

**DECISION**

**2025 NSUARB 02  
M11751**

**NOVA SCOTIA UTILITY AND REVIEW BOARD**

**IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT**

**- and -**

**IN THE MATTER OF AN APPEAL** by **TOM LAVERS (3054226 NOVA SCOTIA LTD.)**  
from a decision by West Hants Regional Municipal Council to refuse a rezoning  
application for property located at Willow Street, Hantsport, Nova Scotia (PID: 45045879)

**BEFORE:** M. Kathleen McManus, K.C., Ph.D., Member

**APPELLANT:** **TOM LAVERS (3054226 NOVA SCOTIA LTD.)**  
Jonathan G. Cuming, Counsel

**RESPONDENT:** **WEST HANTS REGIONAL MUNICIPALITY**  
Raylene Langor, Counsel

**HEARING DATE:** September 17, 2024

**FINAL SUBMISSIONS:** November 13, 2024

**DECISION DATE:** **January 9, 2025**

**DECISION:** The appeal is dismissed.

TABLE OF CONTENTS

1.0 INTRODUCTION ..... 3

2.0 ISSUES ..... 5

3.0 BACKGROUND ..... 5

    3.1 *Scope of Board’s Review* ..... 7

    3.2 *Proposed Rezoning and Municipality Process* ..... 10

    3.3 *Public Participation* ..... 16

    3.4 *The Site Visit* ..... 16

4.0 WITNESSES AND EVIDENCE ..... 17

5.0 SUBMISSIONS ..... 18

6.0 ANALYSIS AND FINDINGS ..... 20

    6.1 *Obtaining a Development Permit* ..... 21

    6.2 *Stormwater Management* ..... 23

    6.3 *Bulk and Size* ..... 31

7.0 CONCLUSION ..... 31

## 1.0 INTRODUCTION

[1] Tom Lavers, on behalf of himself, and on behalf of 3054226 Nova Scotia Ltd. (Appellant) appealed to the Board from the decision of Council refusing his rezoning application on Willow Street, Hantsport, West Hants Regional Municipality, Nova Scotia (Property). It was not clarified in the evidence before the Board if Mr. Lavers or 3054226 Nova Scotia Ltd. owned the property, or if they were co-owners. Only Mr. Lavers made the application for rezoning which is the subject of this appeal. The Board's decision can be rendered without clarification on ownership.

[2] Mr. Lavers proposed to rezone the Property from Single Unit Residential (R-1) zone to the Multiple Unit Residential (R-3) zone which would allow for the construction of up to 15-unit residential apartment building. The Property is currently vacant and largely forested. It is adjacent to single unit residences. The Property is sloped, and nearby properties have experienced flooding in the past.

[3] The Appellant did not file a site plan with the application for rezoning, as it was not required. At the suggestion of his consultant, the Appellant did subsequently file a site plan. The proposed site plan depicted a six-to-eight-unit apartment building.

[4] After communication with the Municipality's planning staff, other relevant Municipal officials, and attendance at public meetings, a staff report was presented to the Municipality's Council with a recommendation to approve the application. At its meeting on May 28, 2024, after the public hearing, Council denied the application without immediately providing reasons. On June 25, 2024, during an in-camera Council meeting, Council passed a motion directing the Chief Administrative Officer to send correspondence to Mr. Lavers stating Council's reasons for refusing his rezoning

application. In a letter dated June 26, 2024, from the Chief Administrative Officer, the following reasons for Council's refusal decision were provided:

- (1) That your proposal entailed a rezoning that would in Council's opinion have negative impacts upon the adjacent residential uses (including due to anticipated storm water run-off and due to the bulk and scale of the multi-unit with no transition between it and surrounding single unit dwellings), contrary to Policy RP-7 and IM-3 (a)(iv); and
- (2) Council's consideration of Policy IM-3(e), due to the steep slope of the lots and its marshy character entailing a large amount of fill, displacement of stormwater absorption without any clear options for lawful storm drainage from the lot, especially as regards a building and driveway potentially involving a high proportion of lot coverage.

[Exhibit L-5, p. 401]

[5] The Appellant appealed Council's decision to the Board, under s. 247(1)(b) of the *Municipal Government Act, (MGA)*, S.N.S. 1998, c. 18, on the grounds that the site meets the applicable policy criteria for rezoning in the Municipal Planning Strategy (MPS) and Council's decision was contrary to the recommendations of the Municipality's planning staff.

[6] An MPS typically sets out the rules, general guidelines and policies for Council to follow when considering a rezoning application. As noted by this Board in *Dumke, (Re)*, 2024 NSUARB 164 at para. 9, in the context of the review and approval of a development agreement, the process "is not a simple exercise of working through a checklist against the wording of each policy". This observation is also applicable to this context of considering an application for rezoning. Rezoning and development agreement appeals are authorized by the same section of the *Act* and both require the Board to review whether the decision of Council "carries out the intent of the Municipal Planning Strategy."

[7] The Courts have held that, as the primary planning authority, Council has discretion about how to apply or balance competing MPS policies and objectives. Council

may give more, or less, weight to different factors to advance certain objectives, provided its ultimate decision reasonably carries out the intent of the MPS. In reviewing the grounds of appeal, the Board must review the applicable policies to understand the intent of the MPS. The standard for evaluating an application for rezoning against the MPS is not perfection, however, the approval must align with an interpretation of the relevant policies that their language can reasonably bear.

