

**NOVA SCOTIA UTILITY AND REVIEW BOARD**

**IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER**

-and-

**IN THE MATTER OF** an Appeal by **THE HERITAGE TRUST OF NOVA SCOTIA** from the Decision of Halifax and West and Community Council to approve a development agreement to permit an eight-storey residential apartment building at 2267 Brunswick Street, Halifax Regional Municipality

**BEFORE:** Roberta J. Clarke, Q.C, Panel Chair  
David J. Almon, LL.B., Member  
Stephen T. McGrath, LL.B., Member

**APPELLANT:** **THE HERITAGE TRUST OF NOVA SCOTIA**  
Billy Sparks (Counsel)  
David R. Donnelly (Counsel)

**RESPONDENT:** **HALIFAX REGIONAL MUNICIPALITY**  
E. Roxanne MacLaurin (Counsel)

**APPLICANT:** **BRUNSWICK STREET DEVELOPMENTS LTD.**  
Jason T. Cooke (Counsel)  
Danielle Keating (Articled Clerk)

**INTERVENORS:** **EZRA EDELSTEIN and JOANNE MACRAE**

**HEARING DATE:** March 11-12, 2020

**DECISION DATE:** **June 1, 2020**

**DECISION:** **Appeal is dismissed.**

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## 1.0 INTRODUCTION

[1] Through its architect, Studioworks International Inc., a developer, Brunswick Street Developments Ltd., applied to Halifax Regional Municipality (HRM) for a development agreement for property at 2267 Brunswick Street, Halifax. The development agreement was for a residential apartment building to be located at the rear of and adjoining the former St. Patrick's Rectory which had previously been redeveloped into a multi-unit residential apartment building. The property is in the municipally designated Brunswick Street Heritage Area. It is on the east side of Brunswick Street, and immediately next door to St. Patrick's Church; the nearest residential property is 2273-75 Brunswick Street, known as Huestis House. Both the Church and Huestis House are registered heritage properties.

[2] The proposal was considered by Halifax and West Community Council (HWCC) which, under s. 31 of the *Halifax Regional Municipality Charter, S.N.S.2008, c. 39 (HRMC)*, has the powers of Council with respect to development agreement applications.

[3] After several versions of a proposed development were submitted to Council, a development agreement was approved for what is described as an eight-storey residential apartment building. Notice of the approval was published in accordance with s. 245(4) of the *HRMC*.

[4] In response to the notice of approval, The Heritage Trust of Nova Scotia filed an appeal of Council's decision with the Nova Scotia Utility and Review Board. Heritage Trust is a non-profit organization whose members are committed to the conservation of heritage properties and cultural and historic areas within Nova Scotia. In the past, Heritage Trust has been involved in many planning matters regarding

development in the downtown areas of Halifax in particular. No party objected to the status of Heritage Trust to appeal the decision of Council as an “aggrieved person.”

[5] Heritage Trust appealed Council’s decision, arguing that the approval of the development agreement does not reasonably carry out the overall intent of the Municipal Planning Strategy (MPS) as the development “does not complement adjacent properties and uses,” specifically St. Patrick’s Church and Huestis House, fails to maintain “the existing heritage streetscape...by ensuring that features...are similar to any adjacent residential buildings particularly any registered heritage properties,” and ignores Council’s past decisions on the development regarding height.

[6] The Board heard evidence from expert planners on behalf of both Heritage Trust and HRM. The Board also received evidence filed by two well-known architects and a historian on behalf of Heritage Trust. The Board also conducted a site visit to view the Rectory property, the Church, and Huestis House as well as portions of Brunswick Street.

[7] The Board notes that Council, in approving a development agreement is not required to give reasons; therefore, the Board does not know Council’s reasons for approval of this development. However, this does not preclude the Board reaching conclusions about whether the decision reasonably carries out the intent of the MPS. The Board considered the provisions of the MPS as a whole, and particularly Policy 9 of the Peninsula North Secondary Planning Strategy (PNSPS), and Policy CH-16 of the Regional Municipal Planning Strategy (RMPS), which address heritage resources.

[8] These policy provisions lead the Board to conclude that it should defer to the decision of Council to approve the development agreement. The Board finds that the

language used in the policies requires Council to exercise a significant degree of subjectivity and discretion.

[9] Under Policy CH-16, Council is required to consider a range of design solutions and architectural expression when assessing a proposed development in the context of abutting registered heritage properties. In this case, the Board finds that an interpretation of the policy that focuses only on the compatibility of the proposed development with the Church is one that the policy can reasonably bear.

[10] The Board also finds that, although Council is directed to consider certain heritage resources, in particular under Policy 9.3.2.1, the focus of Council's consideration is different under the various subsections of the policy, and Council is not directed to consider those resources exclusively. An interpretation of the policy that affords Council the discretion to approve a development that is more complementary to some resources than others is one that the policy can reasonably bear.

[11] In addition, the Board considers that Council's interpretation of terms such as "complement", "similar", "compatible", and "respect" are ones which the MPS policies can reasonably bear. Given the features of the proposed development, Council could reasonably carry out the intent of the MPS as a whole by concluding that the development complements adjacent properties and uses. It would not be unreasonable for Council to conclude that the development could be more complementary to the Church and the Rectory than Huestis House.

[12] Finally, the Board notes that the numerous factors that Council is directed to consider sometimes compete for Council's attention and emphasis, both as between Policy CH-16 and Policy 9.3.2.1 and as between the sub-components within the policies

themselves. The compromises and choices required to resolve such competition is best left to the elected representatives who have the primary authority for planning in the municipality and making the required value judgments.

[13] Guided by the body of case law, the Board finds this to be a matter in which it should defer to Council's decision. It is up to Council, and not the Board, to make the choices under the MPS policies, even if there may have been other choices which might also be reasonable. Thus, the appeal is dismissed.

## **2.0 BACKGROUND**

### **2.1 The Proposed Development and Location**

[14] Studioworks International Inc., on behalf of Brunswick Street Developments Ltd., originally applied to enter into a development agreement to enable a 13-storey building located at the rear of St. Patrick's Rectory at 2267 Brunswick Street in Halifax. The subject lands are within the Brunswick Street Heritage Area, a protected heritage precinct, since the 1970's, which runs along the east side of Brunswick Street, that guides both new buildings and changes to existing buildings within a historic context. The proposal now entails an eight-storey, multi-unit (42) residential building at 2267 Brunswick Street, in the North End of Halifax, east side of Brunswick Street and north of Cornwallis Street.

[15] St. Patrick's Rectory (Rectory) is located at the site. The Rectory, built in the 1880's, is an example of Victorian Gothic Revival, is a heritage building, but is not a registered heritage property. The Rectory, which was previously owned by the Roman Catholic Episcopal Corporation of Halifax, was sold to Brunswick Street Developments

Ltd. as an asset to support the restoration (renovation) of St. Patrick's Church. The Rectory occupies the front side and the development is to take place at the rear of the property; as such, the Rectory continues to form the street wall for the proposed building addition.

[16] Immediately to the south of the site is St. Patrick's Church, also built in the 1880's. The Victorian Gothic style Church is a predominant landmark in the area and has an iconic spire that is 175 feet high that sits atop a tower found at the apex of a steep roof. It is a registered heritage property

[17] On the west side of the street, outside of the Brunswick Street Heritage Area and immediately opposite the Rectory is the St. Patrick's – Alexandra School site.

[18] Huestis House lies to the north of the Rectory. Huestis House is a two-storey building recognized for its Second Empire style and associations with two historic personages: Rev. Dr. Stephen F. Huestis, a prominent Methodist Minister, and businessman Stephen Angus Doane. It is a wood-frame structure with traditional wood shingle cladding typical of many historic homes in older areas of the Halifax Peninsula and along Brunswick Street. Unique features of Huestis House include a mansard roof, one of only a handful in Halifax, ornate gingerbread style trim and a jog in the footprint of the building. The current owners recently renovated the building and constructed an addition at the back, which as a result of a conflict between the heritage rules and the building code, is covered in blue metal siding. It is also a registered heritage property.

[19] In between the Rectory and Huestis House, there is a strip of vacant land owned by HRM that is about 15 feet wide. During the hearing it was referred by some

parties as the “orphan land.” At least some of this vacant land is being used as a driveway to access the rear of the Huestis House property.

## 2.2 The Policy Context

[20] Halifax MPS Policy 9.3.2 permits new apartment buildings with over four dwelling units in areas zoned General Residential (R-2) by development agreement in the area identified in the Land Use By-Law pursuant to Policy 9.3. This Policy is intended to support the preservation of historic properties and registered heritage buildings and allow new development that achieves preservation of the character and appearance of existing heritage structures. The Policy further suggests that the historic streetscape of Brunswick Street is to be retained through architectural controls and standards for building the basement.

[21] MPS Policy 9.3.2 reads as follows:

9.3.2 In the area identified in the land use by-law pursuant to Policy 9.3 above, a new apartment house with over four dwelling units, or an addition to an existing building which produces an apartment house with over four dwelling units, may be permitted in areas zoned as general residential by development agreement; any such residential development in the area zoned as general residential conversion and townhouse, multiple dwelling, or general business, shall only be by development agreement.

[Exhibit H-4, Tab 2, p.210]

[22] Policy 9.3.2.1 states the following:

9.3.2.1 In considering agreements pursuant to Policy 9.3.2, Council shall consider the following:

(a) the building or addition shall complement adjacent properties and uses, particularly any adjacent registered heritage buildings;

(b) the impact of vehicle access and egress and parking on adjacent properties and uses shall be minimized;

(c) the new development shall complement or maintain the existing heritage streetscape of Brunswick Street, by ensuring that features, including but not limited to the following, are similar to adjacent residential buildings particularly any registered heritage properties in the area identified in the land use by-law pursuant to Policy 9.3 above, on which Council shall specify conditions to be met in the development agreement:

- (i) architectural design including building forms such as roofs, entrances, porches and dormers;
- (ii) height, scale and massing;
- (iii) location and style of building details such as doors, windows and exterior walls;
- (iv) front and side yard setbacks;
- (v) building materials.

(d) open space and landscaped areas shall be provided where appropriate;

(e) other relevant land use considerations which are based on the policy guidance of this Section. [Emphasis added]

[Exhibit H-4, Tab 2, pp. 210-211]

[23] The subject lands are zoned R-2 (General Residential) which permits R-1 dwelling units, semi-detached or duplex dwellings, apartments of up to four units and accessory uses. Conversions to multiple-unit buildings, such as the St. Patrick's Rectory conversion, are permitted within the Brunswick Street Heritage Area subject to specific provisions, to encourage the retention of existing buildings in this area which contribute to the heritage streetscape.

[24] Section 7.4 in the RMPS addresses development abutting registered heritage properties. It notes HRM's intention to develop a plan to address and clarify issues surrounding heritage protection and new development in all areas of the municipality. In the meantime, Policy CH-16 provides guidance for development that abuts heritage properties in HRM. Policy CH-16 applies specifically to land abutting federally, provincially or municipally registered heritage properties. It directs HRM, when reviewing applications for development agreements on lands abutting such properties, to "consider a range of design solutions and architectural expressions that are compatible with the abutting... registered heritage properties."

[25] While CH-16 is not included in the grounds of appeal, the Policy was subject to debate at the hearing. CH-16 states:

CH-16 For lands abutting federally, provincially or municipally registered heritage properties, HRM shall, when reviewing applications for development agreements, rezonings and amendments pursuant to secondary planning strategies, or when reviewing the provision of utilities for said lands, consider a range of design solutions and architectural expressions that are compatible with the abutting federally, provincially or municipally registered heritage properties by considering the following:

- (a) the careful use of materials, colour, proportion, and the rhythm established by surface and structural elements should reinforce those same aspects of the existing buildings;
- (b) ensuring that new development is visually compatible with yet distinguishable from the abutting registered heritage property. To accomplish this, an appropriate balance must be struck between mere imitation of the abutting building and pointed contrast, thus complementing the abutting registered heritage property in a manner that respects its heritage value;
- (c) ensuring that new developments respect the building scale, massing, proportions, profile and building character of abutting federally, provincially or municipally registered heritage structures by ensuring that they:
  - (i) incorporate fine-scaled architectural detailing and human-scaled building elements.
  - (ii) reinforce, the structural rhythm (i.e., expression of floor lines, structural bays, etc.) of abutting federally, provincially or municipally registered heritage properties; and
  - (iii) any additional building height proposed above the pedestrian realm mitigate its impact upon the pedestrian realm and abutting registered heritage properties by incorporating design solutions, such as stepbacks from the street wall and abutting registered heritage properties, modulation of building massing, and other methods of massing articulation using horizontal or vertical recesses or projections, datum lines, and changes in material, texture or colour to help reduce its apparent scale;
- (d) the siting of new developments such that their footprints respect the existing Development pattern by:
  - (i) physically orienting new structures to the street in a similar fashion to existing federally, provincially or municipally registered heritage structures to preserve a consistent street wall; and
  - (ii) respecting the existing front and side yard setbacks of the street or heritage conservation district including permitting exceptions to the front yard requirements of the applicable land use by-laws where existing front yard requirements would detract from the heritage values of the streetscape;

- (e) not unreasonably creating shadowing effects on public spaces and heritage resources;
- (f) complementing historic fabric and open space qualities of the existing streetscape;
- (g) minimizing the loss of landscaped open space;
- (h) ensuring that parking facilities (surface lots, residential garages, stand alone parking and parking components as part of larger developments) are compatible with abutting federally, provincially or municipally registered heritage structures;
- (i) placing utility equipment and devices such as metering equipment, transformer boxes, power lines, and conduit equipment boxes in locations which do not detract from the visual building character or architectural integrity of the heritage resource;
- (j) having the proposal meet the heritage considerations of the appropriate Secondary Planning Strategy, as well as any applicable urban design guidelines; and
- (k) any applicable matter as set out in Policy G-14 of this Plan.

[Exhibit H-4, Tab 3, p.101-1-2]

### **2.3 The History of the Development Application**

[26] The application for the development agreement was filed in December 2015. At that time, the proposed development was for a 13-storey, multi-unit residential building that was 132 feet tall. Darrell Joudrey was assigned to manage the case file on behalf of HRM's planning department. The development has gone through several redesigns in subsequent years.

[27] The level of community engagement consisted of consultation, achieved through providing information and seeking comments from the HRM website, signage posted on the subject site, letters mailed to property owners within the notification area and a Public Information Meeting which was held at Saint Joseph's-Alexander McKay Elementary School, on November 30, 2016, for the proposed 13-storey building. In addition to staff from HRM Development Approvals, Councillor Lindell Smith, Studioworks International Inc., the Applicant, and 10 members of the public attended. The purpose of the meeting was to identify the proposed site; look at the current planning approach in the neighbourhood; highlight the proposal; explain the process from the Municipal Planning

Strategy that allows this to be considered; give the Applicant an opportunity to present the proposal; and receive public feedback and input regarding the proposal that will be used to prepare the staff report to go forward with the application. No decisions are made at this stage.

