

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

-and-

IN THE MATTER OF AN APPEAL by **LESLIE CARRIE** from the decision of Amherst Town Council to refuse a development agreement application for property located at 155 East Victoria Street, Amherst, Nova Scotia

BEFORE: Richard J. Melanson, LL.B., Member

APPELLANT: **LESLIE CARRIE**
Kelcie White, Counsel
Katie O'Keefe, Counsel

RESPONDENT: **TOWN OF AMHERST**
Douglas B. Shatford, K.C.

HEARING DATE(S): January 10-11, 2024

FINAL SUBMISSIONS: February 15, 2024

DECISION DATE: **April 15, 2024**

DECISION: **The appeal is denied.**

1.0 INTRODUCTION

[1] This case is about whether a proposed development is too large for the neighbourhood. Leslie Carrie, through his development company, 155 East Victoria Limited, (formerly 3227967 Nova Scotia Limited) wants to build a 48-unit, four-story apartment building at 155 East Victoria Street (Property), a vacant L-shaped lot, in the Town of Amherst. This requires a development agreement under the Town's Municipal Planning Strategy (MPS). A development agreement sets out terms and conditions about how a development is built. It can be tailored to the neighbourhood where the property is located. Mr. Carrie applied for such a development agreement in November 2022.

[2] Mr. Carrie's goal is to develop diverse housing options through an energy efficient building. The design calls for rooftop solar panels and heat pumps in individual units. The target market is seniors who want to age in place, and employees of businesses who are having a difficult time finding places to live in Amherst. Like many communities in Nova Scotia, Amherst needs diverse and affordable housing. Like many others in the province, the Amherst MPS supports the development of diverse housing options while trying to minimize the impact of larger developments on existing residential neighbourhoods.

[3] After an involved process resulting in considerable modifications to the original proposal, the Town's planning staff recommended approval of a development agreement that included numerous terms to address compatibility issues with the surrounding residential neighborhood. The Town Council rejected the application. Mr. Carrie, on behalf of 155 East Victoria Limited, filed an appeal with the Board.

[4] There can be competing and sometimes conflicting policy directions in an MPS. Value judgments must often be applied when deciding how to implement these

policy directions. The *Municipal Government Act (MGA)* gives the elected Town Council primary stewardship over planning matters. The Board cannot substitute its own view for that of the Town Council. Rather, the appellant must show, on a balance of probabilities, that the Town Council's decision does not reasonably carry out the intent of the MPS.

[5] Given its policy directions encouraging diverse housing options in residential neighbourhoods, and the design features in the proposed development agreement, a positive decision by Town Council would have been reasonably consistent with the intent of the MPS. Unfortunately for the appellant, that is not enough to succeed, because there can be more than one outcome that reasonably carries out the intent of the MPS.

[6] While the Town's reasons for denial were not expressed clearly in its decision, it appears the main concern about the proposed development is that it is too large for the neighbourhood, and the adjacent property, in particular. The Town Council was apparently not convinced that the design elements incorporated in the development agreement were sufficient to overcome this concern.

[7] The Board is satisfied the Town Council had enough information to make this determination. Also, under the MPS, compatibility issues are planning concerns that need to be considered by the Town Council. Deciding whether or not the measures in the proposal were sufficient to mitigate the compatibility issues they were intended to address required an exercise in judgment. There is support in the MPS for the Town Council's decision to deny this application. It is appropriate for the Board to defer to the Town Council's judgment in this matter. Accordingly, this appeal is denied.

2.0 ISSUE

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

3.0 BACKGROUND

3.1 Witnesses and Evidence

[9] The appellant called three witnesses. Mr. Carrie is the President of 155 East Victoria Limited. He has extensive experience as a residential real estate agent and broker. He described the proposed project as his retirement fund. Mr. Carrie gave a description of the Property. He discussed the process he followed to get his proposal before the Town Council, including modifications made along the way to respond to neighbourhood concerns about the project. Mr. Carrie also compared the current proposal with one that was approved in 2008 for the Property. Mr. Carrie spoke about the need for the proposed housing in Amherst. He said that a smaller building was not financially viable.

[10] Rashad (Chad) Hindi, OAA, NSAA, MRAIC, is an architect. He was retained by the appellant to design the proposed apartment building. Mr. Hindi was qualified as an expert in architecture, including site analysis, conceptual design, building planning and detailing. Mr. Hindi provided an expert report and gave oral evidence about the various design features and modifications that were made to address potential

compatibility and conflict issues between the proposed project and the surrounding neighbourhood.

[11] Chrystal Fuller, MCIP, LPP, is the principal of Brighter Community Planning & Consulting. She was qualified as an expert in land use planning, including the interpretation and application of municipal planning strategies and land use bylaws. She provided an expert report and oral evidence on various planning considerations. It was Ms. Fuller's opinion that the Town Council's refusal of the subject application did not reasonably carry out the intent of the MPS.

[12] The Town also called three witnesses. Dr. David Kogan is the Town's mayor. He gave evidence about the process before the Town Council and the need for diversified housing in Amherst. He voted against the motion to reject the application.

[13] The Town called Andrew Fisher. He is the Town's Director of Planning and Strategic Initiatives. While Mr. Fisher obviously has a wealth of planning experience, he was not qualified as an independent expert witness in this proceeding. Mr. Fisher was the lead planner in processing the appellant's application. He ultimately recommended that the application be approved. In his oral evidence, he went through various parts of the Appeal Record, including a walk-through of staff reports and recommendations.

[14] Jason MacDonald was the Town's last witness. He is the Town's Chief Administrative Officer. He previously held the position of Director of Planning for the Town. He oversaw the Town's planning department until Mr. Fisher became the responsible director. Mr. MacDonald's evidence focussed on the 2007/2008 development agreement application, his recommendations for approval of that application, and comparisons between the project that was approved in 2008 and the one that was

rejected in 2023. As well, Mr. MacDonald was part of the team that assessed the current proposed development and answered questions about the recommended approval before the Town's Planning Advisory Committee (PAC).

3.2 Board Jurisdiction

[15] Policy RP-9 states that all residential developments greater than four dwelling units per property require a development agreement. The Town Council refused to approve a proposed development agreement for the Property. An applicant may appeal the refusal of a development agreement by a council to the Board (s. 247(2)(b) of the *MGA*).