[8] The Board finds that Council's decision to refuse to amend the Land Use By-law Map to allow rezoning of the Property from Single Unit Residential (R-1) zone to the Multiple Unit Residential (R-3) zone reasonably carries out the intent of the MPS. The appeal is dismissed.

## **2.0 ISSUES**

[9] In this case, the ultimate issue is whether the Appellant has shown, on a balance of probabilities, that Council's decision refusing this application for rezoning does not reasonably carry out the intent of the MPS. This decision reviews MPS policies about potential impacts that the proposed rezoning would have negative impacts on the adjacent residential uses, including issues related to stormwater and the bulk and scale of the multiple-unit building with no transition between it and surrounding single unit dwellings.

## **3.0 BACKGROUND**

[10] In its June 2024 reasons, which explained its denial of the Appellant's rezoning application, Council made the general statement that the rezoning would have "negative impacts upon the adjacent residential uses". Council identified three specific areas of concern: (1) stormwater run-off; (2) no transition between the proposed multiple

unit building and surrounding single unit dwellings; and (3) no clear options of lawful storm drainage from the lot with the displacement of stormwater absorption.

[11] Policy RP-7 of the MPS is the primary policy for the consideration of this rezoning application. This policy favours Council approving a rezoning from Single Unit Residential (R-1) to Multiple Unit Residential (R-3), unless such as a rezoning would have negative impacts upon the adjacent residential uses:

**Policy RP-7**

It shall be the policy of Council to allow new multi-unit residential uses within the Serviced Residential Designation by rezoning to the R-3 zone provided proposed rezoning will not have a negative impact on adjacent residential uses and subject to the criteria contained in Section 11.3.1.

[Exhibit L-7 p. 31]

[12] Section 11.3.1 is the section that contains Policy IM-3, which establishes the general criteria to be considered for all amendments to the Hantsport Land Use By-law (LUB):

**Policy IM-3**

In considering amendments to the Town of Hantsport Land Use By-law, in addition to the criteria set out in various policies of this Strategy, Council shall consider:

- (a) whether the proposal is considered appropriate in terms of:
  - (i) the adequacy of sewer and water services;
  - (ii) the adequacy of school facilities;
  - (iii) the adequacy of fire protection;
  - (iv) the impact on adjacent uses;
  - (v) the adequacy of road networks adjacent to, or leading to the development;  
and
  - (vi) the financial capacity of the Town to absorb any costs relating to the development.
- (b) the suitability with any aspect relative to the movement of auto, rail and pedestrian traffic;
- (c) the adequacy of the dimensions and shape of the lot for the intended use;
- (d) the pattern of development which the proposal might create;
- (e) the suitability of the area in terms of steepness of grade, soil and geological

conditions, location of water courses, marshes or bogs and susceptibility of flooding;

- (f) whether the proposal meets the requirements of the appropriate provincial or federal agencies as well as whether it conforms to all other relevant municipal by-laws and regulations;
- (g) the impact of not only the use being proposed but all uses permitted in the zone;
- (h) the site meets all of the zone requirements for the zone sought; and
- (i) any other matter required by relevant policies of this Strategy.

[Exhibit L-7 p. 39]

[13] The Appellant asserts that there will be a transition to surrounding dwellings including as the LUB's mandatory set back which explains why the Appellant expects that the site would only allow for a six-to-eight-unit apartment building. The Appellant further asserts that he was repeatedly told by the municipality's planning staff that stormwater management would be addressed when applying for a building permit. In contrast, the Municipality focuses on the stormwater issues at the rezoning stage. The Municipality asserts that Municipal staff is incorrect that a stormwater management plan is required before a building permit will be issued. The Municipality says that once the rezoning occurs, there are no controls over stormwater management in the development permitting process. The Municipality also states there is no lawful option for stormwater containment because the building's roof water drains cannot be connected to the Municipality's stormwater system.

### **3.1 Scope of Board's Review**

[14] The burden of proof is on the Appellant to show, on the balance of probabilities, that Council's decision to refuse his application for the rezoning from Single Unit Residential (R-1) to Multiple Unit Residential (R-3) was not consistent with the intent of the MPS.

[15] Under s. 247 (1)(b) of the *MGA*:

**Appeals to the Board**

**247 (1)** The approval or refusal by a council to amend a land-use bylaw may be appealed to the Board by

...  
(b) the applicant;

[16] 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

(a) an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy;

[17] 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, in *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.

[18] While *Barrett* and *Archibald* involved development agreements, the same general principles apply to rezoning appeals (see *Brison (Re)*, 2024 NSUARB 81, para. 34). Clearly, the Board is not permitted to substitute its own decision for that of the 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.

### **3.2 Proposed Rezoning and Municipality Process**

[19] On January 8, 2024, Mr. Lavers applied for the rezoning of a vacant lot located on Willow Street, Hantsport, Nova Scotia (PID 45045879). The Town had previously identified this vacant lot for future infill development. The application seeks to rezone the lot from Single Unit Residential (R-1) to Multiple Unit Residential (R-3) which would allow for the potential to develop a 15-unit residential apartment building. The application was not required to include a site plan and initially did not. After filing his application, Mr. Lavers hired Crystal Fuller, licensed planning professional, to represent him. Ms. Fuller testified that she recommended Mr. Lavers submit a site plan to assist in the understanding of his rezoning application at public hearings. As Ms. Fuller noted, a

site plan is not binding and often changes as a project proceeds through the planning process.

[20] After accounting for the Municipality's setback and parking requirements, Mr. Lavers said the site plan estimates a six-to-eight-unit building would fit on the Property with a projected height of 25 feet. Both the R-1 zone, and R-3 zone have the same height restriction of 35 feet.

