the Board to respect its appellate role. [Emphasis added]

[15] Although *Anglican Diocesan Centre* involved the *Halifax Regional Municipality Charter*, S.N.S. 2003, and a refusal to issue a development permit based on zoning requirements in a land-use by-law, the Board considers the above principles apply equally to the *Municipal Government Act*, S.N.S. 1998, c. 18, and a development officer's refusal to approve a tentative or final plan of subdivision based on the requirements of a subdivision by-law. In such a case, the development officer is exercising a similar executory function and the Board is similarly directed to determine whether the decision conflicts with the subdivision by-law in an appeal of the development officer's decision.

[16] A development officer is an unelected official who must, under s. 278(1) of the *Municipal Government Act*, approve an application for subdivision if the proposed subdivision is in accordance with the enactments or refuse the application if the proposed lots or subdivision falls within the circumstances described in s. 278(2):

Limitations on granting subdivision approval

278 (1) Subject to Section 283, an application for subdivision approval shall be approved if the proposed subdivision is in accordance with the enactments in effect at the time a complete application is received by the development officer.

(2) An application for subdivision approval shall be refused where

(a) the proposed use of the lots being created is not permitted by the land-use by-law;

(b) the proposed lots do not comply with a requirement of the land-use by-law, unless a variance has been granted with respect to the requirement;

(c) the proposed lots would require an on-site sewage disposal system and the proposed lots do not comply with requirements established pursuant to the Environment Act for on-site sewage disposal systems, unless the owner has been granted an exemption from technical requirements by the Minister of the Environment and Climate Change, or a person designated by that Minister;

(d) the development officer is made aware of a discrepancy among survey plans that, if either claimant were completely successful in a claim, would result in a lot that cannot be approved;

(e) the proposed access to a street does not meet the requirements of the municipality or the Province;

(f) the proposed subdivision does not meet the requirements of the subdivision by-law and no variance is granted; or

(g) the proposed subdivision is inconsistent with a proposed subdivision by-law or a proposed amendment to a subdivision by-law, for a period of one hundred and fifty days from the publication of the first notice advertising the council's intention to adopt or amend the subdivision by-law.

[17] Section 283 of the *Municipal Government Act* applies where a tentative plan of subdivision has been approved and is not applicable in the present case.

[18] Under s. 247(3)(b) and s. 284, an applicant may appeal to the Board from a development officer's refusal to approve a tentative or final plan of subdivision or a concept plan. Section 250(3) states:

250 (3) An applicant may only appeal a refusal to approve a concept plan or a tentative or final plan of subdivision on the grounds that the decision of the development officer does not comply with the subdivision by-law.

[19] The powers of the Board on such an appeal are set out in s. 251:

Powers of Board on appeal

251 (1) The Board may

(a) confirm the decision appealed from;

…

(e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan.

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

[20] In considering whether a development officer's decision conflicts with the land-use by-law or the subdivision by-law, the Board applies the principles of statutory interpretation 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 Subdivision Application

[21] Ms. Ritchie owns approximately 21 acres of land near the intersection of Route 362 and Delusion Road, in Victoria Vale, Annapolis County, Nova Scotia (PID 05022322). On February 10, 2020, Ms. Ritchie applied to the Municipality of the County of Annapolis for the approval of a final plan of subdivision for her land.

[22] As proposed, the subdivision would create two single-unit dwelling lots, designated as Lots 19-1 and 19-2, on approximately five acres of land on a part of the property fronting on Route 362. The proposed final plan of subdivision reserves the remainder of the property as woodland and designates it as Parcel R. Parcel R is behind Lots 19-1 and 19-2 and runs southward, behind an adjacent lot not owned by Ms. Ritchie, with a narrow strip wrapping around that lot to Route 362.

[23] The proposed plan of subdivision shows access to Lots 19-1 and 19-2 from Route 362 using an existing entrance straddling their boundary. The plan also identifies

the approximate location of an old foundation on proposed Lot 19-1 near this entrance. This driveway was the focus of the dispute in this appeal.

[24] Evidence filed on behalf of the Appellant by Mr. Backman included photos of the existing driveway (Exhibit R-7, pp. 148-149). The driveway was a bit overgrown and in need of maintenance but was useable. It included a culvert for the ditch running along the highway. One of the photos showed Mr. Backman's vehicle parked in the driveway.