[16] The grounds for an appeal of a council's decision to refuse a development agreement are set out in s. 250(1)(b) of the *MGA*:

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;

[17] In appeals under the *MGA*, the burden of proof is on the appellant. To be successful, the appellant must establish, on the balance of probabilities, that the Town Council's decision does not reasonably carry out the intent of the MPS. If the appellant fails, the Board must defer to the Town Council's decision.

[18] 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. ...

(8) The intent of the MPS is ascertained primarily from the wording of the written strategy.

[19] Clearly, the Board is not permitted to substitute its own decision for that of the Town 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 principles of statutory interpretation which have been adopted by the Court of Appeal, as

well as the provisions of s. 9(1) and s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

3.3 The Proposal

[20] In 2007, 155 East Victoria Street Limited, a company controlled by Mr. Carrie, applied to the Town Council for a development agreement to build a six-story, 32-unit, apartment-style condominium building on the Property. The proposal received a positive recommendation from Town planning staff. The development agreement was ultimately approved by the Town Council on March 8, 2008, and a development agreement was signed on September 3, 2008. Mr. Carrie was unable to proceed with construction because of the financial upheaval that occurred that fall. Amherst residents who had expressed interest in purchasing units were unable to sell their homes. Mr. Carrie decided to postpone his development plans. The signed development agreement lapsed.

[21] In 2022, 155 East Victoria Limited, through Mr. Carrie, applied for a development agreement to construct a six-story, 59-unit apartment on the Property. There was considerable public opposition to this proposal. Ultimately, after a review of the relevant MPS policies, the Town's planning staff provided a negative recommendation to the PAC. On February 6, 2023, the PAC passed a motion indicating it would not recommend the proposed development agreement to Council. On February 27, 2023, the matter went before the Town Council. At this stage, the appellant decided to revise the plans for the proposed development to try to address some of the concerns raised by the public and the Town's planning staff. The Town Council, therefore, remitted the matter back to staff.

[22] The revised proposal for the Property is a 4-story, 48-unit apartment building. Aside from the reduction in height and number of units, the proposed building would be further back from all property boundaries, including an abutting property with a single-family home at 153 East Victoria Street. There were several new proposed architectural features designed to make the building more compatible with the surrounding properties.

[23] The neighbourhood surrounding the property is shown in satellite imagery attached with a presentation to Council prepared by Town planning staff:

NEIGHBOURHOOD CONTEXT

- ❑ The **subject property** is a corner lot bounded by South Adelaide and Victoria East Street.
- ❑ Immediately surrounded by 1-3 storey single-detached and multi-unit converted dwellings.
- ❑ 2-storey seniors apartment building (Shiretown Manor) is located directly south of the property. A extended stay motel and a 4-storey senior's residence is located approximately 70m away.
- ❑ The subject property exists on the first residential block adjacent to the downtown core. Moving further northeast the neighborhood consists of several historically significant residential properties
- ❑ The downtown core area with a variety commercial uses and services is within a very short walking distance.



[Exhibit C-2, p. 396]

[24] A site plan and site plan description were also provided to Town Council:



[Exhibit C-2, p. 397]

[25] It is a development agreement to allow for the construction of the foregoing proposed apartment building that eventually went before the PAC, and ultimately before the Town Council.

3.4 Amherst's Planning Staff's Opinion and Recommendation

[26] Town planning staff reviewed the applicable MPS policies in detail. The proposal was compared to the previous one and analyzed in relation to the applicable policies. Planning staff recommended approval of the revised proposal.

[27] The Town PAC did not recommend approval of the proposed development agreement and it was ultimately rejected by the Town Council at a regular meeting on May 23, 2023. In fact, the proposal was defeated at first reading, without debate. There was, therefore, no public hearing before the Town Council about the applicant's final

proposal. Mr. Fisher testified he had not seen a municipal council proceed this way in his 20 years of planning experience. Mr. Carrie appealed that decision to the Board.

3.5 Letters of Comment

[28] The Board received several letters of comment opposing the appeal. These letters, in most respects, mirrored the correspondence and presentations to the Town Council made by those opposing the original proposed six-story, 59-unit development. It was almost like no change had been made to the proposed development. The Board has summarized the key concerns raised in the letters of comment:

- the proposed development is located near a heritage district, and it has too much bulk, height, and density for this location;
- the proposed development agreement does not respect the current land use bylaw (LUB);
- the proposed building towers over the abutting 153 East Victoria Street, causing loss of privacy and amenities,
- nuisance, such as noise, and water runoff from snow removal;
- the development will lead to a loss of property value for neighbouring homes, and particularly 153 East Victoria Street;
- the building's architecture does not match the nearby heritage homes;
- the lot is too small to allow for adequate buffering;
- there will be street traffic and parking congestion;
- the adjacent South Adelaide Street has no sidewalks;
- there will be unwanted wind and shade impacts; and,
- school capacity may be an issue.

3.6 Public Speakers

[29] Charles Shewfelt made an oral presentation to the Board. Mr. Shewfelt's basic premise is that the proposed development is too big for the neighbourhood. He discussed the pride the community had in its heritage buildings. While admitting the Property was not in a designated heritage area, he pointed out heritage buildings are located nearby. That said, Mr. Shewfelt appeared to dismiss the evidence of Mr. Hindi and Ms. Fuller about a nearby building, Fort Cumberland Manor, with similar height and bulk, on the basis it was in another zone. Mr. Shewfelt pointed out that 153 East Victoria Street, which abuts the Property, and was the topic of some discussion during the hearing, was in fact, in the past, a building related to Fort Cumberland Manor. Mr. Shewfelt expressed concerns about traffic, particularly because of the lack of grocery stores in the nearby downtown area. Mr. Shewfelt said the Town is approving larger developments to address housing issues in more appropriate areas.

[30] Maria Smith appeared before the Board. She also lives on South Adelaide Street. Ms. Smith spoke with pride about the many historic buildings in Amherst, and the value residents place on compatible architecture. She said the historic Bent property is just one block from the Property. Ms. Smith said the proposed building was too large and not compatible with the surrounding neighbourhood. She alluded to the existing LUB restrictions and how this proposed development would go well beyond them. She repeated some of the concerns expressed by others about comparing the project to other larger buildings that were not in the same zone. She suggested that the fact Mr. Carrie did not live in Amherst, and that his desire to proceed at this scale was based on a profit motive, were reasons why the project should not be approved. Ms. Smith dismissed the expert opinions of Mr. Hindi and Ms. Fuller because they were retained by the appellant.

