DECISION **2024 NSUARB 120**
M11286 and M11288

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF APPEALS by **CORNWALLIS FARMS LIMITED (M11286)** and **LINDSAY MACDONALD, CINDY MACDONALD, AND MICHAEL FORSYTH (M11288)** from a Decision of Council for the Municipality of the County of Kings to approve a development agreement for property located at 1207 Belcher Street, Port Williams, Nova Scotia, and associated properties, and identified as PIDs: 55037915, 55534978, 55523153, and 55030092.

BEFORE:	Richard J. Melanson, LL.B., Panel Chair Bruce H. Fisher, MPA, CPA, CMA, Member M. Kathleen McManus, K.C., Ph.D., Member
APPELLANTS:	**CORNWALLIS FARMS LIMITED (M11286)** Jonathan Cuming **LINDSAY MACDONALD (M11288)** **CINDY MACDONALD (M11288)** **MICHAEL FORSYTH (M11288)**
RESPONDENT:	**MUNICIPALITY OF THE COUNTY OF KINGS** Peter M. Rogers, K.C.
APPLICANTS:	**BRADFORD and CONSTANCE HOPGOOD** Robert G. Grant, K.C. Folu Adesanya
HEARING DATE:	December 6, 2023
FINAL SUBMISSIONS:	April 11, 2024
DECISION DATE:	**July 9, 2024**
DECISION:	The appeal is denied, with dissenting reasons.

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1.0 INTRODUCTION

[1] The Village of Port Williams is in the heart of the Annapolis Valley. It lies to the north of the Cornwallis River, in the Municipality of the County of Kings (Municipality), between the towns of Kentville and Wolfville. Highway 358 runs through the Village Centre. This road runs north-south, connecting Port Williams to Greenwich and New Minas. Wolfville is to the east of New Minas along Highway 1. Belcher Street intersects Highway 358 near a bridge over the Cornwallis River. Belcher Street connects Port Williams to Kentville, to the west.

[2] Bradford Hopgood, on behalf of Constance Hopgood and himself, applied to the Municipality for a development agreement for four parcels of land, comprising approximately 12 acres, located at 1207 Belcher Street (Property). The project is called the Port Ridge Development. The Property is located on the south side of Belcher Street, at the intersection of Sutton Road, just beyond the Port Williams Elementary School. Except for the Hopgood residence, which is located on one of the parcels, the Property consists of vacant land. A portion of the Property had previously been used as a commercial sand pit. There is a large sand berm in front of the former sand pit that runs along the Property. Both the top of the berm and the boundaries of the Property (except where it fronts on Belcher Street) have thick stands of trees.

[3] The proposed development agreement would allow for the construction of three, five-storey, 67-unit apartment buildings, generally in the former sand pit area. The proposal also includes a new two-unit dwelling and an existing single-family home (the Hopgood residence) on Belcher Street. The proposed development agreement would also allow a one-storey commercial space on Belcher Street.

[4] Municipal planning staff gathered information on the proposal and analyzed the applicable provisions of the Municipal Planning Strategy (MPS). The Port Williams Secondary Plan (Secondary Plan) is a part of the MPS. Ultimately, the planning staff recommended approval of the development agreement. On July 20, 2023, the Municipal Council followed the planning staff recommendation and approved the application.

[5] Two appeals of Council's decision were filed with the Board. One appeal was brought by Cornwallis Farms Limited (Cornwallis Farms). Cornwallis Farms operates a large commercial farm operation. Cornwallis Farms owns property on the opposite side of Belcher Street from the Property. The company also owns tidal hay lands along the Cornwallis River south of the Property. Another appeal was brought by Cindy MacDonald, Lindsay MacDonald, and Michael Forsyth. They own or occupy two lots on Belcher Street, immediately to the west of the Property. Their single-family dwelling is located on one of these lots.

[6] The two appeals were heard together. The Board will address the following issues raised in this appeal:

- How should the word "shall" preceding policy text be interpreted.
- Whether the proposal is reasonably consistent with the MPS provision placing distance limits between residential developments and intensive livestock operations.
- Whether the proposed density was authorized on the fringe of the Village's Growth Centre.
- Whether the proposal was premature because of issues about traffic, road networks, pedestrian networks, water, sewer and drainage infrastructure, fire protection, water management and compatibility with the nearby land uses, including Cornwallis Farms' commercial farming operation.
- Issues about access to public transit, species at risk and environmental concerns.

- Whether the Municipality complied with the public consultation requirements in the MPS.

[7] The Board has found that because the word “shall” preceding policy text is expressly stated to be permissive, Council has a residual discretion about how to apply MPS policies, provided its ultimate decision reasonably carries out the intent of the MP. The MPS, when read in proper context, allows the density proposed for this location, even though it is not centrally located in the Village. The Board finds that the evidence does not establish the proposal is premature because of the various issues raised by the appellants. Expert evidence establishes Council had a reasonable basis to make the decision it did about traffic issues. There is a reasonable prospect the applicant can address the municipal infrastructure elements discussed in this decision. If it cannot, the project will not proceed. Access to public transit is not required at the time Council grants its approval. Species at risk and environmental considerations are within the purview of responsible government departments. The Municipality followed the public hearing requirements in the *Municipal Government Act*, S.N.S. 1998, c.18 (*MGA*) and undertook sufficient public consultation to satisfy the process requirements in the MPS. Compatibility issues about the size and scale of the development have been appropriately addressed in the development agreement because the proposed apartment buildings, would be located in a hollow, behind a berm, some distance from neighbouring properties, with the proposed maintenance of the existing tree cover. Compatibility issues about the size and scale of the development have been appropriately addressed in the development agreement.

[8] The Board could not come to a consensus on the issue of the proximity of the proposed development to intensive livestock operations. The majority of the Board

panel finds that while Cornwallis Farms operates a large commercial farming operation, the proposal complies with the minimum distances between intensive livestock operations, when that term is properly defined, and new residential development as set out in the MPS. A dissenting member held some proposed residential buildings were within 600 feet of lands used for an intensive livestock operation, when that term is properly defined, and therefore, Council's decision did not reasonably carry out the intent of the MPs on that basis.

[9] The Board realizes that it has gone beyond the 60-day time limit set out in s. 250A (3) of the *MGA*. That provision says a decision can be issued later if "…it is necessary for the interests of justice." This was a complex matter requiring considerable discussion to see if a unanimous decision could be reached. While, in the end, a unanimous decision was not possible, it was in the interest of justice to take sufficient time to have these discussions. In any event, s.250A (4) of the *MGA* expressly says the Board's decision is valid, even if made more than 60 days after the close of submissions.

[10] The majority of the Board panel finds that the appellants have failed to establish that Council's decision does not reasonably carry out the intent of the MPS. Accordingly, this appeal must be dismissed, with dissenting reasons.

2.0 ISSUES

[11] In this case, the Board must determine whether the appellants have shown, on a balance of probabilities, that Council's decision to approve the proposed development agreement did not reasonably carry out the intent of the MPS. For the following reasons, the Board finds the appellants have not satisfied that burden.

3.0 BACKGROUND

3.1 Scope of Review

[12] The burden of proof is on the appellants to show, on the balance of probabilities, that Council's approval of a development agreement to permit comprehensive neighbourhood development and neighbourhood commercial uses at 1207 Belcher Street and associated properties was not consistent with the intent of the MPS.

[13] Under s. 247(2)(a) of the *MGA*:

> Appeals to the Board
>
> 247 …
>
> (2) The approval, or refusal to approve, and the amendment, or refusal to amend, a development agreement may be appealed to the Board by
>
> (a) an aggrieved person;
>
> …

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

> Restrictions on appeals
>
> **250** (1) An aggrieved person or an applicant may only appeal
>
> (b) the approval or refusal of a development agreement or the approval 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;

[15] In municipal planning appeals, the Board follows statutory requirements and guiding principles identified in various Nova Scotia Court of Appeal decisions. The Court summarized the principles 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:

[23] I will start by summarizing the roles of Council, in assessing a prospective development agreement, and the Board on a planning appeal.

[24] In *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50, 1994 NSCA 11 ["*Heritage Trust*, 1994"], Justice Hallett set out the governing principles:

> [99] … A plan is the framework within which municipal councils make decisions. The Board is reviewing a particular decision; it does not interpret the relevant policies or by-laws in a vacuum. In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. …There may be more than one meaning that a policy is reasonably capable of bearing. This is such a case. In my opinion the *Planning Act* dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. The Board should not be confined to looking at the words of the Policy in isolation but should consider the scheme of the relevant legislation and policies that impact on the decision. …This approach to interpretation is consistent with the intent of the *Planning Act* to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions. …
>
> [100] … Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review… . The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course, by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are made. …
>
> …
>
> [163] … Planning decisions often involve compromises and choices between competing policies. Such decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions. … Neither the Board nor this Court should embark on their review duties in a narrow legalistic manner as that would be contrary to the intent of the planning legislation. Policies are to be interpreted reasonably so as to give effect to their intent; there is not necessarily one correct interpretation. This is implicit in the scheme of the *Planning Act* and in particular in the limitation on the Board's power to interfere with a decision of a municipal council to enter into development agreements.

[25] These principles, enunciated under the former *Planning Act*, continue with the planning scheme under the *HRM Charter. Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, para. 24, summarized a series of planning rulings by this Court since *Heritage Trust*, 1994:

> [24] … I will summarize my view of the applicable principles:

> (1) … 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 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*, [*Municipal Government Act*] 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. …
>
> (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. …
> …

[16] In *Archibald*, at para. 24, the Nova Scotia Court of Appeal discussed the assistance a concurrently adopted Land Use By-law (LUB) can provide in the interpretation exercise:

> (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 *Municipal Government Act* 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.

[17] Also, at para. 24, *Archibald* expanded on the issue of conflicting policies:

> 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, ¶ 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.

[18] The Board is not permitted to substitute its own decision for that of Council but must review the decision to determine if it reasonably carries out the intent of the MPS. In determining the intent of the MPS, the Board applies the applicable principles of statutory interpretation which have been adopted by the Court of Appeal, as well as the provisions of ss. 9(1) and 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

3.2 The Proposal

[19] On February 4, 2022, Michael Napier, acting as agent for Brad and Constance Hopgood, applied for a development agreement for four parcels of land (PID#'s 55030092, 55037915, 55534978, and 55523153) at 1207 Belcher Street, Port Williams. The vision was to:

> …create a residential community within the village of Port Williams that will provide options for residents to either down-size from their present accommodations or to live in smaller, modern and energy efficient units. The project location will allow residents to benefit from the abundant lifestyle of the village of Port Williams.
>
> [M11286, Exhibit C-4, p. 8]

[20] The proposed development, named Port Ridge Development, included three five-storey residential buildings, each with approximately 67 units. A commercial building "geared to the project's residents and people in the general area" would be

located near one of the site's two driveways. There would be underground parking and additional surface parking. An area next to an existing single-family home was "reserved" for low density housing.

[21] Mr. Napier described the Port Ridge Development as:

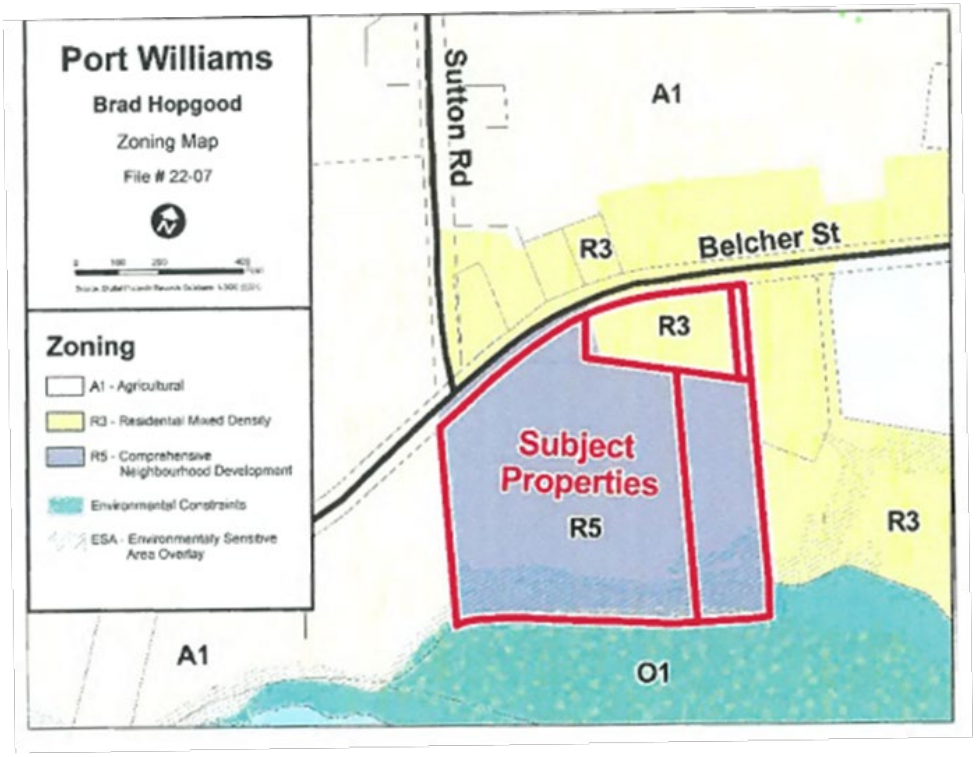
> …a 12 acre site at the western end of Port Williams just beyond the elementary school. It comprises four land parcels, one of which is occupied by a single family residence fronting on Belcher Street.
>
> At the rear of this property is a pine wooded area atop a large sand berm. Behind this berm exists an area which was formerly a sand quarry.
>
> Some of the site has existing growth, both coniferous and deciduous, but the central area is for the most part bare with only minimal re-growth in the sandy soil. The rear of the site, south facing, is heavily treed, sloping down to the Cornwallis River dyke lands.
>
> [M11286, Exhibit C-4, p. 4)

[22] He concluded by stating:

> Its higher density use is located on vacant and underused land. The housing scale will enable seniors to age within the community and benefit from the development's small scale commercial component. Its location between the protective berms and the top of the wooded slope leading down to the agricultural dykelands along the Cornwallis River and adjacent farmland across Belcher Street meet all requirements for separation distances.
>
> We feel that Port Ridge more than meets the goals and aspirations contained within the MPS. It will add important housing stock to the village of Port Williams and the surrounding areas while creating unique living options for its residents. Port Ridge will become an important addition to the existing fabric, allowing needed growth in a well located and sensitive manner.
>
> [M11286, Exhibit C-4, p. 12]

[23] The site is zoned R5 - Comprehensive Neighbourhood Development. Immediately adjacent to the west and across Belcher Street are properties zoned A1 - Agricultural. Cornwallis Farms own multiple properties for a large farming operation in the A1 zone. Cindy and Lindsay MacDonald and Michael Forsyth have a home adjacent to the subject property which is also in the A1 zone. Properties next to the eastern side of the subject are zoned R3 – Residential Mixed Density. Between the subject property and

the dyke, the lands are also owned by Cornwallis Farms and are zoned O1 – Environmental Constraints Zone:



[M11286, Exhibit C-4(a), p. 20]

[24] The proposal was considered by the Planning Advisory Committee (PAC) on May 9, 2023. Laura Mosher, the Municipality's Manager of Planning and Development Services, prepared a report for that meeting, dated May 3, 2023 (Mosher Report). The Mosher Report included a Policy Review, a draft development agreement and a recommendation for a Public Hearing. The conclusion of the staff report noted:

> The proposed development would introduce additional housing resources in a built form that is not common within the Growth Centre of Port Williams on properties in proximity to zoning that permits multi-unit dwellings. The development has been designed to minimize impacts on neighbouring properties and nearby agricultural operations. As a result, Staff are forwarding a positive recommendation to Area Advisory Committee.
>
> [M11286, Exhibit C-4(a), Item 5, p. 18]

[25] Council approved the recommendation on June 6th and held a Public Hearing on July 4, 2023. On July 20, 2023, Council approved entering into the development agreement.

3.3 Letters of Comment

[26] The Board received two letters of comment. One letter from an adjacent farm had concerns with “increased traffic hazards,” especially concerning the movement of farm equipment. In addition, it said the proposal violates MPS Policy 4.5.24. A "high-density development in that particular area will negatively impact our day-to-day operations” and “we expect that any further expansion of our livestock facilities on our own land will be denied by the Municipality simply because now we are too close to a high-density residential area; another negative impact to our existing operation.”

[27] The second letter was from the Village of Port Williams and was neither “an argument for or against the development” but was sent to “clarify the role of the Village of Port Williams” regarding water and wastewater. Water and wastewater will be discussed later in this decision.