[25] The day the Municipality received Ms. Ritchie's subdivision application, it sent a copy of the application to the Department of Transportation's Middleton Area Office. On March 23, 2020, the Municipality received a reply from the department's Area Manager confirming that Route 362 was a publicly listed road and advising that stopping sight distances for the property had been assessed. The letter went on to note that the entire frontage for Lot 19-1, including the location of the existing driveway, failed to meet residential stopping sight distance requirements. It said Lot 19-2 met these requirements, but only in one location some distance south of the existing driveway. The letter concluded:

> …the Department of Transportation and Infrastructure Renewal has no objection to the proposed Lot 19-2 as it has a site that meets Residential Stopping Sight Distance requirements. However, as the frontage of Lot 19-1, as well as the existing access, do not meet Residential Stopping sight distance requirements, Transportation cannot approve access to this Proposed Lot.
>
> [Exhibit R-3, p. 17]

[26] On April 15, 2020, the Municipality advised Mr. Backman about the Department of Transportation's response and suggested he contact the department to discuss their letter. The Municipality advised Mr. Backman that the Appellant could put

the application on hold if she wished. Mr. Backman asked the Municipality to put the application on hold while he sorted out the access issue.

[27] Mr. Backman was unable to sort things out with the Department of Transportation. On December 23, 2020, he asked the Municipality to take the subdivision application off hold and proceed to approve it. He explained to the Municipality that, in his view, the Department of Transportation had not appropriately considered the existing driveway under Chapter 8 of the Government of Nova Scotia's Management Manual 23 (Management Manual). He said the *Municipal Government Act* required this guidance to be followed and noted he was trained and qualified under the legislation to assess stopping sight distances using the Management Manual.

[28] The Municipality received Mr. Backman's letter on January 11, 2021. That same day, the Municipality forwarded his letter to the Department of Transportation Area Office. The Municipality noted that the applicant was challenging the Area Office's findings about Lot 19-1 and sought comments from the Department of Transportation based on this new information.

[29] Mr. Backman contacted the Municipality on March 18, 2021, to confirm that they received his earlier letter. The Municipality advised him that it did and that they had forwarded it to the Department of Transportation for their comments but had not received any response. Still not having heard anything, Mr. Backman emailed the Municipality on October 19, 2021, asking for a reply to the application. He wrote, "Either approve it or reject it, so we can proceed.

[30] On November 9, 2021, the Municipality wrote to the Appellant, noting that the March 23, 2020, letter from the Department of Transportation indicated that the

department could only approve one lot. The Municipality noted the subdivision plan could be amended to have a right-of-way from where access could be approved for Lot 19-2 over that lot to access Lot 19-1. The Municipality invited an amended application "to enable further processing."

[31] Ms. Ritchie wrote the Municipality on November 26, 2021. She reiterated the points raised by Mr. Backman in previous correspondence and noted she had rejected the option of having a right-of-way over the front of Lot 19-2 to access Lot 19-1 several times.

[32] On January 12, 2022, the Municipality's Development Officer wrote to the Appellant to advise her that, given the amount of time that has passed with no further responses, the application was deemed to be refused under s. 277(2) of the *Municipal Government Act*. The Development Officer advised the Appellant she had 14 days from the date of the letter to appeal to the Board.

3.3 Appeal to the Board

[33] On behalf of Ms. Ritchie, Mr. Backman filed a Notice of Appeal with the Board on January 20, 2022. In accordance with a Hearing Order issued by the Board on February 4, 2022, the Municipality filed an Appeal Record and copies of its Municipal Planning Strategy, Land Use By-law, and Subdivision By-law on February 17, 2022. Mr. Backman filed documentation as evidence supporting the Appellant's case on March 10, 2022. The Municipality did not file any additional information beyond the Appeal Record and its planning documents.

[34] The hearing for the appeal was conducted by video conference on April 4, 2022. The Board heard testimony and submissions from Mr. Backman on Ms. Ritchie's

behalf. Linda A. Bent appeared and testified on behalf of the Municipality. Ms. Bent is the Municipality's Manager, Inspection Services, and a Development Officer. The Development Officer who was assigned to the matter by the Municipality, and who had notified the Appellant that her application was deemed to have been refused, was on indefinite leave and unable to testify.