3.7 Site Visit

[31] The Board conducted a site visit of the Property at the conclusion of the oral hearing on January 11, 2024. The Board was accompanied by counsel and representatives of the parties. The Board proceeded on foot from the Town Hall at 98 East Victoria Street, via the sidewalks along this street, to the Property. This is approximately a five-minute walk. The Board was able to observe the streetscape along East Victoria Street, Acadia Street and South Adelaide Street, in the vicinity of the Property.

[32] The Property is a vacant grassed lot with some trees and shrubbery along portions of its boundaries. The Board proceeded to walk along the boundaries of the Property. The Board was able to observe the slope of the lands from the back of the Property to East Victoria Street. The Board observed and walked along the tree line at the back of the Property. The Board observed the position of trees at the front of the Property, including an old oak tree and one close to 153 East Victoria Street. After walking the Property, all site visit participants returned to the Town Hall.

3.8 ANALYSIS AND FINDINGS

[33] After receiving the negative PAC recommendation, the Town Council, at a regular meeting on May 23, 2023, by a five to two vote, decided that the matter would not proceed beyond first reading to a public hearing. There was no debate and no public input on the proposal that was ultimately before the Town Council.

[34] Council's written reasons issued on May 30, 2023, state:

Pursuant to section 230(6) of the Municipal Government Act, I am writing to advise you that on May 23, 2023 Amherst Town Council refused your application to enter into a

development agreement to permit the construction of a 48-unit apartment building at the above noted property by passing the following motion:

That Council refuse to enter into the development agreement for a 48-unit apartment building at 155 East Victoria Street due to the proposal not meeting the intent of policy RP-9 and/or A-5 of the Municipal Planning Strategy.

[Exhibit C-02, p.420]

3.9 Policy Framework for Proposed Development Agreement

[35] MPS Policy RP-9 is central to this appeal. It provides the primary policy guidance about medium and high-density development in residential zones. It states:

RP-9 Within the Residential Designation, it shall be the intention of Council to ensure medium and high-density residential development occur in a manner compatible with a low density residential neighbourhood. Specifically, Council shall require that all residential developments greater than 4 dwelling units per property, be subject to a Development Agreement. In negotiating such an agreement Council shall:

- (a) ensure that the structure is located on the lot in such a manner as to limit potential impacts on surrounding low density residential developments;
- (b) ensure that the development provides sufficient on-site parking, and appropriate access to, and egress from the street;
- (c) ensure that the location of parking facilities does not dominate the surrounding area, including the utilization of vegetation and fences to mitigate the aesthetic impacts of parking lots;
- (d) ensure that any on site outdoor lighting does not negatively impact the surrounding properties;
- (e) ensure that any signage on the property is sympathetic to the surrounding residential properties;
- (f) require the use of vegetation to improve the aesthetic quality of the development;
- (g) ensure that the architecture of the building is sympathetic to any existing development in the surrounding area.

[Exhibit C-4, pp. 16-17]

[36] MPS Policy A-5 is also important. The factors in this policy must be considered when the Town Council is considering entering a development agreement:

A-5 It shall be the intention of Council, when considering an amendment to this or any other planning document, including the entering into or amendment of a development

agreement, to consider the following matters, in addition to all other criteria set out in the various policies of this planning strategy:

- (a) That the proposal conforms to the general intent of this plan and all other municipal bylaws and regulations.
- (b) That the proposal is not premature or inappropriate by reason of:
 - (i) the financial capability of the Town to absorb any costs relating to the development;
 - (ii) the adequacy of municipal water, sanitary sewer and storm sewer services;
 - (iii) the adequacy of road networks, in, adjacent to, or leading to the development;
- (c) That consideration is given to the extent to which the proposed type of development might conflict with any adjacent or nearby land uses by reason of:
 - (i) type of use;
 - (ii) height, bulk and lot coverage of any proposed building;
 - (iii) parking, traffic generation, access to and egress from the site;
 - (iv) any other matter of planning concern outlined in this strategy.

[Exhibit C-4, p. 40]

[37] While these two key MPS policies must be considered, there are other MPS policies that provide context for their meaning and application. There are several MPS policies that encourage a variety of housing types, for various income levels, in residential designations. These include general objectives in the MPS found in ss.2.2(a), (f) and (g), s. 2.2.13, s. 2.3.2, and the specific direction in Policy RP-8 to "...encourage a mix of housing densities in all residential areas of town to encourage a mix of housing types and income groups in all residential areas." There are also MPS policies, such as MS-11 and RP-12, that encourage efficient development, including infill development. On the other hand, there are other MPS policies that focus on "appropriate" density for the "character of the town" (GP-8) and minimizing compatibility issues (GP-7).

[38] With the foregoing context in mind, the Board finds that the MPS encourages medium and high-density residential development in residential areas if compatibility and conflict issues can be minimized to an acceptable level. The extent to which the proposed development achieves this objective is the main issue before the Board.

3.10 MPS Policies RP-9 and A-5 – Compatibility and Conflict Considerations

[39] This matter turns on whether the proposed development, with its various setbacks, architectural features, and buffering elements, as incorporated in the proposed development agreement, is compatible with some existing low-density residential characteristics in the neighbourhood surrounding the Property. This includes considerations about potential conflicts with any nearby or adjacent land uses. In this sense, Policies RP-9 and A-5 are complimentary.

[40] The appellant submits that it was the opinion of the three professional planners who appeared before the Board that the proposed development agreement reasonably carried out the intent of the MPS. The appellant submits that, in the face of such professional opinions, the Town Council's decision to decide otherwise must be based on good planning principles. The Board agrees with the basic premise that, while the Town is not bound to follow the opinions of its professional staff, the decision not to do so must be based on the planning policy direction found in the MPS.