3.4 Public Speakers

[28] Blair Embree spoke at the hearing. He owns an orchard, and his son owns the farm next to Cornwallis Farms. Two of his other sons have orchards. He spoke about visitors and the farms. He said it was difficult to watch people pick blossoms, take pictures, leave a mess and walk or drive out. He indicated an apartment complex this close to the farms would make it easy for people to walk over to their farms. He was concerned about their health as they are spraying their crops with equipment.

[29] Mr. Embree stated Port Williams was originally developed to support the agricultural community that surrounds it. Cornwallis Farms is up the street and there are 14 heritage buildings nearby. He said they don't match a new apartment complex. He thought there is not much that works for a transition. Mr. Embree said there are often 20 tractors on the road, along with associated equipment and people driving up the road. Mr. Embree felt the current situation was dangerous. He said if you add 200 more cars it would be a nightmare.

[30] Jim Baker lives on Sutton Road. He has owned a horse farm on 14 acres for 12 years. He described the intersection at Belcher Street and Sutton Road as "tricky." He said there was an accident years ago where a child was killed.

[31] Mr. Baker described this proposal as huge, involving three five-storey buildings. Mr. Baker said there might be 400 more people in the Village, or about 36% of the whole population of Port Williams. He said there is nothing like it in the area. In Halifax you see other buildings, here you see a farm.

[32] Mr. Baker commented that farms are a big business and take a lot of money. Tractors can cost $100,000 and a harvester may cost approximately $1 million. Farmers want to invest in their land, and they are worried about apartment buildings. People moving into apartments are not farmers. It is a different life with spray and manure being spread. He feared this would set up a confrontation between the farmers and the people in the buildings. Four hundred people can complain to 10 farmers. He asked who is going to have the biggest voice?

[33] Mr. Baker said there was not a lot of publicity about this development and that not many people in Port Williams heard about it. In his view, the scale was too large to approve without more input from the people.

[34] Peter Oleskevich lives on Belcher Street. He has two properties west of the proposal. He talked about traffic, the speed limit and the lack of sidewalks, especially west of the school. He said it took seven years to get the speed limit lowered. He indicated there is a blind curve at Belcher Street.

[35] In Mr. Oleskevich's view, adding a development with enough parking for 300 cars will create a dangerous situation as people are going to and from work at the same time as children are arriving and leaving for school. He noted that the road becomes dangerous when there is an event at school. Cars line up on both sides of the road, creating a single line of traffic. He is concerned for safety. He stated the population increase in Port Williams would be 40%. He felt the development does not fit this area.

3.5 The Site Visit

[36] The Board visited the subject property on December 8, 2023. The three members parked on the access roads for Cornwallis Farms and proceeded to cross Belcher Street to the subject property. The Board was accompanied by Mr. Newcombe and met by Hayden Hopgood, the applicants' son. The Board toured the subject property viewing the berm and walked around the subject property and through the woods to where they could view the property line and the dyke. The Members viewed the MacDonald lot. They viewed the paddock at the corner of Belcher Street and Sutton Road. They walked through the Cornwallis Farms property. They viewed the dairy barn before returning to their vehicle. During its visit the Board was able to view various sightlines along Belcher

Street, including from the Hopgood residence, and was able to view the elementary school, including its entrance and exit.

4.0 WITNESSES

[37] The appellants, Cindy MacDonald, Lindsay MacDonald and Michael Forsyth had Cindy MacDonald provide evidence on their behalf.

[38] Brian Newcombe, Vice-President of Cornwallis Farms, also testified.

[39] The applicants called three witnesses: Benjamin Smyth, P.Eng., Harrison McGrath, P.Eng., and Constance (Connie) Hopgood. At the hearing, Mr. Smyth was qualified, without objection, as an expert capable of giving opinion evidence about municipal infrastructure, including stormwater servicing, environmental impacts of water runoff, site grading and design of storm, sewer and water infrastructure. Prior to the hearing, Mr. Smyth filed an expert report dated November 16, 2023. Mr. Harrison was also qualified, without objection, as an expert engineer capable of giving evidence about subdivision design; and traffic impacts related to development proposals, including the interpretation and application of traffic impact studies and statements; and the adequacy of the street networks, access routes and access to and from development sites. He filed an expert report dated November 16, 2023, in advance of the hearing.

[40] The Municipality called Ms. Mosher as its only witness. Ms. Mosher was qualified, without objection, to give opinion evidence on planning and development matters, including the interpretation and application of municipal planning strategies, land use by-laws and subdivision by-laws. Ms. Mosher did not file a new expert report in this

matter. That said, the Mosher Report was in the Appeal Record, and she was questioned on it.

5.0 ANALYSIS AND FINDINGS

5.1 *Shall* vs *May*

[41] Section 1.1 of the MPS describes the history of municipal planning in the Municipality. The first MPS was adopted in 1979. There were several reviews and revisions over the years. In 2012, Council committed to a comprehensive review of the MPS. The current MPS was adopted by Council on November 21, 2019, following extensive public consultation. The MPS was approved, with amendments, by the Minister of Municipal Affairs on March 5, 2020. Section 1.2 of the MPS, under the heading "Interpretation," at p.1. 2-1, states:

> Policies are shown in shaded text and reflect the intent of the Council. Notwithstanding the words "Council shall" preceding policy text throughout the document, policy statements are intended to be permissive.

[42] The MPS uses the phrase "Council shall" some 209 times. Ordinarily, as a matter of general law, the word "shall" is mandatory and the word "may" is permissive, unless the context shows a contrary intent. The most obvious example of this approach is set out in ss. 6(1) and 9(3) of the *Interpretation Act*. During the hearing, the Board raised a line of cases involving public bodies where the word "shall" has been interpreted to be permissive when dealing with statutory timelines. In those cases, the permissive sense of the word means that the public body does not lose jurisdiction if the statutory deadlines are not met. It does not mean that the public body is excused from performing the statutory duty. It was in this context that the Board asked for specific submissions on the interpretation of the words "Council shall" in the MPS.

[43] While this provision has been discussed in a few of its decisions, the Board requested full submissions on the topic of what the permissive nature of the words “Council shall” means in the context of this appeal. Perhaps not surprisingly, because the MPS wording is not related to a statutory deadline, no cases about what the permissive interpretation of the word “shall” in that context means were cited as an aid to the interpretive exercise in this proceeding.

[44] The appellants, Lindsay MacDonald, Cindy MacDonald and Michael Forsyth, made no specific submissions on this issue. Mr. Cuming, on behalf of Cornwallis Farms, cited the Municipality’s LUB where the standard approach, that the word “shall” is mandatory and “may” is permissive, is set out in the “Rules of Interpretation." He acknowledged that the wording in s. 1.2 of the MPS is of a different character. The Board agrees in the sense that the administration of the LUB is an executory function. It serves a different purpose than the MPS. The LUB is meant to implement the MPS and is administered by unelected development officers. Development officers do not have the discretion given to Council in planning matters where the application of policy is involved. The definition in the LUB is of little assistance in interpreting the parameters of the permissive nature of the word shall, except to highlight the distinction between the choice of language.

[45] Mr. Cuming submitted that the permissive wording “…is little more than a reminder…” about potential intersecting or conflicting policies. He says the wording provides the Municipality with the discretion to make value judgments and exercise discretion in those circumstances.

[46] Mr. Cuming submitted that the Municipality cannot contract out of the provisions of the *MGA*. He referenced s. 217 of the *MGA*, which says Council cannot act in a manner inconsistent with the MPS. Mr. Cuming also cited s. 216 of the *MGA*, which authorizes secondary plans to address "…issues with respect to a particular part of the planning area, which may not, in the opinion of Council, be adequately addressed…" in the MPS. Mr. Cuming emphasized s. 225(1)(c) of the *MGA* which authorizes a council to consider a development agreement where the MPS identifies "…the matters that Council shall consider prior to the approval of a development agreement."

[47] Mr. Cuming said that in this context, the policies that Council must consider under s. 225(1)(c) of the *MGA* are the very ones that were raised in this matter. Therefore, he submitted, the permissive intent expressed in s. 1.2 of the MPS is of little importance in deciding this appeal.

[48] The Municipality submitted that the wording in s. 1.2 of the MPS shows a clear intention that the words "Council shall" are permissive. Mr. Rogers submitted this MPS direction cannot be disregarded. He said that the language was in keeping with the nature of the MPS. It reflected an intent to preserve Council's discretion "…not to rigidly adhere to any singular policy or text in the MPS."

[49] The Municipality cited previous Board decisions on this topic. The Board has previously held that the permissive nature of the words "Council shall" does not mean Council can ignore a particular relevant policy. It does mean Council has discretion about how the policy in question is applied [see: *Blanchard (Re)*, 2023 NSUARB 191, at para.90; *Community for Responsible Development for District 1 (Re)*, 2023 NSUARB 37, at paras. [85],[86]] (*Canning*).

[50] Like the Municipality, the applicants also noted that the MPS provides specific direction that the words “Council shall” are permissive. Mr. Grant commented on the broad and purposive approach to interpreting the MPS. He also cited the *Blanchard* case. Mr. Grant submitted that the permissive nature of the phrase means that Council has “…to consider the policy in question and whether or not to exercise its discretion as to its application.” He said that Council is entitled to deference in the exercise of this discretion.

[51] All parties agreed s. 1.2 of the MPS, which used the words “Council shall” is permissive and provides Council with some discretion. Mr. Cuming suggested this discretion is limited to situations where there are intersecting or conflicting policies. Mr. Grant and Mr. Rogers submitted that the discretion is broader and extends to whether Council must apply a particular policy at all. The Board is satisfied its prior decisions capture the essence of what s. 1.2 of the MPS means. The permissive nature of the words “Council shall” does not mean it can ignore relevant policies. It leaves Council with a residual discretion about how particular policies should be applied.

[52] Despite Mr. Cuming’s able argument, the cited provisions of the *MGA* do not alter this approach. This is because s. 225(1)(c) of the *MGA* requires the MPS to include matters that Council “shall consider” to authorize the development agreement process. This wording does not require mandatory policies. Consistent with the Board’s interpretation, Council must consider relevant policies even where the words “Council shall” are permissive. It is the extent of Council’s discretion once it has considered such policies which is usually at issue.

[53] The exercise of Council's discretion in relation to relevant policies is not absolute. Council's decision must still be guided by the MPS and reasonably carry out its intent. The extent to which Council can decide how to apply a particular policy may depend on its relative importance within the overall guidance provided by the MPS. The particular facts of the case will also be a key factor. The Board agrees with Mr. Grant's submission that, in the final analysis, "…a council's discretion must be exercised in a manner that the planning strategy's language can reasonably bear."

5.2 Is the Proposal Within 600-Feet of an Intensive Livestock Operation?

[54] Cornwallis Farms operates a commercial dairy cattle, chicken and cash crop farm. It is the largest farm in Port Williams. The farm has a fenced in pasture which extends along Sutton Road and Belcher Street. It is used for pasturing cattle. A small corral at the corner of Sutton Road and Belcher Street is used for feeding cattle at certain times. A portion of this land is within 600 feet of some of the proposed Port Ridge Development buildings.

[55] Policy 4.5.24(c) in the Secondary Plan provides that "Council shall":

> 4.5.24 consider only by development agreement in the Comprehensive Neighbourhood development (R5) Zone, residential development which is sympathetic to neighbouring farms and will not interfere with normal agricultural activities. In considering such development agreements **Council shall be satisfied** that:
>
> …
>
> (c) a separation distance of **a minimum of 100 feet (30.5 metres) shall be maintained between any residential building and land actively used for crop land and 600 feet (183 metres) shall be maintained between any residential building and land used for intensive livestock operations**; [Emphasis added]

[56] The goal of s. 4.5 of the Secondary Plan is "…to accommodate residential growth that meets the needs of residents from all stages and ages of life." There are seven objectives listed in s. 4.5 of the Secondary Plan, including providing "a buffer

between residential developments and agricultural activities." Policy 4.5.24 is related to this objective.

[57] In their Notice of Appeal, the MacDonalds and Mr. Forsyth alleged that Council failed to carry out the intent of Policy 4.5.24 on development agreements. The Notice of Appeal referenced Policy 4.5.24(f), but not Policy 4.5.24(c). The Notice of Appeal did reference potential negative impacts on daily agricultural activities under the general heading of Policy 4.5.24. Interestingly, the Cornwallis Farms Notice of Appeal did not raise this issue.

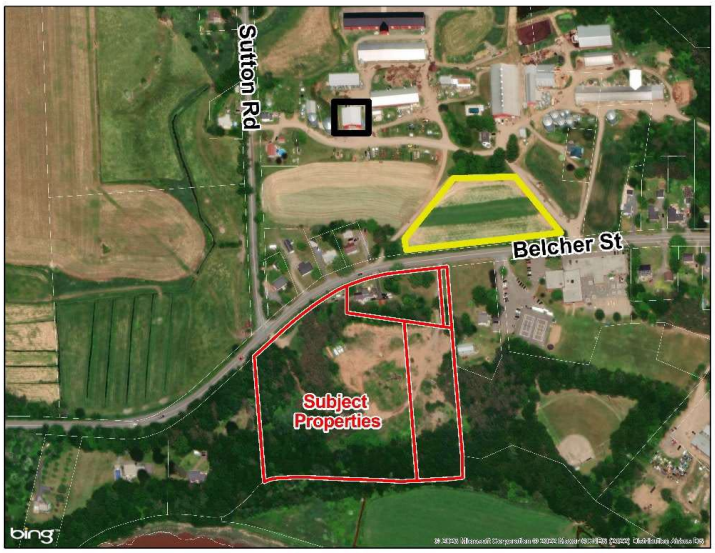
[58] There was some limited photographic evidence about the use of a pasture and coral in Cornwallis Farms' pre-filed evidence. There was a good deal of evidence presented on this topic during the hearing process. Mr. Newcombe, Ms. Morash and Ms. Hopgood all testified about the use of the pasture and coral. As well, Policy 4.5.24(c) was discussed in the Mosher Report. All parties made arguments on this policy in their initial closing submissions. In responding to a Board question on a part of the MPS that might shed some light on the meaning of Policy 4.5.24(f), Mr. Grant and Mr. Rogers both pointed out the specific policy had not been raised in the Notices of Appeal.

[59] While the standard form Notice of Appeal requests a list of applicable policies in contention, the Board recognizes that there are short appeal periods. Appeal issues are perhaps not fully fleshed out when the Notice of Appeal is filed because appellants do not have access to the Appeal Record until after the notice period has expired. Often issues that are not identified in a Notice of Appeal become evident from the Appeal Record or pre-filed evidence. In this case, the issue became apparent from

the evidence that was led during the hearing. In the circumstances, the Board is satisfied this issue is properly before it and that it has sufficient evidence to decide it.