[21] Alex Dunphy, a planner with the Municipality, was the primary planner involved in assessing the application. Mr. Dunphy sought comments from different Municipal officials on the potential impact of the proposed rezoning on auto and pedestrian traffic, adequacy of fire protection for the Property, and adequacy of school facilities. All responded that they had no concerns. Mr. Dunphy also asked Doug MacInnis, a development officer with the Municipality, if he had any concerns about the application because of: (1) the impact of the proposed use on surrounding residential use; (2) the adequacy of the dimensions and shape of the lot for rezoning (such as park and zone requirements); and (3) the pattern of development which the development might create. Mr. MacInnis advised he had no concerns about the impact on surrounding residential uses or the pattern of development that might be created. He also advised that the lot size was larger than the 15-unit requirement, but lacked sufficient frontage, so the building would have to be less than 15-units. Todd Richard, the Municipality's Director of Public Works, advised Mr. Dunphy that there was a capability for the lot to access or be serviced by municipal water and sewer service. He further advised that municipal services had the capacity for the proposed increase in residential use on the lot.

[22] On February 6, 2024, Mr. Dunphy outlined the rezoning application at a public information meeting. Some members of the public asked how existing drainage problems on the Property would be fixed. Mr. Dunphy answered that “staff reach out to subject matter experts to address concerns and that a stormwater management plan would be required.” [Exhibit L-5, p. 44]. Other concerns expressed at this meeting were about the slope of the lot and infilling, effect on property values, traffic, setbacks, parking and density of the neighbourhood.

[23] On February 27, 2024, Mr. Dunphy wrote to Erin Amirault, Project Engineer, Public Works Engineer Division asking:

Just a quick clarifying question. Where this application is for a rezoning and the ultimate build would be as-of-right afterwards, I don't think there would be a requirement in the Hantsport Land Use By-law for a stormwater management plan. Would a stormwater management plan be required through a separate regulator document (ie. Municipal Spec.)?

[Exhibit L-5, p. 388]

[24] The record does not contain a written response from Mr. Amirault. The subsequent staff report suggests that a response was received. The Municipality's staff report dated March 14, 2024, prepared by Alex Dunphy for the Planning and Heritage Advisory Committee (PAC/HAC), recommended the Committee send a positive recommendation for Council to give First Reading to the rezoning application. The staff report recommended the rezoning application be approved because the development officer had no concerns about negative impacts on adjacent residential uses and “there are other regulatory requirements to address potential impacts on surrounding properties”. [Exhibit L-5, p. 191]. The staff comments portion of the report provided more detail about why staff had no concerns that approving the rezoning application would have a negative impact on the surrounding uses:

The Development Officer commented that they had no concerns regarding the impact on surrounding uses. Of the potential impacts of the proposed development identified by the public, staff have been advised that there are adequate measures to ensure that surrounding properties are not affected by the development of this lot. This includes stormwater management, adequate on-site parking, building setbacks, maximum height, traffic capacity of Willow Street, municipal service capacity, and geotechnical requirements for the land. The proposal will be required to meet the zone requirements of the Multiple Unit Residential (R-3) zone and the designation is intended for residential development of varied density.

[Exhibit L-5, p. 198]

[25] During its March 14, 2024 meeting, the Planning Advisory Committee and Heritage Advisory Committee (PAC/HAC) recommended against the rezoning application. The staff report dated March 26, 2024, which was before Council, was prepared by Alex Dunphy and included the Advisory Committee's recommendation. Despite this recommendation, staff continued to support approving the application as staff had no concerns about negative impact on surrounding uses, considering that a stormwater management plan and setbacks approvals would be required before a permit would be issued.

[26] At its meeting on March 26, 2024, Council gave First Reading to the application and directed that a public hearing be held. The public hearing opened on April 23, 2024. Staff presented its report of the same date to Council. The staff report recommended approval and explained that Mr. Lavers could apply under the Property's current R-1 zoning to have the lot divided into three single lots. If the subdivision application was approved, then each lot would have "as of right" a single dwelling unit and an accessory building. Council had questions about the possibility of subdivision of the Property and if a stormwater plan would be required. The public hearing was postponed until May 28, 2024, so that staff could obtain the information requested by Council.

[27] The staff report dated May 28, 2024, which was prepared by Alex Dunphy and approved by Mark Phillips, Chief Administrative Officer, provided the information requested by Council. Staff advised that the Property, if successful in a subdivision application, could be subdivided into three Single Unit Residential (R-1) lots, which would permit the owner to construct a single dwelling unit and an accessory dwelling unit on each lot, for a total of six dwelling units. Further, staff advised Council that a stormwater management plan would be required as part of the subdivision application:

1. What can be accommodated for as-of-right residential development on the subject lot through the subdivision process?

The Development Officer confirmed, based on lot area and frontage, that the subject lot could be subdivided (provided a successful application) into 3 separate lots. Based on the underlying Single Unit Residential (R-1) zoning, the owner would be permitted to construct a single unit dwelling and accessory dwelling unit on each lot, totaling 6 dwelling units.

2. Is a stormwater management plan required for as-of-right development?

The Development Officer confirmed that through the subdivision approval process, comments from the Municipal Public Works Department would be requested. Staff reached out to the Municipal Public Works Department for further information and they commented that each subdivision application is analyzed on a case-by-case basis. In this scenario, the Municipal Public Works Department confirmed that they would request a stormwater management plan as part of a potential subdivision application for this subject lot due to the concerns with existing water on the site.