[41] The Board has no difficulty accepting that, given the need for housing in Amherst, which was even acknowledged by some of those opposing the project, along with the policy directions encouraging a diversity of residential housing, there was ample basis for the Town Council to conclude that approving the proposed development

agreement reasonably carried out the intent of the MPS. The Town Council could have readily found that the development agreement had sufficient design features to address compatibility and conflict issues, or any other factors under the framework set out in Policies RP-9 and A-5. While not necessary to arrive at this conclusion, a previous Town Council had approved a development agreement for a taller building with many of the same bulk and lot coverage characteristics, albeit less density, under substantially the same MPS policy direction.

[42] A more difficult question arises when the Board is exercising its restricted appellate role because, as expressed in *Archibald*, and correctly acknowledged by the appellant, there can be more than one decision that reasonably carries out the intent of the MPS. The fact that a proposal is reasonably consistent with the intent of the MPS does not automatically prove the "...converse proposition, that Council's refusal is inconsistent with the MPS."

[43] The Board must first examine the Town Council's reasons for rejecting the application. The written reasons provide little guidance to the Board in framing what concerns the Town Council had about the proposed development. They are generic in nature, simply citing the two most applicable MPS policies. They are devoid of any analysis or description of what, if any, conflicting policy choices the Town Council resolved when denying the development agreement application. They are silent on what value-laden judgments, if any, the Town Council made when arriving at its decision. While the Board does not usually parse the comments of individual councilors in a search for error, they can sometimes provide some insight into the ultimate decision. In this case there were no comments made by councilors at the Town Council meeting.

[44] *Heritage Trust of Nova Scotia v. AMK Barrettt*, 2021 NSCA 42, at para. [30], explains that the "...Board's appraisal of whether Council has 'reasonably carried out the intent of the municipal planning strategy' is not confined..." to the events at the May 23, 2023, meeting. A council's deliberations and decisions in planning matters do not take place in a vacuum. In this case there was a lengthy process, involving two proposals, and three PAC meetings, prior to the May 23, 2023, Town Council meeting. Town Council was faced with a positive recommendation from staff and a negative recommendation from its PAC.

[45] During the May 17, 2023, PAC meeting, Councilor Davidson asked questions about height, bulk, and lot coverage, including setbacks, specifically referring to Policy A-5(3)(c) and the abutting property at 153 East Victoria Street. Deputy Mayor Landry questioned the staff report's recommendation when considering bulk and height. In the PAC meeting, both Mr. Fisher and Mr. MacDonald indicated that the bulk and height of the building were really the only planning issues at play in the discussion. Mr. Fisher also made reference to the location of the building on the lot.

[46] When the decision was made to reject the appellant's application, the Town Council had the May 17, 2023, PAC meeting minutes. It also had a staff memo of the same date, which, while recommending approval, identified potential issues of compatibility about the height, bulk, and location on the lot of the building. The staff memo also raised a potential concern with the "compatibility and sensitivity with the surrounding neighbourhood."

[47] Councilor Davidson, a member of the Town's PAC, moved the motion to reject the development agreement. It was seconded by Councilor Dale Fawthrop, who

was not involved in the PAC meeting. Both Deputy Mayor Landry and Councilor Davidson, who had actively participated in the PAC meeting, voted in favour of the motion to reject the application. The record does not reveal the reasons why Councillors Charlie Chambers, Lisa Emery and Dale Fawthrop voted in favour of the motion. That said, it is reasonable to assume that the issues in the PAC minutes about the size, bulk, location and height of the proposed development played a part in the vote's outcome.

[48] The Board must decide, framed in this light, whether the Town Council had sustainable reasons, grounded in the MPS, to reach its conclusion to reject the application. The Town submits that the principles outlined in *Archibald* support the proposition that the Town's decision reasonably carries out the intent of the MPS. The Town's position is largely premised on the wording expressed in Mr. Fisher's May 17, 2023, staff memo:

It was suggested to the applicant that if the proposed building were reduced to three levels (4 at East Victoria) it would be similar in height to the 3-level, 8-unit building at 157 East Victoria and other 3-level buildings in the broader neighbourhood. In addition, stepping the upper floor back 10-15 feet would reduce the shear face of the building wall that fronts on East Victoria and potentially reduce its impact on the streetscape and neighbourhood character. Staff suggested that these two reductions in the height and bulk of the building might allow an argument to be made that the building is in keeping with the general intent of the key MPS policies. The applicant responded that these changes would make the project financially unfeasible.

In conclusion, staff and the public raised concerns about the compatibility of the proposal with respect to its location on the lot, bulk height and lack of compatibility and sensitivity with the surrounding neighbourhood. These concerns also reflect issues identified by MPS policies that must be considered in evaluating this proposal. In response, the proposal has been significantly revised to address these concerns to mitigate the potential conflicts and impacts. The three planners on staff have discussed this proposal at length and feel that a legitimate argument can be made for both a positive and a negative recommendation; however, there is consensus that once complete, the proposed building will have a positive impact on the town over all. It will have a limited impact on South Adelaide and a significant visual impact on East Victoria.

[Exhibit C-2, p.424]

[49] At a May 1, 2023, PAC meeting, the committee voted against recommending the proposed development agreement. The minutes of this meeting do

not reveal why. After the meeting, the Town planning staff discovered an error in the height calculations. In fact, the proposed building was three meters shorter than had been indicated in the May 1, 2023, memorandum to the PAC. This meant that the proposed building would be approximately the same height as the tallest building in the immediate area. This was the three-level, 15-unit apartment building at 157 East Victoria Street, which is directly across South Adelaide Street from the proposed development. Interestingly, while this change was made in the body of the report, the part quoted above, from the Discussion and Conclusion section, does not reflect this change.

[50] This height calculation change was discussed at the PAC meeting on May 17, 2023. The correction of this error was the purpose of having the meeting. The Board would ordinarily assume the PAC members were fully aware of this error in the calculation, but that is not clear from the minutes.

[51] The minutes of the May 17, 2023, PAC meeting record that Deputy Mayor Landry had Mr. MacDonald read a passage from the May 1, 2023, staff memo. This memo had the same error as in the Discussion and Conclusion section in the May 17, 2023, staff memo set out above, suggesting a reduction of the proposed building to three levels would make it the same height as the apartment building at 157 East Victoria Street. In fact, the proposed four-story building was already the same height as the building at 157 East Victoria Street. The following exchange is then recorded:

Deputy Mayor Landry wants to know how staff can recommend we enter into an agreement and state that it adheres to our MPS when they also state changes needed to be made to be more inline [sic] with our MPS. Deputy Mayor Landry again stated it seems like a vague recommendation to him.