[28] Some of the public comments received at the meeting included the following topics:

- 13-storey height is overly tall;
- Limited on-site parking creates off-street parking issues;
- Will HRM right-of-way always exist to act as setback; and
- Blank wall facing Huestis House is unattractive.

[29] Following the Public Information Meeting, a Team Review request was sent to relevant HRM divisions for review and comments on January 6, 2017. The review included seeking comments from various HRM divisions or groups that are relevant to the application, i.e., Development Engineering, Halifax Water, Land Development, Subdivision and Fire Protection.

[30] Because the evaluative framework for the development agreement request included RMPS Policy CH-16, the application for the 13-storey proposal was sent to Heritage Planning for review. Policy CH-16 provides municipal-wide guidance for development of lands that abut registered heritage properties for development agreements. The development abuts a registered heritage property (the Church). Team review comments are not provided to Council but assist Staff in negotiating the proposed development agreement, evaluating and responding to the policy set and preparing the Staff Recommendation Report.

[31] Aaron Murnaghan is a heritage planner employed by HRM on a team that administers the MPS in relation to properties formally designated as heritage properties

under the *Heritage Property Act*, S.N.S 1989, c. 199 (*HPA*). Since the Rectory is not a registered heritage property, Mr. Murnaghan's group did not manage this file. However, Mr. Joudrey consulted Mr. Murnaghan when he sent the development application to relevant HRM divisions, as part of the Team Review, for review and comment, in January 2017. Mr. Murnaghan provided a written report to Mr. Joudrey, dated May 11, 2017.

[32] In his written report, Mr. Murnaghan advised that a reduction of height to a maximum of six stories would be appropriate to conserve the visual prominence of the Church steeple and so as not to overwhelm neighbouring structures.

[33] The matter proceeded to the Planning Advisory Committee on May 29, 2017, where the Committee recommended rejection of the development agreement application to HWCC, and suggested the Applicant explore another design.

[34] In a Memo to HWCC, the Committee noted the following concerns:

- The design appears to not observe the principles of the heritage district, in that it overwhelms and subordinates the adjacent building (the church);
- The design would be more acceptable at a height of approximately 3-6 storeys, generally in keeping with the height of the church roof;
- The Committee would support a requirement to analyze the impact of wind and shade of the building;
- The Committee feels that the limited number of parking spaces proposed would have a negative impact on the ability of neighbours to find parking; and,
- The Committee has concerns regarding overall lot coverage, particularly sideyards adjacent to existing residential uses.

[Exhibit H-3, p.66]

[35] As a result, the design was revised. None of the subsequent revisions were referred back to Mr. Murnaghan.

[36] At first reading at HWCC, on October 9, 2018, the proposed development was for a nine-storey, 51-unit multiple unit building. The proposed addition was now to

be attached to the existing Rectory by a pedway and the west edge of the footprint was set back about 62 feet 8 inches from the Brunswick Street property line. A cantilevered portion of the building begins at the fifth-floor level and vertically aligns with the rear façade of the Rectory. As well, changes were made to the façades and balconies added to the west elevation facing Huestis House.

[37] The Application came before HWCC at a public hearing on November 14, 2018, and following Council's deferral, HWCC asked Staff to consider further design changes with the Applicant, including reducing the height of the proposed addition to at least the height of the roofline of the Church and to take any resulting revisions before the Heritage Advisory Committee for their review and comment and to prepare a Supplementary Report following completion of those tasks. The role of the Heritage Advisory Committee is to provide advisory comments on heritage concerns to Council to assist in their decision making.

[38] As requested, following the meeting, Planning Staff entered further consultations with the Applicant, working with municipal staff, planners and the Church to further revise the proposed development in several significant ways, including limiting the height of the proposal to not exceed the roofline of St. Patrick's Church. Building materials were altered to better complement the surrounding areas. Staff were directed to return with a supplementary report outlining the terms of any revised development agreement.

[39] At their March 27, 2019, meeting, the Heritage Advisory Committee received the March 13, 2019 Supplementary Staff Report which included a revised application that showed an eight-storey 42-unit building. Red brick was used as a material for the sheer vertical wall at the Brunswick Street façade in proportions of the two west

and east façades; and, the penthouse was aligned to the center of the Brunswick Street façade.

[40] At the April 9, 2019 meeting of the HWCC, Staff presented revised schedules showing changes to the proposed building to Council that the Applicant made, following the meeting with the Heritage Advisory Committee. Some of those changes to be implemented, as shown in the March 13, 2020, Supplementary Report, included the following:

- Building height was reduced from nine (9) floor levels to eight (8) floor levels;
- Dwelling units were reduced from 51 units to 42 units;
- Motor vehicle parking spaces were reduced from eight (8) to four (4);
- Subdivision of lands is not required to accommodate a proposed smaller building footprint (6792 square feet was reduced to 5964 square feet);
- Brick, similar in colour to the Rectory, is now proposed on the Brunswick Street and two interior lot elevations (east and west elevations);
- Stone masonry is now the proposed material for first and second floor level exterior;
- Light coloured cladding and aluminum curtain walls are proposed materials for third floor level to penthouse; and
- Protruding balconies removed from the elevation facing the Church (east elevation).

[Exhibit H-3, p. 121]

[41] A new motion to defer consideration was passed. Staff was directed to return to the Heritage Advisory Committee with the revisions and prepare another supplementary report evaluating the building design options, to permit an eight-storey residential building.

[42] At a meeting of the Heritage Advisory Committee on June 5, 2019, staff presented a revised building to the Committee with the height remaining at eight stories.

Some of the additional changes to be implemented, as shown in the Supplementary Report, included the following:

- Brunswick Street facade revised to include three vertical clear glass walls. The vertical brick wall nearest Huestis House shows two punched windows per floor while the other vertical wall nearest the Church has no windows. This amendment provides for a better balance of brick and glass on the Brunswick Street facade and these vertical expressions are in keeping with the local grain of vertical bays and gaps;
- The voided comer appearing on the Brunswick Street and Huestis House facades is mirrored on the other side of the Brunswick Street elevation at the corner of the Brunswick Street and St. Patrick's Church facades. This spatial effect contributes to the Brunswick Street facade symmetry and detracts from the "box" effect;
- Removal of the overhanging roof of the eighth storey penthouse from all facades. This alleviates the heavy look of the top level and decreases the perception of building mass; and
- Further stepback of the rooftop penthouse from 8 feet to 21 feet 10 inches from the edge of the Brunswick Street facade and re-locating of the common amenity space in that enlarged stepback area created. This larger stepback makes the top level less visible from the pedestrian realm and street.

[Exhibit H-3, p. 215]

[43] As well, the Brunswick Street façade now had two brick verticals; one having a double column of punched windows; both verticals edge against glass verticals. Material changes on the remainder façades feature stone masonry and red brick and light coloured cladding.

[44] The wall of the addition facing Huestis House was described by Mr. Murnaghan as a sheer wall with no articulation or glazing. Through the course of the various design changes that were made to the project, additional details and features were provided. The Huestis House facing side of the addition now includes recessed balconies. As with the Church facing side of the addition, stone masonry is shown above the parking level up to a height which approximates the top of the Rectory's wall and then changing to red brick, except behind the recessed balconies, where light-coloured cladding is provided.

[45] On June 11, 2019, HWCC gave notice of motion to consider the revised proposed development agreement to permit an eight-storey residential building on the proposed site and to schedule a new public hearing.

[46] On June 22 and 29, 2019, advertisements regarding the proposed development agreement were placed in *The Chronicle-Herald* advising of a Notice of Public Hearing for July 9, 2019.

[47] At the July 9, 2019, meeting of the HWCC a number of items were placed before HWCC, including a Recommendation Report from the Chair of the Heritage Advisory Committee, dated June 6, 2019, with attached Staff Recommendation Report, dated May 9, 2019; a memorandum from the Chair of the Halifax Peninsula Planning Advisory Committee, dated May 29, 2017; as well as both a Staff presentation and the Applicant's presentation.

[48] The HWCC Minutes reflect the following: Darrell Joudrey, Planner II, provided Community Council with a presentation on Case 20417: development agreement for 2267 Brunswick Street, Halifax, to permit an eight-storey residential building. Mr. Joudrey outlined the feedback on Case 20417 provided by the Halifax Peninsula Planning Advisory Committee (HPPAC), and the Heritage Advisory Committee (HAC), as well as the modifications made by the Developer as a result:

Responding to questions from members of Community Council, Joudrey and Carl Purvis, Major Projects Planner, noted that when this item first came before Community Council in 2018, direction was provided to staff to engage with the Developer to seek revisions to the proposal so that the height of the building does not exceed the roofline of neighbouring St. Patrick's Church. Joudrey explained that the proposal currently before Community Council, although reduced in height, still exceeds the roofline. Joudrey further explained that after further consultation, the Developer declined to put forward a revised proposal meeting the requested height limitation sought by Community Council. Purvis noted that if a Developer does not want [to] make revisions to their proposal requested by the Municipality, then staff are still obliged to bring forward their proposal to Community Council, as the Developer has the right to appeal any decision to the Nova Scotia Utility Review Board.

The Chair invited the Applicant to come forward to address Community Council.

**Ron Smith**, Studio Works International, Applicant, provided Community Council with a presentation on Case 20417: Development Agreement for 2267 Brunswick Street, to permit an eight (8) storey residential building. They outlined some of the revisions made to the proposed Development Agreement in response to some of the concerns raised by the HPPAC, as well as the HAC. They additionally noted that they have received support for their current eight (8) storey proposal from St. Patrick's Church.

[Exhibit H-3, p.41]

[49] The Chair then opened the meeting to a public hearing and called for any members of the public wishing to come forward to speak to the matter. Two individuals spoke in support, while 3 individuals spoke against the proposal.

[50] Following the public hearing, a motion was put and passed where Council approved the proposed development agreement "which shall be substantially of the same form as set out in Attachments A and B of the May 9, 2019 staff report."

[51] Architectural requirements for the proposed addition, in the approved development agreement, include, but are not limited to, the following:

- The Development will comprise of a multiple unit residential building with a maximum of 42 residential units.
- The Development will have ground level parking with a minimum of four parking spaces.
- The Development's lot coverage shall not exceed 70%, the first four levels will be a maximum of 60 feet from the front lot line, and a minimum of 1200 square feet of outdoor open space must be provided at ground level.
- The Development's height will not exceed 87.5 feet.
- The Development's facades facing the Church, Barrington Street, and Huestis House shall be as designed and detailed as the primary facade for Brunswick Street. The architectural treatment of the windows, balconies, and other surfaces will be continued on all sides of the building.
- Windows shall be vertical or square in proportion and should be framed with pre-finished metal.
- Large blank walls will not be permitted in the Development and any large walls will be tempered by details.
- Vinyl siding is not a permitted building material.

- Exposed foundations (if any) will be architecturally detailed.
- Mechanical systems and telecommunication equipment shall all be either integrated into the Development's design or screened from public view.

[Exhibit H-3, pp.221-222]

## 2.4 The Appeal

[52] The grounds of appeal are listed in the Notice of Planning Appeal, as follows:

Section 250(1) of the Municipal Government Act or Section 265(1) of the Halifax Regional Municipality Charter provide that an aggrieved person or an applicant may only appeal on the grounds that the decision "does not reasonably carry out the intent of the municipal planning strategy" ("MPS").

...

The Heritage Trust of Nova Scotia maintains that Halifax and West Community Council erred in approving the Development Agreement in Case 20417. Council did not reasonably carry out the overall intent of the municipal planning strategy as stated in the Objective of the section on Heritage Resources: "The preservation, maintenance and enhancement of buildings, areas, streetscapes and conditions which contribute to the heritage character of certain areas of Peninsula North."

Policy 9.3.2.1 dictates that:

In considering agreements pursuant to Policy 9.3.2, Council shall consider the following:

- (a) the building or addition shall complement adjacent properties and uses, particularly any adjacent registered heritage buildings;
- (b) the impact of vehicle access and egress and parking on adjacent properties and uses shall be minimized;
- (c) the new development shall complement or maintain the existing heritage streetscape of Brunswick Street, by ensuring that features, including but not limited to the following, are similar to adjacent residential buildings particularly any registered heritage properties in the area identified in the land use by-law pursuant to Policy 9.3 above, on which Council shall specify conditions to be met in the Development Agreement:
  - (i) architectural design including building forms such as roofs, entrances, porches and dormers;
  - (ii) height, scale and massing;
  - (iii) location and style of building details such as doors, windows and exterior walls;
  - (iv) front and side yard setbacks;
  - (v) building materials.

(d) open space and landscaped areas shall be provided where appropriate;

(e) other relevant land use considerations which are based on the policy guidance of this section.

The Heritage Trust is concerned the proposed development does not follow the overall purpose or intent of the land use policy; in particular, subsections (a) and (c).

Subsection (a) requires "the building or addition [to] complement adjacent properties and uses, particularly any adjacent registered heritage buildings"; 2267 Brunswick Street is framed by St. Patrick's Church, a Provincially Registered Heritage Property, and the Huestis House, a Municipally Registered Heritage Property, neither of which is complemented by the proposed addition.

Subsection (c) requires "the new development [to] complement or maintain the existing heritage streetscape of Brunswick Street, by ensuring that features...are similar to adjacent residential buildings particularly any registered heritage properties in the area identified in the land use by-law..." Features of the proposed development are not similar to adjacent properties, nor to those of other registered heritage properties in the area. The Council did not adhere to past decisions regarding development of this property, such as reduction in height.

[Exhibit H-1]

[53] The hearing for this matter was held before the Nova Scotia Utility and Review Board on March 11 and 12, 2020. The Appellant, The Heritage Trust of Nova Scotia, was represented by David R. Donnelly and Billy Sparks; the Applicant, Brunswick Street Developments Ltd., was represented by Jason Cooke; and the Respondent, Halifax Regional Municipality (HRM), was represented by Roxanne MacLaurin. Ezra Edelstein and Joanne Macrae, owners of Huestis House, requested intervenor status, stating that their concerns related to whether the zoning laws were properly applied. They were self-represented.

[54] The Board heard from three witnesses: John Heseltine, MCIP; Darrell Joudrey, Planner II for HRM; and, Ezra Edelstein.

[55] The Appellants called one witness, John Heseltine, an experienced land-use planner, who has appeared before the Board on several occasions, and who had previously worked for the City of Halifax in the planning department, now employed with

Stantec. Mr. Heseltine filed two reports, one dated September 19, 2019, and a reply report dated November 7, 2019. He was qualified to speak as an expert on HRM planning policy, including policy applicable to the Brunswick Street Heritage Area. He was cross-examined by HRM and Brunswick Street Developments Ltd.