[Exhibit L-5, pp. 284-285]

[28] The staff report dated May 28, 2024, stated again that it had no concerns that approving the rezoning application would have a negative impact on the adjacent residential uses. The staff comments portion of the report provided more detail about why staff had no concerns that approving the rezoning application. In its analysis of Policy RP-7, staff wrote that measures in the permitting phase would address any potential negative impact on the surrounding uses identified by the public, such as stormwater management.

The Development Officer commented that they had no concerns regarding the impact on surrounding uses. Of the potential impacts of the proposed development identified by the public, staff have been advised that there are adequate measures to ensure that surrounding properties are not affected by the development of this lot. This includes stormwater management, adequate on-site parking, building setbacks, maximum height, traffic capacity of Willow Street, municipal service capacity, and geotechnical requirements for the land. The proposal will be required to meet the zone requirements of the Multiple Unit Residential (R-3) zone and the designation is intended for residential development of varied density.

[Exhibit L-5, p. 307]

[29] Under Policy IM-3(e), staff stated there could be issues because of wet conditions on the land, as reported by the public, but the requirement of a stormwater management plan during the permitting phase would ensure that stormwater flowing from the development would be neutral or better.

There are some existing challenges for construction on the subject lot. The first is the sloping to the rear of the subject lot, which would require some form of infilling to provide a stable base for construction. The Manager of Building and Fire Inspection Services advised staff that a geotechnical report would be required to be submitted to ensure that the infill is stable and will support the proposed structure. No waterbodies or wetlands appear to be present on the mapping for the subject lot, however, there have been comments from the public that there are wet conditions on the property. The Public Works Engineering Division commented that they would be requesting a stormwater management plan as part of the permitting process to ensure that pre- and postdevelopment flows are neutral or better. Based on the correspondence received, staff consider this criterion met.

All Municipal, Provincial, and Federal regulations will have to be met.

[Exhibit L-5, p. 309-310]

[30] The Chief Administrative Officer approved the staff report and, in his comments, noted that, even after rezoning, the permit phase of the development would require proof that obligations had been met, including the requirement for a stormwater management plan:

#### **CHIEF ADMINISTRATIVE OFFICER REVIEW**

The application has received significant feedback from residents in the Hantsport area expressing concerns that are generally rooted in the development and building permit phases and not the rezoning phase. Rezoning provides for the capacity of a parcel of land(s) for a future use knowing that the obligation for stormwater management plans, construction standards, setbacks, etc. must be supported by the applicant during the permit phase of the development or the development will not proceed. Staff have not provided any concerns that relate to the application to rezone and municipal planning policy. Staff have further noted the potential of the site “as is” and “as of right” under the R1 classification

indicating that development has the right to proceed as R1 zoned lands pending permit compliance. It is suggested that Council should reflect on existing planning policy and the answers to the noted questions above as well as the entire report package while they reflect on their decision. [Emphasis added]

[Exhibit L-5, p. 286]

[31] After the public hearing on May 28, 2024, Council decided to deny the rezoning application. Mr. Lavers appealed Council's refusal to the Board on June 11, 2024. Council's reasons for refusal were sent to the Appellant in a letter dated June 26, 2024.

### **3.3 Public Participation**

[32] The Board received five letters of comment, one of which included two short videos, opposing amending the LUB to rezone the Property. The letters expressed the following concerns:

- Increased flooding and stormwater issues from the Property;
- No confidence a stormwater management plan would work;
- Traffic volumes and noise;
- Street should only be for single family dwellings; and
- Loss of trees which ameliorate the flooding issues.

[33] The Board received no requests to speak at the hearing.

### **3.4 The Site Visit**

[34] I visited the Property immediately following the conclusion of the public hearing on September 17, 2024. The parties did not participate in the site visit, by agreement. I drove from the West Hants Regional Municipality building, 76 Morison Drive, Windsor, west on NS Highway 101 until exit 8A, Ben Jackson Road, then Nova Scotia Trunk 1E from which I turned right onto Willow Street, Hantsport. At the hearing, Mr. Lavers' counsel advised that there was no civic address for the Property, however it



abutted 26 Willow Street which was owned by Mr. Lavers. I drove down the driveway at 26 Willow Street and viewed the Property's slope. I then returned to Willow Street level and walked along the sidewalk abutting the Property. The Property was as described at the hearing, including that it was forested with fallen trees and there was a drop from street level down to the Property. I then drove west on Willow Street and turned right at the intersection onto School Street, drove along School Street, turned right on Main Street and right onto Willow Street and ended in front of the Property. Most of the homes on Willow Street are older single-family homes. There was a mix of single-family homes, a new home construction, a multiple-unit residential building and commercial property on School Street. These streets were discussed in the evidence during the hearing.

#### **4.0 WITNESSES AND EVIDENCE**

[35] The Appellant testified at the hearing and called four additional witnesses. Crystal Fuller, a licensed planning professional, was qualified, without objection, as an expert capable of giving opinion evidence about land use planning, including the interpretation and application of municipal planning strategies and land use bylaws. Prior to the hearing, Ms. Fuller filed an expert report dated August 21, 2024 [Exhibit L-11, p. 8].

[36] Under subpoena, the Appellant called as witnesses: Abraham Zebian, Mayor of the Municipality, Alex Dunphy, the Municipality's land use planner and Sara Poirier, the Municipality's Director of Planning and Development. The Appellant also sought to call Doug MacInnis, a development officer with the Municipality, as a witness under subpoena, but he was out of the country.