Jason MacDonald replied there are approximately 20 policies that addresses [sic] this application and that it easily satisfies 19 of them. The issues are the height and the bulk of the building that is more of an interpretive thing on balance that is being addressed. It would be better if it was three storeys but he does feel that at the end of the day that four-storeys does satisfy the policy.

[52] It is, therefore, not clear if Deputy Mayor Landry was still under the impression the proposed building was taller than the one located at 157 East Victoria Street. That said, Mr. MacDonald had just addressed the height issue when responding to Councilor Davidson. It is, therefore, reasonable to conclude Deputy Mayor Landry used the quoted passage to highlight the potential compatibility issues more generally, rather than focusing on 157 East Victoria Street.

[53] In any event, Mr. Fisher and Mr. MacDonald maintained their respective opinions that an argument could be made for both a positive and a negative recommendation during their oral evidence. They were both aware of the height of the proposed building compared to 157 East Victoria Street. That said, neither of them changed their view that the proposed development agreement was reasonably consistent with the MPS.

[54] As the Board understands it, the Town submits that its Town planners indicated a legitimate argument could be made for both a positive and a negative recommendation. Their position was based on height, bulk and lot coverage compatibility issues expressed in policies R-9 and A-5. Therefore, Mr. Rathford submits that, despite the Town planners' ultimate positive recommendation, there were two possible outcomes that were reasonably consistent with the intent of the MPS.

[55] The Town's submission suggests the degree to which a proposal is compatible with the neighbourhood and adjacent properties involves value judgments and resolving potential conflicting policy directions in the MPS. Mr. Rathford submits it was open to the Town Council to resolve this "question begging" issue as it did. He relies upon the directions in *Archibald*, and the principle set out in *Dunsmuir v. New Brunswick*,

[2008] 1 S.C.R. 190, that a decision under review is presumed reasonable until an appellant shows otherwise. Mr. Rathford says the appellant has not discharged its burden in this type of appeal. The Town submits that the Board, therefore, has no basis for interfering with this decision.

[56] The appellant submits that the evidence establishes that the Town Council's decision was not reasonably consistent with the MPS. Ms. White provided a good summary of the various design features in the development agreement. She said it was the recommendation of the two Town planners who testified in this matter that the proposed development was consistent with the intent of the MPS. She acknowledged the proposition in *Archibald* that there can be more than one decision that reasonably carries out the intent of the MPS. However, she said that where the Town Council decided not to follow their expert planners' recommendations, there had to be good planning reasons to do so.

[57] Ms. White said the Town Council's reasons simply recited the two central MPS policies without an analysis explaining why the proposed development agreement did not meet their intent. She submitted that to the extent that the Town Council's decision was based on a lack of compatibility, if that can be gleaned from the comments in the Appeal Record, it could not be sustained.

[58] Ms. White submitted that, in planning matters "compatible" does not mean the same. She said the issue is whether buildings can co-exist in a neighbourhood, adding that the various controls set out in Policy R-9 ensure medium and high-density buildings can co-exist with lower density residential dwellings. She said Ms. Fuller was

right when she said during cross-examination that the intent of Policy R-9 is not to eliminate impacts on surrounding lower density dwellings, but to minimize them.

[59] Ms. White submits that the development agreement incorporates all the compatibility controls expressed in Policy R-9 to achieve this purpose. She further says that the potential conflict in uses set out in Policy A-5(c), if applicable at all, since the proposed development is a residential use, must be read together with Policy R-9. It is through the controls in Policy R-9 that these potential conflicts can be resolved.

[60] Ms. White's central argument is well articulated at paragraphs 93 to 97 of the Post-Hearing Submissions of the Appellant:

93. RP-9 establishes various controls to ensure mid- and high-density development co-exists with surrounding low density. As detailed above, the proposed four-level building incorporates all controls, including vegetative buffering and landscaping (in addition to existing tree cover), privacy fencing, sympathetic design choices (to minimize the building's presence on the streetscape and blend with its surroundings), reduced height comparable to other buildings in the immediate area, setbacks exceeding the requirements of the LUB, parking exceeding the requirements of the LUB, and lot coverage similar to surrounding properties. As Ms. Fuller noted on cross-examination, the intention is to minimize impact on surrounding low density, not eliminate impact altogether.
94. To repeat, the MPS is clear in its intention to encourage a mix of housing types and densities, while maintaining compatibility with the surrounding area, as prescribed by RP-9. Council's apparent determination that the proposed mid-density development is "incompatible" with the surrounding area, when it satisfies all relevant MPS criteria specifically intended to guide Council's assessment of "compatibility", does not reasonably carry out this intention. This is the unchallenged expert opinion of Ms. Fuller, who concludes that:

...After reviewing the goals of the plan, the residential objectives, the Municipal Planning Strategy, the Land Use By-law, the design brief provided by the applicant's architect, the materials in the Appeal Record, and other documents to help understand the issue of compatibility within residential zone, I am of the opinion that the development is in keeping with the intent of the MPS. Furthermore, **given that the MPS is clear that the intention is to encourage a variety of housing densities while ensuring compatibility with the existing neighbourhood, and that the DA addressed each criteria established in RP-9 which specifically guides Councils' consideration of compatibility, it is my opinion that Council's decision is not reasonably consistent with the intent of the MPS.**

(emphasis added)

95. While Council decisions between conflicting policies, and interpretations of “question begging terms”, are entitled to deference, this is not a license to make ad hoc decisions unguided by principle: *Creelman v. Truro (Town)*, 2010 NSCA 27 at para. 24 [**Book of Authorities, Tab 3**]. The RP-9 criteria are in place to guide Council’s assessment of a proposed multi-unit building’s compatibility with its surroundings. Council appears to have disregarded these criteria—all of which are addressed in the DA - and instead maintained tunnel vision on the size of the building alone.
96. In his testimony, Mr. Fisher stood by his view, as expressed in his staff report, that a “legitimate argument [could] be made for both a positive and negative recommendation”. Mr. MacDonald echoed this opinion on redirect (despite his acknowledgement that there are approximately 20 applicable policies, 19 of which are “easily satisfied”). It seems the alternate argument is that the proposed building is incompatible with the surrounding neighbourhood solely because of its scale and bulk. Again, this appears to have been Council’s rationale—that the proposed building is necessarily incompatible because it is larger than and different from a single-family dwelling.
97. With respect, this rationale (that larger scale necessarily gives rise to incompatibility) defeats the clear intention of the MPS. It is not an interpretation that RP-9 can reasonably bear. Interpreting the MPS in this manner impedes any mid or high-density development in lower density residential areas, which is contrary to the stated intention to encourage a mix of housing types and densities in all residential areas. It also runs counter to the planning evidence before the Board, and the Board’s guidance in past cases, that “compatible” does not mean “identical” or “the same as”. Council’s decision to refuse the DA application was not based upon an interpretation of the policies of the MPS as a whole, but rather on perceived incompatibility due to scale and bulk alone.