[56] HRM called one witness, Darrell Joudrey, Planner II, HRM. Mr. Joudrey was qualified as an expert in land-use planning, capable of giving expert opinion evidence on land-use planning matters, including the interpretation and application of the Halifax Municipal Planning Strategy, Peninsula North Secondary Planning Strategy, and the Halifax Regional Municipal Planning Strategy and Halifax Peninsula Land-Use By-law and the extent to which the July 9, 2019, decision of Council to approve a development agreement for property located 2267 Brunswick Street, Halifax, was reasonably consistent with the intent of the Municipal Planning Strategy. Mr. Joudrey was also the staff planner who recommended the development to HWCC and was able to testify as a fact witness as well as an expert.

[57] Mr. Joudrey filed two reports, one dated September 17, 2019, and a supplemental report, dated October 11, 2019.

[58] During the qualification phase of Mr. Joudrey's appearance before the Board, Mr. Donnelly submitted that he had no objection to Mr. Joudrey's qualification as, what he called, "a garden variety planner." However, he raised an objection to his witness statement and rebuttal, in which he felt Mr. Joudrey veered into areas of architectural detail and urban design, which were, in his opinion, not within Mr. Joudrey's ambit. Mr. Donnelly submitted that the Board should give limited weight to Mr. Joudrey's evidence

concerning architectural detail changes to the proposed development and heritage planning process.

[59] In response to questions from the Board and Counsel, Mr. Joudrey testified that he had experience with one heritage property development agreement application and two heritage site plan files not requiring a council decision. Mr. Joudrey's qualifications are considered later in this decision.

[60] Ezra Edelstein testified in his capacity as the owner of Huestis House, a registered municipal heritage property adjacent to St. Patrick's Rectory, located at 2275 Brunswick Street. His concerns centered on the effects that the proposed development has directly on his property, most particularly, the north façade of the proposed addition to the Rectory which he deemed "a horribly blank wall."

[61] Beverly Miller was the only person registered to speak at the evening public session, and in the interest of time management, she agreed to address the Board during the hearing. Ms. Miller testified, as a layperson, and shared her many years of experience as a heritage conservationist, including in Halifax and in St. John's, NL, where she helped establish a heritage conservation area, buying, repairing and selling old buildings. She spoke of the need for consistency in planning strategy for her neighbourhood, pointing to the creation of the Brunswick Comprehensive Development District and the Brickyard Development, as examples of consistency in planning strategy for her neighbourhood. Ms. Miller also testified as to the importance of community consultation and being involved in planning decisions and developments.

[62] In addition to Mr. Heseltine's two reports, the Appellants filed expert reports from Gary R. Hanley, Mettam Group Inc., and Brian MacKay-Lyons, MacKay-Lyons Sweetapple.

[63] Mr. Hanley was qualified to give expert opinion in matters of architecture, with particular experience in heritage resources, including: a significance of heritage resources adjacent to the subject property and in the Brunswick Street Heritage Area as identified on Map 3 of the Halifax Municipal Planning Strategy (Peninsula North Planning Area 7); and the design of new or infilled developments appropriate to the protection and enhancement of adjacent building heritage resources.

[64] In his written report, Mr. Hanley opined that the development will be exposed to view when walking or driving north on Brunswick Street. He also explains his opinion is that the development "does not complement or maintain the heritage streetscape of Brunswick to the scale, massing or height." His report does not elaborate on his opinion or address any other architectural or aesthetic elements of the development. Mr. Hanley was not cross-examined at the hearing.

[65] Brian MacKay-Lyons was qualified as an expert in architecture, urban design, capable of giving expert opinion in architectural and urban design matters, as they relate to the protection of heritage resources, particularly those within the Brunswick Street Heritage Area and the impact on the building design in relation to MPS Policy criteria relating to the protection of heritage resources. In his report, he was of the opinion the development is not "in keeping with intentions clearly stated in the object of Policy 9 of Section XI" of the MPS. Mr. MacKay-Lyons expressed concerns that the development could put the heritage character of the area at risk. His report does not elaborate on his

opinion or offer specific opinions on architectural design elements present in the development. He was not cross-examined at the hearing.

[66] Also on the Witness List for the Appellants, was Allen B. Robertson, Ph.D., who was qualified to speak as an expert on the history of the Brunswick Street Heritage Area, including the heritage significance of individual buildings in that area, such as Saint Patrick's Roman Catholic Church; the impact of urban planning relative to designated Heritage Conservation Districts; and the various means that have been undertaken to protect the integrity of the Brunswick Street Heritage Area. Like Mr. Hanley and Mr. MacKay-Lyons, he was not cross-examined at the hearing.

[67] As well, the Appellant provided a document at Appendix "D (iii)" of its evidence, purporting to speak to the character of Brunswick Street, and entitled *Historical Value and Context: A Place of National Importance*, the authors of which, were not cross-examined.

### **3.0 SITE VISIT**

[68] The Board conducted a site visit on March 13, 2020, accompanied by representatives of each party. The parties met at 2267 Brunswick Street, the former Rectory, now an apartment building. As noted earlier in this Decision, the proposed development is adjacent to and abuts St. Patrick's Roman Catholic Church on the south side and Huestis House on the north side. Huestis House does not abut the development, as it is separated by a strip of land, owned by HRM.

[69] The parties walked to the rear of the Church's former Rectory and observed a paved parking lot for approximately 12 vehicles, which is the actual site of the proposed

development, enclosed by a chain link fence, and overlooking undeveloped lands to the east, between the rear of the Rectory property and Barrington Street. From this position, the parties also observed both the north side of the Church and the south rear side of Huestis House.

[70] Walking north on Brunswick Street, the Board passed Huestis House, which is a two-storey, wood and shingled private residence, with a two-storey rear addition; noteworthy, as it is clad in blue metal siding, with a large metal staircase, presumably to a rear entry.

[71] Continuing north along Brunswick Street, the parties passed a number of older 2-3 storied buildings, some wood shingled and one brick and stuccoed, before passing the multi-storied Harbourview Apartments at 2309 and 2355 Brunswick Street and 5214 Gerrish Street, along with several townhouse rentals. The parties walked past the intersection of Brunswick and Gerrish Streets, observing The Little Dutch Church to the right, and continued further north to Hope Cottage, which is across the street from Uniacke Square.

[72] At this point, the parties crossed Brunswick Street and reversed the walk, in a southerly direction past several units of Uniacke Square on the west side, observing the height of the Harbourview Apartments across the street, and a neighbouring two and a half-storey older Italianate style building at 2319 and 2323 Brunswick Street.

[73] Continuing the walk, the Board observed the Murray Warrington Park on the west side of Brunswick Street, directly across the street from the Harbourview Apartments site. South of the park, the parties observed the building mass of the red

brick structure, almost two city blocks long, which is the former St. Patrick's - Alexandra School, also on the west side of Brunswick Street.

[74] As the parties approached the site of the proposed development, the Board also observed, from this vantage point, the steep-pitched roofline and the height of the steeple of St. Patrick's Church, and the Spice Building a six-storey apartment building, located on the corner of Cornwallis and Barrington Streets, but easily visible through a vacant lot on the south side of Saint Patrick's Church.

[75] The parties walked to Saint George's Church (The Round Church) on the corner of Brunswick and Cornwallis Streets, before returning to the site of the proposed development.

#### **4.0 BOARD'S JURISDICTION AND STATUTORY INTERPRETATION**

##### **4.1 Board's Jurisdiction**

[76] The burden of proof is on the Appellant to show, on the balance of probabilities, that Council's decision to approve the development agreement for the property at 2267 Brunswick Street does not reasonably carry out the intent of the MPS.

[77] Under s. 265(b) of the *Halifax Regional Municipal Charter*, the grounds for appealing such a decision are limited:

265 (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.

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

267 (2) The Board may not allow an appeal unless it determines that the decision of Council or the development officer, as the case may be, does not reasonably carry out the intent

of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law. [Emphasis added]

[79] Thus, the Board must not interfere with the decision of Council unless it determines that Council's approval does not reasonably carry out the intent of the MPS.

[80] While the Appellant asserts that the approval of the development agreement fails to meet the requirements of specific policy criteria in the MPS, i.e., Policy 9, Section XI of the PNSPS, and Policy CH-16, in Section 7.4 of the RMPS, the issue to be addressed by the Board in this appeal is whether Council's decision to approve the development agreement fails to reasonably carry out the intent of the MPS in its entirety. The Board has no jurisdiction to allow the Appellant's appeal if Council "interpreted and applied the [MPS] policies in a manner that the language of the policies can reasonably bear." See *Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility and Review Board et al.*, 1994 NSCA 11, at para. 99 of that decision.

[81] If the Appellant can show, on the balance of probabilities, that Council's decision does not reasonably carry out the intent of the MPS, the Board must reverse Council's decision. If, however, the Appellant fails to meet this standard of proof, the Board must defer to the decision of Council (see for example *Heritage Trust*, 1994 NSCA 11; *Re MacInnis*, 2019 NSUARB 9, aff'd at 2019 NSCA 77).

[82] The Nova Scotia Court of Appeal has considered the standard by which this Board must review a council's decision. The Board is not permitted to substitute its own decision for that of council. The Board's mandate is restricted to the jurisdiction conferred upon it by the relevant statute, here the *HRM Charter*, as noted by Hallett, J.A., in *Kynock v. Bennett et al.* (1994), 131 N.S.R. (2d) 334 (C.A.) and *Heritage Trust*, 1994 NSCA 11, in discussing the predecessor *Planning Act*. The extent of the Board's jurisdiction in

planning appeals generally, and in appeals respecting development agreements specifically, was described in *Heritage Trust*:

[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 bylaws 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 of enacting s.78(6) of the *Planning Act*. *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 to be made.* ... [Emphasis added]

[83] The Court of Appeal continued:

[164] ... 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...

[84] The approach to be followed by the Board was also described by the Court of Appeal in *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115. In that decision, the Court reviewed several of its decisions on planning appeals (e.g., *Tsimiklis v. Halifax (Regional Municipality)*, 2003 NSCA 30; *Kynock, supra*, *Mahone Bay Heritage & Cultural Society v. 3012543 Nova Scotia Limited*, 2000 NSCA 93). The Court confirmed that the Board cannot impose its own interpretation of the MPS; that council's decision is entitled to deference as long as it reasonably reflects the

intention of the MPS; that there may be more than one reasonable interpretation of the MPS; and that the MPS must be looked at as a whole.

[85] The Court concluded:

[50] Thus, in the end, resort inevitably must be had to specific directions contained in the statute. By doing so, the fundamental question therefore becomes: Can it be said that Council's decision does "not reasonably carry out the intent of the MPS"?

[51] To answer this question, the Board must embark upon a thorough fact-finding mission to determine the exact nature of the proposal in the context of the applicable MPS and corresponding by-laws. As in this case, this may include the reception of evidence as to the intent of the MPS.

[52] However the Board should not then take its body of decided facts and use this work product to conclude how it feels the MPS should be interpreted. In this regard, I agree with the developer. Instead, after completing its factual analysis, the Board should go immediately to Council's conclusion. The Board should then ask itself, based on the facts as determined, have the opponents established that Council's decision did not reasonably carry out the intent of the MPS?

[53] This would be consistent with the approach taken by this court over the years and as first enunciated by Hallett, J.A. in *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50. [Emphasis added]

[86] In *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, Fichaud, J.A., summarized the applicable principles for the Board's review in appeals from council decisions in planning matters:

[24] The Board then [¶51-62] recounted the provisions of the MG A and passages from decisions of this court that state the principles to govern the Board's treatment of an appealed planning decision. I will summarize my view of the applicable principles:

(1) The Board usually is the first tribunal to hear sworn testimony with cross-examination respecting the proposal. The Board should undertake a thorough factual analysis to determine the nature of the proposal in the context of the MPS and any applicable land use by-law.

(2) The appellant to the Board bears the onus to prove the facts that establish, on a balance of probabilities, that the Council's decision does not reasonably carry out the intent of the MPS.

(3) The premise, stated in s. 190(b) of the MGA, for the formulation and application of planning policies is that the municipality be the primary steward of planning, through municipal planning strategies and land use by-laws.

(4) The Board's role is to decide an appeal from the Council's decision. So the Board should not just launch its own detached planning analysis that disregards the Council's view. Rather, the Board should address the

Council's conclusion and reasons and ask whether the Council's decision does or does not reasonably carry out the intent of the MPS. Later (¶ 30) I will elaborate on the treatment of the Council's reasons.

(5) There may be more than one conclusion that reasonably carries out the intent of the MPS. If so, the consistency of the proposed development with the MPS does not automatically establish the converse proposition, that the Council's refusal is inconsistent with the MPS.

(6) The Board should not interpret the MPS formalistically, but pragmatically and purposively, to make the MPS work as a whole. From this vantage, the Board should gather the MPS' intent on the relevant issue, then determine whether the Council's decision reasonably carries out that intent.

(7) When planning perspectives in the MPS intersect, the elected and democratically accountable Council may be expected to make a value judgment. Accordingly, barring an error of fact or principle, the Board should defer to the Council's compromises of conflicting intentions in the MPS and to the Council's choices on question begging terms such as "appropriate" development or "undue" impact. By this, I do not suggest that the Board should apply a different standard of review for such matters. The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. But the intent of the MPS may be that the Council, and nobody else, choose between conflicting policies that appear in the MPS. This deference to Council's difficult choices between conflicting policies is not a license for Council to make ad hoc decisions unguided by principle. As Justice Cromwell said, the "purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council's authority should be exercised" (Lewis v. North West Community Council of HRM, 2001 NSCA 98 (CanLII), ¶ 19). So, if the MPS' intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council's decision reasonably bears that intent.

(8) The intent of the MPS is ascertained primarily from the wording of the written strategy. The search for intent also may be assisted by the enabling legislation that defines the municipality's mandate in the formulation of planning strategy. For instance, ss. 219(1) and (3) of the MGA direct the municipality to adopt a land use by-law "to carry out the intent of the municipal planning strategy" at "the same time" as the municipality adopts the MPS. The reflexivity between the MPS and a concurrently adopted land use by-law means the contemporaneous land use by-law may assist the Board to deduce the intent of the MPS. A land use by-law enacted after the MPS may offer little to the interpretation of the MPS.

[25] These principles are extracted from the decisions of this court in: *Heritage Trust*, ¶ 77-79, 94-103, 164; *Lewis v. North West* ¶19-21; *Midtown Tavern*, ¶ 46-58, 81,85; *Can- Euro Investments*, ¶ 26-28, 88-95; *Kynock v. Bennett* (1994), 1994 CanLII 4008 (NS CA), 131 N.S.R. (2d) 334, ¶ 37-61; *Tsimiklis v. Halifax (Regional Municipality)*, 2003 NSCA 30 (CanLII) ¶ 24-27, 54-59, 63-64; 3012543 *Nova Scotia Limited v. Mahone Bay Heritage and Cultural Society*, 2000 NSCA 93 (CanLII), ¶ 9-10, 61-64, 66, 84, 86, 89, 91-97; *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality)*, 2004 NSCA 59 (CanLII), ¶ 26. [Emphasis added]

[87] The role of the Board in discerning the intent of an MPS was further canvassed in the decision of the Nova Scotia Court of Appeal in *Mahone Bay, supra*. The Court in *Mahone Bay*, while affirming the principles in *Kynock* and *Heritage Trust*, cautioned that the principles referred to in *Heritage Trust* “were made in the context of the issues raised by the facts of that appeal,” and need not be applied “when the intent of the strategy is clear,” as the Court found it to be in *Mahone Bay*.