[60] The "Policy Review" section of the Mosher Report included a map and noted that:

> There is a large agricultural operation just beyond the edge of the Growth Centre and this operation **includes a livestock operation**. The aerial photo below identifies the nearest cropped area in yellow and the nearest building that could be used for livestock in black. The distance to the cropped area the nearest new residential use is in excess of 250 feet away. **The distance from a new residential use and any building that might house livestock is in excess of 650 feet.**



[M11286, Exhibit C-4(a), Item 5, p. 16, Emphasis added]

[61] In the hearing, Ms. Mosher was questioned as to how she determined the 600-foot limit. She explained that she was "specifically looking to buildings containing cattle." She used GIS to measure from the "most easterly building" on the site plan to the "closest building that wasn't a house on Cornwallis Farms." The farm building she measured to is a machinery shop. When questioned she agreed that Cornwallis Farms was a "Livestock Operation" as defined in the LUB, and that there was no definition in the

plan for “intensive livestock operation." She explained her approach in measuring to a building and not the land:

> A. Oh. Because typically, for me, in considering intensive livestock, pastured cows -- and I will credit Mr. Newcombe. I did learn a lot about farming over the last couple of days, of which was incredibly interesting to me.
>
> But I would not consider pastured cows significantly high intensity. I would be looking at a building that contains livestock on a regular basis at significant numbers such as a chicken barn. I was not aware that a chicken barn held 30,000 chickens, so that is significantly higher than I would have estimated as a city girl myself.
>
> But that’s why I looked to a building and not pastured cows.
>
> [Transcript, December 7, 2023, p. 221]

[62] Ms. Mosher elaborated on her interpretation. She stated:

> A. …I think if Cornwallis Farms was home to, say, a slaughterhouse on that piece of land and they used that land as a stockyard in advance where many, many, many animals are in a somewhat small space, I think that would be considered high intensity. But that is quite a sizable field, and all the evidence we’ve been presented and my own observations over the course of my living here and driving by that site on a somewhat regular basis, I’ve never seen a significant number of animals in that field that would make go, “Wow, that is a lot of cows. That is very intensive”, so.
>
> [Transcript, December 7, 2023, p. 292]

[63] She stated that she believed the word “land” was “added through an amendment by the Minister on approval, so I don’t actually know what the Minister meant.” No evidence was provided to support this conclusion. She added:

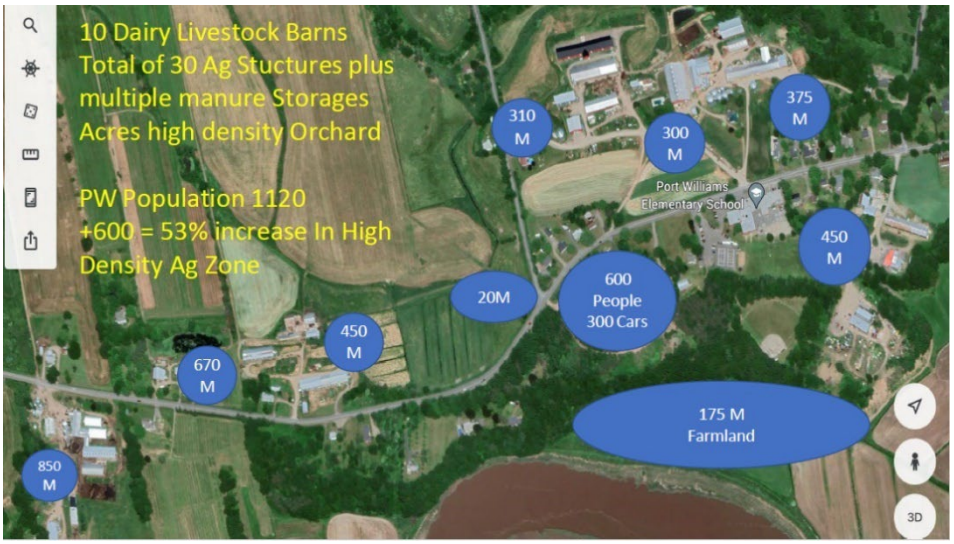
> A. …I think we would be having a very different discussion if, instead of the corral, there was a chicken barn there. I think I would include a chicken barn as intensive livestock.
>
> [Transcript, December 7, 2023, p. 294]

[64] Similarly, Mr. Newcombe was questioned as to his livestock operations and their intensity:

> A. …so we have the only farm in Nova Scotia with dairy, laying hens, broilers, pullets, and this is where the County thinks it’s a good idea to increase the population of Port Williams by 53 percent.
>
> In this slide you can also see, I guess, up in the top left, it kind of shows in this slide there’s eight chicken barns, 10 dairy barns, a total of 30 agricultural structures, being barns, manure storages, and there’s also high-density orchard, and hundreds of acres of

> farmland in this picture. I guess you don't get all of the acres but they're all surrounding this one spot.
>
> [Transcript, December 6, 2023, p. 152]

[65] He displayed an overlay of their operations, over multiple parcels of land, with a slide, number five. The proposed Port Ridge development is labelled "600 people 300 cars":



[66] Mr. Newcombe specified that:

> A. We are a dairy, layer, broiler, cash crop, feed mill. Basically, we're -- we do about everything we need to do to -- we grow all the feed, we mow our own feed. As I say, we have the three different types of livestock as well.
>
> [Transcript, December 6, 2023, p. 126]

[67] He elaborated that their three types of livestock include dairy cattle, layers, and broilers, the latter two being chickens. Cornwallis Farms had 30 to 40 heifers bred "at any one time" plus milking cows, "dry" cows, and calves. The livestock barns and livestock produce approximately 3,000 to 4,000 tons of manure per year and included multiple manure storage facilities. The manure is spread over the various crops, with multiple applications per year.

[68] He was asked about pasturing by Mr. Rogers:

> Q. Now, I don't pretend to have grown up on a farm but isn't a pasture, by its very nature, un-intensive? Isn't that when you turn the animals loose in a field and they eat the grass, if they're cows or horses?
>
> A. If you've got a second I can explain the difference, because there's a huge difference.
>
> No, it's not -- nothing -- okay. If I have 20 acres, I could pasture it two ways. I could throw 20 cows out there and let them eat where they want, and when it's all gone, it's gone. Or if you want to have intensive pasture, you take that 20 acres, you divide it into paddocks and you have fences. So you put your 20 cows onto a smaller paddock, so they eat that all up. But you don't want to eat down too far because if you eat down to the roots, it takes longer for the grass to regrow.
>
> Q. Yes.
>
> A. So you put them in there for a day or two, depending on the size of the paddock and how many animals you have. And then you move them to the next paddock, and the next paddock. So instead of having food for 20 cows for maybe a month, you could have food for cows for three months by moving around on the paddock.
>
> Q. Okay.
>
> A. And always have grass growing behind them, and that's intensive. Non-intensive is you just throw them out there, you let them go where they want.
>
> Q. Okay. So it's the fact that -- and I guess I am familiar with that, now that you mention it, with the idea of -- you use an electric fence, and you sort of move them to different parts of the field at different times.
>
> A. Yes.
>
> Q. And that's what you're referring to as an intensive pasture, livestock pasture, right?
>
> A. That's the definition. Intensive livestock pasture is when you have a certain density of cows on, and you move them around in paddocks.
>
> [Transcript, December 6, 2023, pp. 231-233]

[69] While Mr. Newcombe indicated the corral was used daily to feed a group of cattle, Ms. Hopgood contradicted this evidence. She lives across the road from the pasture and corral in question. She said she observed the pasture and corral on a daily basis and only saw a few cattle at a time were present in the corral from June to the fall. Ms. Hopgood said it could not be used every day, even during that period, because the corral area was often flooded after rainfalls. Ms. Mosher testified that when she went by

Cornwallis Farms, there were only a few cattle grazing in the pasture. She did not have an opportunity to observe the pasture on many occasions, so her testimony is of limited assistance.

[70] The Board finds it is unlikely the corral was used during periods when the cattle were not grazing in the pasture or when it was flooded. The Board finds it is likely that when Mr. Newcombe testified the cattle used the corral every day, he meant every day it was in regular use. The Board therefore accepts Ms. Hopgood's evidence about the seasonal use of the corral. The Board is satisfied that the number of cattle could well have varied. While Ms. Hopgood may have only seen a few cattle in the corral, based on Mr. Newcombe's testimony, the Board accepts there were probably often more cattle in the corral than what Ms. Hopgood observed.

[71] During the hearing, Ms. Mosher testified that no definition existed in the MPS for intensive livestock operations. Neither Ms. Mosher nor Mr. Newcombe gave a clear definition of their understanding of the term "intensive livestock operations." Ms. Mosher emphasized the number of animals in an area but that defining it "would merit additional study from planning staff." Mr. Newcombe referred to a certain "density of cows" but, due to his farming methods, saw the animals as moving around.

[72] Following the hearing, while reviewing material for its decision, the Board took note of the wording used in the Agricultural Designation, Section 3.4 of the MPS. It is found under General Agricultural Policy and refers to Livestock Operations:

> The raising of livestock, such as poultry, cattle, and mink, is an integral part of the agricultural economy. The Municipality has one of the highest densities of commercial livestock facilities in Eastern Canada. Although livestock buildings need not locate on optimal soils, the feed the animals consume and the manure they produce are interconnected with other agricultural systems. Livestock operations, therefore, must be permitted to locate and expand in many locations. Appropriate controls, based on the scale and potential impact on neighbours, are established to mitigate land use conflict and environmental concerns. Livestock operations are distinguished as intensive or

> commercial-scale livestock operations, and household livestock which are small-scale, hobby or niche-market livestock operations. [Emphasis added]
>
> [M11286, Exhibit C-4(a), Item 1, MPS, pp. 3.4-5 - 3.4-6]

[73] The wording appeared to provide context that could help interpret the meaning of intensive livestock operations. It was not referred to at the hearing, or in the legal submissions. The Board, therefore, in a letter dated March 4, 2024, sought "additional submissions from the parties as to the impact, if any, the part of the MPS quoted above has on the meaning of the wording 'intensive livestock operations,' and how the term applies to the factual situation in this case."

[74] In his first submission, Mr. Rogers referred to "intensive livestock pasture" as an oxymoron:

> Pasture is by its very nature a low intensity livestock use – with cattle feeding themselves during the growing season by grazing on the grass, and being taken to the barn for the winter. Mr. Newcombe indicated the farm controlled which areas within that pasture the cattle grazed at any time and adjusted it during the growing season by use of portable electric fencing, such that the cattle do not have access to the entire field at any one time. This is good, modern pasture management practice, but does not mean that pasture lands are now elevated to an "intensive livestock use". Any single area within the pasture is only occasionally frequented by cattle, just as occurs within a traditional grassland pasture.
>
> [Respondent's Post-Hearing Submissions, p. 8]

[75] He summarized that "the question is not whether heifers grazing on pasture can be characterized as a Livestock Operation, but whether they are properly characterized as an intensive livestock operation." [Empasis added in original]

[76] In the subsequent submission following the Board's letter, while continuing to support his assertion that pasturing is not intensive by its nature, Mr. Rogers approached the argument somewhat differently. He emphasized the words "facilities" and "livestock buildings", along with "feed "and "manure" in the portion of the MPS the Board raised, saying this "suggests that the land use conflicts and controls in the planning documents would be focused, at most, on buildings, feed and manure."

[77] Mr. Rogers asserted there are at least three livestock uses recognized in the planning documents, including “pasturing livestock as an agricultural use." Mr. Rogers said the Cornwallis Farms' activities discussed in the evidence involve pasturing livestock. Mr. Rogers submitted pasturing livestock is not part of “livestock operations.” This submission is based primarily on the definition of Livestock Operation found in the Definitions section of the LUB. Page 17-17 of LUB has the following definition:

> Livestock Operations means a livestock operation in which a number of animals exceeding five (5) animal units are confined to a barn, feedlot or other facility for feeding, breeding, milking or holding for riding, eventual sale or egg production but does not include Household Livestock.
>
> [Respondent's Supplemental Post-Hearing Brief, p. 8]

[78] Using the concurrently adopted LUB definition as an interpretive tool, Mr. Rogers submitted that pasturing is not an activity that takes place in a barn, feedlot, or other facility. He said because it is not a “Livestock Operation” pasturing cannot be an “intensive livestock operation.”

[79] Mr. Rogers emphasizes the following points in his submission:

> 24. If there were any doubt that pasturing livestock is excluded from the phrase “Livestock Operations” it is surely dispelled by the definition of “Agricultural Use”:
>
> > **Agricultural Use** means the use of land, buildings, or structures for the cultivation of crops such as, but not limited to, corn, hay, fruit and vegetables and shall include a greenhouse. This definition **includes** bee keeping and **animal pasturing but excludes buildings for the raising of animals, which is covered by the definitions of livestock operation and household livestock.**
>
> 25. It follows that pasturing livestock is a general “agricultural use” of land. It is not a “livestock operation” within the meaning of the planning documents, let alone an “intensive livestock operation” within the meaning of MPS s.4.5.24 (c). The fact that pasturing obviously involves livestock accordingly does not make it a “livestock operation” within the meaning of the planning documents. [Emphasis in original]
>
> [Respondent's Supplemental Post-Hearing Brief, p. 9]

[80] Mr. Rogers said this position is supported by Policies 3.4.6 and 3.4.7. He submits requirements in the latter for manure disposal plans “obviously” do “not apply to

grazing cattle on grass, as no disposal is required." Mr. Rogers emphasized Policy 3.4.7 discusses "flexible controls" and "adequate separation between livestock operations and Growth Centres." Likewise, special conditions for Livestock Operations in 14.3.21 in the LUB "pertain exclusively to buildings housing livestock or manure storage facilities." Hence, using these various MPS and LUB provisions to assist in the interpretation exercise, he concludes that the "separation distances between livestock operations and Growth Centres are only for buildings." [Emphasis added in Original]

[81] Mr. Roger's arguments were supported by Mr. Grant. Mr. Grant added that "If the Cornwallis [sic] Farms use of the paddock for intermittent pasturing and feeding of a small number of cattle is an intensive livestock operation it would have made the boundary of the Growth Centre inconsistent with Policy 3.4.7." That Policy requires "flexible controls" including "adequate separation between the livestock operation and Growth Centres, and watercourses consistent with the intent of the zone."

[82] Mr. Cuming responded by making several points. While he accepted that barns are buildings, he pointed out that:

> …there is nothing in the MPS or LUB to support a conclusion that the terms "feedlot" or "facility for feeding" are necessarily buildings. In fact, the plain language definition of "feedlot" offered by the Municipality at paragraph 21, simply being "a plot of land on which cattle are fattened for market", accords precisely with the use being made of the lands situated diagonally across from the lands proposed for development. Moreover, while the Municipality's submissions, at paragraph 22, offers a further definition of feedlot (from Wikipedia) which it suggests should be accepted as evidence that the area in question is not a "feedlot" (for the purposes of the MPS), I would note that the definition offered makes no reference to buildings or a requirement that such facilities be located indoors.
>
> [Appellant Cornwallis Farms' Reply Submissions, p. 4]

[83] Mr. Cuming re-stated Mr. Newcombe's testimony that livestock are fed daily from a large green trough in the paddock at the corner of Sutton Road and Belcher Street, with the gate closed behind them:

> The Municipality, in its submissions, has made important omissions in its characterization of what occurs in the area depicted in the photographs viz., that, in addition to pasturing, the livestock are paddocked, and, also, placed in an enclosed corral at that location for the purpose of feeding them. These omissions appear to be the basis for the further assertion that the use of the lands does not amount to a livestock operation. It is respectfully submitted that, for the reasons outlined herein, that assertion should be rejected.
>
> [Appellant Cornwallis Farms' Reply Submissions, p. 4]

[84] Mr. Cuming also made the point that it is not just the paddock for the cows that is relevant, but also their barn:

> The Appellant agrees that the barns which house the cattle in the winter are not located within 600 feet of the proposed development. Mr. Newcombe identified the location of the barns when discussing slide 5 of Exhibit C-7 (19:50 mark of Audio File 1020). That said, it is incorrect to assert there is no barn associated with the livestock operation. Also, not to repeat myself but Policy 4.5.24(c) contemplates setback distances from "lands used for intensive livestock operations" (not buildings).
>
> [Appellant Cornwallis Farms' Reply Submissions, p. 5]

[85] He pointed out that Ms. Mosher accepted that under the LUB definitions the Cornwallis Farms livestock are a “Livestock Operation” and have sufficient cows to meet that definition. She refused to consider it intensive, not because “of the language contained in the MPS and LUB” but due to her “independent understanding of the word intensive." Mr. Cuming submits that the language in Section 3.4 was “intended to draw a distinction between ‘intensive or commercial’ livestock operations on the one hand, and household livestock on the other.” If intensive livestock operation is a synonym for commercial livestock operation, “the Policy can be made to work."

[86] On the other hand, Mr. Cuming submits if the Municipality’s interpretation is accepted:

> …we could have large scale commercial livestock operations operating essentially adjacent to a residential building, located on the fringe of the Port Williams Growth Centre…. Such is not a result that is contemplated by the language contained in Policy 4.5.24 or the contextual language found at Part 3, Section 3.4, page 3.4-5 of By-law 105.
>
> [Appellant Cornwallis Farms' Supplemental Submissions, p. 6]

5.3 Analysis and Findings on this Issue

[87] The Board could not come to a consensus on this issue. In this part of the decision, the term Board refers to the majority of the Board panel. Interpreting Policy 4.5.24(c) of the Secondary Plan requires a determination of what is included in the term “land used for intensive livestock operations." The phrase is not a defined term in the MPS and must not be looked at in isolation. The Board must consider the scheme expressed in the MPS. In this case, because the MPS and the LUB were enacted concurrently, recourse to the LUB can be useful in the interpretation exercise, as it was intended to implement the policy guidance in the MPS. That said, the LUB definitions are not incorporated into the MPS. The entire exercise must be done using a liberal, pragmatic, and purposive approach. In statutory interpretation, this usually involves an analysis of the text, context, and purpose of the wording being considered. That said, the MPS involves a particular form of interpretation. The concept of whether the wording can reasonably bear a particular interpretation has been maintained.

[88] As discussed in *AMK Barrett* and *Archibald*, the Board is mindful when looking at MPS language that there can be more than one interpretation that the wording can reasonably bear. In this case, a potential interpretation of intensive livestock operations could be, as submitted by Mr. Cuming, and proposed by the dissenting reasons, that a large commercial farm operation, where cattle are fed or graze in a fenced pasture or corral, meets the definition. This would mean residential buildings in the R5 zone must be at least 600 feet from where this activity takes place, whether in a building or not. The question remains whether there is an alternative interpretation the language

can reasonably bear that supports the proposition put forward by the applicants and the Municipality.