4.0 DISCUSSION

4.1 Access is Required for Subdivision Approval

[35] The Court of Appeal has said a development officer's written reasons are central to an appeal to the Board. It said that although the Board is not confined to those reasons, the Board's decision should address those reasons.

[36] The present appeal is from a deemed refusal, but it is apparent from the evidence before the Board that the Municipality did not believe it could approve the subdivision because of the information it received from the Department of Transportation advising that the department could not approve access to proposed Lot 19-1. This was apparent to the Appellant as well.

[37] In her Notice of Appeal and in the evidence and submissions presented to the Board on her behalf in this appeal, the Appellant relied upon s.39 of the Municipality's Subdivision By-law:

> 39. Approval of a Final Plan of Subdivision may not be refused or withheld as a result of the assessment or recommendations made by the Department of Environment, the Department of Transportation and Infrastructure Renewal or of any other agency of the Province or the Municipality unless the Final Plan of Subdivision is clearly contrary to a by-law of the Municipality or a law of the Province or regulation made pursuant to a law of the Province.
>
> [Exhibit R-6, p. 18]

[38] It is the Appellant's position that the existing driveway on the property provides valid access to proposed Lots 19-1 and 19-2. The Appellant says there was no

basis upon which the Development Officer could have concluded that the proposed subdivision was “clearly contrary to a by-law of the Municipality or a law of the Province or regulation made pursuant to a law of the Province.”

[39] In addressing the issue raised in this appeal, the Board considers it must first consider whether an approved access to a lot is required for subdivision approval. The Board finds that it is.

[40] As noted above, s. 278(2) identifies specific circumstances when a Development Officer must refuse an application for subdivision approval. Under s. 278(2)(e), “An application for subdivision approval shall be refused where… the proposed access to a street does not meet the requirements of the municipality or the Province.”

[41] The *Municipal Government Act* also requires municipalities in the province to have a subdivision by-law. They may adopt their own or, if they have not, they are deemed to have adopted the *Provincial Subdivision Regulations*, N.S. Reg. 38/99 under the *Municipal Government Act* as their subdivision by-law. The Municipality of the County of Annapolis has adopted its own Subdivision By-law.

[42] At the hearing, Ms. Bent said it was her understanding that although municipalities can develop their own subdivision by-laws, they must defer to the *Provincial Subdivision Regulations* unless the municipal subdivision was more stringent. The *Municipal Government Act* addresses this relationship and supports Ms. Bent's understanding:

> **Provincial subdivision regulations**
>
> **270 (1)** The Minister shall prescribe provincial subdivision regulations.
>
> …

> **(5)** Where, on the coming into force of this Act, a municipality has not adopted a subdivision by-law, the municipality is deemed to have adopted the provincial subdivision regulations applicable to the municipality as its subdivision by-law.
>
> **(6)** A subdivision by-law that is inconsistent with the provincial subdivision regulations is deemed to be amended by the subdivision regulations applicable to the municipality, unless the by-law provisions are more stringent, implement the municipal planning strategy or, with respect to the regulations concerning instruments of subdivision, do not provide for instruments of subdivision.

[43] Access to a public street is also a requirement under s. 14 of the *Provincial Subdivision Regulations*:

> **14** A proposed lot that abuts a public street shall have any access to the public street approved by the authority having jurisdiction for the public street, based on adequate stopping sight distance as determined by the authority having jurisdiction.

[44] The Municipality's Subdivision By-law closely models the *Provincial Subdivision Regulations*. It has a similar structure and many of the provisions in the regulations are reproduced in the by-law verbatim or with similar language. However, the Subdivision By-law does not include a provision like s. 14 of *Provincial Subdivision Regulations*.

[45] In her testimony at the hearing, Ms. Bent said when development staff at the Municipality is considering a subdivision application it considers Part IX of the *Municipal Government Act* dealing with subdivision, the *Provincial Subdivision Regulations* and its own Subdivision By-law. Mr. Backman submitted s. 14 in the *Provincial Subdivision Regulations* did not apply in the Municipality, otherwise it would have been reproduced in the Subdivision By-law, especially since the regulations and the by-law were otherwise so similar.