[88] The Board's task in an appeal of the approval of a development agreement is to determine whether the Council's decision reasonably carries out the intent of the MPS. The Board's task is not to substitute its own decision for that of Council. In the words of the Court of Appeal in *Archibald*, the Board is not to “launch its own detailed planning analysis that disregards Council's view.”

[89] To determine the intent of the MPS, the Board must look to the specific policies which apply to the application. Previous decisions of the Court of Appeal and the Board make it clear that the Board must look at the policy provisions and interpret their meaning in a liberal, purposive manner. However, the Board is not to limit itself to specific policies. The Board must look at the MPS as a whole to determine its intent.

#### **4.2 Statutory Interpretation**

[90] The principles of statutory interpretation apply when interpreting an MPS. In a recent judgment, the Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation in *Sparks v. Holland*, 2019 NSCA 3. Farrar, J.A., stated:

[27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that “[t]he words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd.(Re)*, [1998] 1 S.C.R. 27 at H21).

[28] This Court typically asks three questions when applying the modern principle.

These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.

[29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slaenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the *Sullivan* questions are:

1. What is the meaning of the legislative text?
2. What did the Legislature intend?
3. What are the consequences of adopting a proposed interpretation?

[*Sparks*, 2019 NSCA 3, paras. 27-29]

[91] The Board has adopted the approach of statutory interpretation as outlined in *Rizzo & Rizzo Shoes*, referred to in *Sparks*, in the interpretation of the provisions of an MPS and an LUB, (See, for example, *Re Monkman*, 2019 NSUARB 167; *Re Legros*, 2019 NSUARB 148).

[92] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

9(1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

## 5.0 ISSUE

[93] Halifax and West and Community Council approved a development agreement to permit an eight-storey residential apartment building at 2267 Brunswick Street, the former St. Patrick's Rectory, in Halifax. The issue in this appeal is whether Council's decision reasonably carries out the intent of HRM's Municipal Planning

Strategy, as the property is in the Brunswick Street Heritage Area, which is subject to specific heritage policies.

## **6.0 ANALYSIS**

### **6.1 The Heritage Related Policies at Issue in the Appeal**

[94] The Board must consider the MPS in its entirety, but like many planning appeals, the evidence and submissions to the Board focused on a limited number of policies the parties viewed as central to the appeal. In this case, these were Policy CH-16 and Policy 9.3.2.1. Paragraphs (a) and (c) were at the core of the evidence and submissions relating to Policy 9.3.2.1, and are specifically identified in the Notice of Appeal in this proceeding.

[95] Additionally, concerns about the height of the proposed development dominated the evidence presented to the Board. While there was evidence and argument relating to other architectural details, this too tended to focus on whether those details were sufficient or effective to mitigate the perceived height of the proposed building. As a result, this decision focuses on the concern about the height of the building. However, the Board's analysis of this issue would apply to any concerns that were expressed about other architectural details in this appeal.

### **6.2 Policy CH-16**

[96] Policy CH-16 directs Council to consider a range of design solutions and architectural expressions that are compatible with abutting registered heritage properties. To meet this requirement, the policy directs Council to consider specific listed factors. Policy CH-16 states:

For lands abutting federally, provincially or municipally registered heritage properties, HRM shall, when reviewing applications for development agreements, rezonings and amendments pursuant to secondary planning strategies, or when reviewing the provision of utilities for said lands, consider a range of design solutions and architectural expressions that are compatible with the abutting federally, provincially or municipally registered heritage properties by considering the following:

- (a) the careful use of materials, colour, proportion, and the rhythm established by surface and structural elements should reinforce those same aspects of the existing buildings;
- (b) ensuring that new development is visually compatible with yet distinguishable from the abutting registered heritage property. To accomplish this, an appropriate balance must be struck between mere imitation of the abutting building and pointed contrast, thus complementing the abutting registered heritage property in a manner that respects its heritage value;
- (c) ensuring that new developments respect the building scale, massing, proportions, profile and building character of abutting federally, provincially or municipally registered heritage structures by ensuring that they:
  - (i) incorporate fine-scaled architectural detailing and human-scaled building elements.
  - (ii) reinforce, the structural rhythm (i.e., expression of floor lines, structural bays, etc.) of abutting federally, provincially or municipally registered heritage properties; and
  - (iii) any additional building height proposed above the pedestrian realm mitigate its impact upon the pedestrian realm and abutting registered heritage properties by incorporating design solutions, such as stepbacks from the street wall and abutting registered heritage properties, modulation of building massing, and other methods of massing articulation using horizontal or vertical recesses or projections, datum lines, and changes in material, texture or colour to help reduce its apparent scale;
- (d) the siting of new developments such that their footprints respect the existing development pattern by:
  - (i) physically orienting new structures to the street in a similar fashion to existing federally, provincially or municipally registered heritage structures to preserve a consistent street wall; and
  - (ii) respecting the existing front and side yard setbacks of the street or heritage conservation district including permitting exceptions to the front yard requirements of the applicable land use by-laws where existing front yard requirements would detract from the heritage values of the streetscape;
- (e) not unreasonably creating shadowing effects on public spaces and heritage resources;
- (f) complementing historic fabric and open space qualities of the existing streetscape;
- (g) minimizing the loss of landscaped open space;
- (h) ensuring that parking facilities (surface lots, residential garages, stand alone parking and parking components as part of larger developments) are compatible with abutting federally, provincially or municipally registered heritage structures;
- (i) placing utility equipment and devices such as metering equipment, transformer boxes, power lines, and conduit equipment boxes in locations which do not detract from the visual building character or architectural integrity of the heritage resource;
- (j) having the proposal meet the heritage considerations of the appropriate Secondary Planning Strategy, as well as any applicable urban design guidelines; and
- (k) any applicable matter as set out in Policy G-14 of this Plan.

For the purposes of Policy CH-16, the following definitions apply:

1. "Abutting" means adjoining and includes properties having a common boundary or a building or buildings that share at least one wall. Properties are not abutting where they share only one boundary point as opposed to a boundary line.
2. "Building scale" means a building's size relative to another building's size, or the size of one building's elements relative to another building's elements.
3. "Massing" means the way in which a building's gross cubic volume is distributed upon the site, which parts are higher, lower, wider, or narrower.
4. "Proportion" means the relationship of two or more dimensions, such as the ratio of width to height of a window or the ratio of width to height of a building or the ratio of the height of one building to another.
5. "Profile" means a building's cross-sectional shape or the shape of its outline.
6. "Building character" means the combined effect of all of the architectural elements of a building or a group of buildings.
7. "Human-scaled building elements" means a range of building details from small (masonry units, doorknobs, window muntins, etc.) to medium (doors, windows, awnings, balconies, railings, signs, etc.) to large (expression of floor lines, expression of structural bays, cornice lines, etc.).
8. "Street wall" means the vertical plane parallel to the street in which the front building facades of the majority of the buildings along a street are located.
9. "Pedestrian realm" means the volume of space enclosed by the horizontal plane of the street and sidewalks, and the vertical planes of the facing streetwalls. The height of this volume is determined by the height of the base of the adjacent buildings as defined by a major cornice line or by the point at which a building's massing is first stepped-back from the streetwall. Where cornice lines or setbacks do not exist, the height will be generally two to five stories, as appropriate.  
[Emphasis added]

[Exhibit H-4, Tab 3, p.101-103]

[97] The Church is a registered heritage property that abuts the proposed development, so its compatibility with the proposed development must be considered under Policy CH-16. Heritage Trust argued that Huestis House should also be considered under the policy, but this was disputed by HRM and Brunswick Street Developments Ltd.

### **6.2.1 The Application of CH-16 to Huestis House**

[98] Huestis House is a registered heritage property, but it is separated from the proposed development by a 15-foot strip of land owned by HRM. HRM and Brunswick Street Developments Ltd. submitted this geographic separation means Huestis House is not an abutting heritage property under the policy. As set out above, the definition of "abutting" in Policy CH-16 requires that the properties share a common boundary.

[99] Heritage Trust characterized the HRM owned land as an invisible right-of-way and said that Huestis House appears to be next door to the Rectory. This assertion was supported by Mr. Heseltine who conceded that Huestis House does not meet the definition of “abutting” in Policy CH-16, but said that, visually and practically, it is an abutting property in every way except for the shared property line:

We would observe, however, that while PID 04286940 separates the lands on which the Rectory and the Huestis House respectively stand, the HRM property is presently clearly incorporated in the use of Huestis House. Specifically, the HRM property is used to access back areas of the Huestis House property where cars are parked. The HRM land has been largely covered with gravel that currently comes to the very edge of the Rectory building and extends onto the Huestis House lands. Visually and practically, HRM’s land is currently being used for access and parking that appears to be used by occupants of Huestis House. In other words, the fifteen-foot wide HRM property currently presents as part of the Huestis House property and Huestis House meets all of the practical standards of abutting land use with the exception of a shared property line (**see figure 1**). [Emphasis in original]

[Exhibit H-20, p. 1]

[100] To underscore this point, Heritage Trust noted HRM planning staff said that Huestis House abutted the proposed development in the September 14, 2018, report prepared by Mr. Joudrey for HWCC. The report stated:

The proposed building will be located behind the existing St. Patrick’s Rectory, the Rectory is not a Registered Heritage property but the abutting properties on both sides of the Rectory, St. Patrick’s Church and Huestis House, are registered heritage properties. The proposal is subject to HRM Regional Municipal Planning Strategy (RMPS) Policy CH-16 for new buildings which abut registered heritage properties.

[Exhibit H-3, p. 68]

[101] Heritage Trust urged the Board to conclude that a reasonable interpretation of Policy CH-16(c) requires Council to consider ensuring that the proposed development respects the building scale, massing, proportions, profile and building character of Huestis House:

It is respectfully submitted that a question facing the Board is: Should RMPS Policy CH-16 (c) apply to the invisible right-of-way abutting the Huestis House property, or can the

RMPS Policy be reasonably interpreted to include Huestis House as an abutting property, when Huestis House appears to be part of the right-of-way, next-door to the Rectory?

[Heritage House Closing Submissions, p. 8, para. 39]

### **6.2.1.1 Findings**

[102] As noted above, the Board has no jurisdiction to allow the appeal if Council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. Hence, the question facing the Board is not whether Policy CH-16 can be reasonably interpreted to include Huestis House, but whether an interpretation of Policy CH-16 that excludes Huestis House from consideration is one that the policy can reasonably bear.

[103] Given that the definition of “abutting” in the policy explicitly excludes properties that only share a boundary point and not a boundary line, the Board seriously doubts that Policy CH-16 can be reasonably interpreted to include Huestis House as an abutting property when it does not even share a boundary point. Regardless, the Board finds that an interpretation of the policy that requires the Church to be considered, but not Huestis House, is an interpretation the policy can reasonably bear. As such, not considering Huestis House under Policy CH-16 does not make Council’s decision to approve the development agreement inconsistent with the intent of the MPS.

### **6.2.2 Council’s Consideration of Policy CH-16**

[104] Before considering the application of Policy CH-16, the Board will address an argument advanced by Heritage Trust in its closing submissions that Council’s decision does not reasonably carry out the intent of the MPS because Council failed to consider Policy CH-16. Heritage Trust noted that Mr. Heseltine was critical of the lack of

consideration given to Policy CH-16 by HRM staff during their review of the proposed development.

[105] In his first report in this proceeding, Mr. Heseltine said that the HRM staff report dated September 14, 2018, ignored Policy CH-16. However, Mr. Heseltine agreed on cross-examination that it was referenced in the body of the report, but only mentioned twice.

[106] Based on Mr. Heseltine's comments, Heritage Trust said Mr. Joudrey hardly raised CH-16 in his submissions to Council, which would have left Council ill-equipped to make an informed decision. In Heritage Trust's closing submissions, it said:

Mr. Heseltine was critical of the September 14, 2018 HRM Staff Report because it "ignores" RMPS Policy CH-16 [H-15, page 3 of 11]. From the HRM Appeal Record, there is nothing to indicate Council considered this policy. It is respectfully submitted Council could not reasonably carry out the intent of the RMPS if the critical policy protecting heritage resources was ignored by Staff and, based on the record, apparently ignored by Council.

[Heritage Trust Closing Submissions, para. 41]

### **6.2.2.1 Findings**

[107] The Board does not accept the suggestion that Policy CH-16 was ignored by HRM in its consideration of the application for the development agreement, or that if it was, it means that the decision of Council did not reasonably carry out the intent of the MPS. The consideration of Policy CH-16 featured prominently in the report prepared by Mr. Murnaghan, and while there were not many references to the policy in the staff reports that were prepared for HWCC, those references noted that the proposed development was subject to that policy.

[108] The extent to which Council may or may not have specifically considered Policy CH-16 is difficult to assess. Council did not supply formal reasons for approving the development agreement and none were required. The *HRMC* requires Council to

provide reasons to an applicant when it refuses to approve a development agreement, but when it approves one all that is required is a notice in a newspaper circulating in the municipality stating that the development agreement has been approved and that there is a right of appeal (ss.245(4) and (6)). In a recent decision, *Re Gaudet*, 2019 NSUARB 113, the Board confirmed that the absence of reasons is not a basis for it to allow a planning appeal under the *Municipal Government Act*, which contains planning appeal provisions that are substantially the same.

[109] In *Gaudet*, as in the present case, no formal reasons were provided. In addition, no planning report or staff opinion was presented to the municipal council. The only report that was provided was from the municipality's Chief Administrative Officer, who was not a planner and had no expertise in that field. The report did not refer to policies in the municipal planning strategy or discuss its application to the proposed development in that case. The appellant argued that before the Board could assess whether the decision of a council did not reasonably carry out the intent of a municipal planning strategy, it must first determine whether the council actually interpreted and applied the municipal planning strategy when making the decision. The Board rejected the appellant's argument:

It is an important tenet of administrative law that a decision making body has a duty to provide reasons for its decisions. The absence of such reasons, or the inadequacy of reasons, is generally a factor to be considered in the review of administrative decisions. This is certainly the state of the law with respect to the review of a decision by a statutory delegate: *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

However, given the well-established jurisprudence respecting the Board's limited jurisdiction on municipal planning appeals, as outlined earlier in this Decision, the Board does not accept the argument that it should apply a two-step test, as suggested by the Appellants. The Board has reached this conclusion for several reasons.

First, the Board notes that the test it must apply is specifically set out in the statute, i.e., the *MGA*. In the case of an appeal from a decision of council, the test is described in s. 251(2).