[89] The Secondary Plan, and attempts to adjust the Growth Centre borders, is discussed in the part of this decision about density. The Secondary Plan pre-dates the MPS. The MPS went through a comprehensive review culminating in its current form in 2020. While the MPS incorporated the Secondary Plan, it is a forward-looking document that should be interpreted, where possible, to avoid conflicts. It is reasonable to assume that when the Secondary Plan was incorporated in the MPS, the general concepts of Growth Centres as expressed in the MPS, and Comprehensive Neighbourhood Development, discussed in Policy 3.1.2(d), under which the R5 zone was created, were also incorporated in the Secondary Plan. Policy 3.1.2(d) says the R5 zone is for "…integrated and comprehensive planning of new large-scale developments by development agreement." While certain restrictions were maintained in the Secondary Plan, the scope of these restrictions can be informed by other MPS policies.

[90] The Board has placed little weight on the opinions expressed by Ms. Mosher in the Mosher Report, or in her oral testimony, about the meaning of "intensive livestock operations." This is primarily because she appeared to have made errors with limited knowledge about the Cornwallis Farms operations. She readily admitted she had no significant farming knowledge. She also admitted she really did not know what was intended by the word "land" in Policy 4.5.24(c). The Board has, therefore, been guided primarily by the submissions of counsel and applied its own reasoning, based on the evidence, after analyzing these submissions.

[91] One objective in s. 4.5 of the Secondary Plan discusses “a buffer between residential development and agricultural activities.” This objective does not discuss what or how agricultural activities will be protected. This objective is also tempered by the overall goal of accommodating residential growth. While s. 3.4 of the MPS makes a distinction between “intensive or commercial-scale livestock operations” and “household livestock,” those terms are not defined in the MPS either. Also, while the use of the word “and” in the phrase could indicate the preamble only contemplates two types of livestock operations, the word “or,” is a conjunction which is often used to link two alternatives., This implies “commercial-scale livestock operations” and “intensive livestock operations” could be two different things. The Board is also mindful that a preamble is not a definition.

[92] In the absence of anything definitive in the MPS about the meaning of “intensive livestock operations”, the Board agrees with the proposition that the concurrently enabled LUB can be helpful in the search for the intent of the MPS. That said, LUB definitions are not directly incorporated into the MPS. While the LUB can be an interpretive aid, the MPS and the LUB serve two different functions. The language of the LUB must be as precise, and sometimes as prescriptive, as possible, because it must be enforced by Municipal staff. The MPS ordinarily uses broader language that is flexible and adaptable to many different and sometimes competing policy directions Council must consider.

[93] In any event, while the LUB has a definition of “Household Livestock” of up to five “animal units”, it has no definition of “intensive livestock operations” or “commercial scale livestock operations." The LUB defines “Livestock Operations”, which covers a category of livestock activities that are not included in the term Household Livestock.

“Animal units” can include free-range chickens. It would not appear logical that the MPS intended to describe all the land used to accommodate six free-range chickens as “lands used for intensive livestock operations.” Yet that could be the result if the Board were to decide, based on the LUB definitions and the preamble wording, that there are only two types of livestock operations contemplated by the MPS, and if an activity does not involve Household Livestock, it must be an “intensive livestock operations." This observation still does not resolve the issue of what is included in the term “intensive livestock operations."

[94] It is somewhat axiomatic that an activity cannot be an intensive livestock operation if it is not a livestock operation. The term “Livestock Operations” is defined in the LUB. Parts of the LUB definition, which speaks of animals “confined to a barn, feedlot or other facility for feeding, breeding, milking or holding for riding, eventual sale or egg production” have their own interpretation challenges.

[95] Subject to a discussion about the scope of the meaning of “land used” in Policy 4.5.24(c), the Cornwallis Farms barns themselves are not within 600 feet of the proposed residential buildings. This was admitted by Mr. Cuming and is shown by the evidence.

[96] The term “feedlot” is also not defined in the LUB. The Board accepts that a feedlot is not necessarily contained in a building. That said, Mr. Rogers points out the Merriam-Webster.com dictionary defines the term as “a plot of land on which livestock are fattened for market.” The definitions in the *Malcolm* v. *Shaw* [1998 NSUARB 78], cited by Cornwallis Farms in its Supplementary submissions, while not definitive, are consistent with the definition proposed by the Municipality. In that case, the Board discussed the fact the term “feedlot” was not generally used in West Hants. The definitions

cited in that case related to enclosures for fattening beef cattle like that proposed by Mr. Rogers. The Board accepts that this definition is one that the words can reasonably bear when considering the LUB as an interpretive tool. Cornwallis Farms is not a beef cattle operation where cows are fattened for market for eventual sale. The cattle component of the operation is a dairy farm. The Board finds there is no feedlot associated with the Cornwallis Farms lands.

[97] In coming to this determination, the Board realizes that in *Shaw*, it expanded the meaning of feedlot to include barns. In that case, there were different LUB definitions of Household Livestock and Livestock Operations. Intensive Livestock Operations was a defined term in the LUB. The *Shaw* case was also about a development permit, where different principles apply with respect to discretion and policy considerations.

[98] The final part of the LUB definition begs the question of what is meant by a 'facility for feeding, breeding or milking." Mr. Cuming submits that while a facility could be a building, the LUB provision does not restrict the meaning of a facility to a building. He says that a feedlot or a "facility for feeding" need not be a building. Leaving aside the extent and intensity of the feeding activities that take place on the lands adjacent to the corner of Sutton Road and Belcher Street, that includes the small corral, the issue turns on whether restricting the meaning of facility to a building or similar structure is an interpretation the wording of the provision can reasonably bear.

[99] As this MPS was finally approved in 2020, there must be some recognition that Cornwallis Farms was operating at that time. The site visit provided some insight into what structures might be intended to be captured by facilities associated with milking and feeding. The Board observed the dairy cattle on Cornwallis Farms walking in and out of

a structure where they could access automated milking machines. The cattle could also feed in this structure. The structure provided cover from weather. This was not a traditional barn.

[100] While there are undoubtedly other potential interpretations, it would be an interpretation of the word “facility” it could reasonably bear, in the context of the MPS as a whole, to limit it to enclosed structures which can provide some degree of confinement and protection, in a well-defined space, that would encompass something more than fencing. This would be consistent with the focus on building in the controls established in s.14.3.21 of the LUB. It would be consistent with the use of the words “livestock buildings” in s. 3.4 of the MPS. The Board notes manure storage facilities are regulated elsewhere in the LUB. The interpretation would also be consistent with the definition of the term “Agricultural Use” in the LUB, which makes a distinction between pasturing and buildings for raising animals, the latter of which are excluded from the definition because that aspect “…is covered in the definitions of livestock operations."

[101] Cornwallis Farms operates a “livestock operation,” as that term is defined in the LUB, on a part of its lands. It is further reasonable to conclude that the structures housing the chickens and the cattle would be a part of the Cornwallis Farms business where “intensive livestock operations” take place. The Board did not understand the Municipality was taking the position that no “intensive livestock operations” took place on the Cornwallis Farms lands. The question is how the “intensive livestock operations” are delineated.

[102] As to the meaning of the phrase “…lands used for intensive livestock operations”, the question is whether this refers to only the land under the buildings or

structures discussed above, whether it extends to all lands associated with those buildings that are incorporated into the livestock operation, or something between these two options. Here, intersecting MPS policies and the implementation scheme under the LUB, come into play when arriving at an interpretation the words can reasonably bear.

[103] One could argue, as Mr. Cuming does, that even if an intensive livestock operation takes place in a structure such as a barn, the term “land used” includes the land associated with that barn or structure, as integral to the dairy operation. This would mean that limiting the term "intensive livestock operations” to a barn or similar structure would not, in fact, limit the scope of the distance buffer set out in Policy.4.5.24(c) of the Secondary Plan.

[104] The Board finds that limiting the scope of “lands used” to that part of a livestock operation that sees the most intensive use, such as a barn or an enclosed structure, or a crowded beef cattle feedlot, or structures associated with storing manure, is an interpretation that the wording can reasonably bear.

[105] While LUB provisions can assist with the interpretation of words, one must still consider that Council deliberately chose not to define the term “intensive livestock operation” in the MPS. The intent was probably to leave Council with the ability to exercise an element of discretion and judgement when considering the facts on the ground. This could include considering the number of animals involved so that lands associated with a commercial livestock operation with only six cows or chickens would not necessarily become an intensive livestock operation. Where Council deliberately chose not to define the term “intensive” it is a question-begging term. The issue then becomes how many

cows or how many chickens, and over what area is there intensive use of the lands, for the livestock operations.

[106] The Board is aware that the information provided to Council by Ms. Mosher, when she measured from a building housing equipment to ascertain the intensive livestock operations boundary, may not have been accurate. That said, the Board must still consider whether, based on the evidence presented to it, Council could have reasonably come to the same determination. In this case, the Board concludes that it was open to Council not to include in a pasture where cattle graze in segmented portions, or a corral used at a certain time of the day, even if over a relatively lengthy season, in the boundary of lands used for intensive livestock operations. Such a way of interpreting the distance limitations in Policy 4.5.24(c) recognizes the flexibility and discretion that should be afforded to Council when reconciling the need to provide a buffer between residential development and intensive livestock operations and the expressed MPS policy direction of integrated and large-scale residential development in the R5 zone.

[107] Also, to interpret the provision otherwise would have significant impacts on the planning scheme envisaged by the MPS. If the meaning of the phrase “land used for intensive livestock operations” were given the meaning suggested by Mr. Cuming, it would mean that the Cornwallis Farms property at the corner of Sutton Street and Belcher Street would be included in the definition. This would therefore mean that Council-approved Growth Centre boundaries that included a significant portion of what was designated the R5 zone that could not be used for residential development, let alone large-scale development. In fact, if the Cornwallis Farms lands at the corner of Sutton Street and Belcher Street are included in the definition of “intensive livestock operations”,

then there would not have been an adequate separation between the Cornwallis Farms livestock operation and the portion of the Growth Centre boundary designated for the R5 zone, at the time of its creation, as required by MPS Policy 3.4.7. This is because a significant portion of the R5 zone for the Property, which can only be developed under the development agreement criteria, would be within 600 feet of this part of Cornwallis Farms.

[108] The Board accepts that if it found intensive livestock operations were carried on in the pasture and corral area next to Sutton Road and Belcher Street, there would still be a portion of the R5 zone lands that could be used for residential development. In this sense, the interpretation proposed by the appellants would not render all the applicants' lands sterile. That does not detract from the fact that if the boundary of the lands used for intensive livestock operations is established at the corner of Sutton Road and Belcher Street, it would mean that Council had deliberately included lands in a zone intended for integrated large scale residential development that could not accommodate any new residential development. It also begs the question how confining residential development to a portion of the designated lands fulfills the concept of integrated development. The Board does not believe this was the intent of Council when the MPS was approved.

[109] While it is true that the buffer described in Policy 4.5.24(c) is more limited than if the appellants' interpretation were accepted, it is a reasonable compromise with the intersecting Growth Centre policy directions found within the Secondary Plan itself, along with those MPS provisions applicable to the Municipality as a whole.

[110] Therefore, while Ms. Mosher's analysis on this issue may have contained some mistakes, the Board agrees with her that the proposed project is not inconsistent

with Policy 4.5.24(c) of the Secondary Plan. That recommendation is supported by interpretation of that Policy that the wording can reasonably bear. Council's decision on this point was reasonably consistent with the MPS.

5.4 Is the Proposal to be a Lower-Density Development on the Fringe?

5.4.1 The MPS Context

[111] MPS Policy 2.1.2 identifies Growth Centres as the "…primary growth areas in the Municipality." The MPS establishes parts of Port Williams as a Growth Centre. MPS Policy 2.1.4 indicates an intent to "…establish a detailed and individualized policy direction within the Secondary Plan …" for the Port Williams Growth Centre. Policy 2.1.6 of the MPS establishes a review mechanism for reviewing existing Secondary Plans about Growth Centres. MPS Policy 2.1.13 provides a process for amending the boundaries of Growth Centres. Policy 2.3.2 encourages the development of "higher density" developments in Growth Centres that permits "various housing types." The intent of this policy is "…to increase the efficiency and cost-effectiveness of municipal sanitary sewer and water servicing."

[112] The Secondary Plan, which mostly predates the current MPS, was incorporated in Part 4 of the MPS. The Secondary Plan indicates it is:

> …tailored to the Growth Centre's distinct qualities and planning needs. It establishes long-term goals and implements planning tools, such as zoning, intended to achieve these goals.

[113] The importance of secondary plans is highlighted by MPS Policy 4.02 indicating that "Council shall…give precedence to Secondary Plan policies in the event of a conflict between the Secondary Plan and the policies of the remainder of this Strategy."

[114] The Secondary Plan says most residents live in “low-density single-family dwellings”, while acknowledging the existence of multi-unit buildings on major roads and in central locations. It discusses an intent to welcome new residents and provide a variety of housing styles for them, along with accommodating the changing housing needs of current residents. Some of the objectives of the Secondary Plan are:

- To direct higher-density developments to central locations;
- To direct lower-density developments to the Growth Centre fringe;
- To encourage infill development on vacant and underused land;
  …
- To provide opportunities for mixed-use developments;
- To enable residents to age within the community by accommodating housing that is suitable for seniors; and
- To provide a buffer between residential developments and agricultural activities.

[115] The Port Williams Secondary Plan has a section about the expansion of the Growth Centre Boundary. This boundary was first established in 1979. By 2010, the MPS says most of the underdeveloped land within the Growth Centre boundaries had been taken up by residential subdivisions. The Secondary Plan says expansion was controversial because of potential impacts on agricultural lands and wellfields. In 2010, the Growth Centre boundary was adjusted. Some lands were added adjacent to the intersection of Collins Road and Starr’s Point Road. Council added 78 acres of land between Collins Road and Highway 358. Council had wanted to add more land in this area, but the provincial government had stepped in to limit a proposed expansion of the Growth Centre between Collins Road and Highway 358 to protect high quality agricultural lands.

[116] The additions to the Growth Centre were offset by the removal of 120 acres of protected dykeland where development opportunities were limited in any event. Also,

72 acres of agricultural and forest lands, between High Street and Highway 358, were removed at the request of a landowner, who did not want this land used for residential housing. If the dykelands are excluded, since they could not be effectively developed in any event, only a limited amount of lands available for development were added by the adjustment to the Growth Centre boundary.

[117] The foregoing aspects of the Secondary Plan were already in place when the MPS was updated to its current form in 2019/2020. In discussing the Residential Designation generally, s.3.1 of the MPS says the goal is to "identify lands where development of complete residential neighbourhoods is promoted and prioritized over other land uses." An objective was identified to "…discourage urban developments in rural areas by providing a variety of development opportunities within Growth Centres." MPS Policy 3.1.2(d) allowed for the creation of the R5 zone that envisaged comprehensive planning for "…new large-scale development by development agreement." MPS Policy 3.1.13 specifies how Council must assess development agreements in the R5 zone. The only specific reference to density for the R5 zone is found in MPS Policy 3.1.13(c). This provision requires a minimum density of four units per acre.

[118] With this backdrop, the specific policy guidance, implementing two of the stated objectives in the Port Williams Secondary Plan, about higher and lower density development in the Growth Centre authorized by a development agreement, is found in MPS Policy 4.5.24(f). This policy states in part that "…Council shall be satisfied that… higher-density areas are centrally located while lower-density areas are located towards the Growth Centre fringe."

5.4.2 Is the Project on the "Fringe"?

[119] The facts establish that the proposed project is on the fringe of the Growth Centre. The Property is not located in the Village Core, or the central part of Port Williams, which runs along Highway 358 after the bridge over the Cornwallis River. It is located on the western extremity of the Growth Centre, near the Cornwallis Farms agricultural lands, single-family residential dwellings, and the Port Wiliams Elementary School. Ms. Mosher confirmed the Property is located on the fringe of the Growth Centre, both in the Mosher Report and in her oral testimony before the Board. The Municipality did not challenge the proposition that the Property was located on the fringe of the Growth Centre.

[120] Mr. Grant submitted that it was open to Council to interpret the word "fringe" as excluding the Property because the "…high-density component of the project is buffered from the active agricultural lands..." While the terms "fringe" and "centrally located" are not defined in the MPS, the Board does not accept the applicants' position on this point. Not only is it not apparent this is how Council interpreted the term, but it is not an interpretation the words themselves can reasonably bear. The wording makes a distinction between a central location and the fringe. As a factual matter, the Property is not centrally located in Port Williams. It is located on the fringe of the Growth Centre.