[Appellant's Post-Hearing Submissions, January 25, 2024]

[61] The neighbourhood context is important when assessing the meaning and application of the relevant MPS policies. The Property is currently a vacant lot. While some of the letters of comment described this as a small lot, in fact, based on the aerial views, it appears larger than most lots in the neighbourhood. The Property is at the corner of East Victoria Street and South Adelaide Street on a block also bounded by Acadia Street and Prince Arthur Street. East Victoria Street is a continuation of Highway 6 and is, therefore, a major thoroughfare through the Town. The abutting property to the west at 153 East Victoria Street is a single-family dwelling. There is a 15-unit Nova Scotia Housing complex to the north, abutting the rear of the Property. Another multi-unit complex on Adelaide Street also abuts the western property line. An eight-unit, three-

level property, with a comparable height, is located immediately across Adelaide Street, at 157 East Victoria Street, to the east of the Property. The remainder of the neighbourhood on this block appears to be primarily a mix of large single detached dwellings, or former large single detached dwellings that were converted to apartments.

[62] The immediate neighbourhood is in the General Residential Zone. It borders the commercial zone that includes the downtown core. It is approximately a five-minute walk to downtown. There is a four-story seniors' complex near the Property. It has offices on the ground floor and 30 dwelling units on the remaining three floors. There is also a motel nearby. Further, there is a large commercial building at the corner of Acadia and East Victoria Streets. All these buildings are visible in the aerial view reproduced earlier in this decision.

[63] The Property is not located in a heritage preservation area. However, there are some charming, large older homes in the neighbourhood. Also, there are heritage buildings to the northeast. A heritage property known as Bent Cottage is located a short distance on East Victoria Street from the Property. The Board agrees with Ms. White that Mr. MacDonald provided an apt description of the neighbourhood when he described it as "...very much a mixed density neighbourhood in the transition area from downtown to the surrounding residential area."

[64] With the built form in the area in mind, the Board now turns to the provisions of the proposed development agreement that address compatibility and how they relate to Policy RP-9. To address Policy RP-9(a) about the location of the structure to minimize impacts on surrounding low density residential developments, the building setbacks exceed the LUB requirements. The setback from the property line of the abutting single-

family dwelling at 153 East Victoria Street is more than double the LUB requirement, at 7.3 meters. The footprint of the building would cover 29.5% of the lot. This is within the mid-range of neighbourhood lot coverage.

[65] Policy RP-9(b) deals with parking. The development agreement requires on-site parking. There would be 25 underground parking spaces. The underground parking would have access to South Adelaide Street. An additional 39 surface parking spaces would have access to East Victoria Street. The number of parking spaces exceeds the LUB requirements.

[66] Policy RP-9(c) directs the Town Council to ensure that the location of parking facilities does not dominate the surrounding area. The proposed development agreement places the surface parking lot away from East Victoria Street. The parking area is mostly behind the building when looking from South Adelaide Street. There are some parking spaces along the southern boundary of the lot that would be visible from that street. The proposed development agreement requires an opaque fence two metres high along all boundaries not fronting a street. This will shield the view of the parking lot from neighbouring properties. The proposed development agreement also calls for planting juvenile trees to create a visual barrier between the Property and the single-family dwelling at 153 East Victoria Street. The aerial view and site plan reproduced earlier confirm that there is already some tree coverage in this area. The Board was able to observe this during the site visit.

[67] Policy RP-9(d) is addressed in the proposed development agreement by prohibiting exterior lighting from shining directly onto adjacent properties. Policy RP-9(e)

relates to exterior signage. The site plan in the proposed development agreement does not include any outdoor signs.

[68] Policy RP-9(f) requires the use of vegetation management to improve the aesthetic quality of the project. In addition to the vegetation buffering discussed above, the proposed development agreement calls for landscaping of all unpaved areas.

[69] Policy RP-9(g) indicates Town Council shall "... ensure that the architecture of the building is sympathetic to any existing development in the surrounding area." The proposed development agreement has schedules showing building perspectives which have various design features to address this issue. The building footprint has been reduced from the original proposal. The setback from the property lines was increased on all four sides. A rusticated base of sandstone material is proposed to match the Edwardian style of Amherst's most historic buildings, as well as several houses in the surrounding area. The proposed simple colour and horizontal pattern is like neighbourhood homes.

[70] Changes from the original design were made to the massing as well. Aside from the reduction in height, setbacks were incorporated that break up the long façade of the building. Gable roofs were incorporated to simulate the built form of some neighbourhood homes. There is a setback at the fourth level corner facing South Adelaide and East Victoria Streets. The old oak tree will be preserved, along with existing trees at the corner and along the boundary of the Property.

[71] Policy A-5(c) is an implementation policy applicable to development agreements. Like Policy RP-9, it addresses compatibility issues. It requires the Town Council to consider the extent to which a proposed development might conflict with

adjacent or nearby land uses. Some of the relevant factors are height, bulk, lot coverage, parking, and traffic concerns. The Board agrees with Ms. White's submission that if there are conflict issues, Policy RP-9 provides a potential way to address them. The policies are, therefore, complimentary and should not be read in isolation. Therefore, the development agreement terms previously addressed when discussing Policy RP-9 apply equally to considerations under Policy A-5(c).

[72] The Board will now turn to its substantive analysis of the merits of this appeal. The Board finds that compatibility is the key issue it must assess to determine if the Town Council's decision reasonably carries out the intent of the MPS. That said, because of how the Town Council's decision letter was framed, the Board will first address areas which do not appear to be seriously in dispute between the parties.