[37] Raylene Langor, counsel for the Municipality, objected to the Mayor being called as a witness on the basis that the Council spoke as one voice. This is a principle

that this Board's decisions have repeatedly acknowledged. The Appellant's counsel explained that he wished to examine the Mayor on a broader range of issues. The objection was denied, but the Municipality's counsel was reminded that she could object to specific questions as they were posed to the Mayor. Ms. Langor did not object to any of the questions asked. In response to the questions from the Appellant, the Mayor said he could not remember anything about the Property generally or specifically from when the matter came before Council.

[38] The Municipality called one witness, Todd Richard, the Municipality's Director of Public Works. In testimony, Mr. Richard described his role as managing people and projects related to Public Works services, Municipal services, fleet facilities and capital projects. In addition to the Appeal Record, the Municipality filed as an exhibit a one-page memo dated September 4, 2024, prepared by Mr. Richard about sections 5.2.4, 5.2.5 and 5.2.6 of the Municipal Services Specifications Manual [Exhibit L-17].

[39] Under s. 19 of the *Utility and Review Board Act*, S.N.S. 1992, c. 11, the Board operates under relaxed rules of evidence. All witnesses, to some degree, relied on hearsay and offered opinions beyond their qualifications. There were generally no objections to the admissibility of these statements, and I was able to weigh the evidentiary value in the normal course. I found the evidence of the witnesses to be helpful and credible, unless stated otherwise.

## **5.0 SUBMISSIONS**

[40] The Appellant argues that Council's rejection of his rezoning application did not reasonably carry out the intent of the MPS. The Appellant says that the Municipality's staff recommended approving his application. Staff also provided assurances to Council

that, at the development stage (following a rezoning approval) the Appellant would have to provide a stormwater management plan, which would need to establish that the pre-development and post-development stormwater flows would be neutral or better, and a geo-technical report associated with the slope of the Property. The Appellant says that the proposed rezoning will meet the stated goals of the applicable policies and is generally consistent with the intent of the MPS.

[41] The Respondent Municipality argues that Council's decision is reasonably consistent with the MPS. It says that Council is not required to accept its staff's assurances or its information when Council exercises its statutory discretion as the primary authority in planning. Council can, when it has good planning reasons, proceed against staff advice. The Municipality argues that Council was concerned that the bulk and scale of the multiple unit and issues arising from stormwater would have a negative impact on the adjacent residential uses. The Municipality states that this concern is justified as there are no mandatory controls under the *MGA*, the Town of Hantsport LUB or any other applicable legislation that requires, following a rezoning, that a stormwater management plan be submitted by the Appellant at the permitting stage. The Municipality says that s. 246 of the *MGA* requires that a development permit shall be issued if the development meets all the requirements of the applicable LUB. The Municipality says that this development's stormwater must be managed on-site, as it is not permitted to connect to the Municipality's stormwater system. The Town of Hantsport LUB does not require a stormwater management plan, and the Property does not consist of or abut designated wetlands so no provincial regulations respecting wetlands protection would apply. Further, the Municipality says that the Appellant has not provided any legislation or policy

that would authorize a development officer to halt the Appellant's post-rezoning development permit process for failure to provide a feasible stormwater management plan. Finally, the Municipality says the Municipal Specifications Manual would not apply in this matter as it only applies to developments which propose municipal sanitary sewer, water, and storm drainage systems. In the alternative, the Municipality says that Council must be afforded discretion to reasonably interpret undefined phrases within the MPS and its applicable rezoning and implementation policies.

[42] The Appellant, in his rebuttal submissions, says that he did not provide a stormwater management plan at the rezoning stage because staff told him that it was not required, but would be required later at the permitting stage. The Appellant also notes that all the evidence from the Municipality's staff stated that Mr. Lavers would be required to provide a stormwater management plan at the time of permitting. The Appellant also raises a concern that the Respondent failed to challenge the witnesses on the requirement for a stormwater management plan during the hearing and to do so in closing argument may amount to a violation of the rule in *Browne v. Dunn* [(1863), 6 R. 67 (U.K. H.L)] but does not say that he seeks relief. Finally, the Appellant submits that while "the LUB may be silent in relation to stormwater management plans", the Municipal Services Specifications Manual applies and has requirements related to stormwater that must be met before a building permit will be issued [Appellant's Rebuttal Submission, para. 15].

## **6.0 ANALYSIS AND FINDINGS**

[43] The Court of Appeal's judgment in *Archibald*, discussed earlier in this decision, emphasizes the importance of Council's written reasons for the refusal in providing a framework for the Board exercising its appellate jurisdiction (although the

Board is not confined to these written reasons in deciding this case). As noted above, Council did not provide written reasons to the Appellant when he was first advised of its decision refusing his application. Subsequently, Council's written reasons were set out in a letter dated June 26, 2024, from the Municipality's Chief Administrative Officer.

[44] The Board notes its comments in *Armco Capital Inc. (Re)*, 2021 NSUARB 147 about guiding principles for its review when Council has not followed the recommendations of its planning staff:

[41] The Board recognizes that municipal councils are not bound by the recommendations of planning staff when considering planning applications and has repeatedly confirmed this in past decisions. The Board also recognizes the fact that a development is consistent with a municipal planning strategy does not automatically mean that a municipal council's refusal to approve the development is inconsistent with the strategy. As discussed above, the principles derived from Court of Appeal decisions confirm that there may be more than one conclusion that reasonably carries out the intent of a municipality's planning strategy.