5.4.3 Is the Project a Higher or Lower Density Residential Development?

[121] An issue raised by the parties relates to whether the specific Growth Centre requirements in the Secondary Plan take precedence over the Growth Centre provisions in the MPS applicable to the entire Municipality. The Municipality submitted that with the enactment of the country-wide Growth Centre implementation policies, Policy 4.5.24(f) in the Secondary Plan became redundant. The Municipality supported Ms. Mosher's opinion

that the secondary plan policies were subordinate to the “primary” policies” set out in the MPS policy guidance for the entire Municipality.

[122] The Board does not agree with the Municipality on this point. The MPS itself clearly indicates secondary plans take precedence when there are conflicts with the MPS. As Mr. Cuming pointed out, the Secondary Plan was designed to take account of the unique features of Port Williams. This is the very nature of a secondary plan. It can create exceptions and modifications to the MPS, based on the particular characteristics of a region. In this case, while much of the Secondary Plan preceded the current MPS and was purposefully incorporated within this current version.

[123] There were no transitional provisions suggesting redundancy, or that the usual precedence between a secondary plan and a primary strategy, as specifically addressed in the MPS, should be disregarded. The precedence afforded to secondary strategies is fundamental to the structure of the MPS as a whole. It does not involve individual policies, but the interaction of the entire Secondary Plan with the rest of the MPS. Even with a residual discretion afforded by the permissive nature of the words “Council shall”, to disregard the clear purpose and place of a secondary strategy within the MPS would not be a reasonable exercise of discretion. It is not an interpretation the language of the MPS can reasonably bear.

[124] To address the issue of density it is important to describe what the term means. The Secondary Plan discusses low-density single-family dwellings, but density is not automatically a function of the type of dwelling such as apartment buildings or single-family dwellings. It is a function of the number of dwelling units allowed within a specified area, usually measured in units per acre. Simply put, an apartment building on a large

piece of land can conceivably result in lower density per acre than a group of single-family homes on smaller lots.

[125] The appellants focused on the existing built form in the Port Williams Growth Centre and the areas near the Property. Ms. Mosher did this to some extent in her staff report. The applicants also referenced high-density and low-density as a function of building type. Mr. Cuming suggested that Ms. Mosher should have identified a conflict between the proposal and MPS Policy 4.5.24(f), rather than simply indicating that the project "…is located on the fringe, but as discussed above, Staff are of the opinion that this development is appropriate in considering all the relevant information." The evidence does show that the proposed development will have a higher density than much of the existing Growth Centre built form. This does not mean that a development agreement can only be approved if this pattern is maintained. Interpreted in the proper context, there is not a true conflict between Policy 4.4.24(f) in the Secondary Plan and the MPS policies establishing Growth Centres.

[126] The MPS is a forward-looking document intended to provide policy guidance for future development. The Growth Centre provisions, such as Policy 3.1.2 of the MPS, and the criteria set out in Policy 3.1.11, envisage large scale developments in Growth Centres. The terms "higher density" and "lower density" are not defined in the MPS. This begs the question: higher or lower than what?

[127] It is reasonable to assume that when the Secondary Pan provisions were incorporated into the MPS, the concept of what was envisaged by Growth Centres was as well. It would therefore be appropriate to incorporate the concept of large-scale

developments into what constitutes higher and lower density, keeping in mind that the density of a large-scale project is dependent on the land available to build that project.

[128] The Property consists of 12 acres. The development agreement allows for up to 204 units. This translates to 17 units per acre. The R1 zone currently allows a single-family dwelling unit, a secondary suite and an accessory building that can be used as a dwelling unit (often referred to as a backyard suite). Ms. Mosher pointed out that the LUB lot size requirements would allow approximately 10 R1 properties per acre. This means approximately 30 units per acre can be accommodated in the R1 zone. Therefore, the density authorized by the development agreement is considerably lower than what is currently permitted as-of-right in the R1 zone. The Board recognizes that backyard suites were only added as permitted uses for all residential designations in 2024. Even allowing for this, the LUB adopted concurrently with the MPS allowed 20 units per acre in the R1 zone. The R4 Residential multi-unit zone can accommodate 24 units per acre.

[129] How Council came to its determination on this issue is not entirely clear. That said, the Board finds that when Council considers a development agreement under the MPS, which includes the Secondary Plan, there may be intersecting or overlapping policies related to density. This does not necessarily create a conflict. The intersection can be resolved by not limiting the “higher density” and “lower density" considerations to existing built form. Rather, Council can consider whether the proposal is “higher density” or “lower density” by looking at what might otherwise be built in other zones, and what is contemplated in the R5 zone.

[130] In this case, there was an assumption by many that lower density development is the same as single-family dwellings and that apartment-style buildings

are higher density developments. This is not necessarily the case, given that more density can be achieved in the R1 zone than proposed by the applicants. The Board finds that an interpretation that allows for a development with a lower density than what the single-family dwelling zone allows, or allowed at the time the MPS was adopted, can properly be called a lower density development on the fringe. This interpretation allows for large scale development, in the future, on appropriately sized properties while accounting for the need to consider the appropriate level of density in the fringe areas.

[131] At the time the MPS was adopted, the R4 zone had the highest allowable density at approximately 24 dwelling units per acre. It stands to reason that the R5 zone, with its focus on “large-scale developments” could allow for higher densities in the appropriate location. As a forward-looking document, the MPS wording could potentially allow for redevelopment in the Village core at a higher density than currently exists, or that is proposed by the applicants on the fringe in this matter. An interpretation of Policy 4.5.24(f) that allows for development at a density on the fringe below the density allowed in the R1 zone at the time the MPS was adopted, and higher density in the core than what was allowed in the R4 zone, reconciles the intersecting policies in a way that the policy language can reasonably bear. Council’s decision to approve the development agreement is not inconsistent with Policy 4.5.24(f) of the MPS and reasonably carries out its intent.

5.5 Policy 5.3.7(c) of the MPS: Proposed Development is not Premature or Inappropriate

[132] The MacDonalds and Mr. Forsyth made submissions on almost every aspect of Policy 5.3.7(c) of the MPS. This Policy states that when deciding whether to approve a development agreement Council must be satisfied that the proposal is not

“premature or inappropriate.” Policy 5.3.7 sets out policy items but does not set out bright lines or a standard of proof a development must meet to satisfy Council the application is not premature or inappropriate. Certainty is not the test. A development agreement is not a subdivision application or a building permit application, where specific design and engineering standards must be met to the satisfaction of a development officer who performs an executory function. A development agreement is more conceptual in nature. While Council can choose the degree of specifics it requires, a development agreement generally sets out the parameters within which construction will be allowed.

[133] The Board believes that the main purpose of provisions such as Policy 5.3.7(c) is to establish, to Council’s satisfaction, that there is a reasonable prospect that the proposed development can be built in accordance with the parameters set out in the proposed development agreement. Otherwise, the process can lead to wasted time and expense on the part of both the Municipality and the developer. Council must, therefore, have a rational basis for concluding that the application is not premature or inappropriate, to avoid *ad hoc* decision-making not guided by the very policies it must consider. In an appeal before the Board, additional evidence can be provided to either support or refute the information that was before Council. With these general parameters in mind, the Board will address specific issues raised by the appellants.

5.5.1 Traffic and Road and Pedestrian Network

[134] Throughout this process, the appellants expressed a concern about an increase in traffic based on this proposal. They said that traffic flow was already a problem. They highlighted times when the students arrived and left the Port Williams Elementary School on Belcher Street near the proposed development and when there

were special events at the school. Ms. MacDonald said this proposal would add to existing problems because it would increase the volume of vehicles. Ms. MacDonald also questioned the methodology of the traffic study submitted as part of the applicants' proposal. She stated the traffic study failed to measure the traffic during the times when children were picked up from the school. The appellant, Cornwallis Farms, stated that traffic was already an issue on Belcher Street near the proposed development, including for the movement of farming equipment, deliveries to the farm, and large trucks picking up its milk. It expressed concern that the proposal would worsen the traffic issues.

[135] Policy 5.3.7(c)(iv) states in approving a development agreement, Council shall "be satisfied" that the proposal would not create any excessive traffic hazards or congestion due to road or pedestrian network inadequacy, within, adjacent to, and leading to the proposal."

[136] The applicants hired Mr. Harrison McGrath, P.Eng. of DesignPoint Engineering and Surveying Ltd. (DesignPoint) to prepare a Traffic Impact Study (TIS) as part of its proposal. Mr. McGrath testified that he prepared an interim TIS dated January 28, 2023. He said this interim TIS, as is standard practice, was reviewed by the Nova Scotia Department of Public Works and it provided comments on the data and conclusions. He then prepared a final TIS dated July 27, 2023. The interim and final TIS were similar in content. The scope of the TIS included:

> A review of the existing transportation network and operations;
>
> Calculating trips generated by the development and estimated distribution of trips into the transportation network;
>
> Analysing how new trips affect the level of service of the existing transportation network; and,

> Identifying improvements that may be needed to accommodate site generated traffic on the network.
>
> [M11286, Exhibit C-4, p. 107]

[137] The final TIS concluded that the traffic generated by the proposed development can be handled by the existing street network by adding an eastbound left turn lane on Belcher Street at the intersection of Highway 358. The TIS also found that a northbound left turn on Highway 358 at Belcher Street would be warranted because of future background traffic volumes. Future background traffic volumes are future traffic due to annual traffic growth without additional traffic added by the proposal. The final TIS was accepted by the Department of Public Works and no concerns were expressed.

[138] In his expert report dated November 16, 2023, Mr. McGrath stated that the eastbound left turn lane on Belcher Street at the Highway 358 intersection would be the responsibility of the applicants. The Department of Public Works, however, would be responsible for a left turn lane from Highway 358 onto Belcher Street as this upgrade would be necessary because of annual traffic growth and is not related to the proposal. Mr. McGrath testified that school dismissal times were much earlier than normal afternoon peak hours and inclusion of school dismissal would not have materially changed his TIS.

[139] The Mosher Report indicated that staff was satisfied there were no concerns under criterion in MPS Policy 5.3.7(iv) for approving a development agreement. The TIS was submitted by the applicants, which the Department of Public Works reviewed. The Department determined the TIS was “acceptable,” and did “not have any concerns.” [M11286, Exhibit C-4(a), Item 5, p. 45]

[140] None of the appellants prepared a traffic report or called an expert to contradict the evidence of Mr. McGrath. The Board finds, based on the final TIS, that was

accepted by the Department of Public Works, that Council's decision about traffic hazards due to road or pedestrian network reasonably carries out the intent of the MPS.

5.5.2 Water and Sewer

[141] Ms. MacDonald stated her concerns about sewer and water servicing to the proposed development. She said that the proposal requires an extension of water and sewer services to the Property and, as stated in the development agreement, this extension will be through a cost-sharing agreement between the Village and the applicants. Ms. MacDonald stated her concern that this cost-sharing would have a negative impact on the Village's finances.

[142] Policy 4.5.1. of the Secondary Plan states that Council shall "require all new development within the Growth Centre to be serviced by central water and sewer services." The context at p. 4.5-3 further prescribes that while new development "would make more efficient use of existing infrastructure, urban growth and redevelopment should be managed in order to ensure water and sewer services are cost-effective, environmentally sustainable and provide a high level of service." In approving a development agreement, Policies 5.3.7(c)(i) and (vi) of the MPS require Council "be satisfied" that the proposal is not premature or inappropriate due to the Municipal or Village costs related to the application as well as the adequacy of sewer and water services.

[143] As part of their application, the Hopgoods submitted a report prepared by Mr. Logan King dated June 1, 2022, which addressed wastewater and water servicing for the Port Ridge Development. In this appeal, the applicants filed an expert report prepared by Mr. Benjamin Smyth, P. Eng., DesignPoint, prepared on November 16, 2023, about

servicing requirements and additional information on storm water management methods. Mr. Smyth concluded that the management plans for water and sewer servicing were adequate for the development.

[144] The applicants submitted that the extension of the sewer and water services to the Property would have to be negotiated between the Village and the applicants as part of the development permitting stage of the project. Also, at the permitting stage, the applicants will have to provide a detailed technical design. The applicants stated that the proposed development would utilize existing water infrastructure and would increase the overall efficiency of the system, as the cost of servicing and maintaining the system would benefit from additional ratepayers.

[145] The Village confirmed in an email to the Municipality that its engineers reviewed the project and the information provided by the applicants and determined there were “water and sewer services available and adequate capacity for the proposed use.” [M11286, Exhibit C-4, p. 283]

[146] The Mosher Report stated that there was “no reason to believe that this portion of the system would be designed in such a way as to be inefficient to service since the total number of new possible ratepayers outside this development is limited." She also advised that staff was satisfied the development would have a “positive impact” on the Municipal and Village finances as there would be “minimal costs generated due to limited infrastructure expansion and a significant increase in property tax revenues resulting from the proposed development." [M11286, Exhibit C-4(a), Item 5, p. 11]

[147] In cross-examination, Ms. Mosher said the Municipal Engineering and Public Works Department indicated there was adequate capacity in the sewer system to

accommodate the Port Ridge Development. Further, Ms. Mosher said that the development agreement required that applicants use municipal and sewer services.

[148] In this matter, the Village provided a letter of comment on November 2, 2023 about the proposed development. The Village wrote:

> …This submission is intended to clarify the role of the Village of Port Williams in this matter. This should not be understood as an argument for or against the development. Please note the following:
>
> - The Village was asked to confirm the availability of water and wastewater capacity to service the development in question, which it has done.
>
> - The Village has stated on numerous occasions that the wastewater (sewer) service line terminates before the property in question.
>
> - The Village has not allocated any capital funding to extend the wastewater service at this time.
>
> - The Village has not received any formal proposal and/or detailed plans to extend the service. Any extension of the service by the developer to be conveyed to the Village must be approved by the Village Engineer.
>
> - The Village has flagged concerns with a proposed private wastewater main from the development. Specifically, that provincial authorities are unlikely to approve a private service of this type.
>
> [M11286, Exhibit C-8]

[149] None of the appellants presented expert evidence to contradict Mr. Smyth. The Mosher Report confirmed to Council that it was anticipated that the proposal would have a positive, not negative, impact on the Municipality's or Village's finances. Finally, the Village confirmed the availability of water and sewer capacity to service the development. As stated in the Village's letter, in the next stages of the development process, the applicants must submit detailed plans for the extension of water and sewer services and these plans must be approved by the Village Engineer as a requirement of the development proceeding. Accordingly, the Board finds that Council made a reasonable decision, consistent with the MPS, in finding that the proposal was not premature or inappropriate due to inadequate water management services or negative

financial impact on the Municipality or Village related to the costs of the extensions of these services to the Property.

5.5.3 Drainage, Fire Protection, Water Management and Storm Water Infrastructure

[150] Ms. MacDonald stated her concerns about the effects of storm water runoff from the proposed development onto adjacent areas, the impact of global warming and severe weather on the drainage system and the adequacy of fire protection services.

[151] Cornwallis Farms also expressed concerns about the adequacy of fire protection services. It noted that the Mosher Report did not advise Council that Mr. King's report dated June 1, 2022 said the proposed development required fire flows which exceeded the Village's existing flow, and a system will have to be designed that provides for the difference between the available fire flow capacity and the required flow to each building.

[152] The MPS requires that in approving a development agreement Council be "satisfied" that the proposal is not premature or inappropriate due to inadequate fire protection services" (Policy 5.3.7(c)(v)), "potential for creating flooding or serious drainage problems" (Policy 5.3.7(c)(vii)), and "pollution in the area, including soil erosion and siltation of watercourses." (Policy 5.3.7(c)(ix))

[153] As discussed above, the Village confirmed in an email to the Municipality on August 26, 2022, that there was adequate water and sewer services available for the Property and the proposed uses. In the same email, the Village stated that its engineers said that for a fire flow scenario the Village "should consider additional pumping capacity to service fire flows while maintaining minimum acceptable pressures throughout the system." [Matter M11286, Exhibit C-4, p. 283]

[154] The Mosher Report advised that the Port Williams' Fire Chief indicated that the fire protection was "adequate" and had "no issues given the proposed development." [M11286, Exhibit 4(a), Item 5, p. 45] The Municipality stated the hydrant and sprinkler pressure for fire suppression would be dealt with at later stages of the development process.

[155] In support of their application, the Hopgoods filed a storm water management plan prepared by Mr. King on March 23, 2023. Mr. Smyth's report, dated November 16, 2023, provided additional information about the storm water management plan submitted in March 2023. Mr. Smyth's report indicated that the proposed development "will incorporate infiltration measures which will mimic the hydrologic characteristics of the existing site." His report stated the preliminary design had been completed in such a way that the storm water runoff pre-development and post-development will be generally equal and within the allowable limits as determined by Nova Scotia Environment and Climate Change. In the event of severe weather, his report stated that an emergency overflow pipe, which would flow into an existing ditch on the Property, was incorporated into the design. [Matter M11286, Exhibit C-12]

[156] The Mosher Report advised that:

> The property owner is required to control stormwater flows through the incorporated low impact approaches for stormwater management. The Municipal Engineer is able to request the necessary reports and materials at the time of permitting.
>
> [M11286, Exhibit 4(a), Item 5, p. 45]

[157] In its submissions, the Municipality stated that low-intensity storm water drainage would be dealt with at later stages of the development process.