[73] For instance, the proposed development agreement addresses outdoor lighting and there is no exterior signage. There was no evidence during the hearing that these issues are not adequately addressed. There is no indication in the Appeal Record this was a Town Council concern. The Board has no basis for denying the appeal based on the considerations in Policies RP-9(d) and (e).

[74] Traffic issues, including driveways, and the lack of sidewalks, were raised by some public participants. These concerns appear speculative. There is no objective or expert evidence before the Board that traffic and pedestrian safety will be an issue. Town staff had no such concerns. Mr. Hindi indicated a sidewalk would be built along South Adelaide Street. The only committee member who asked about driveways at the May 17, 2023, PAC meeting, voted to recommend the proposal. In any event, there is no evidence in this matter that would lead the Board to make a finding this appeal should be

denied based on the considerations in Policy RP-9(b), related to access and egress, or considerations in Policy A-5(c)(iii) related to traffic, access, and egress.

[75] Public comments also raised concerns about parking. These were primarily related to the adequacy of the proposed number of parking spots and possible impacts on street parking. The Board has considered both the adequacy of parking, and whether compatibility issues are adequately addressed in the proposed development agreement, under Policies RP-9(b) and (c), and A-5(c)(iii). The number of proposed parking spaces exceeds the LUB requirements. There is no reliable evidence this will not be sufficient. The surface parking area is primarily at the rear of the building, although some of the parking along the south lot line would be visible from South Adelaide Street. In any event, the opaque fencing and vegetation buffer will shield neighbours from the view of the parking lot. The Appeal Record does not reveal this was a particular concern of the Town Council. All the planners, and Mr. Hindi, agreed parking issues were adequately addressed under the applicable MPS policies. The Board concurs.

[76] There were several other points raised through public comments that should be addressed. For example, there was concern expressed that the developer was not from Amherst, was a large-scale developer, and was only interested in maximizing profit. Leaving aside whether this is even accurate, none of the foregoing are factors which the Town Council could consider when assessing a development agreement against the MPS. Another factor that is not relevant under the MPS is the degree of public support or opposition to a particular project. Shade impacts were addressed in the staff report. Potential wind and snow removal impacts are speculative, as are school capacity concerns. LUB requirements can be altered by a development agreement. Finally, the

potential impact of a proposed project on property values is a factor in determining if someone is an aggrieved person with standing before the Board in planning appeals under the *MGA*. It is not one of the considerations set out in the MPS when the Town Council is tasked with deciding whether to approve a development agreement. It is possible that in a general sense, property value issues are subsumed in compatibility factors.

[77] Reviewing the proposed development agreement against the policy considerations discussed above could be done largely on a factual basis without any significant interpretive analysis. The compatibility issues related to height, bulk, lot coverage, building location, and sympathetic architecture, are of a somewhat different character.

[78] As a starting point, the Board agrees with Ms. White's submission that the MPS encourages mixed housing types to serve the different needs, income levels, ages, and lifestyles of the Town's population. Growth is also a relevant consideration. This is evident from Section 2.2.13, Section 2.3.2, and the Objectives (a) and (f) found in the preamble to Section 3.2, addressing residential development generally.

[79] When considering vacant lots, Policy RP-11 encourages infill development. With respect to density, Policy RP-8 is explicit in encouraging "a mix of housing densities in all residential areas." Policy RP-3 provides for the creation of a General Residential Zone which allows for a range of housing densities. Policy RP-4 provides for the creation of a Low-Density Residential Zone, where medium and high-density developments are inappropriate. The Property is in the General Residential Zone. All these provisions, in

the Board's view, support an MPS policy intent that encourages the proposed development.

[80] The MPS also contains checks and balances on medium and high-density developments in residential neighbourhoods. Section 2.3.2, while encouraging a mix of housing types, also speaks about "maintaining the existing character of diverse residential neighbourhoods...." Policy GP-7, a general policy, speaks in terms of minimizing impacts by using buffering, setbacks, visual barriers, and regulating the location of parking. Policy GP-8 encourages "...a density appropriate to the overall character of the Town." In the Board's opinion, when interpreting the compatibility wording in Policies RP-9(a), (f) and (g), and Policy A5-(c)(ii), the objective of encouraging different housing types and densities must be balanced against the objective of reasonably protecting the character of existing neighbourhoods.

[81] Turning to sympathetic architecture under Policy RP-9(g), the Board agrees with the expert evidence of Mr. Hindi that "[s]ympathetic architecture refers to the design and construction of new buildings that complements or harmonizes with the existing architectural style of the town and surrounding structures." The Board will first look at design features unrelated to height, bulk, and lot coverage. Policy RP-9(g) directs our attention to the "surrounding area." Furthermore, the architecture must be sympathetic to "any existing development in the surrounding area." *Archibald* says MPS wording cannot be read narrowly. There are many different types of buildings in the immediate area, when considering built form, irrespective of zoning. The wording must, therefore, mean sympathetic, in general, in the neighbourhood context. To interpret the

wording otherwise might completely nullify the objectives related to diverse housing in the MPS.

[82] Mr. Hindi outlined the various design elements discussed in this decision. It was his opinion that the building design incorporated in the proposed development agreement was sympathetic to the surrounding neighbourhood. The Board agrees that design features such as the sandstone materials, gable roofing, simple colours and horizontal patterns create sufficient cohesiveness with the architectural style in the surrounding area to satisfy the intent of Policy RP-9(g). Leaving aside considerations about height, bulk, and style, the Board had no opinion evidence that provided a different perspective from that of Mr. Hindi.

[83] The Board cannot discern if the architectural style of the building was a concern that led the Town Council to reject the application. It is unclear what, if any, value judgments the Town Council made about this issue. The Board accepts Mr. Hindi's expert opinion on this point. In the absence of any discernable value judgments on the part of the Town Council on this issue, the Board finds the evidence before it establishes that a denial of the application based on considerations about sympathetic architecture, unrelated to height, bulk, and lot coverage, does not reasonably carry out the intent of the MPS.