[46] It is likely that s. 14 of the *Provincial Subdivision Regulations* applies and that the Municipality's Subdivision By-law is deemed to be amended to include it under s. 270(6) of the *Municipal Government Act*. However, the Board does not need to dwell on this given the clear requirement to refuse an application for subdivision approval where

the proposed access to a street does not meet the requirements of the Municipality or the Province under s. 278(2)(e) of the *Municipal Government Act*. Indeed, while Mr. Backman submitted that the existing driveway in this case met the Management Manual requirements, he agreed that in a case where no access could be approved, the Municipality would be justified in refusing a subdivision application:

> Q. This is a bit of a hypothetical question Mr. Backman, but let's say there was no existing driveway here [and] you were creating a subdivision for two brand new lots that's never had anything on them before. If the Department of Transportation had concluded that they could not be accessed under the existing requirements because they didn't meet stopping site distances, would that – as far as you understand it – be sufficient justification for the municipality to deny the subdivision approval?
>
> A. Yes, I mean certainly. If there was no existing entrance, we're in a totally different situation. …
>
> [GoTo Webinar Recording: 1:03:18 – 1:04:08]

4.2 The Municipality May Rely on Information from the Department of Transportation that it would not Approve Access

[47] Route 362 is a public highway under the authority of the Province of Nova Scotia through the Department of Transportation. The parties in the appeal agreed that properties abutting provincial highways require formal approvals from the Department of Transportation for driveways and the building of structures within 100 metres of the road. This is consistent with the *Public Highways Act*, R.S.N.S. 1989, c. 371, including s. 42(1) and s. 47(1):

> **No structure within 100 metres of fence, hedge, etc. on highway**
>
> **42 (1)** Subject to subsection (1) of Section 22 and unless the consent in writing of the Minister has been first obtained, no person shall erect, construct or place or cause to be erected, constructed or placed, any building or other structure, or part thereof, or extension or addition thereto, upon any highway or within one hundred metres from the centre line of the travelled portion of any highway.
>
> **Application to break up soil of highway**
>
> **47 (1)** No person shall break up the soil of a highway without first making application in writing to a person employed in the public service of the Province in the Department of Transportation and Infrastructure Renewal designated by the Minister,

> specifying the purpose for which it is required to so break up the soil, and obtaining the person employed by the Minister's permission therefor in writing.

[48] Since access to a proposed lot from a provincial public highway must meet the Department of Transportation's requirements, it is the Municipality's practice to send applications for subdivision approval for such lots to the department's Area Office. The Municipality's Subdivision By-law requires it to forward the proposed final plan of subdivision to certain authorities, including "any authority having jurisdiction for public streets within 500 metres (1,640 feet) of the boundary of the proposed lots" (s. 36(c)) and "any other agency of the Province or the Municipality which the Development Officer deems necessary" (s. 36(d)).

[49] An authority that receives the plan of subdivision must provide the Development Officer with a written report of its assessment or recommendations (s. 38). However, as noted already, s. 39 of the Subdivision By-law prohibits the Municipality from refusing to approve a final plan of subdivision because of an assessment or recommendation made by such an authority unless the subdivision "is clearly contrary to a by-law of the Municipality or a law of the Province or regulation made pursuant to a law of the Province."

[50] As discussed already, the Municipality's Subdivision By-law models the *Provincial Subdivision Regulations*. The same provisions for forwarding a subdivision application to relevant authorities, including an authority having jurisdiction over public streets within 500 metres, are in the regulations. Section 54 of the regulations is the same as s. 39 of the Subdivision By-law, except there is no reference to the Municipality's by-laws.

[51] The Board notes the Municipality does not require an applicant to provide it with formal approvals from the Department of Transportation at the subdivision approval stage. At the appeal hearing, Ms. Bent said it has been her experience, working with the Municipality for 30 years, that these approvals must be produced at the building permit stage. At the subdivision approval stage, the Municipality relies on the comments from the Department of Transportation.

[52] Mr. Backman argued that reliance on the Area Manager's assessment that the Department of Transportation could not approve access for Lot 19-1 contravened s. 39 of the Subdivision By-law because the Area Manager's assessment is simply incorrect. Mr. Backman said the existing driveway satisfies the requirements of the Management Manual; therefore, the proposed final plan of subdivision is not clearly contrary to a by-law of the Municipality or a law of the Province or regulation made pursuant to a law of the Province and the Municipality must approve it.