Second, as noted by counsel for the Municipality, s. 230(6) of the *MGA* specifically directs a municipal council to provide reasons when a development agreement is refused, but is silent on the need for reasons when the development is approved. Thus, where a development agreement is approved by council, as in the present case, the *MGA* does not require, at least impliedly, that reasons be provided. For the Appellants to suggest that they should succeed on this appeal because Municipal Council has not provided any basis for its decision through its deliberations, or in its failure to provide reasons, on how it interpreted and applied the MPS, would not be consistent with the provisions of the *MGA* that do not require the issuance of any reasons whatsoever for its approval of the development agreement.

Third, as noted in the *MGA*, a municipal council is the body which is provided the authority to make policy choices under an MPS. Section 190 of the *MGA* provides that the purpose of the planning provisions of the *Act* is to “enable municipalities to assume the primary authority for planning within their respective jurisdictions”. In that vein, a municipal council makes pure policy choices about development in its municipal unit, provided its decisions reasonably comply with the intent of the MPS. The comments of individual councillors do not form the reasons for a decision by Council. Council speaks through the collective voice of all its councillors as a group, not of the individual councillors. Thus, the actual reasons for a particular decision approving a development agreement may be difficult to discern, as different councillors may have voted for a particular result because of different reasons: see also *Weatherhead v. Halifax Regional Municipality*, 2019 NSUARB 17, paras. 148-151.

Fourth, the Board refers to the guidance of MacDonald, C.J., in *Midtown*, in which he refers to the process to be followed by the Board, after looking at the MPS as a whole, to answer the fundamental question laid out in the *MGA*: “Can it be said that Council's decision does ‘not reasonably carry out the intent of the MPS’”? He states:

[51] To answer this question, the Board must embark upon a thorough fact-finding mission to determine the exact nature of the proposal in the context of the applicable MPS and corresponding by-laws. As in this case, this may include the reception of evidence as to the intent of the MPS.

[52] However the Board should not then take its body of decided facts and use this work product to conclude how it feels the MPS should be interpreted. In this regard, I agree with the developer. Instead, after completing its factual analysis, the Board should go immediately to Council's conclusion. The Board should then ask itself, based on the facts as determined, have the opponents established that Council's decision did not reasonably carry out the intent of the MPS? [Emphasis added]

[*Midtown* Decision, paras. 51-52]

On this point, the Board notes that HRM Council initially approved the development agreement in *Midtown*, which decision was on appeal to the Board. There were no reasons given by HRM Council in that instance. Applying the direction of MacDonald, C.J., the Board's task, after reviewing the MPS as a whole and undertaking its fact-finding exercise, was to resort directly to Council's conclusion, without reasons, and to determine if it reasonably complied with the intent of the MPS. Thus, in *Midtown*, the Court of Appeal did not consider the lack or inadequacy of reasons, in and of themselves, to be an impediment to the Board applying the scope of its review as outlined in the *MGA*.

Finally, even where no reasons are given by a Court or other decision maker, recent case law provides that the reviewing Court or tribunal is required to refer to the record in applying the appropriate standard of review to an impugned decision. The lack of reasons or the

failure of a decision maker to outline its reasoning process does not prevent the reviewing body from having to consider the entire record in determining the reasonableness of an outcome (i.e., in the case of the reasonableness standard of review). In *Halifax (Regional Municipality) v. Rehberg*, 2019 NSCA 65, the Court stated:

[49] The Committee gave no reasons for its decision to refuse the requested four-month extension. There is no reasoning path to examine. I interject that the respondent has never suggested he was denied procedural fairness in any aspect of the proceedings, including the absence of reasons by the Committee.

[50] Where there are no reasons, the reviewing court must consider what reasons could be offered in support of the administrative decision. This entitles the reviewing court to examine the record, including submissions before the tribunal and on judicial review for the purpose of assessing the reasonableness of the outcome.

[51] This was most recently affirmed in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, where the majority wrote:

[29] Reasonableness review requires “a respectful attention to the reasons offered or which could be offered in support of a decision” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 48 (emphasis added); see also *Newfoundland and Labrador Nurses’ Union v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 11). Reviewing courts “may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome” (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at para. 52, quoting *Newfoundland Nurses*, at para. 15). ... [*Emphasis in original*] [Emphasis (underline) added]

Taking all of the above into account, the Board concludes that, in its review of Council’s decision, it should not apply the two-step process submitted by the Appellants. In the view of the Board, its proper scope of review in this appeal is as set out in s. 251(2) of the *MGA*, which states that the “Board shall not allow an appeal unless it determines that the decision of council...does not reasonably carry out the intent of the municipal planning strategy”. There is nothing in the case law, or in the Board’s prior decisions, including *MacInnis*, which sets out a different test to be applied in this appeal.

[*Gaudet*, paras. 108-116]

[110] The absence of any analysis of an issue in a planning report is a factor for the Board to consider, but this is not determinative of an appeal. It is, at the end of the day, the decision that Council made that must be reasonably consistent with the MPS.

[111] Even if, for the sake of argument, the Board were to equate the analysis in the staff reports in this case with the reasons of Council, the Board is not limited to those

reasons. The Court of Appeal in *Archibald* confirmed this in the context of a refusal to approve a development agreement where reasons were required under the *Municipal Government Act*.

Section 230(6) of the MGA requires the municipality to give the applicant written reasons for the refusal to approve a development agreement:

Within seven days after a decision refusing to approve a development agreement or an amendment to a development agreement, the clerk shall notify the applicant in writing, giving reasons for the refusal and setting out the right of appeal.

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

[*Archibald*, paras. 29 and 30, emphasis added]

[112] Furthermore, the role of the Board in a planning appeal is to consider whether the decision of a municipal council reasonably carries out the intent of the municipal planning strategy. The Board is not sitting as a reviewing body to assess the decision-making processes that Council used to arrive at its decision (*Maskine v. Halifax County*, (1992) 118 N.S.R. (2d) 356 at para. 12).

### **6.2.3 The Height of the Proposed Development**

[113] Heritage Trust argued that approval of the development agreement does not carry out the intent of Policy CH-16 because the height of the proposed development is not compatible with the Church. It said the height of the proposed development would surpass the roofline of the Church and detract from its iconic steeple.

### **6.2.3.1 HRM Planning Staff Reports**

[114] In HRM planning staff's initial report to HWCC dated September 14, 2018, staff felt that the design of the proposed development ensured that the Church's iconic steeple remained visible in the skyline. The report noted that the building's height terminated below the Church steeple and the base of the building was stepped back from Brunswick Street, with a further stepback at the penthouse level. HRM planning staff considered that as the proposed development was not altering the existing Rectory, and was being built away from Brunswick Street, the impact of the addition was reduced.

[115] Staff also considered other design details in the report. As discussed above, some design details, including the building's height, were later changed to make the proposed development more compatible with the Rectory and the Church.

[116] As the design of the building evolved, staff noted in their March 13, 2019, report that the height of the proposed building was reduced. Staff advised that although the proposed development was still higher than the Church's roofline, it was not so high as to cause a significant change to the skyline. In the report, staff also discussed the use of brick similar in colour to the Rectory, the use of masonry and light-coloured cladding, and the change to the balconies on the side of the building facing the Church.

[117] In their final updated report to HWCC, dated May 9, 2019, HRM planning staff discussed the addition of the punched windows and the redesign of the Brunswick Street face of the addition. Staff also emphasized the stepback of the rooftop penthouse, from eight feet to 21 feet, ten inches from the edge of the Brunswick Street façade of the addition, and removal of the overhanging roof.

### **6.2.3.2 Mr. Joudrey's Qualifications**

[118] In its closing submissions, Heritage Trust criticized the proponent and HRM for not confirming the view planes in which the Church's profile would be compromised by the proposed development, through either a technical study or computer rendering. Heritage Trust said that a vantage point from which the steeple would disappear or be partially obscured, or where the "grace of the roofline" of the Church would be compromised were "all questions that beg for answers."

[119] Heritage Trust also questioned whether Mr. Joudrey, who was the lead for the HRM staff review of the proposed development, was qualified to provide opinions and advice about the extent to which the impact of the proposed development may have been mitigated by certain design features or details. Heritage Trust accepted Mr. Joudrey's qualifications as a planner but considered that aspects of the reports and opinions he provided veered into the fields of architecture and urban design. It said that these were not proper planning opinions and that Mr. Joudrey should not have been put in the position of having to give architectural evidence as if his opinions were his own.

[120] In its closing submissions, Heritage Trust said that Mr. Joudrey is in "the beginning stages of familiarity with heritage planning, heritage resources, heritage conservation area planning, urban design and heritage architecture," and as a result, his opinions and conclusions should be given limited weight, particularly in light of the Board having access to the report of Aaron Murnaghan, HRM's Heritage Planner. Heritage Trust further submitted that Mr. Joudrey is inexperienced in interpreting heritage resource policies and is unfamiliar with some of the key terms and policies in the MPS. It said he confused the meanings of "complement" and "compatible", and made up a policy having

the effect of reducing the intent of the MPS to ensure new additions are complementary to the Brunswick Street streetscape, all of which, it argued, should be given no weight by the Board.

[121] In cross-examination by counsel for Heritage Trust, Mr. Joudrey acknowledged that he had no formal training in architecture or urban design. He agreed with the suggestion that many of the comments made in his reports related to those fields. In some instances, he said that he was required to consider such issues in applying and assessing HRM policies as a planner.

[122] Both HRM and Brunswick Street Developments Ltd. submitted that Mr. Joudrey's professional experience and role as a planner provided the necessary basis for the opinions. However, in its submissions, HRM recognized "that some of the language around architectural design contained in the staff reports is more technical than we would normally see from a planner." Counsel for HRM went on to suggest that this reflected Mr. Joudrey's familiarity with the topic from his past experience.

#### **6.2.3.3 Recommendations to Reduce the Height of the Development**

[123] Heritage Trust noted that the information before the Board showed that, aside from HRM planning staff, reviewers of the proposed development expressed the view that it should be lower. Mr. Heseltine said that the "repeated insistence" of reviewing bodies that the height of the proposed development be no taller than six storeys was "based on a desire that it not diminish the prominence of the Church tower and steeple." Heritage Trust placed particular emphasis on a report prepared by HRM's heritage planner, Aaron Murnaghan.

[124] In his report, Mr. Murnaghan noted that the Rectory was not a registered heritage property, but he felt it was an important contributing heritage resource on Brunswick Street and he recognized the quality of the restoration work that had been previously undertaken on the Rectory by the developer who applied for the development agreement for the addition. Mr. Murnaghan indicated that the owner's decision to retain the character of the Rectory had factored into his review of the proposal.

[125] Mr. Murnaghan considered Policy CH-16 and Policy 9.3.2.1. As the proposed development would be separated from Brunswick Street by the existing Rectory, he felt this would help to mitigate some of the effects that the proposed multi-unit structure would have on Brunswick Street. Despite this, he felt that the proportion, colour and materials proposed for the addition were not reflective of the existing structures or the adjacent heritage building. He also expressed concern over the sheer wall on the north elevation (facing Huestis House) which, due to required fire and building code requirements, showed no articulation or glazing.

[126] Mr. Murnaghan said that the effect of the scale of the proposed structure on the abutting registered heritage property was a particular concern and he felt the sheer height and scale as proposed would detract from the Church. He advised that the height should be reduced to a maximum of six storeys to conserve visual prominence of the Church steeple and so as not to overwhelm neighbouring structures.

[127] Mr. Murnaghan recommended the proposed building mass be visually mitigated using high-quality materials complementary to neighbouring historic buildings, especially on the storeys above the existing Rectory. He said the design should be

revised to reference architectural elements in the existing Rectory and the neighbouring Church, while keeping an appropriate level of contrast with the historic buildings.

[128] Ultimately, Mr. Murnaghan closed his report with the following:

In conclusion, a much lower building would be preferable from a heritage conservation perspective in order to complement the existing registered, and non-registered heritage buildings on the street. Heritage staff would be amenable to a proposed height six stories on this property so long as the existing Rectory structure is maintained in its entirety, and the effect of the building's mass is visually mitigated through some of the following means, specifically on the west [Brunswick Street] and north [Huestis House] elevations:

- Additional articulation;
- Improved fenestration and additional glazing;
- Increased use of high-quality materials which are complementary to existing structures (brick and masonry);
- The inclusion of architectural cues and the tower structure reflective of the existing Rectory or other neighbouring properties.

Heritage staff would also like to see these requested design revisions demonstrated in a series of colour renderings showing perspective views from Brunswick Street.

[Exhibit H-10, p.18]

[129] Heritage Trust also referred to the Planning Advisory Committee recommendations. As noted above, that committee expressed the view that the proposed development overwhelmed and subordinated the Church. The committee advised that the design would be more acceptable at a height of three to six storeys, "generally in keeping with the height of the church roof."

[130] The 2017 reports from Mr. Murnaghan and the Planning Advisory Committee were both based on a review of the originally proposed 13-storey structure. The Heritage Advisory Committee, however, made similar comments about the proposed development after reviewing later designs.

[131] In March 2019, after the height of the building had been reduced to eight storeys, the Heritage Advisory Committee reported that its height was still well above the

roofline of the Church causing it to appear hidden and overwhelmed. The committee recommended that the height of the development not exceed the Church's roofline. After further design revisions, the proposal was again reviewed by the Heritage Advisory Committee, and in a report dated June 6, 2019, the Committee recommended that Council direct staff to work with the developer to reduce the height of the proposed development to seven storeys.

#### **6.2.3.4 Heritage Trust Expert Evidence on the Height of the Development**

[132] Heritage Trust filed reports from two well-known architects, Brian MacKay-Lyons and Gary Hanley. In their reports, both architects specifically referenced Policy 9.3.2.1, but neither mentioned CH-16. However, as the central concern in both opinions is the scale of the proposed development, their comments about the height of the proposed development are relevant to the Board's analysis of Council's decision as it related to Policy CH-16.

[133] In his report, Mr. MacKay-Lyons reproduces Policy 9.3.2.1 and references UNESCO World Heritage principles, citing several Articles from the Venice Charter of 1964. In addition to these references the report provides photographs of other developments as precedents that follow these principles and drawings to "diagrammatically show" the heritage implications of the proposed development. These are followed by a conclusion that the proposal is not in keeping with Policy 9 and "on the basis of scale alone, this development will completely overshadow the St. Patrick's Rectory and the heritage properties adjacent to the site and along Brunswick St."

[134] HRM and Brunswick Street Developments Ltd. urged the Board to disregard these conclusions. They both argued that Mr. MacKay-Lyons' report lacked supporting detail for his conclusions.

[135] In its closing submissions, Brunswick Street Developments Ltd. said, "Mr. MacKay-Lyons' report does not elaborate on his opinion or offer specific opinions on architectural design elements present in the Development."