[158] The Mosher Report also stated that staff was satisfied that the proposal would "not generate any pollution" and that the applicants would "be required to follow

provincial requirements related to erosion and siltation." [M11286, Exhibit 4(a), Item 5, p. 45]

[159] The Board finds that at this stage of the development process, the report provided by the applicants in support of their application, which were reviewed by the Municipality and Village staff, establish that the prospect that the development would satisfy the mandatory controls for fire safety protection, storm water management and soil erosion and siltation in the next stages of the development process. The applicants will have to satisfy all the requirements before obtaining permits. Accordingly, the Board finds that Council's decision that the project is not premature on these issues, reasonably carries out the intent of the MPS.

5.5.4 Compatibility

[160] Policy 5.3.7(c) of the MPS requires that before approving a development agreement that Council is "satisfied" that the proposal is not "premature" or "inappropriate" because the land use is not compatible with the surrounding land uses (Policy 5.3.7(c)(ii) or would have "negative impacts on neighbouring farm operations" (Policy 5.3.7(c)(xi). All the appellants in their respective Notices of Appeal referred to Policy 5.3.7(c)(xi) but in their testimony and in their submissions stated in general that the proposal was not compatible to the surrounding land uses.

[161] The appellants, MacDonalds and Forsyth, said that the proposal would have negative impacts on the nearby farming operations because of traffic concerns and nuisance complaints arising from the farming operations. They also referred to Policy 3.1.10(c) which states that, when approving development agreements for high-density residential development and new mini-home parks or expanding existing parks, Council

“shall be satisfied” that design, scale and location of buildings “is sensitive to the character of and provides appropriate transition to the surrounding areas.” The appellants said that the proposal does not have an appropriate transition to agricultural lands. Further, R5 zoning only permits a maximum height of four storeys but Council permitted this to be a five-storey without providing a justification.

[162] Cornwallis Farms expressed similar concerns that the proposal was not compatible because it would worsen existing traffic issues around Belcher Street near the proposed development. Cornwallis Farms stated, even without this development, it had to time deliveries and pickups of milk from its site to non-peak hours due to the existing traffic and faced even more difficulties when there were special events at the Port Williams Elementary School. Cornwallis Farms said the proposal would lead to increased costs in its production and changes in its operations which would lead to more pollution.

[163] Cornwallis Farms also stated that the proposed development could result in an increase in nuisance complaints related to the farming operations. The applicants stated that the provisions of the *Farms Practices Act*, SNS 2000, c. 3, will provide protection for this concern expressed by Cornwallis Farms. Cornwallis Farms stated its concerns that its farming operations, such as no till farming, would not come under the protection of the *Farms Practices Act*.

[164] The Mosher Report did not refer to Policy 3.1.10 as a policy it considered for this proposal. The report stated that its opinion that the proposal was compatible under Policy 5.3.7(c)(ii) and Policy 5.3.7(c)(xi). About Policy 5.3.7(c)(ii), the report wrote:

> The surrounding neighbourhood is characterized by a mix of uses including a mix of residential and agricultural uses as well as an educational facility. The proposal development is compatible with these uses.

About Policy 5.3.7(c)(xi), the report stated:

> There is a large agricultural operation on the north side of Belcher Street. Given the distance from the Subject Properties and the site layout. Staff do not expect any negative impacts beyond what might have been generated had the lands been placed in the same zone as the residential lands in the immediate vicinity of the subject properties (sic).
>
> [M11286, Exhibit 4(a), Item 5, pp. 44-46]

[165] The Municipality said that the proposed development is a good fit for this location, because the setbacks, buffering and graduation of the development intensity are provided for in the development agreement. Additionally, the site topography and mature tree cover in the buffer areas were ideal.

[166] The Board has already determined that Council's decision reasonably carries the intent of the MPS as it relates to any concerns about traffic hazards due to road or pedestrian networks.

[167] The Board finds that compatibility issues about the size and scale of the development have been appropriately addressed in the development agreement, particularly given the location of the proposed apartment buildings. There are natural features, such as a hollow behind a berm and trees, and transitioning considerations, arising from the location of the proposed R1, R2 and commercial buildings that blunt the impact of the larger scale apartment building. Additionally, the proposed buildings will be a distance from the neighbouring properties.

[168] The Board also finds that the proposal does not negatively impact on the neighbouring farm operations including for issues arising for traffic or nuisance complaints. Any potential nuisance complaints would likely be addressed under the *Farm Practices Act*. Finally, the Board finds that Policy 3.1.10, which is about high-density residential developments, mini-parks and mobile parks, does not apply in this matter.

[169] The Board finds that Council's decision to approve the development agreement is not inconsistent with Policy 5.3.7(c)(ii) and Policy 5.3.7(c)(xi) of the MPS and reasonably carries out its intent.

5.6 Access to Public Transit and Sidewalks

[170] Ms. MacDonald stated her concern about access to public transportation and sidewalks in front of the development site. She testified there was no public transportation along Belcher Street. She also testified that she worked for Kings Transit Authority and gave her opinion that the availability of public transportation was going to decrease in the upcoming years and lead to more people having to travel by car. She said that that the development agreement was in contravention of Policy 4.5.32 of the MPS as Kings Transit was conducting a comprehensive review and would likely be eliminating services to Port Williams. Ms. MacDonald also stated her concern that there were no sidewalks on Belcher Street and no proposed sidewalks connecting to the proposed development in contravention of Policy 2.3.14 and Policy 2.8.1 of the MPS.

[171] Policy 4.5.32 of the MPS states, in part, that Council shall "encourage, in cooperation with Kings Transit," transit service. Policy 2.3.14 of the MPS states, in part, that Council shall "encourage the development of complete roads, including…active transportation infrastructure including but not limited to sidewalks…bicycle lanes…and frequent pedestrian crossings." Policy 2.8.1 of the MPS says that Council shall "encourage businesses and residents to reduce energy consumption, while protecting human health and safety" when establishing policies in the MPS and in community infrastructure investment.

[172] In her testimony, Ms. Mosher said that the public transit route along Belcher Street was eliminated during the COVID-19 pandemic. She also testified that the proposed development would likely incentivize the Village to augment the availability of public transportation along Belcher Street.

[173] The applicants stated that the development agreement requires sidewalks within the project, and these will promote a safe active transportation network within the project and beyond. They said that Policy 4.5-14 of the MPS looks to the future and directs the Growth Centre of Port Williams to "maintain and improve its transportation network by providing a variety of safe transportation options, including measures to encourage walking, transit use, carpooling, and biking." The applicants also noted that, under Policy 2.3.21 of the MPS, Council is committed to constructing sidewalks with priority to areas along "roads with greater speed and/or traffic volumes" (Policy 2.3.21(e)), "documented safety concerns or pedestrian/car incidents" (Policy 2.3.21(f)), or service areas with "a higher residential density" (Policy 2.3.21(g)).

[174] The Municipality submitted that Ms. MacDonald's allegation that Kings Transit was financially distressed was not a valid reason for denying the project. Further, it said the proposed development could increase the likelihood of restoring the transit service.

[175] Sections 4.5 and 2.3 of the MPS "encourage" Council to maintain and improve transit use and safe walking and biking. As discussed above, the developer will be required to build sidewalks within the proposed development. Also, an increase in the number of residents because of the proposed development may lead to the reinstatement of the transit route on Belcher Street, or lead Council to decide to build sidewalks from

the proposed development. Approval of this development agreement does not prevent the Municipality from encouraging these future actions. The Board finds that Council's decision reasonably carries out the intent of the MPS for considerations about transit access and sidewalks.

5.7 Species at Risk

[176] Ms. MacDonald testified about concerns that the proposed development will destroy the habitat of Bank Swallows, an endangered species. She testified that the site was "once peppered with over 100 nest holes." The MacDonald appellants did not raise this issue in their Notice of Appeal, did not provide written submissions, and in testimony did not refer to a specific policy of the MPS about this issue.

[177] The Appeal Record documents that in August 2022, the Municipality contacted Nova Scotia Natural Resources and Renewables for any information it had about Bank Swallows and their habitat and nesting areas. The Municipality explained that during the public engagement phase of the application of the Property a local resident said the Bank Swallows were observed. A biologist from Nova Scotia Natural Resources and Renewables advised the Municipality that a site visit was conducted, and no evidence of any habitat or nesting was found. [M11286, Exhibit C-4, p. 262] The Mosher Report included this finding. [M11286, Exhibit C-4(a), Item 5, p. 32]

5.8 Environmental Concerns

[178] Throughout the process, in testimony and written submissions, the appellants raised environmental concerns such as the effects of global warming on stormwater and drainage infrastructure, species at risk and farming and agriculture. As stated by the Court of Appeal in *Bennett* v. *Kynock*, 1994 NSCA 114 and decisions of this

Board, primary responsibility for the environment rests with the Nova Scotia Department of Environment and Climate Change. In other words, the province is the environmental regulator, not the municipalities, municipal council or this Board. Further, in exercising their planning responsibilities, even when the MPS directs Council to consider environmental matters, Council can assume provincial and federal environmental regulators will properly determine any environmental issues within their mandates associated with a proposed development [see: *Cameron*, (*Re*) 2021 NSUARB 8, at para. 139].

5.9 Did Public Consultations Meet the MPS Requirements for Community Engagement?

[179] Ms. MacDonald said that Council did not engage with the public in a "meaningful and transparent way" as required by Section 5.1 of the MPS which provides policy direction on public engagement, specifically by Policies 5.1.1(a), (c), (d), (e) and (f). She said that civic addresses within 500 feet of the proposed development were notified by mail about the public hearing in this matter but were not informed by mail of Council's decision. She expressed concern about the strategies undertaken to engage residents who did not have access to the Municipality's website, local newspapers or online newspapers which require a paid subscription. She said it was a significant barrier to community engagement when the public hearing was advertised on a Saltwire website. She said that the Municipality's website was the victim of a cyber-attack and was inaccessible from July 11 to August 9, 2023, and caused Council's decision to be delayed until July 20, 2023. She stated that only six of the 11 councillors participated in the decision and Council's decision was made with the minimum majority of four councillors

and a minimum quorum required. The inaccessibility of the Municipality's website also affected access to information for nine of the 14 days allowed for submitting an appeal.

[180] The appellant, Cornwallis Farm, also noted that only four councillors provided the majority vote, when the Council was comprised of 11 councillors.

[181] The preamble to the specific policy directions indicates "[c]ouncil will continue to engage with the public by meaningful and transparent methods" when implementing, reviewing, and updating the MPS. The Board notes this matter does not involve reviewing or updating the MPS. The LUB is a primary means of implementing the MPS [see ss. 219(1) and (3) of the *MGA* directing Council to adopt a LUB to carry out the intent of the MPS, as discussed in *Archibald*]. This case does not involve amendments to the LUB.

[182] Policy 5.1.1 provides policy direction on what meaningful engagement means. This includes "exceeding the minimum public consultation requirements" in the *MGA* [5.1.1(a)], "researching issues and making the information readily accessible to the public" [5.1.1(c)], "developing and implementing engagement strategies that recognize equity, diversity and inclusion" [5.1.1(d)], "seeking ways to collect comments that represent the broader community, including, but not limited to, …First Nations groups" [5.1.1(e)] and "exploring new technologies and methods for increased public engagement" [5.1.1(f)].

[183] Development agreements are used as a form of implementation under Policies 5.3.6 to 5.3.9 of the MPS. In the specific case of development agreements, the text preceding Policy 5.3.6 of the MPS says:

> Development agreement applications must be considered through a public process involving neighbour notification, public and committee meetings and a decision by Council. Within this Strategy, Council has decided to use development agreements where public

> consultation and/or site-specific land use controls are warranted or where the impact of certain developments is not known.

[184] Policy 5.3.6 of the MPS references ss. 225 to 230 of the *MGA* in the context of considering development agreements. The only statutory requirement in the *MGA* relating to public consultation in the approval of a development agreement is that Council hold a public hearing [s. 230(2)].

[185] The Board has consistently held it has no jurisdiction to overturn municipal council decisions based on alleged procedural errors [see: *Municipal Board Halifax (County)* v. *Maskine*, 1992 CanLII 2469 (NSCA); *Community For Responsible Development For District 1*, (*Re*) 2023 NSUARB 37 (*Canning*) and *Tawil*, (*Re*) 2022 NSUARB 95]. These cases did not address the situation of when there was a process required by the MPS.

[186] In *Peninsula South Community Association* v. *Chebucto Community Council (Halifax Regional Municipality)*, 2002 NSUARB 7, (appeal allowed on other grounds *sub nom, Tsimiklis*, (*Re*) 2003 NSCA 30, at paras. 112-127), the Board determined that where procedural public consultation provisions were embedded in the MPS, the Board could consider whether a council's failure to adequately address them reasonably carried out the intent of the MPS.

[187] As noted by the Board in *Canning*, the Board's jurisdiction to consider procedural issues arising from the MPS itself has not been the subject of a definitive appellate ruling but it continued with an analysis to determine if Council had adequately consulted with the public as required by Policy 5.1.1(a) and (b). The Board found that in the context of the development agreement the public consultation requirement had been

satisfied. The public consultation used in *Canning* is almost identical to the consultation used in this matter.

[188] As discussed above, the use of the word “shall” in the MPS is intended to be permissive, not mandatory, but Council must consider the policy and whether or not to exercise its discretion about its application. When the MPS provides discretion to Council, the exercise of that discretion is usually entitled to deference by this Board. That said, Council’s discretion must be exercised in a manner consistent with an interpretation that the MPS language can reasonably bear. When looking at what the MPS contemplated for public consultation, context is important.

[189] At the time the MPS and the LUB were adopted, Council clearly contemplated that if this type of development proceeded in Port Williams’ R5 zone, then such a development should only proceed by development agreement. The MPS provides directions on what form of consultation is appropriate for development agreements. The preamble to the development agreement policies contemplates “a public process involving neighbour notification, public and committee meetings and a decision by Council.”

[190] The Board must consider the words used in the MPS as a primary interpretive tool. A concurrently adopted LUB can assist the Board in interpreting the MPS.

[191] The general preamble to Part 5 of the MPS addresses consultation related to the major themes of changes to the MPS and LUB. The preamble to the policies on development agreements provides a specific public consultation process. The process followed in this matter included:

- A public information meeting on March 10, 2023, and a video recording of this meeting on the Municipality's website;

- Resident notifications in accordance with Council's notification policies on March 14, 2023;

- Municipal staff appearing before the Port Williams Area Advisory Committee on May 3, 2023, and receiving the Village's recommendation that the Planning Advisory Committee recommend to Council the initial consideration and holding of a public hearing regarding entering a development agreement for the project;

- A Planning Advisory Committee on May 9, 2023;

- A public hearing on July 4, 2023, immediately preceding the Council meeting when Council decided to postpone the vote on the development agreement for a future date so that it could review all the information; and,

- Council's decision on July 20, 2023.

[192] Ms. MacDonald submitted that the process used by the Municipality was not easily accessible or transparent as required by Policy 5.1.1 of the MPS. She faulted the Municipality for the amount and quality of information provided, when it was provided, and the means used to give notice to the public. The Board does not agree with this assessment. The process provided a reasonable opportunity for the appellants and other community members to be apprised of the proposed development and put forward their views. The views and positions advanced by those opposed to, or concerned about, the development were considered by the Municipality's planning staff. Council held a full public hearing where residents were again given an opportunity to express their positions.

[193] In the end, after hearing many of the same submissions as the appellants made before this Board, Council decided to approve the development agreement. This does not mean the residents who opposed the project were not heard. It means Council was not convinced the concerns raised by those opponents of the development

agreement outweighed the policy directions in the MPS and the information it had before it in support of the proposal, upon which it placed the most weight. The Board therefore finds there is no basis for overturning Council's decision under s. 5.1.1. of the MPS based upon the process it followed.

5.10 Other

[194] The Board received comprehensive submissions addressing many aspects of the MPS. The Board considered all the submissions and the issues raised. Given the approach the Board has taken in determining this appeal, it has not made a complete catalog, or disposed of every point raised by every party. To the extent the Board does not explicitly deal with all aspects of an argument, or a point raised by the parties, it can be assumed the Board did not agree, or the point or argument carried insufficient weight to impact this decision.

6.0 CONCLUSION OF THE MAJORITY

[195] The majority of the Board finds the appellants have failed to establish that Council's decision does not reasonably carry out the intent of the MPS. The appeal is denied, with dissenting reasons issued separately in this decision.