[42] However, a municipal council should not arbitrarily dismiss the recommendations of its planning staff. When a municipal council disagrees with its professional planners, there should be good planning reasons to do so and these reasons must be rooted in the municipality's planning strategy (see *Re Bona Investments Limited*, 2009 NSUARB 58 at para. 75; *Re Griff Construction Limited*, 2011 NSUARB 51 at para. 146; *Re Rodgers*, 2013 NSUARB 131 at para. 109; *Re Abruzzi Properties Incorporated*, 2017 NSUARB 111 at para. 116; and *Re MacNeil*, 2021 NSUARB 78 at para. 59).

[Re *Armco*, NSUARB 147, paras 41-43]

[45] Bearing these principles in mind, the Board will consider the issues raised by Council in its refusal of the rezoning application.

### **6.1 *Obtaining a Development Permit***

[46] Under s. 244(1) of the *MGA*, before development is commenced, a development permit must be obtained if Council has adopted a land-use by-law:

#### **Development permit**

**244 (1)** Before any development is commenced, a development permit shall be obtained if the council has adopted a land-use by-law.

...

[47] Section 246(1) of the *MGA* requires that a development permit must be issued for a proposed development if the development meets the requirements of the land-use by-law:

**Limitations on granting development permit**

**246 (1)** A development permit shall be issued for a proposed development if the development meets the requirements of the land-use by-law, the terms of a development agreement or an approved site plan. [Emphasis added]

...

[48] The Town of Hantsport has adopted a LUB which specifies various requirements to be met before the issuance of a development permit, including, but not limited to, height restrictions, setbacks and frontage on streets and permitted uses in various zones. There is, however, no reference to stormwater or the requirement of a stormwater management plan before the issuance of a development permit.

[49] Under s. 5.3, the LUB also requires compliance with other Town By-laws, as well as federal and provincial statutes and regulations, before a development permit will be issued:

**5.3 Compliance with Other Bylaws**

- (a) Nothing in this Bylaw shall exempt any person from complying with the requirements of any other Bylaw of the Town or statute or regulation of the Province of Nova Scotia or the Government of Canada.

[Exhibit L-8, p. 19]

[50] In contrast, the Town's Subdivision By-law requires, as part of the application for subdivision, that a subdivider provide a stormwater management plan for the area which they seek to subdivide (s. 8.9). Also, where a new public street is proposed, the subdivider must design and install various systems that meet the requirements of the Standard Specifications for Municipal Services (ss. 8.1-8.3):

## PART 8: NEW MUNICIPAL SERVICES

- 8.1 Where a new public street is proposed the services identified in subsection 8.2 shall apply.
- 8.2 The subdivider shall:
- design, construct and pave the street,
  - design and install a water system,
  - design and install a wastewater system,
  - design and install a stormwater system,
- in the area of land being subdivided.
- 8.3 The services required by Section 8.2 shall be designed by a professional engineer and shall meet the requirements of the Standard Specifications for Municipal Services and the following requirements. [Emphasis added]

[Exhibit L-6]

### 6.2 *Stormwater Management*

[51] In its reasons, Council said it denied the rezoning application because rezoning would negatively impact adjacent residential uses and, in part, because of issues related to stormwater management. Council specified negative impacts on adjacent residential uses because of stormwater run-off and displacement of stormwater absorption:

Council discussed this application at length at various stages of the process and asked for additional information from staff leading up to Second Reading. Council's reasons for refusing your application were:

- (1) That your proposal entailed a rezoning that would in Council's opinion have negative impacts upon the adjacent residential uses (including due to anticipated storm water run-off and due to the bulk and scale of the multi-unit with no transition between it and surrounding single unit dwellings), contrary to Policy RP-7 and IM-3 (a)(iv); and
- (2) Council's consideration of Policy IM-3(e), due to the steep slope of the lots and its marshy character entailing a large amount of fill, displacement of stormwater absorption without any clear options for lawful storm drainage from the lot, especially as regards a building and driveway potentially involving a high proportion of lot coverage. [Emphasis added]

[Exhibit L-5, p. 401]

[52] As noted above, in February 2024, Mr. Dunphy identified a concern about whether a successful rezoning would mean that the Appellant could build "as-of-right", without having a stormwater management plan approved. He sought clarification from the

Municipality's Public Works staff. The staff reports beginning March 14, 2024, until the final report on May 28, 2024, all prepared by Mr. Dunphy, stated that a stormwater management plan would be required during the permitting phase, or the development would not proceed. Mr. Dunphy confirmed his understanding during his testimony at the hearing. He also testified, as stated in his report dated May 28, 2024, that there was no wetland on the Property. He said that this question came up during the public hearing on April 23, 2024, and he used the provincial mapping tool to confirm there was no wetland.

[53] When cross-examined by the Municipality, Mr. Dunphy said that he relied on the advice of the development officer and the Director of Public Works, who were identified as the subject matter experts, that the permitting process required a stormwater management plan. He also stated if there had not been a requirement for a stormwater management plan then he would have found that the rezoning would have a negative impact:

**Q.** Yes, yes. So:  
Stormwater management plans, construction standards, setbacks, et cetera, must be supported by the Applicant during the permit phase, or the development will not proceed.

Do you agree with me that you are basing your agreement with that statement on what you were told and not by what you're actually knowledgeable based on your interaction with the Land Use By-Law and current thinking?

**A.** I ... if I'm understanding the question I reach out to the subject matter experts. So in this case it would either be the Director of Public Works or the development officer. So it would not be an understanding that I, myself, using my expertise, would arrive to. It would be relying on the subject matter experts. If that answers ...