[84] The Board's final consideration relates specifically to height, bulk, and lot coverage, which is broad enough to include the positioning of the building on the lot. The Board considers the wording of Policy RP-9(a), along with Policy RP-9(g), in conjunction with Policy A-5 (c), is broad enough to include consideration of all these factors. In other words, sympathetic architecture goes beyond the look and style of the building but can

include massing and height. Mr. Hindi discussed this aspect from an architectural standpoint in his report. It is on this issue that the Board cannot agree with the appellant's position.

[85] In deciding this issue, the Board agrees with most of the legal premises Ms. White advances. In the first instance, the Board should focus its analysis on the Town Council's reasons. This task is made more difficult because the written reasons are so generic as to provide no assistance to the Board. The lack of any discussion at the May 23, 2023, Town Council meeting also offers the Board no assistance. The fact that most of the public presentations appear not to differentiate between the two proposals advanced by the appellant offer the Board little assistance. The minutes of the May 1, 2023, PAC meeting, where the second proposal was initially rejected, shed no light on the PAC's reasons.

[86] The various staff reports, and the discussion at the May 17, 2023, PAC meeting, provide important context. Where development agreements are approved, no written reasons are required. The Board has used the staff reports to shed light on what was likely on the mind of a council. While ultimately recommending approval, Mr. Fisher's final May 17, 2023, staff report, which also refers to the policy analysis in the May 1, 2023, staff report, outlines potential concerns with the location of the building on the lot, its bulk, and height. Mr. Fisher says this raises legitimate arguments to support denying the application. The PAC members who actively participated in the May 17, 2023, meeting focused primarily on these issues. It is reasonable to assume these issues were considered by Town Council when they decided not to approve the development agreement.

[87] The Board also agrees with Ms. White's submission, and the evidence from Mr. Fisher and Mr. MacDonald, that compatibility does not mean that new development must be the same height and bulk as the existing built form. Any higher density developments will ordinarily have more height and bulk than the existing lower density residential dwellings. Compatibility relates to whether the new development can co-exist within the neighbourhood.

[88] The Board further agrees with Ms. White that deference to the conflicting or competing policies, or question-begging terms incorporating value judgments, does not give the Town Council unfettered discretion to decide an application as it pleases, unguided by the intent of the MPS. *Archibald* makes it clear the decision must be rooted in the intent of the MPS. This is why the Board has said a council must have good planning reasons to depart from recommendations of its professional planning staff.

[89] The Board departs from Ms. White's analysis when she says focusing on the size of the building alone was inconsistent with the policy directions in the MPS. The Board agrees that size and bulk cannot be looked at in isolation. However, the staff reports before the Town Council did not review these factors in isolation, but in the context of most of the policies referenced by Ms. Fuller and Ms. White. Also, in many planning matters, size, bulk and lot coverage are often the key considerations when addressing compatibility.

[90] Denying an application based on the size, location and bulk of the building does not defeat the clear intention of the MPS encouraging a variety of housing types and densities in all residential areas. The fact is the record reveals there is already a variety of housing types and densities in this neighbourhood. This has been accomplished

without a building with both the height and bulk of the proposed building. It is the height and bulk of the building, combined with the inability to set it further back from 153 East Victoria Street, that creates the debatable issue. The lack of a further lot setback from 153 East Victoria Street was clearly a big concern for Councillor Davidson. The Board also notes that Fort Cumberland Manor, the other building of comparable height and bulk, does not have the same visual impact because of the considerable available setback. That property is also located in the commercial zone. The building at 157 East Victoria Street is the same height as the proposed development, but not the same bulk.

[91] The Board agrees with Ms. Fuller that the goal of Policy RP-9 is to mitigate compatibility issues and not to eliminate them. The Board further accepts that the height of this building is not that much greater than a three-story building allowed as-of-right. Whether such a building can even be built is speculative, because according to Mr. Carrie, that is not financially viable.

[92] The Board also has some difficulty with the proposition that Ms. Fuller's opinion that all the criteria under Policy RP-9 have been addressed necessarily means that the Town Council's decision is not consistent with the MPS. That was certainly her opinion. It was also Mr. Hindi's opinion that the architectural features such as setbacks that broke in the building façade, building setbacks that eased with transitions, along with the lot clearances and vegetation requirements, were sufficient to respond to the policy directions in Policies RP-9(b) and (g), and Policy A-5(c). Mr. Fisher and Mr. MacDonald said that was debatable.

[93] In the Board's view, while all the foregoing opinions are supportable, in the end, the degree to which the provisions in the proposed development agreement alleviate

compatibility concerns requires the exercise of value judgments. It also requires weighing of the intent to promote diversified housing types and densities with the intent to address compatibility with existing residential development.

[94] This case involves a situation where the proposed building is considerably larger than its immediate neighbour. Policy A-5(c) specifically refers to adjacent or nearby land uses. The appellant made considerable efforts to try to alleviate the impacts of the proposed development on this neighbouring property. The fact remains that even with the proposed setbacks and buffers, it is clear the development will have a major impact on 153 East Victoria Street. This is a valid consideration for the Town Council under the MPS.

[95] Policies A-5(c), RP-9(a) and RP-9(g) are to be read as part of whole, in a liberal and purposive manner. An interpretation of these policies that gives the Town Council the discretion to consider the extent to which the design elements incorporated in the development agreement have addressed potential impacts on a neighbouring property is one that the language of the policies can reasonably bear. While expert opinion can assist, in the end, there are value-laden judgments involved. It was, therefore, open to the Town Council to decide that a building with a significant height and mass had to be set back further from 153 East Victoria Street than what is proposed in the development agreement.

[96] Balancing the impact of the proposed development, including a focus on a neighbouring property, with the policy directions in the MPS encouraging diverse housing involves the very types of compromises and value-laden judgments where the Court of Appeal says deference is owed to elected officials. This is particularly the case where

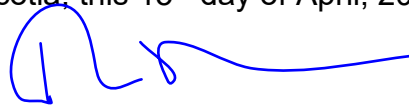
diversified housing in this residential area already exists to address the MPS objectives. While not well articulated in the Town Council's written decision, in the circumstances of this case, the Board finds that denying the application was one of the possible decisions open to the Town Council that reasonably carries out the intent of the MPS.

4.0 CONCLUSION

[97] The Board finds the appellant has failed to establish that the Town Council's decision does not reasonably carry out the intent of the MPS. The appeal is denied.

[98] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 15th day of April, 2024.



Richard J. Melanson