[196] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 9th day of July, 2024.

Richard J. Melanson

M. Kathleen McManus

7.0 DISSENTING REASONS OF BOARD MEMBER FISHER

[197] This matter involves a series of complex interpretations of the MPS and the accompanying evidence and argument. I agree completely with my colleagues about the facts, evidence and the interpretation of all issues discussed except for one.

[198] I will not repeat the legal tests which are more than capably explained by my colleagues. I agree with their explanation of these tests completely. The Board's role is not to make value judgements on planning issues. In a democracy that is, and must be, the role of elected officials. I do not have the authority to make such value-laden decisions. My only role is to determine if a council's decision does not reasonably carry out the intent of its own MPS.

[199] The Municipality's decision to approve a Development Agreement for the R5 zone, that allows a residential building within 600 feet of an Intensive Livestock Operation, does not reasonably carry out the intent of its MPS. As such, the appeal should be allowed.

[200] In making this decision I focused not only on the literal words of the MPS but pragmatically considered the consequences of the possible interpretations. My interpretation follows a different route than my colleagues. For the reasons that follow, I have placed greater or lesser emphasis on certain questions. While some individual pieces of the Municipality's arguments are compelling, taken as a whole, viewed pragmatically, and considering their consequences, the language of the policies cannot reasonably bear the Municipality's interpretation.

[201] The Policy in question is 4.5.24(c) which states:

> Council shall:
> …
> 4.5.24 consider only by development agreement in the Comprehensive Neighbourhood Development (R5) Zone, residential development which is sympathetic to neighbouring farms and will not interfere with normal agricultural activities. In considering such development agreements Council shall be satisfied that:
> …
> (c) a separation distance of a minimum of 100 feet (30.5 metres) shall be maintained between any residential building and land actively used for crop land and 600 feet (183 metres) shall be maintained between any residential building and land used for intensive livestock operations; [Emphasis added]
>
> [M11286, Exhibit C-4(a), Item 1, MPS, pp. 4.5-10 – 4.5-11]

[202] I consider the Objectives set in the preamble to provide important context for understanding Policy 4.5.24(c). The Objectives is to “provide a buffer between residential developments and agricultural activities." I would also note the Goal set out in the preamble to the Growth Centre Boundary which is to “balance urban growth with the long-term protection of ground water resources and the surrounding agricultural lands (emphasis added); and one of its Objectives, which is to “buffer urban development from surrounding agriculture."

[203] In making my dissent, I considered two important questions under Policy 4.5.24(c). The first question is whether the relevant agricultural activities are an “intensive livestock operation." The second question is whether the “lands used for” that intensive livestock operation are within 600 feet of a proposed residential building. I will discuss each question by considering the MPS, Council’s decision, and any alternative interpretations including from the parties. Then I shall consider these two questions using the available evidence and argument as well as the implications of the “Shall vs May” text of the plan.

7.1 What is an Intensive Livestock Operation?

[204] To understand Intensive Livestock Operations, we must first discuss Livestock Operations.

7.1.1 What is a Livestock Operation?

[205] Livestock Operations are defined in the LUB as:

> … a livestock operation in which a number of animals exceeding five (5) animal units are confined to a barn, feedlot or other facility for feeding, breeding, milking or holding for riding, eventual sale or egg production but does not include Household Livestock.
>
> [M11286, Exhibit 4(a), Item 2, LUB, p.17-17]

[206] There are three key components to this definition. First, there must be more than five animals. Second, they must be confined to a “barn, feedlot or other facility." Third, the purpose must be for “for feeding, breeding, milking or holding for riding, eventual sale or egg production” but excluding household livestock, which has its own definition.

[207] Based on this definition, a dairy barn with more than five cows would be a Livestock Operation. The same is true of other barns and structures that house multiple animals such as chickens or pigs. I found no evidence or argument that contradicts this interpretation.

[208] Ancillary buildings (such as a machine shed) would not be part of a Livestock Operation because they do not contain animals, although they might be part of the “lands used” for such an operation. Importantly, the definition appears limited to those structures and enclosures that contain more than five animals (Household Livestock must have no more than five animals, suggesting there are two types of Livestock Operations).

[209] There has been disagreement amongst the parties about whether the phrase “barn, feedlot or other facility” would include a pasture. I do not consider this to be

a relevant consideration. This will become more apparent as I discuss the second question and the evidence. However, as it is fundamental to the Municipality's interpretation, I wish to elaborate on whether a pasture is a livestock operation. I will cover two aspects of the debate. First, whether pasturing is considered an “other facility”, and second, whether pasturing is its own land use, separate from other Livestock Operations.

7.1.2 Is Pasturing an “Other Facility”?

[210] As discussed in the main decision, I agree that a feedlot may be “a plot of land on which livestock are fattened for market” and that this definition is one that the words of the policy can reasonably bear. I also agree that a pasture used for dairy cattle (versus beef cattle) may not be a feedlot. I do not agree, however, that to be a Livestock Operation a building must be involved. This is because of the term “other facility”, which is important. “Other facility” should be read in the context of the two preceding words “barn, feedlot.” A barn is a structure while a feedlot, as described in Mr. Rogers submission, is not necessarily a structure but a form of enclosure. Therefore, a pragmatic, contextual reading of the phrase leads to the conclusion that “other facility” would be a variation on a barn or a feedlot, meaning it would be another type of structure or enclosure. If the word “feedlot” did not appear in the definition than I would agree that one could interpret that definition as applying only to structures. However, it is not reasonable to selectively ignore the term “feedlot” and the more expansive concept of "other facility." The language cannot reasonably bear that interpretation. Hence, I would consider a paddock or an enclosure that contains more than five animals, including an enclosed pasture, to be a Livestock Operation.

7.1.3 Is Pasturing its Own Land Use?

[211] In his submission, Mr. Rogers skillfully develops an extensive argument that pasturing is not a Livestock Operation but a separate land use. Again, I do not consider this to be a relevant consideration and would not give it much weight, but it is important to explain why the language cannot bear this interpretation. His argument, explained earlier in this decision, rests on the use of the word “pasturing” in the definition for “Agricultural Uses." Because pasturing appears in that definition, and because that same definition excludes “buildings for the raising of animals, which is covered by the definitions of livestock operation and household livestock”, he argues that pasturing must therefore be a third type of livestock operation. I find this argument narrow and overly legalistic. It does not consider the purpose and the intent behind imposing the buffers. I also do not find this argument compelling for four other reasons.

[212] First, other sections of the MPS directly contradict his interpretation. For instance, Policy 3.4.31, that outlines what can be permitted within the A4 zone, allows for “agricultural uses excluding livestock operations." Zones A1 and A2 in the LUB both list permitted “Agricultural Uses." Both of these lists (8.3.2.1 and 8.4.2.1) identify “Livestock Operations” as an “Agricultural Use." These passages directly reveal that, despite Mr. Roger’s interpretation to the contrary, both Livestock Operations and pasturing are Agricultural Uses. They are not separate and distinct as he suggests. Clearly pasturing may be both an Agricultural Use and a Livestock Operation.

[213] Secondly, the term “pasturing” appears only once in the MPS, and only as an example of agricultural use. It is not a defined term, nor does it appear in any policies, goals or objectives. This suggests it has limited significance in the MPS.

[214] Third, the exclusion of “buildings for the raising of animals” from the definition of “Agricultural Uses” does not mean all Livestock Operations are entirely separate from Agricultural Uses. Livestock Operations also include “feedlots” and “other facilities”, and these are not excluded from the definition of Agricultural Uses. The purpose of excluding “buildings for the raising of animals” from this definition is not obvious, but it does not logically follow that pasturing is a third type of livestock operation.

[215] Fourthly, I am mindful of using a “pragmatic” approach and considering “policies that impact on the decision." If pastures and enclosures are not part of Livestock Operations, then those parts of the MPS that apply to Livestock Operations do not apply to such operations:

- That interpretation implies that setbacks intended for livestock only apply to some, but not all, livestock farms. I believe that Council’s intent is shown in the Objectives for the Residential portion of the Port Williams Secondary Plan to “provide a buffer between residential developments and agricultural activities” (4.5 – 10). That intent would be frustrated by Mr. Roger’s argument. Intensive Livestock Operations have a 600-foot buffer, crops have a 100-foot setback, but, under his interpretation, livestock on pastures would have no setback, even if contained within an enclosure. It seems unreasonable that Council intended to establish setbacks for all crops but only some livestock.

- General Regulation 14.3.21 is specifically for Livestock Operations. It places setbacks on new buildings, additions and manure storage facilities from watercourses and the Growth Centre Boundaries. General Regulation 14.1 duplicates the setbacks between Livestock Operation buildings and watercourses. Under Mr. Rogers interpretation these setbacks would apply to some livestock farms and not to others.

- Policy 3.4.7 requires a manure disposal plan for Livestock Operations. Again, this would only apply to livestock barns, not pastures or enclosures. Cornwallis Farms, however, accumulates and spreads an estimated 3,000 to 4,000 tons of manure per year, some from barns, some from the corral and enclosures. These would require no such plan. The owner of a pasture might argue that there is no restriction on where it places a manure storage facility.

- Another example would be the Grand Pré and Area Secondary Plan’s Policy 4.6.5. It permits Livestock Operations “in existence prior to adoption of the initial

> Municipal Development Plan on June 19, 1979". Under Mr. Roger's interpretation this would not apply to all livestock farms.

[216] As such, I do not find the definition of Livestock Operations a difficult one to understand or apply. None of the potential outcomes listed above are reasonable. The language of the MPS cannot bear the interpretation that pastures and enclosures are their own land use category, separate from Livestock Operations.

7.1.4 The Meaning of an Intensive Livestock Operation

[217] Next, I must explain the meaning of Intensive Livestock Operations. Intensive Livestock Operations are not defined in the MPS. The term appears twice in the MPS, once in the preamble and once in Policy 4.5.24(c). The preamble simply states that "Livestock operations are distinguished as intensive or commercial-scale livestock operations, and household livestock which are small-scale, hobby or niche-market livestock operations." This suggests that Livestock Operations consist of two types and that intensive livestock is synonymous with commercial livestock. While this is a reasonable interpretation, we must consider whether there is another interpretation that the language could bear.

[218] The submissions from the parties do not provide an alternative interpretation for "intensive." Ms. Mosher suggested in her testimony that the term was tied to the number of animals in an area but that defining it would require "additional study from planning staff." Mr. Newcombe suggested the term was tied to density and saw his method of rotating cows through electric paddocks as fulfilling that density requirement. The Mosher Report to Council is silent on any definition of this term. It appears that Council did not put its mind to defining, or considering a definition for, Intensive Livestock Operation.

[219] I have reviewed the MPS for clarity on this issue but have found little that is conclusive. The Vision Statement for Agriculture talks of “diversification and innovation in the sustainable use of agricultural land” while the Vision Statement for Settlement mentions “efficient service and infrastructure delivery." Density, both low and high, is generally used in the MPS in relation to residential development, but not for agricultural uses. This suggests to me that it may not be appropriate to use a density measure as a definition for agricultural activities. Certainly, there is no “cows per acre” requirement in the MPS comparable to a minimum “units per acre” in Policy 4.5.24 or other policies.

[220] The sole piece of context that talks of Intensive Livestock Operations is the preamble that equates commercial livestock to an intensive use. I accept that the preamble reflects the intent of Council to have two classes of Livestock Operations: Intensive (i.e., Commercial) and Household, and that there is not another reasonable interpretation that the words can bear.

7.2 What is Meant by “Land Used For” an Intensive Livestock Operation?

[221] The second key part of Policy 4.5.24(c) is the term “lands used for." It is important to remember that the setback requirement applies not to the Intensive Livestock Operations itself but to the “land used for intensive livestock operations." What is meant by the term “land used for” such operations? Obviously that land must encompass and be part of the Livestock Operations. But what constitutes “land used for” the operations?

[222] The Municipality argues that only a building structure or a feedlot can be an intensive livestock operation and that the land used for it refers to the land underneath the structure. I am unclear as to how they drew this conclusion. I have heard no argument that explains how “land used for” can be narrowly interpreted to mean only the land

underneath a structure. Nor, considering the plan, do I see any reason to restrict the meaning of the phrase so narrowly. I find nothing in the purpose, context or the words of the MPS that suggests such an interpretation. I would agree that in some limited cases possibly only the land underneath a structure might qualify as “lands used for" a given purpose. However, that would depend on the context and circumstances. I will elaborate.

[223] First, I would note that there was no evidence or argument whether the use of the term “land” meant the full parcel of land; the land associated with the function of the building (if accepting the Municipality’s argument that an Intensive Livestock Operation takes place only in a building); or the land of the complete farm operations (i.e., crossing multiple lots). Cornwallis Farms encompasses numerous lots, not all immediately adjacent to each other.

[224] An interpretation might go to two extremes. In one case it might mean only the land underneath a barn or a feedlot. In another it might mean the entire lot or lots, regardless of how it is used? For instance, if a dairy farm had a 700-foot driveway would the 600-foot buffer start where the driveway meets the street? Or would it start where the driveway meets a barn? I shall consider to what extent the language of the MPS can reasonably bear such interpretations.

[225] First, let us consider Council’s purpose and the relevant context. I believe a reasonable interpretation of Council’s intent can again be found in the Objective for the Residential portion of the Port Williams Secondary to “provide a buffer between residential developments and agricultural activities.” [p. 4.5 – 10] Council does not specifically say why it wants buffers. A hint is found in Section 2.7 which references land dedications under the Subdivision By-law “that provide a buffer on the periphery of Growth Centres

to reduce land use conflicts between rural and urban land uses.” [p. 2.7 -3] Likewise, the Objectives for the Growth Centre Boundary speak of buffering “urban development from surrounding agriculture.” [p. 4.5 – 17] Presumably, relevant conflicts include the dust, noise, vibration, sprays and odours that Ms. Mosher described at the hearing.

[226] Based on this review, I conclude that there must be a clear and active link between the “land used for” and the agricultural activities. Looking at the stated Objective, the land that directly supports “agricultural activities” is the relevant consideration. In other words, it is the land that supports the dust, noise, vibration, sprays or odours that creates the need for the buffer. The hypothetical 700-foot driveway is largely irrelevant as it creates no more issues for residential development than might a similar driveway for a local business or industry. The land for ancillary uses might be considered part of those agricultural activities if they produced dust, noise, vibration, sprays, odours or other similar land-use conflicts or issues. Their status would be based on their contextual use. For instance, a manure storage facility might be considered “lands used for” an intensive livestock operation. On the other hand, a machine shop may create no more conflict than other commercial or industrial buildings.

[227] Policy 3.2.24(c) sets a 100-foot buffer for crop land and a 600-foot buffer for “land used for intensive livestock operations." Looking at the issue pragmatically, I conclude that “lands used for” must satisfy two tests before Council:

a. First, the lands in question must be a part of the Intensive Livestock Operations. Lands used for a dairy farm must be linked to that livestock operation, not a chicken barn, or crops, or a slaughterhouse. And they must be in regular use. The use of the lands must also be active and ongoing. That is not to say that they must be used every day or even on a regular schedule. Agricultural work is not office work. The regularity with which lands are used will vary with the type of livestock, the season, weather, and the approach to farming. It is enough that the land is connected to the

Livestock Operation and is actively used in some systematic fashion to support it.

b. Secondly, being part of the Livestock Operation is not enough. Land must directly support the Livestock Operations, meaning that the Livestock Operations on the land can reasonably be expected to produce the dust, noise, vibration, sprays or odours or other conflicts that Council wished to separate, or buffer, from other uses. The existence and severity of such conflicts may be a matter of individual sensitivities. It is sufficient that such conflicts can reasonably be expected to occur.

[228] Let us return to the two extremes I mentioned earlier. One where the entire lot(s) is considered “land used for” and the second where only the land underneath the structure is “lands used for.” It might be reasonable for Council to take a broader or narrower interpretation of “lands used for” but that would be dependant on the circumstances and the context. For instance, Council might conclude that the 700-foot hypothetical driveway created farm-related traffic or that other issues justified a broader buffer. Likewise, Council might conclude that lands for an ancillary building (eg the machine shop or feed storage) cause no land-control issues and hence are not part of “lands used for.” In that instance they might narrow the buffer. There could be multiple interpretations the language of the policy might reasonably bear, provided they followed the intent of the MPS which I have attempted to outline in the above two tests.

7.3 Are the Proposed Residential Buildings within 600 feet of Lands used for an Intensive Livestock Operation?

[229] Having concluded what the proper tests are to define Intensive Livestock Operations and the “lands used” for these operations, I will now examine the specific situation between the proposed Port Ridge development and Cornwallis Farms.