[53] Mr. Backman said the Department of Transportation trained him to assess stopping site distances using the Management Manual in 1996. He said this training was provided to surveyors because staff reductions made it difficult for the department to do stopping site distance checks on all subdivision applications in a timely manner. He said when he was trained on the assessment of stopping site distances, he was told that existing driveways for residential development did not need a specific stopping site distance assessment and would be deemed to pass if they were not intended to be used for more than three dwelling units.

[54] Mr. Backman also noted that the *Provincial Subdivision Regulations* and the Municipality's Subdivision By-law recognized a surveyor's ability to do stopping site

distance assessments for subdivision applications. The following provision is in both the regulations (s. 49(7)) and the by-law (s. 33(7)):

> For a proposed lot that will have access to a provincial public highway, the final plan of subdivision must be accompanied by or show stopping site distances information in the form specified in Schedule "G" completed by a Nova Scotia Land Surveyor or by the authority having jurisdiction for the public streets abutting the lot.
>
> [The By-law references Schedule "B" instead of "G"]

[55] The schedule referenced in the *Provincial Subdivision Regulations* is reproduced below. Aside from inconsequential formatting differences, the same schedule appears as Schedule "B" in the Subdivision By-law.

Schedule "G" - Stopping Sight Distances

STOPPING SIGHT DISTANCES								
LOT NO.	SPEED ZONE	DISTANCE FROM LOT CORNER LEFT/RIGHT	LEFT		RIGHT		PASS OR FAIL*	COMMENT
			GRADE	DISTANCE	GRADE	DISTANCE		

*According to the Government of Nova Scotia Management Manual 23, Department of Transporation and Infrastructure Renewal Management, Chapter 8, Construction and Maintenance.

Signed:_____
Nova Scotia Land Surveyor

[56] At the hearing, Mr. Backman emphasized that the "pass or fail" assessment was to be done "According to the Government of Nova Scotia Management Manual 23, Department of Transportation and Infrastructure Renewal Management, Chapter 8, Construction and Maintenance." In the Appellant's pre-filed evidence, Mr. Backman supplied a copy of Chapter 8 from Management Manual 23 and information provided to him when he was trained to do stopping sight distance assessments using the Management Manual. At the appeal hearing, he referred to parts of these materials that tended to support his argument that existing driveways would be deemed to be

acceptable in circumstances such as those present in the subdivision application he filed for Ms. Ritchie.

[57] Mr. Backman surmised that staff within the Department of Transportation were not consistent in reviewing subdivision applications. He said that the Area Manager who provided comments to the Municipality in this case appeared to be referencing a standard other than the Management Manual. He said the Area Manager also appeared to be basing his assessment on whether the existing driveway on the property had been used enough to allow it to be approved, which was not a requirement Mr. Backman had heard of before or could find any reference to in the materials he had on the assessment of stopping site distances under the Management Manual.

[58] Although Mr. Backman presented a strong case for concluding that the existing driveway on the property met the stopping site distance requirements in the Management Manual, the Board concludes that the Municipality may rely upon the information provided by the Department of Transportation Area Manager that the Department could not approve access for Lot 19-1. While s. 39 of the Subdivision By-law precluded the Municipality from refusing the subdivision application based on the Department of Transportation Area Manager's assessment or recommendation unless the final plan of subdivision was "clearly contrary" to a municipal by-law or a provincial law or regulation, the Area Manager's assessment in this case was about the approval of access to the proposed lots from a provincial public highway, which is both required by s. 278(2)(e) for subdivision approval and within the jurisdiction of the Department of Transportation under the *Public Highways Act*.

[59] In the case of environmental laws and regulations under the authority of the federal and provincial governments, the Nova Scotia Court of Appeal has said a municipality may assume that provincial and federal environmental regulators will properly ascertain any environmental issues within their mandate associated with a proposed development. The Court of Appeal noted that a municipality is primarily responsible for planning matters in its territory, but it is not an environmental regulator and does not have primary responsibility for matters affecting the environment (*Bennett v. Kynock*, 1994 NSCA 114). Since that time, the Board has repeatedly recognized its limitations in this area when dealing with appeals from municipal decisions which raised matters subject to environmental regulation by other authorities (e.g., *Re Cameron*, 2021 NSUARB 8, and *Re Armco Capital Inc.*, 2021 NSUARB 147).

[60] Although the context in this case is the safe use of public highways rather than environmental regulation, the Board considers similar issues arise. Neither the Municipality nor the Board has authority over the use of provincial public highways or the issuance of the necessary approvals for driveways and buildings within 100 metres of the road.