**Q.** Yes.

**A.** Okay.

**Q.** So you're saying you do not personally know for certain whether a detailed stormwater management plan would be required during the permitting phase based on your own knowledge, not what you're told.

**A.** I ... if I didn't have access to the resources, then no, I would not be able to determine that.

**Q.** And just to confirm. You're relying on what you're told by the subject matter experts and not your own opinion in agreeing with that statement.

**A.** Yes, yeah.

**Q.** Later on my friend brought you to page 307 in Exhibit L-5 , and you were speaking about how you had interpreted the policy IM-3 and you had said that, based on your analysis each of the concerns that were raised, there was some alternative path to address



those concerns and that is why you ultimately concluded there were no negative impacts. Correct?

A. Yes, yeah.

Q. So if there was no alternative path to address all of those concerns raised would your recommendation have changed?

A. Yes, it would. So if there wasn't a method such as a stormwater management plan or a geo-technical plan or something like that required at the permitting process as had been relayed to me, then those would be outstanding concerns and then I would consider those a negative impact based on the outstanding concerns.

[Transcript pp. 154-156]

[54] Sara Poirier, Director of Planning and Development for the Municipality, testified that she was a licensed professional planner but did not have any development training or certification. She testified that she considered the staff report dated May 28, 2024, correctly described the processes that the Appellant would have to follow to obtain a development permit, if his rezoning application was approved. She testified, however, that her assumption that the permitting process was described accurately was based on the information provided by the subject matter experts.

[55] In her expert report, Chrystal Fuller stated that Policy IM-3 must be used as the criteria to evaluate negative impacts in Policy RP-7. In her evaluation of IM-3(e), she wrote:

(e)The suitability of the area in terms of steepness of grade, soil and geological conditions, location of water courses, marshes or bogs and susceptibility of flooding. The Property has slope and areas of steepness. No information was presented about soil types and geological locations. There are no designated watercourses or bogs on the property and the Property is not susceptible to flooding but may have areas of water pooling at the bottom of the slope.<sup>8</sup> However, this Property will need detailed stormwater planning to meet the requirements for the balancing of pre- and post development flows. This is normally a requirement at the time of application for a building and development permit.

[56] Ms. Fuller stated that stormwater issues and potential impact on the flooding of adjacent properties are dealt with through the stormwater management requirements of the province and the Municipal Specifications Manual when a development permit is sought [Exhibit I-11, p. 12]. For provincial requirements, Ms. Fuller's report referred to the

Nova Scotia Environment and Labour's Storm Drainage Works Approval Policy dated December 10, 2002. In testimony, she also referred to provincial regulations when wetlands were involved and possible requirements under the *Fisheries Act, R.S., c. F-14*.

[57] In cross-examination, Ms. Fuller testified that there are stormwater issues now with the Property. She said that with the development, there would be more stormwater run-off, because there would be more hard surfaces and less ground for absorption of stormwater. She said that these issues would be addressed in the stormwater management plan.

[58] In cross-examination, Ms. Fuller was questioned, in part, on the statement in her expert report that a stormwater management plan would be required as part of the building permit process. When asked how the Municipal Specifications Manual applied to the LUB, Ms. Fuller testified that she assumed the Manual was binding in the permitting process because it had been adopted by Council and the Manual has requirements for building permits. Further, Municipal planning staff had advised that a stormwater management plan would be required as part of the permitting process. Ms. Fuller also testified that she could not speak to anything in the LUB which required a stormwater management plan. She said that throughout her career stormwater management plans have always been required, particularly where there is a potential for flooding or another concern about the need for management.

[59] Mr. Lavers testified that he was advised by the Municipality's staff that he was not required to provide a stormwater management plan for rezoning, but a plan would be required in the permitting process. Mr. Lavers stated his understanding, from his interactions with the Municipality staff, that even if the Property was successfully rezoned

to R-3, he would not receive a building permit if a stormwater management plan was not approved.

[60] Todd Richard, Director of Public Works for the Municipality, was the only witness called by the Municipality. In response to questions from counsel for the Municipality, Mr. Richard testified that his memo filed as Exhibit L-17 comes directly from the Municipal Specifications Manual. Further to his memo, he said that foundation drains can be connected to the Municipality's stormwater system, but roof drains could not be connected. Further, he said that the Municipality did not want roof drains discharging into any driveway that would directly lead to the Municipality's stormwater system. Mr. Richard testified that if a R-3 zone requested connection of their roof drainage system to the Municipality's stormwater system, based on the Municipal Specifications Manual, a stormwater management plan would be required at the permitting stage:

**Q.** So Mr. Richard, if somebody comes to you and asks to hook up to the Municipal stormwater system in an R3 zone and to the Municipal piping for their roof drainage, where would you look for guidance in answering that question?

**A.** So we would get further documentation in our Municipal specifications. We refer to it as pre- and post-development flows. So in order to meet pre-development flows based on the current structure of the parcel and in post-development flows if there's buildings and parking lots.

So with that, we would reach out to our Engineering division within Public Works and sometimes we also reach out to our third party consultants, which are professionals in that, to review the proponents of the stormwater management plan.

So our ask would be, at the permit stage, for them to submit a stormwater management plan internally. We would review it and we would look for expert advice if needed outside of our department.

**Q.** Would you expect a developer who is building a subdivision to provide you with a stormwater management plan for that subdivision?

**A.** Yes, at certain stage. Yeah, I think conceptual ... at the tentative stage, I believe.

**Q.** At the what stage, sorry?

**A.** At the tentative stage ...

**Q.** Tentative stage.

**A.** ... I believe. Yes.

**Q.** And where does the requirement for that ... providing that stormwater management plan for the subdivision come from?