[136] For its part, HRM said the following in its closing submissions:

HRM submits that the UNESCO World Heritage principles and the Venice Charter of 1964 are not applicable to the Brunswick Street Heritage Area, and as such, have little relevance on this Appeal. HRM also notes that contrary to the Municipal Government Act Rules, and in particular Rule 15, the report does not set out the essential facts on which the opinions are based. Furthermore, Mr. MacKay-Lyons does not discuss any of the architectural details of the development as they relate to the application of Policies 9.3.2.1 and CH-16. While HRM appreciates that Mr. MacKay-Lyons is a highly respected architect his report does little to assist the Board in this matter.

[HRM Closing Submissions, p.5]

[137] In addition to being a respected architect, Mr. Hanley also owns Akins Cottage Limited at 2152 Brunswick Street and was the architect involved with both the Akins Cottage and Akins Court Townhouse developments. Mr. Hanley observed that Brunswick Street has a rich architectural heritage creating a unique streetscape exhibiting a composite of numerous architectural periods. He also noted that, since the mid 1960's numerous surveys and reports were commissioned that resulted in the policies in Section 9 of the MPS. He says that Policy 9.7.2, which references a maximum building height of 40 feet affirms the height restriction.

[138] Mr. Hanley said that the development would be hidden from view by the Church as one drives north on Brunswick Street, but when driving south, the full height would be exposed. As for pedestrian traffic, Mr. Hanley said that standing on the sidewalk in front of the Rectory on the east side of Brunswick Street, the development would be

hidden from one's line of sight. However, one would see the top two floors of the development standing on the sidewalk across the street.

[139] In his conclusion, Mr. Hanley said the proposed development does not complement or maintain the existing heritage streetscape of Brunswick Street in scale, massing or height. He was also critical of the HRM planning staff for using the Church in their assessment of the height of the proposed development rather than Huestis House.

[140] Heritage Trust sought to have Mr. Hanley qualified as an expert in matters of architecture related to heritage resources, including: the significance of the heritage resources adjacent to the proposed development and in the Brunswick Street Heritage Area; the design of new or in-fill developments appropriate to the protection and enhancement of adjacent built heritage resources; interpretation of the intent of planning documents as they relate to the protection of Brunswick Street Heritage Area heritage resources; and the extent to which the development agreement for 2267 Brunswick Street is consistent with the intent of the Halifax MPS. HRM objected to the scope of the request to the extent that it included opinions related to the interpretation of planning documents and consistency with the MPS.

[141] In a preliminary telephone conference to address this, the Board accepted these limitations on qualifications, and understood the parties would discuss and agree upon the parts of Mr. Hanley's report to be removed as a result. As the parties were unable to agree, the Board heard submissions from the parties at the hearing and provided directions on the parts of the report to be removed. A revised report was filed as Exhibit H-21.

[142] As with the report from Mr. MacKay-Lyons, HRM and Brunswick Street Developments Ltd. suggested that the conclusions rendered in Mr. Hanley's report lacked a supporting analysis and are therefore of limited use to the Board. Brunswick Street Developments Ltd. also highlighted that the report addresses only height, scale and massing, but not other architectural or esthetic elements of the proposed development.

[143] Heritage Trust's planning expert, John Heseltine, also commented on the height of the proposed development. In his expert report, Mr. Heseltine noted that the eight-storey addition remained two storeys taller than the maximum height considered acceptable by HRM's heritage planner, who he felt was the municipal staff member best qualified to judge the compatibility of the proposed development with the Brunswick Street Heritage Area. Mr. Heseltine said this recommendation was well-founded in its relationship to the roofline of the Church and was grounds for the rejection of the application.

[144] The closing submissions filed by HRM noted that, on cross-examination, Mr. Heseltine agreed that Policy CH-16 did not specify that new development needed to be lower than the abutting heritage property and that, to the contrary, the policy specifically contemplates that the new development might be higher. This is addressed in Policy CH-16(c)(iii) which, in the event that the new development is higher than the existing abutting heritage property, directs that:

any additional building height proposed above the pedestrian realm mitigate its impact upon the pedestrian realm and abutting registered heritage properties by incorporating design solutions, such as stepbacks from the street wall and abutting registered heritage properties, modulation of building massing, and other methods of massing articulation using horizontal and vertical recesses or projections, datum lines, and changes in material, texture or colour to help reduce its apparent scale.

[Exhibit H-4, Tab 3, p. 101]

### **6.2.3.5 Findings**

[145] The Board can only allow this appeal if it finds that Council's decision does not reasonably carry out the intent of the MPS. In the case of Policy CH-16, the language suggests that the application of the policy requires a significant degree of subjectivity and discretion. The policy is quite explicit in directing Council to consider a "range of design solutions and architectural expressions that are compatible." This is not a strictly prescribed standard.

[146] The height of the proposed development was the most significantly criticized feature in the evidence presented to the Board on this appeal. As Heritage Trust has noted, this was a significant concern raised during the review of the proposed development.

[147] In response to these concerns, the building's height was reduced. This was characterized as a reduction from 13 floors to eight floors; however, it was demonstrated to the Board at the hearing that there are actually nine floors when counted on the same basis as the original 13-floor proposal (i.e., the floor above the parking level is identified as the second level on the plans filed with the original application, but it is identified as the first level in the final plans for the approved development agreement). That aside, there was a significant reduction in the height of the building, from 132 feet in the original application to 87.5 feet. The reduction of about a third of the originally proposed height brings the top of the proposed addition well below the top of the Church's bell tower, but still higher than the peak of the roof on St. Patrick's Church.

[148] Changes were also made to the design of the building in an effort to mitigate its impact on heritage resources, including the Church. As discussed above, these changes included:

- the penthouse level was stepped back further from Brunswick Street and its overhanging roof was removed;
- voided corners were added to the design of the Brunswick Street face of the proposed development;
- light-coloured cladding was specified;
- red brick was added, matching the material used in the Church and Rectory, and the Rectory's colouring;
- punched windows, which are found in the Rectory, were added to the Brunswick Street face of the addition;
- the pattern of brick and windows on the Brunswick Street face of the addition was changed to better match the front of the Rectory;
- the masonry on the sides of the building was changed to match the height of the walls of the Rectory;
- full balconies on the side of the addition facing the Church were replaced with smaller Juliet style balconies; and
- recessed balconies were added to the Huestis House side of the addition, between columns of masonry and red brick, with textured light-coloured cladding behind the balconies.

[149] While Heritage Trust was critical of Mr. Joudrey's qualifications to provide opinions about the extent to which the changes in the architectural design details were

actually effective in mitigating the height of the proposed development, the changes made to the design of the proposed development were of the type contemplated by Mr. Murnaghan and in Policy CH-16(c)(iii). Furthermore, Heritage Trust's expert planner, Mr. Heseltine, agreed that the changes were improvements and that the "design for the addition had evolved to become more compatible with the Rectory and the Church."

[150] Despite expressing concern that there were no technical studies or computer renditions to assess whether vantage points of the steeple have been compromised, Heritage Trust supplied no evidence of this itself. It is not enough for Heritage Trust to raise "questions that beg for answers."

[151] Although the recommendations from Mr. Murnaghan and others that the height of the proposed development not exceed the roofline of the Church provides an objective basis for limiting the height of the proposed development, Policy CH-16 does not require the new development to be shorter than the abutting heritage building. Instead, it provides guidance about measures to mitigate the impact of the additional height, including stepbacks and other design solutions like those recommended by Mr. Murnaghan and included in the revised development design that was approved.

[152] As it is, the proposed development is not higher than the Church. It is higher than the roofline of the Church, but below the top of the tower and the steeple. Further, while the Church tower and steeple are on the front of the Church facing Brunswick Street, the proposed development is stepped back from the street, and the penthouse in the proposed addition is stepped back even further.

[153] The expert evidence submitted by Heritage Trust, although critical of the height of the proposed development, is also not very helpful. The expert reports of Mr.

MacKay-Lyons and Mr. Hanley were accepted into evidence but fall short of the requirements for expert reports in planning appeals. Subsection 15(1) of the Board's *Municipal Government Act Rules* provides:

Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of the expert's qualifications, and a summary of the grounds for each opinion expressed, has been served on each party and filed with the Board, as directed by the hearing order referred to in Rule 16(4), the evidence of the expert shall not be admissible at the hearing without leave of the Board.

[154] Likely recognizing the problem with the format of the report that was provided to the Board, Heritage Trust sought leave of the Board to conduct a direct examination of Mr. MacKay-Lyons, beyond the Board's practice of having the expert adopt the report in advance of cross-examination. The Board's practice of having experts simply adopt their reports with no direct examination was specifically discussed in a pre-hearing conference on July 31, 2019, before the parties filed any expert reports in the proceeding. As a matter of ensuring fairness for the opposing parties in the proceeding, the Board declined to allow the filed report to be supplemented in this way at the oral hearing.

[155] The Board finds that the report filed by Mr. MacKay-Lyons, while offering an overall conclusion, does not provide essential facts and grounds for the opinions expressed. As such, the Board places very little weight on this conclusion.

[156] Mr. Hanley's report is two pages long and attaches a drawing showing sight lines related to the proposed development. At least a third of the text of the report simply reproduces policies in the MPS. One of the policies he referenced does not even apply to the Brunswick Street Heritage Area. Policy 9.7.2 contains an explicit 40-foot height restriction in the Brunswick Comprehensive Development District zone. The proposed development is not in this zone and Policy 9.7.2 does not apply to it. Mr. Hanley also

described how the proposed development will be visible from different vantage points on Brunswick Street, which is not in dispute.

[157] As for the opinion expressed in the report, Mr. Hanley referenced Policy 9.3.2.1 and expressed the opinion that the proposed development does not complement or maintain the existing heritage streetscape of Brunswick Street in scale, massing or height. He was critical of the HRM planners for not referring to the height of Huestis House in their analysis but referring to the Church instead. Once again, the Board finds that the report does not provide essential facts and grounds and the Board therefore places very little weight on this conclusion.

[158] The reports prepared by Heritage Trust's expert planner do not suffer the same weakness. However, Mr. Heseltine's reports do not contain an independent recommendation on a specific height for the proposed addition.

[159] In his initial report, Mr. Heseltine felt that Council should have preferred the maximum height recommended by HRM's heritage planner, and he was of the view that Council's decision failed to account for the more moderate height of the neighbouring Huestis House, which he said should have been given primary consideration under Policy 9.3.2.1. As discussed above, Huestis House was not required to be considered under Policy CH-16. It will be considered in the context of Policy 9.3.2.1 later in this decision.

[160] In his reply report, Mr. Heseltine noted again that the development application had been repeatedly rejected by various municipal bodies over concerns about the building's height, and concluded "More detailed consultation was clearly needed to reach the conclusion that the eight-storey addition approved on July 9, 2019, was compliant with the policy." Interestingly, when asked by the Board at the hearing

whether it was possible that, after such consultation, Council could have concluded that the approved addition was compliant, he indicated that it was. The Board finds this response significant, because regardless of the level of consultation, a development agreement may only be approved if it is consistent with the municipal planning strategy.

[161] As noted above, the application of Policy CH-16 requires a significant degree of subjectivity and discretion. In paragraph 24 in *Archibald*, the Court of Appeal indicated that “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.” In *Tsimiklis v. Nova Scotia Utility and Review Board et al.*, 2003 NSCA 30, the Nova Scotia Court of Appeal made the following comments about subjective and imprecise terms which appeared in the MPS:

Such notions as "appropriate development" and "undue impact" as applied to the appellant's project are primarily for the consideration of Council, not the Board. There is no sharp line of division in these policies as they relate to the appellant's proposal that were crossed by Council.

[*Tsimiklis*, para. 63]

[162] The Board considers that the requirement in Policy CH-16 for Council “to consider a range of design solutions and architectural expressions that are compatible” with the Church calls for Council to make such choices. It is not the role of the Board to simply replace its subjective opinion about the application of the policy for that of Council. Furthermore, the evidence before the Board does not establish that Council’s decision could be described as *ad hoc* and unguided by principle. There is no sharp line that was crossed.

[163] Council had before it HRM planning staff’s analysis and their recommendation to approve the proposed development. Although the evidence before the Board suggests that others might have made a different choice than Council, the

choice was Council's to make, and the Board finds that Heritage Trust has not met the burden on it to demonstrate, on the balance of probabilities, that the decision of Council to approve the development at its final proposed height did not reasonably carry out the intent of Policy CH-16.

#### **6.2.4 Other Factors Under Policy CH-16**

[164] The Board recognizes that height is only one aspect of Policy CH-16, but it was clearly the focus of the evidence and opinions presented in this proceeding. To the extent that Heritage Trust may be suggesting that there were other aspects of Policy CH-16 in issue, the Board finds that there is little evidence to support such a position. The Board finds, on the whole, that Council's decision to approve the development agreement reasonably carried out the intent of Policy CH-16.

#### **6.3 Policy 9.3.2.1**

[165] Section 9 of the MPS is devoted to heritage resources. Its objective is the preservation, maintenance and enhancement of buildings, areas, streetscapes and conditions that contribute to the heritage character of certain areas of Peninsula North. Policy 9.3.2 stipulates that, in the Brunswick Street Heritage Area, a new apartment house with over four dwelling units, or an addition to an existing building which produces an apartment house with over four dwelling units, may be permitted by development agreement. Policy 9.3.2.1 sets out several factors that council must consider when approving such a development agreement:

In considering agreements pursuant to Policy 9.3.2, Council shall consider the following:

- (a) the building or addition shall complement adjacent properties and uses, particularly any adjacent registered heritage buildings;
- (b) the impact of vehicle access and egress and parking on adjacent properties and uses shall be minimized;

- (c) the new development shall complement or maintain the existing heritage streetscape of Brunswick Street, by ensuring that features, including but not limited to the following, are similar to adjacent residential buildings particularly any registered heritage properties in the area identified in the land use by-law pursuant to Policy 9.3 above, on which Council shall specify conditions to be met in the development agreement:
  - (i) architectural design including building forms such as roofs, entrances, porches and dormers;
  - (ii) height, scale and massing;
  - (iii) location and style of building details such as doors, windows and exterior walls;
  - (iv) front and side yard setbacks;
  - (v) building materials.
- (d) open space and landscaped areas shall be provided where appropriate;
- (e) other relevant land use considerations which are based on the policy guidance of this Section.

[Exhibit H-4, Tab 2, pp. 210-211]

[166] The considerations under Policy 9.3.2.1 (a) and (c) were a focus in the hearing and they are the policies specifically identified in the Notice of Appeal. Given the concerns over the height of the proposed development, much of Heritage Trust's evidence and submissions centered on Policy 9.3.2.1(c).

### **6.3.1 "Complement" and "Similar"**

[167] Policy 9.3.2.1(a) directs Council to consider that the proposed development "shall complement adjacent properties and uses." Policy 9.3.2.1(c) requires Council to consider that the proposed development shall "complement or maintain the existing heritage streetscape of Brunswick Street." To meet the requirement under Policy 9.3.2.1(c), Council is directed to ensure that the proposed development includes features "similar to adjacent residential buildings."