[61] The Board considers it would not have been appropriate for the Development Officer to arbitrate a dispute between the Appellant and the Department of Transportation about whether Lot 19-1 would be approved for access by the Department of Transportation. As noted above, the Development Officer is performing an executory function not involving the hearing of objections as a municipal council may do.

[62] Furthermore, any conclusion the Development Officer might have made about the matter would not have been binding on the Department of Transportation. The

Board also notes that if the Development Officer had decided to ignore the information from the Area Manager that access to proposed Lot 19-1 could not be approved and approved the subdivision, the Department of Transportation would have no right of appeal to the Board as s. 247(3) of the *Municipal Government Act* only provides for an appeal to the Board from a refusal to approve a final plan of subdivision and only by the applicant.

[63] A decision of the Development Officer to approve the subdivision application despite the Department of Transportation's comments in this case would also have resulted in the creation of a legal lot that may end up not being able to be developed, or at least not without the hardship of finding alternative legal access to the lot if the Department of Transportation maintained its position. This could be even more complicated if the lot were sold to a third party who was unaware of the situation.

[64] Likewise, the Board's decision in this appeal would not be binding on the Department of Transportation. If the Board were to allow the appeal, the underlying problem about access to Lot 19-1 would not likely disappear unless the Department of Transportation reconsidered its position and concluded the existing driveway on the property did meet its requirements.

[65] The Board is also mindful that the Department of Transportation was not a party to the appeal, nor was it required to be. Thus, while Mr. Backman presented a strong argument that the existing driveway satisfied the stopping sight distance assessment requirements in the Management Manual, there was no evidence or submissions before the Board from the Department of Transportation supporting the views expressed by its Area Manager in his letter to the Municipality.

[66] Additionally, while the Management Manual is referenced in the *Provincial Subdivision Regulations* and the Subdivision By-law as the basis for a surveyor's assessment of stopping sight distances for subdivision applications, it is not specifically referenced in the *Public Highways Act*. This leaves open the possibility that other or different considerations could be brought to bear on specific applications under s. 42 and 47 of the *Public Highways Act* to construct a building within 100 metres of a highway or to "break up the soil of a highway." Even if the Management Manual guides such decisions, it could be argued the suggestion that the Management Manual is determinative when issuing approvals under the *Public Highways Act* might amount to fettering unless the statutory decision maker retains the residual discretion to vary from the Management Manual in appropriate circumstances.

[67] The Board considers that, in the circumstances of this case, the more appropriate recourse for the Appellant would have been to directly challenge any refusal by the Department of Transportation to issue an approval relating to the driveway or future construction on the property. Although the Board understands that the Appellant has not applied for any approval from the Department of Transportation at this point, it was open for her to make such an application. If her application was approved, that would have paved the way for the approval of a subdivision by the Municipality. If it was not approved, then it would have been open to the Appellant to have that decision judicially reviewed and appropriately determined by the Supreme Court of Nova Scotia. That option is still open to her.

5.0 CONCLUSION

[68] Ms. Ritchie applied to the Municipality for the approval of a subdivision that would create two lots abutting a provincial public highway. When a subdivision creates lots abutting a provincial public highway, access to the lots from the public highway must meet provincial requirements. The Municipality was advised by the Department of Transportation that access for one of the lots could not be approved. The Appellant and her surveyor disagree with that assessment.

[69] Although s. 39 of the Municipality's Subdivision By-law prohibits the Municipality from refusing a subdivision application based on the assessment or recommendations made by the Department of Transportation unless the proposed final plan of subdivision is clearly contrary to a municipal by-law or a provincial law or regulation, the Board finds it would not have been appropriate for the Development Officer to attempt to adjudicate the dispute and the Development Officer was entitled to rely on the comments of the authority having jurisdiction over the public highway whose requirements must be met.

[70] It is open to the Appellant to apply directly to the Department of Transportation for the requisite approval. If she disagrees with the decision on that application, it would be open to her to challenge that decision in an application to the Supreme Court of Nova Scotia. The decision of the court in such a proceeding would be binding on the Department of Transportation and would support another application for subdivision approval if the court accepted her surveyor's position.

[71] The appeal is dismissed.

[72] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 24th day of May, 2022.

Stephen T. McGrath