**A.** Our Municipal specs and ... I can't comment. I'm not sure of the terminology, but I think it's, maybe, in the land use planning. But I'm not ... as far as Public Works, it's a document

in our Municipal Services Specifications.

**Q.** No further questions.

[Transcript pp. 210-211]

[61] The Board finds that Mr. Richard's testimony demonstrates the belief of the Municipality's staff that a stormwater management plan would be required as part of the permitting process. Further, the Board finds that this belief was reflected in the staff report dated May 28, 2024, and this guidance was provided to Mr. Lavers.

[62] The Municipality, as Respondent in this appeal, has asserted that a development officer cannot exercise discretion when issuing a development permit. Section 246 of the *MGA* requires the development officer to issue a development permit once all the requirements under the LUB have been met. The Municipality further asserts that the information before Council did not establish that a R-3 zone must, under the LUB, submit a stormwater management plan to obtain a development permit.

[63] The Board finds that the Town's LUB does not require a stormwater management plan for the issuance of a development permit. The Board notes that there is no reference to stormwater in the LUB. Section 5.3 of the LUB does require compliance with other Town By-laws, federal and provincial statutes and regulations before a development permit will be issued. Accordingly, if there is a requirement for a stormwater management plan as part of the LUB development permit process then it must be found in another Town By-Law, federal and provincial statutes and regulations.

[64] The Board does not accept the Appellant's assertion in his rebuttal submissions that the Municipality failed to test the reliability of the witnesses' evidence about whether a stormwater management plan would be required to obtain a

development permit. The Board finds that the questioning by the Municipality's counsel of Ms. Fuller, Mr. Dunphy, Ms. Poirier and Mr. Richard repeatedly sought to adduce the legal authority that the witnesses relied on in their assertions that the development officer could not issue a development permit under the LUB unless there was a stormwater management plan.

[65] The Board finds as a fact that no witness could identify this legal authority for a development officer based on another Town By-law, federal and provincial statutes and regulations. The provincial regulation on wetlands does not apply as it was determined that there were no designated wetlands on the Property or the abutting properties. Ms. Fuller referred to the Storm Drainage Works Approval Policy, dated December 10, 2002, in her expert report [Exhibit L-12, p. 363], but there were no submissions on how, if at all, this Policy is incorporated as a requirement for issuing a development permit under the LUB. The Board could not find the basis of the legal authority based in another Town By-law, federal and provincial statutes and regulations in the filed evidence. The Appellant did not identify any legal authority in his written submissions.

[66] The Board found that in the filed evidence, the witnesses' testimony and the Appellant's submissions, there is a suggestion that the requirement for the stormwater management plan, as part of the permitting process, comes from the Municipal Services Specification Manual. Based on the evidence before it, the Board cannot make a finding that the Manual falls into one of the categories under s. 5.3 of the LUB, such that the requirements of the Manual are incorporated into the LUB. The LUB does not make any

reference to the Specifications Manual. This is to be contrasted with the Town's Subdivision By-law which incorporates requirements from the Specifications Manual.

[67] The Board is not satisfied that the evidence presented in the proceeding establishes that a stormwater management plan will be necessarily required at the permitting stage.

[68] Policy RP-7 says that Council should approve a rezoning to R-3 provided that the rezoning will not have a negative impact on adjacent residential uses. The phrase "negative impact" is not defined. Policy IM-3 assists in identifying what issues could have "negative impact".

[69] The Board finds that Council had evidence before it that the Property had existing stormwater issues, such as the existing wet conditions. Council also had evidence before it that the development permitted in R-3 again would exacerbate the stormwater issues. Ms. Fuller's expert report and testimony confirmed the existence of stormwater issues on the Property and that development would increase the amount of stormwater run-off from the property.

[70] There is no evidence before the Board which suggests future stormwater issues would be contained to the property. Mr. Richard testified that a multiple unit apartment development on the property could not connect its roof drains to the Town's stormwater system. The evidence establishes that a stormwater management plan would be the only way to ensure stormwater issues are addressed so as to prevent a negative impact on the adjacent properties. As the development permitting process does not require a stormwater management plan, the identified stormwater issues would not be addressed after rezoning approval.

[71] I find that the Appellant has not established that Council's decision that issues associated with stormwater would have a negative impact upon the adjacent residential uses does not reasonably carry out the intent of the MPS.

### **6.3 Bulk and Size**

[72] Among Council's reasons of June 26, 2024, was a statement that the rezoning application would have negative impact on the adjacent residential uses because there was no transition between the multiple unit apartment building and the surrounding uses:

due to the bulk and scale of the multiple unit with no transition between it and the surrounding single unit dwellings, contrary to Policy RP-7 and IM-3(a)(iv)...

[Exhibit L-2]

[73] The Appellant submits that this determination by the Council does not reasonably carry out the intent of the MPS.

[74] The Board's determination that Council's decision to refuse the rezoning application due to the negative impact caused by stormwater issues is sufficient to dismiss the appeal. The Board would further note that the record before it was not robust enough for making a decision on this ground.

## **7.0 CONCLUSION**

[75] The Board concludes that the Appellant has not established that Council's decision does not reasonably comply with the intent of the MPS. The appeal is dismissed.

[76] An Order will issue accordingly.

**DATED** at Halifax, Nova Scotia, this 9<sup>th</sup> day of January, 2025.



---

M. Kathleen McManus