[168] In its closing submissions, Heritage Trust said these commands were "crystal clear":

It is respectfully submitted that the commands in the RMPS and MPS are crystal clear. New development is to complement existing development, and shall be similar in height, scale, massing and architectural detail. The words "complement" and "similar" have very clear meaning, which puts the onus on the reviewer to be more rigorous in their assessment, going beyond the more common tests for compatibility.

[Heritage Trust Closing Submissions, para. 184]

[169] Heritage Trust contrasted the use of the term "complement" with "compatible," which it submitted is a lower threshold that "implies nothing more than being capable of existing together in harmony" (*Motisi et al. v. Bernardi*, 1987 CarswellOnt 3719, at p.4 (Ontario Municipal Board)). Heritage Trust noted that the term "complement" does not appear in the MPS or the RMPS and, by the rules of statutory interpretation, should be given its dictionary meaning.

[170] With reference to the *Merriam-Webster On-line Dictionary*, Heritage Trust said that "complement" means something that fills up, completes, or makes better or perfect (e.g., the scarf is a perfect complement to her outfit). Heritage Trust said that the word "similar" is defined as "strictly comparable." Heritage Trust said that the word "similar" implies the possibility of being "mistaken for each other."

[171] HRM submitted that, in considering the extent to which a proposed development is similar to another property, there may be a range of similarity. HRM said that the policy directs that certain conditions are to be specified in the development agreement, but it does not set out the degree of similarity for any of those conditions. HRM argued that if the development were required to be similar to Huestis House, to the degree suggested by the Appellant, the only addition permitted would be a Victorian style two-storey, single-family home wrapped in shingles and metal cladding. HRM submitted that this would defeat the purpose of the policy which permits apartment buildings with more than four units to proceed by development agreement.

[172] Brunswick Street Developments Ltd. also submitted that the interpretation offered by the Appellant would paralyze Council in the circumstances. It said if the Appellant's interpretation were taken, it would mean that only two or possibly three-storey development, similar in height to Huestis House could be appropriate. It submitted that the expert evidence presented on appeal does not support a notion that the only reasonable development would be a two or three-storey building, including the evidence of Mr. Heseltine and Mr. Murnaghan's report.

### **6.3.1.1 Findings**

[173] In the absence of definitions in the MPS, the Board considers that in interpreting words such as “complement” or “similar,” the Board can turn to such tools as the opinions of experts and the ordinary meanings of such terms in dictionaries (*Re Heritage Trust of Nova Scotia*, 2007 NSUARB 122, para. 266). Reliable dictionaries can also provide a basis for judicial notice (*Burpee v. Bernikier*, 2013 NSSC 272, para. 121).

[174] None of the experts in the proceeding ascribed a technical or special meaning to the terms. In considering the ordinary meaning of these words, in addition to the *Merriam-Webster On-line Dictionary* references provided by Heritage Trust, the Board has reviewed definitions in other sources.

[175] With respect to “complement,” the Board notes that the definition in the *Merriam-Webster On-line Dictionary* provides alternate definitions for the word used as a noun or a transitive verb. The definition cited by Heritage Trust was one of the definitions when used as a noun. When used as a transitive verb, the term is defined as “to complete or enhance by providing something additional: to be complementary to.” The example provided is, “The illustrations complement the text.”

[176] In *Heritage Trust* (2007 NSUARB 122), the Board considered the term “complementary” in the context of other provisions in the HRM MPS and reviewed some dictionary references to that term. In that case, the appellant asserted that that the only possible meaning of the term “complementary” required new development to be the same as, or to “replicate or mimic” heritage buildings. The Board did not accept that the definitions it reviewed supported that assertion.

[177] Another definition of the word “similar” the Board has reviewed is “showing resemblance in qualities, characteristics, or appearance; alike but not identical” (*Collins English Dictionary (Thirteenth Edition)* (Collins: Glasgow, 2018)).

[178] As with other questions of interpretation, the Board must determine if Council interpreted the policy in a manner that it can reasonably bear. Here, the Board is not convinced that the meaning of the terms “complement” and “similar” are as crystal clear, as Heritage Trust suggests.

[179] Furthermore, the Board agrees with the concerns raised by HRM and Brunswick Street Developments Ltd. that the intent of the policy would be hindered by interpreting the word “similar” in a way which requires proposed development to be virtually identical to Huestis House, or as Heritage Trust suggests, implies the possibility that the new development might be mistaken for Huestis House. As HRM points out, the purpose of Policy 9.3.2.1 is to guide Council in considering development agreements to permit a new apartment house with over four dwelling units or the conversion of an existing building into an apartment house with over four dwelling units.

[180] The determination of whether one building complements or is similar to another building is subjective and requires the exercise of discretion. It reflects a choice

that Council must make. As such, provided it is not *ad hoc* and unguided by principle, the choice must be respected.

### **6.3.2 Comparisons to Adjacent Properties and Uses**

[181] The nature of the considerations under Policies 9.3.2.1 (a) and (c) require that the proposed development be compared to an existing heritage resource. Under Policy 9.3.2.1(a), the proposed development is considered against “adjacent properties and uses, particularly any adjacent registered heritage buildings.” In Policy 9.3.2.1(c), the focus is on complementing or maintaining the existing streetscape, by ensuring that the proposed development includes features that are similar to “adjacent residential buildings particularly any registered heritage properties” in the Brunswick Street Heritage Area.

[182] Heritage Trust submitted that there is a near perfect uniformity of buildings along the Brunswick Street Heritage Area (which the Board notes is only one side of part of Brunswick Street). It said the structures are primarily single-detached residential dwellings, most of which are two stories in height. Heritage Trust acknowledged that the area includes churches but said that these exceptions are institutional buildings meant to stand out or be iconic. On cross-examination, Mr. Joudrey agreed with the characterization of the Brunswick Street Heritage Area as a residential low-rise area.

[183] Given the language in Policy 9.3.2.1(c), Heritage Trust submitted that Council should have focused its assessment on Huestis House, which is the closest residential heritage property to the proposed development. Instead, Heritage Trust said that Council compared the features of the proposed development to the Rectory and the Church and Huestis House was largely ignored.

[184] Heritage Trust said that the policy is explicit: a development is to be similar to adjacent residential properties with respect to a number of features, including height. It said the policy does not say developments must share some similar characteristics, but not others.

[185] Heritage Trust also provided evidence to show that the heritage planning policies relating to the Brunswick Street Heritage Area were born from studies, reports and discussions dating back to at least the 1960's. Heritage Trust said that these do not contemplate a structure more than 35 to 40 feet high. It also provided examples of developments that it said demonstrate that the height limitations in this neighbourhood have been respected over the years.

[186] Heritage Trust submitted that Mr. Joudrey's reports to Council reduced the intent of the MPS to, in effect, be simply compatible with the Brunswick Street Heritage Area streetscape. It said that the new development must instead complement existing developments, and be similar in height, scale, massing and architectural detail. Heritage Trust relied on the evidence of its experts to demonstrate that the proposed development does not satisfy these requirements.

[187] Heritage Trust stated that no reasonable person could conclude that a nine-storey building with dark red brick and a large blank wall facing north, complements, or is similar to, Huestis House. The Board notes that, under cross-examination by counsel for Heritage Trust, Mr. Joudrey acknowledged that the proposed development differed in many ways from Huestis House and other heritage homes in the Brunswick Street Heritage Area. Heritage Trust stated:

Finally, with respect to the design, "blank wall" elevation, materials, fenestration, setbacks, open space, density, massing, heritage character, lot coverage and other details, the

proposed Rectory Tower is not similar or complementary in almost every way to the Brunswick Street Heritage Area, and Huestis House in particular.

[Appellant's Closing Submissions, para. 85]

[188] In respect of Policy 9.3.2.1(a), HRM submitted that there is no clear uniformity along Brunswick Street and that adjacent properties include the Harbour View Apartments, the Spice Condominium, Huestis House, the Church, the Rectory, a school, and several single-family homes. It said that this "mixed bag of adjacent properties, adjacent uses, and adjacent heritage buildings" provides little guidance to Council when making a decision based on the policy. As such, HRM submitted that Council has considerable discretion to determine whether the proposed building is complementary to adjacent properties and uses. HRM submitted:

Adjacent heritage buildings include the Church, Huestis House, and the Rectory. HRM submits that it is for Council to determine how and to what degree the development should complement each of the three entirely different heritage buildings. Something that is complementary to the Church may be less complementary to the other two adjacent heritage buildings, and vice versa, but these are choices for Council. Furthermore, the considerations under policy 9.3.2.1(a) are not limited to heritage considerations. The policy involves consideration of all adjacent properties and uses.

[HRM Closing Submissions, p. 10]

[189] HRM's submissions listed several features of the proposed development that it said could reasonably lead Council to conclude that it complemented adjacent properties and uses. These consisted of:

- foot print will be 5964 square feet in keeping with the Rectory
- exterior of the building on Brunswick Street and on the two interior lot elevations (east and west elevations) will be kiln fired brick similar in colour to the Rectory (façades facing the Church and Huestis House)
- stone masonry will be used for the first and second floor level exterior
- façade facing the Church uses real stone masonry up to the top height of the Rectory wall and then textured cladding for the remainder of the elevation
- light-coloured cladding and aluminum curtain walls are proposed materials for the third-floor level to the penthouse

- double rows of punched vertically proportioned windows
- vertical glazed curtain walls touch the edge of the brick verticals with the horizontal spandrel glass emphasised - these vertical elements emulate the vertical characteristics of the existing buildings vertical bays and gaps of the surrounding neighbourhood
- no balconies are located on the elevation facing the Church
- height of the building does not exceed the Church steeple
- infill does not take place at the streetwall
- Rectory remains the focus of the streetscape
- inset balconies on the side of the building facing Huestis house are sheathed in coated cladding
- height of the building is stepped back from the streetwall
- 1200 square feet of open space at the rear of the property near the Church plus 500 square feet of amenity space on the exterior of the eighth floor
- access to transit and walking distance to downtown allows for reduction in parking
- residential use is complementary to the surrounding heritage building uses
- set back from the street behind the Rectory mitigates view at pedestrian level
- subtracted comers add symmetry and lessen the perception of mass as does the set back of the penthouse
- the side yard set back from Huestis house is additionally buffered by the HRM right of way.

[HRM Closing Submissions, pp. 9-10]

[190] Brunswick Street Developments Ltd. also argued that Council is given the discretion, under Policy 9.3.2.1(a), to decide which surrounding buildings should be complemented by the proposed development. It said while heritage properties are to be given priority, non-heritage properties and uses are also considered under the policy.

[191] Brunswick Street Developments Ltd. referred to Mr. Joudrey's opinion that the development was complementary to the adjacent heritage properties because its location, set back from the street, did not obscure defining features of the Rectory and

leaves the street wall intact. Brunswick Street Developments Ltd. said that the design of the building was complementary to other properties and uses in the Brunswick Street Area, including properties like Huestis House, noting that Mr. Joudrey concluded that the proposed development allowed for differentiation between old and new, while preserving the character of the heritage area.

[192] Brunswick Street Developments Ltd. submitted that Council's decision is reasonably consistent with the MPS because the proposed development shares many similarities with the Church and the Rectory. In particular, it said that the use of brick, colouring, height, massing and punched windows are similarities to either the Rectory or the Church. Brunswick Street Developments Ltd. noted that Mr. Heseltine testified that the Church was not removed from consideration under this policy and stated that Policy CH-16 requires the Church, as the only abutting heritage property, to be the focal point of the analysis.

[193] In respect of Policy 9.3.2.1(c), HRM noted that the policy was aimed at complementing or maintaining the existing heritage streetscape. HRM noted that the term "streetscape" is not defined in the MPS, the land-use by-law or the *HRMC*.

[194] HRM also referred to evidence from Mr. Joudrey that referred to a heritage streetscape as "an aggregation of several heritage buildings in close proximity to each other on one or both sides of the street". HRM also noted that the *Heritage Property Act* defines streetscape in section 3(k) as meaning "two or more adjacent properties whose collective appearance from the streets has heritage value". HRM emphasized that the front of the Rectory on Brunswick Street was not being altered. It submitted that Policy

9.3.2.1(c) was satisfied by the retention of the Rectory which results in the existing streetscape remaining virtually unchanged.

[195] Brunswick Street Developments Ltd. also submitted that the focus of Policy 9.3.2.1(c) is streetscape. It referred to testimony from Mr. Heseltine who said that the streetscape was "the street frontage and the visible portions of the street."

[196] Brunswick Street Developments Ltd. submitted that the Brunswick Street Heritage Area has a diverse and varied streetscape. The immediate area of the proposed development includes the Rectory, the Church and Huestis House. Brunswick Street Developments Ltd. submitted that these buildings are dissimilar from each other in many ways, including height, colour, building materials and usage. Brunswick Street Developments Ltd. further said that this type of variety is a theme in the broader Brunswick Street Heritage Area which includes a vast array of buildings of different sizes, building materials, uses and heights. In its closing submissions, it said "[w]hile several buildings along this street-edge are heritage buildings, the street is also host to more modern structures and to views of the Harbour View Towers and the Spice Building." As a result, it submitted, Council is given the task of approving a building that is similar to buildings in the streetscape, even when those buildings are not similar to each other.

[197] Brunswick Street Developments Ltd. also noted that Mr. Heseltine testified that Council is given some discretion to weigh the factors set out in Policy 9.3.2.1(c). In respect of 9.3.2.1(c)(ii) in particular, Brunswick Street Developments Ltd. noted that Mr. Joudrey determined that, with respect to height, scale and massing, the proposed development was compliant because the 60-foot setback and other architectural features reduced the visual impact of the building's height on the streetscape. Brunswick Street

Developments Ltd. noted that none of the policies have a maximum height requirement, and Policy 9.3.2.1(c) merely states that the height must be "similar" to adjacent properties.

In particular, it submitted:

As we have stated, the standard of similarity creates numerous challenges in these circumstances. Mr. Heseltine's testimony that PNSPS 9.3.2.1(c) gives some discretion to Council to determine what elements they focus on in a given circumstance is noteworthy. While the Development may not be strictly "similar" in height to adjacent buildings such as Huestis House, it is reasonable for Council to place less emphasis on the factor of height in these circumstances, where the neighbouring buildings - the Rectory, the Church, and Huestis House - are dissimilar from one another. Council must be given deference here.

[Brunswick Street Developments Ltd. Closing Submissions, para. 44]

### **6.3.2.1 Findings**

[198] The proposed development is not similar to Huestis House or other low-rise residential buildings in the Brunswick Street Heritage Area. On cross-examination, Mr. Joudrey readily agreed when asked, essentially feature by feature, that there were many dissimilarities. Likewise, it is not the Board's understanding that either HRM or Brunswick Street Developments Ltd. are suggesting this is the case. As the Board understands their position, it is that the proposed development is consistent with Policy 9.3.2.1 because it makes no changes to the face of the Rectory at the street and the impact of the development, particularly its height, has been mitigated. The mitigation measures include placement of the proposed development behind the Rectory and the incorporation of a number of design features to make it more complementary to the Rectory and the Church.