[230] I have reviewed the written and oral evidence to determine which Cornwallis Farms lots are within 600 feet of the proposed residential buildings and what farm

operations are on those lots. No single map showed the property lines and labelled the structures and operations. I considered the Port Williams map filed as Exhibit C-17 (in M11828) which shows lot parcels. However, I found the “Mailing List Map” filed in the Appeal Record, although it measured from the proposed development rather than the buildings, to be very useful. It shows the property lines, an aerial view of structures, and a 500-foot buffer:

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[M11286, Exhibit C-4, p.184]

[231] From a review of this map, it appears the proposed development (in dark purple/blue and labelled “R5”) had at least two, and perhaps five, parcels north of Belcher Street that were within the 600-foot distance. I will concentrate on two of these parcels,

both abutting the intersection of Belcher Street and Sutton Road. The first, to the west of the intersection, contains the much-discussed corral. The second, on the east of the intersection, includes many structures, including the machine shop identified by Ms. Mosher as 650 feet from the most easterly residential building.

[232] I reviewed the evidence supplied by Mr. Newcombe, both his Slide Five listed earlier in this decision, and his testimony. The first lot, which contains the corral lot, has no structures other than the corral. I note the discussion regarding the electric fences and the “large green trough” for feeding the cows referred to by Mr. Cuming.

[233] The second lot has a significant number of structures that, looking at the mailing map, are clearly within its property line. Considering both the mailing map and Slide Five included in this decision, I would note Mr. Newcombe’s testimony during which he identified the buildings on the slide:

> And then we move down from that, the 20 metres, or 65 feet, is the pasture across from the driveway.
>
> Then we go to the north, at 310 there’s two chicken barns there, which is 310 metres away. Three hundred (300) metres is our newer dairy barn. Beside that’s our older dairy barn which has calves in it. And then the 375 metres is our layer barn, and to the east of the proposed development, 450 metres away, is another large chicken barn. And then to the south of that, 175 metres away is our active farmland.
>
> [Transcript, December 6, 2023, pp.149-150]

[234] I interpret this to mean that the lot includes two chicken barns (at 310 metres), two dairy barns (at 300 metres are the new and old barns), and the layer barn (at 375 metres). These structures would be on the other side of the machinery shop, identified by Ms. Mosher as being the closest non-residential building, at 650 feet. I do not consider Mr. Newcombe’s distances to be exact but have used them to identify which structures are on the parcels. Each of these structures contains animals. While I do not know the exact number of animals within each, I understand each to be greater than five.

Therefore, I consider the two chicken barns, two dairy barns and the laying barn to meet the definition of Livestock Operations. As they are obviously significant farming operations and commercial in nature, I consider them to be Intensive Livestock Operations.

[235] With respect to the five Livestock Operations, there was little evidence at the hearing on the two chicken barns and the layer barn. We do not know what portion of land are associated with these three barns. I have no evidence that any Cornwallis Farms lands within 600 feet of the residential developments are used for these operations. As such, I have concluded that the buffer between the proposed development and the three chicken operations is greater than the required 600 feet.

[236] With respect to the pasture on the first lot, this includes the corral that Cornwallis Farms uses for its dairy cattle. As discussed previously, I consider an enclosure such as this to be an intensive livestock operation. However, it is more appropriate to look at the enclosure not as a stand-alone livestock operation, but as part of the intensive livestock operation that includes the two dairy barns. I will discuss the enclosure and pasture as part of the dairy operations.

[237] It is this dairy operation that is the biggest issue. The evidence shows that Cornwallis Farms has 30 to 40 heifers plus milking cows, “dry” cows, and calves. We do not know the exact number of cattle. There are two dairy barns, the older barn containing the young calves. The cows are contained in the dairy barn but also use the pasture at the corner of Sutton Road and Belcher Street. The applicant testified that cows were “not very often” in the corral. Mr. Newcombe, however, testified that in the corral the cows were fed grain supplement every morning and it was where they would catch the cows if they

had to. He stated, “we like to get as many cows out on pasture as we can because it’s just good for them, good for the legs to get walking around, [in] the fresh air."

[238] He explained in detail how the cattle were placed within electric paddocks to graze but moved between paddocks at different times. All of this was consistent with his approach to sustainable farming. I found Mr. Newcombe’s testimony to be clear and consistent. Cornwallis Farms is a sophisticated operation. It appears to practice “innovation in the sustainable use of agricultural land” which the MPS speaks of in its Agriculture Vision Statement. It is the largest such farm in Port Williams.

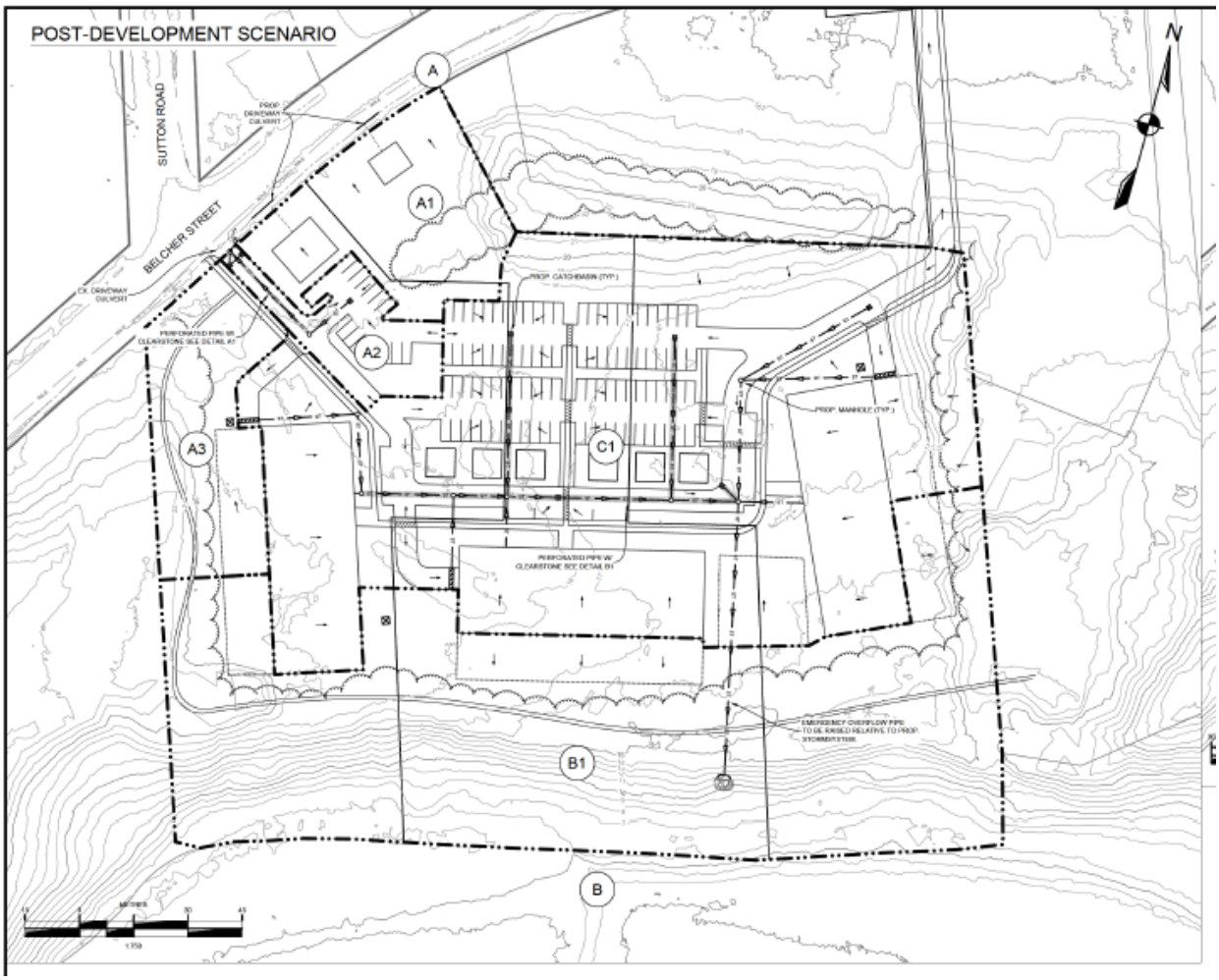
[239] I have concluded that the dairy farm is not three separate Livestock Operations (two barns and an enclosure on the pasture) but a single Intensive Livestock Operation which includes structures (two barns) and uses the surrounding pasture lands for its operations (the corral and the electric fencing). The pasture and the barns are not separate businesses or operations. I find that they are interdependent components of the same Livestock Operation, and that one cannot function properly without the other. The cows that are milked in the barn also graze in the pasture within the electric fence and are fed grain in the corral. The pasture, seasonal considerations aside, appears to be regularly used to support the dairy barns. It is not reasonable to conclude that the pasture and the barns are separate operations; and, that the pasture and enclosure must be evaluated under the Policy without considering their relationship to the dairy barns. The intent of Policy 4.5.24(c) is to look at the Livestock Operations and “land used for” together. To do otherwise is to frustrate the purpose of the policy. It is an approach that the language of the MPS cannot bear.

[240] In reviewing the separation requirements, I find that the Municipality misinterpreted and misapplied the requirements of Policy 4.5.24(c). That Policy requires that 600 feet “shall be maintained between any residential building and land used for intensive livestock operations.” [Emphasis added] Ms. Mosher measured from the most easterly building to the closest non-residential building. The Policy does not specify measurement from building to building but from building to “land used for." At the hearing Ms. Mosher was unable to clearly explain how she interpreted “lands used for” to be restricted to a building. Even if Intensive Livestock Operations could only occur within a building (which I have concluded the language of the Policy cannot bear), the measurement would still occur from the land used for the operations, not the building itself. The Mosher Report to Council emphasized that the “distance from a new residential use and any building that might house livestock is in excess of 650 feet” and failed to mention or discuss the broader lands used for the livestock operation, including the pasture or the corral.

[241] While Council has discretion in whether it draws a narrow or a wide boundary for “lands used for” it may not ignore the issue. The pasture lands are part of the Intensive Livestock Operation and can reasonably be expected to cause the land use conflicts that Council wished separation from. The argument that Policy 4.5.24(c) does not apply is based on a narrow legalistic interpretation of the MPS that fails to consider the purpose and intent of the buffer and the context of the MPS as a whole.

[242] The pasture and the corral are within 600 feet of the proposed development. The required measurement is from the property line of the lot at the corner of Sutton Road and Belcher Drive, on which the corral sits, to the residential buildings. Based on the

diagram for the post-development scenario (in the larger Stormwater Management Plan map filed by the applicant) I have used the 60m scale, at the bottom left of the map, to observe that the proposed two-unit dwelling and two of the three multi-residential buildings will be within the 600-foot (183-metre) buffer. The third, and most easterly residential multi-unit building, appears to be outside this 600-foot buffer. Clearly the proposal does not meet the separation requirements of Policy 4.5.24(c) and cannot proceed as is.



[M11286, Exhibit C-4, p.21]

[243] The Municipality has argued that the consequence of this interpretation is that:

> … amending the zoning map would be the planning route of choice open to an applicant in the position of the Hopgoods to allow it to achieve multi-unit apartment buildings on R5 zoned lands.

I do not accept this. Assuming the proposal remains economic (site development and infrastructure plans will likely need to be revised as may the building height) there appears to be sufficient space for one of the three buildings (with 67 units) to be placed on the eastern side of the property. Based on the acreage this could allow a density of roughly six units, more than the required minimum of four units per acre under Policy 4.5.24(a). It is not correct to say these lands cannot be developed at all without rezoning. The current proposal may not be allowed but the eastern side of the parcel offers the opportunity for four or more units per acre while remaining outside the 600-foot buffer.

[244] Regardless, while the LUB can be used to shed light on the MPS, the mere fact that Policy 4.5.24 may prevent this property from being fully developed as R5 is not an indication as to the intent of the plan regarding Livestock Operations. That may be a tempting interpretation, but it is inappropriate to use the zoning and development of a single property to interpret the MPS. There is no conflict between policies, only a perceived conflict between a Policy and the zoning of a property. The R5 designation exists across the Municipality. The Secondary Plan applies local restrictions that take precedence in Port Williams. It is entirely within Council's purview to allow a Policy to overrule or restrict the development of a property. That is inherent in the nature of the plan.

[245] Further, Policy 4.5.24(c) applies only to the R5 zone and only in the Port Williams Growth Centre. There are only three R5 areas in Port Williams, hence the only three areas in the Municipality where this policy can apply. Presumably Council understood this when they added Policy 4.5.24(c) to the MPS and understood that they

were possibly limiting the growth of these three R5 areas. They knowingly established higher density areas next to an A1 zone but, aware of the potential conflict with agriculture, choose to simultaneously protect those A1 areas by creating buffers. In Section 4.5 on the Growth Centre Boundaries the MPS describes the debate over the expansion of the growth centre that took place in 2010. The Section's Goal is to "balance urban growth with the long-term protection of ground water resources and the surrounding agricultural lands." Based on this, the buffers should be viewed not as a conflicting policy, but as a policy intended by Council to balance the expansion of the R5 zone. To argue that the zoning of a property takes precedence over a Policy in the Secondary Plan is to frustrate the intent of Council by nullifying a Policy that was intended to place restrictions on the R5 zone.

7.4 How Does the *Shall* vs *May* Text Apply?

[246] Having concluded that the Municipality approved a development agreement that failed to follow Policy 4.5.24(c), I will consider whether the Shall vs May text in Section 1.2 the of the MPS might allow the Municipality the discretion to not apply that policy. As concluded by the Panel in this decision, Council's discretion is not absolute, and it must still follow the intent of the MPS. In the case of *Blanchard*, the Municipality considered, but did not undertake, a required groundwater study because it concluded it would not acquire additional information and there would be no negative impacts from not doing so. This is not a comparable situation. Council does not appear to have considered whether the lands in question were part of an Intensive Livestock Operation. The Municipality has discretion in how it might apply a Policy. But it must consider the Policy and it must reasonably follow the intent of the MPS. It did not do so.

7.5 Conclusions

[247] In the Port Williams Secondary Plan, Council intended to “balance” the expansion of the growth centre boundaries with protection of agricultural lands. Hence it planned for buffers between “residential development and agricultural activities." Policy 4.5.24(c) established a 600-foot (183-metre) buffer “between any residential building and land used for intensive livestock operations." This Policy applies only to the R5 zone and only in Port Williams. There are only three such areas in Port Williams.

[248] Livestock Operations is a defined term in the LUB. I have concluded that the two dairy barns on Cornwallis Farms are Livestock Operations. Intensive Livestock Operations is an undefined term in the MPS. Based on the context in the MPS I have concluded that an Intensive Livestock Operation is a Commercial Livestock Operation. The two dairy barns are Intensive Livestock Operations.

[249] I have concluded that the “lands used for” an Intensive Livestock Operation must pass two tests for Council to consider it "lands used for an intensive livestock operation." First, the lands must be an active part of the Livestock Operations. Secondly, they must directly support the “agricultural activities” in question, meaning they are capably of producing the dust, noise, vibration, sprays or odours or other conflicts that Council presumably wished separation from.

[250] I have considered the Municipality’s alternative interpretation, namely that the pasture and enclosure is not a Livestock Operation and that the measurement of 600 feet must be from a residential building to the land underneath a livestock building. I do not agree that it is not a Livestock Operation. This interpretation is contradicted by parts of the MPS I have quoted. Moreover, the consequences of this interpretation are contrary to the intent of Council in the MPS as a whole. Regardless, even if this were an

interpretation the language could bear, the matter would not turn on this issue. The deep issue is not whether the pasture is a Livestock Operation, or the "intensity" of the pasture, but rather whether the pasture and the corral and its enclosures are "lands used for" an Intensive Livestock Operation. The pasture and the corral and the dairy barns are all part of Cornwallis Farm's dairy operations and must be treated as such, rather than being artificially split into their individual components and evaluated separately.

[251] Further, I do not agree that the 600-foot buffer is intended to be measured from building to the land underneath another building. The language of the plan cannot support this interpretation. In measuring from the closest residential building to the machine shop the Municipality erred. The measurement should have been to the lands with the pasture and corral. These were the "lands used for" the two dairy barns, which is an Intensive Livestock Operation. Instead, the Mosher Report was silent to Council on the intensive dairy operation that existed and the lands that were used to support it. Council appears to have not properly considered whether the proposed residential buildings were within 600 feet of an Intensive Livestock Operation.

[252] When the measurement from building to land is properly done, two of the three proposed multi-residential buildings fall within the 600-foot buffer. The proposal, as approved does not "reasonably carry out the intent" of the MPS. The appeal should be allowed.

DATED at Halifax, Nova Scotia, this 9th day of July, 2024.

Bruce H. Fisher