[199] Policy 9.3.2.1(a) requires Council to consider whether the proposed development complements adjacent properties and uses, particularly any adjacent registered heritage buildings. The closest registered heritage properties to the proposed development are the Church and Huestis House. These are two different styles of buildings, used for two different purposes.

[200] In such a case, the Board finds that an interpretation of the policy that would permit Council to choose which heritage property the proposed development should complement, and in what ways, is one that the policy can reasonably bear. Council might prefer that the development complement only one property, that it complements one more than the other, or perhaps that it complements both in different ways.

[201] While the policy directs Council to consider adjacent registered heritage properties in particular, it does not direct it to consider them exclusively. In this case, the final design incorporates features intended to complement the Rectory, such as punched windows, the pattern of the windows on the Brunswick Street face of the building, and the use of brick similar in colour to the brick in the Rectory.

[202] The Rectory was a registered heritage property, but it was deregistered. Although not registered, the Rectory is historic, and in fact pre-dates Huestis House, as noted by Mr. Heseltine in his initial report. Mr. Joudrey explained to the Board, in cross-examination, that the registration was the result of an error. He said that the wrong civic address was used for a registration for Saint Patrick's Church. He also said that the Rectory seems to be a worthwhile candidate for a heritage property because of its age and appearance. Similarly, Mr. Heseltine said during cross-examination that he regarded the Rectory as a heritage building, but it was not a registered heritage building.

[203] Furthermore, given that the proposed development is on the same lot as the Rectory, and attached to it, it would not seem unnatural to the Board if Council were to prefer that the development have a closer relationship to the Rectory.

[204] Given these circumstances, the Board finds that an interpretation of Policy 9.3.2.1(a) that would permit Council to prefer a development that is more complementary

to the Church and the Rectory than Huestis House is an interpretation that the policy can reasonably bear.

[205] As to whether the development actually complements the Church and Rectory, the Board considers that, despite some differences in the policy language, its findings in relation to the Church in respect of Policy CH-16 apply here as well. Whether the proposed development must be “compatible” with, “complement” or “respect” the heritage resource, the assessment requires the exercise of subjectivity and discretion. These terms do not establish objective measures by any definition. Although the Rectory was not considered under Policy CH-16, and is shorter than the Church, the Board finds that the proposed development also incorporates design features, such as colouring and windows that more closely connect it to the Rectory.

[206] In the circumstances, the Board is unable to conclude that the decision of Council to approve the development agreement did not reasonably carry out the intent of Policy 9.3.2.1(a).

[207] Policy 9.3.2.1(c) requires Council to consider that the proposed development must complement or maintain the existing heritage streetscape. Council is directed to do so by ensuring that the proposed development includes features similar to adjacent residential buildings particularly any registered heritage properties in the Brunswick Street Heritage Area. A non-exhaustive list of features is included in the policy.

[208] This policy addresses the impact of the proposed development on the streetscape, and not individual buildings and uses like Policy 9.3.2.1(a). Therefore, a broader lens is required than focusing solely on an individual property, such as Huestis House. Be that as it may, the policy does direct Council’s attention to similarities between

the proposed development and residential properties in the Brunswick Street Heritage Area, particularly registered heritage properties. Huestis House, as the closest registered heritage residential building to the proposed development is one relevant comparator.

[209] The attention Council must pay to residential properties is consistent with Heritage Trust's residential characterization of the Brunswick Street Heritage Area, which Mr. Joudrey agreed with on cross-examination. But this does not mean there is a complete uniformity of development in the area. Notably, the Rectory, while not a registered heritage property, is a residential building. In cross-examination by Ms. McLaurin, Mr. Heseltine noted the role of the Rectory in maintaining the streetscape:

Q. Okay. And Mr. Heseltine, I didn't see anywhere in your report when you're discussing at sub-paragraph (c) and the streetscape, I didn't see anywhere where you mentioned the role of the rectory in maintenance of the streetscape.

A. Yeah I don't recall making a direct reference to it. I think it - kind of take it for granted that it is a component of the streetscape and it's retained its historic appearance.

[Transcript, March 11, 2020, pp. 113-114]

[210] Council also has the discretion to weigh which of the non-exhaustive list of features in Policy 9.3.2.1(c) it should ensure are similar in the proposed development. In response to a question from the Board, Mr. Heseltine agreed that Council had discretion in the weight to give to these elements, although in a follow-up question from Mr. Donnelly, he said that he felt height was the most important.

[211] Given that the reference to height is one of several features set out in Policy 9.3.2.1(c), the basis for Mr. Heseltine's opinion that height should be emphasized is not at all clear. This is particularly so, given that height is not even first on the list, and in fact, is not even listed separately but appears as a single item under Policy 9.3.2.1(c)(ii) addressing "height, scale and massing." The Board finds that an interpretation of Policy 9.3.2.1(c) as providing Council with the discretion to choose which factors it should give

weight to when considering the similarity of properties is one that the policy can reasonably bear.

[212] With respect to height, the Board does not accept Heritage Trust's assertion that the historical evidence proves that a structure of not more than 35 to 40 feet is contemplated under Policy 9.3.2.1(c)(ii). As Policy 9.3.2.1 only applies to development agreements in the Brunswick Street Heritage Area it could easily have specified a maximum height for the area. In *Heritage Trust* (2007 NSUARB 122), the Board reviewed several common methods for doing so (paras. 242-247).

[213] In fact, a few pages later in Section 9 of the MPS, Policy 9.7.2 specifies site development requirements in the Brunswick Comprehensive Development District zone that do precisely that. As such, the Board finds that an interpretation of Policy 9.3.2.1(c)(ii) that would permit buildings taller than 40 feet is an interpretation that the policy can reasonably bear.

[214] Returning to the overarching objective in Policy 9.3.2.1(c) that the proposed development complement or maintain the existing streetscape of Brunswick Street, and given that Council has the discretion under the policy to identify which properties and which of the non-exhaustive features it wishes to simulate in the new development, the Board does not find it unreasonable that Council's determination of how similar is similar enough might be influenced by such things as the mitigation of impacts from the proposed development because it is set back from the street, the maintenance of the Rectory's place in the streetscape, and the fact that the proposed development is next to larger structures in the streetscape (the Rectory and the Church). The Board finds that such an interpretation of Policy 9.3.2.1(c) is one that it can reasonably bear.

[215] For these reasons, and those already discussed in considering Policy CH-16 and Policy 9.3.2.1(a) as they relate to the consideration of height and architectural details of the proposed development, the Board finds that it was open to Council to consider that the development complemented or maintained the existing streetscape. The Board finds that Heritage Trust has not met its burden to demonstrate that Council's approval of the development agreement did not reasonably carry out the intent of the MPS.

#### **6.4 The Overlapping Nature of the Policies**

[216] As a final observation, the Board notes that the analysis in this decision largely considers the policies in isolation. At a high level, the policies considered to this point address whether it is appropriate for the proposed development to have been approved in light of the HRM policies that are protective of heritage resources. There is much overlap among the policies considered in this decision, but there are also some important differences as well, in terms of the language, requirements and focus. For example, Policy CH-16 focuses on the abutting Church, Policy 9.3.2.1(a) focuses on adjacent properties and uses with an emphasis on heritage buildings, and Policy 9.3.2.1(c) focuses on the heritage streetscape, but does so by considering the features of adjacent residential buildings with an emphasis on registered heritage properties.

[217] As a result of these differences, Council is not only required to consider the choices inherent in the separate policies, but choices that may arise from considering the policies together as a whole. In this regard, the Board is mindful of the Court of Appeal's comments in *Heritage Trust* (1994 NSCA 11):

Planning policies address a multitude of planning considerations, some of which are in conflict. Most striking are those that relate to economics versus heritage preservation. 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. So long as a decision to enter into a development contract is reasonably consistent with the intent of a municipal planning strategy, the Nova Scotia Utility and Review Board has no jurisdiction to interfere with the decision.

[*Heritage Trust*, para. 164]

[218] The Board considers that given the qualitative nature of the policies already considered separately in this decision, a more holistic review reinforces the Board's findings in respect of the discretion that is given to Council in the MPS.

## **6.5 The Remedies Requested by the Appellant**

[219] In closing submissions, the Appellant asked the Board to:

- a. Allow the appeal and reverse the decision of Council to amend the land use by-law, per section 267(1)(b) of the *Charter*, or in the alternative,
- b. The Rectory should be registered as a heritage property and the developer should apply for a heritage development agreement process. This will ensure compliance with the heritage objectives for Brunswick Street.

[Closing Submissions of the Appellant, April 8, 2020, p.4]

### **6.5.1 Amending the LUB**

[220] As pointed out by Counsel for the Applicant in his reply submissions, asking the Board to amend the LUB must be considered as an error, as there was no amendment of the LUB by Council regarding the proposed development. The Board will, therefore, not give this request further consideration.

### **6.5.2 Registration of 2267 Brunswick Street as a heritage property and requiring the developer to apply for a heritage development agreement**

[221] The registration of a property as a provincial or municipal heritage property is governed by the *HPA*. Such a registration can only be done by the Cabinet Minister assigned responsibility for the *HPA* or the municipality. This is done either on the advice of the provincial Advisory Council or the municipal Heritage Advisory Committee, which

may be at the request of a property owner. Policy 6.7, Section II, of the HRM MPS describes consideration for a development agreement for a registered heritage property.

[222] According to the evidence before the Board, 2267 Brunswick Street had been a registered heritage property for a period, but the registration was revoked as it had been made in error according to Mr. Joudrey. At the time of the developer's application, the property was not a registered heritage property, so Policy 6.7 did not apply.

[223] The Board's power in this appeal is restricted by s. 267(1) of the HRMC:

**Powers of Board on appeal**

**267 (1)** The Board may

(a) confirm the decision appealed from;

(b) allow the appeal by reversing the decision of the Council to amend the land-use by-law or to approve or amend a development agreement;

(c) allow the appeal and order the Council to amend the land-use by-law in the manner prescribed by the Board or order the Council to approve the development agreement, approve the development agreement with the changes required by the Board or amend the development agreement in the manner prescribed by the Board; [Emphasis added]

...

[224] The alternative remedy requested by the Appellant is not within the jurisdiction of the Board.

**6.5.3 Establish a Heritage Conservation District**

[225] In closing submissions, the Appellant said:

Heritage Conservation Area Policy

146. Mr. Joudrey conceded in answer to the Board's question that the neighbourhood should be designated as a Heritage Conservation Area. Inexplicably, the properties neighbouring the Rectory were not designated as a Heritage Conservation Area, per Appendix E Section II: City-Wide Objectives and Policies, 6. Heritage Resources. The explanation that staff failed to "unravel" this policy is insufficient. The development agreement, should it ever proceed, would benefit greatly from first, a consideration of the application of this policy.

147. Carrying out the intent of the HRM policies should include a careful consideration of this City-wide policy before irrevocable planning decisions are made; conversely not considering it is not reasonably carrying out the intent of City heritage policies.

[Closing Submissions of the Appellant, April 8, 2020, p.33]

[226] This topic was canvassed by the Board with Mr. Joudrey:

Q. (Mr. McGrath) Now, I want to ask about your comment that this building is not in an area that's a heritage conservation area or district. And it may be helpful to refer to appendix E in your evidence because there's definitions there.

A. Yes.

Q. And so there is a definition for a heritage conservation area and a heritage conservation district. And my question to you, Mr. Joudrey, is why doesn't this fall into the definition of heritage conservation area?

A. This was a point of discussion between me and other staff as to why this was just called the Brunswick Street Heritage Area. And it wasn't given – these titles were available at the time that the planner did the report establishing the Brunswick Street Heritage Area but chose not to call them Heritage Conservation Area or Heritage Conservation District and Council did not change that when the report was brought before them.

And I have to say that we didn't unravel why they were not one of these especially the Heritage Conservation area was not used. But we regard it as distinct from this.

Q. So as I see the two definitions there for Heritage Conservation Area and Heritage Conservation District that the District requires a particular designation under the Heritage Property Act. It doesn't look like the Heritage Conservation Area requires any particular designation. Are you aware whether it does?

A. I'm not aware.

Q. And would the Brunswick Street Heritage Area be an area of concentration of properties unified by similar use, architectural style or historical development which retains an atmosphere of a past era?

A. I believe it does and I believe that's why we questioned why this hadn't been applied to the title.

[Transcript, March 12, 2020; p.266, line 17 – p. 268, line 11]

[227] While the Appellant did not expressly ask the Board to establish a Heritage Conservation District which would encompass the Rectory property, the Board observes that the establishment of such a district falls to the municipality, which would act through council. The Board has no role to play in this in the context of this appeal.

#### **6.5.4 Require the transfer of the “orphan land” under Administrative Order 50**

[228] What was referred to during the hearing as the “orphan land” is a parcel of land between the Edelstein property (Huestis House) and 2267 Brunswick Street, an approximately 15-foot wide strip of land owned by HRM. The Appellant did not ask the Board to take the step of directing that the property be sold to and divided between the owners of the properties abutting the “orphan land”. However, in closing submissions, the Appellant suggested that HRM staff, presumably Mr. Joudrey, should have done this as a part of his review of the application for the development agreement:

##### **Administrative Order #50: An Obvious Solution**

128. On November 14, 2018, Mr. Joudrey was given a mandate from Council to “negotiate changes to the proposed development agreement”. This created an opportunity to address one of the primary problems facing the application, being the lack of a sideyard setback to protect Huestis House, and excuses an unfortunate monolithic design of the north elevation of the tower vis its relationship to the south wall of Huestis House.

129. At the time of the negotiations between the developer and HRM, Mr. E. Edelstein and the Rectory property owner Mr. Adam Barrett were negotiated an agreement with HRM to acquire the “orphan” land/right-of-way between their respective properties under the auspices of Administrative Order #50. These lands cannot be built upon with a stand alone structure.

130. It is respectfully submitted that HRM Staff should have insisted that the transfer occur before the development agreement was approved, in order to improve the compatibility of the Rectory Tower concerning the sideyard setback problem.

[Closing Submissions of the Appellant, April 8, 2020, pp.30-31]

[229] The Appellant went on to suggest:

158. Finally, Mr. Joudrey missed an obvious opportunity to negotiate, per Council’s November 14, 2018 mandate, changes to the development agreement beneficial to both Huestis House and the developer Mr. A. Barrett, per Administrative Order #50. It is respectfully submitted a planner should have inquired or pressed the point of transferring the land before the development application was approved, ...

[Closing Submissions of the Appellant, April 8, 2020, p.37]

[230] Administrative Order 50 deals with the disposition of surplus property owned by HRM. It is not specific to the “orphan land”. Although Mr. Edelstein testified that

transfer of the so-called “orphan land” had been the subject of discussion with HRM, and, apparently, the principal of the Applicant, there was no evidence before the Board that any agreement for the transfer of the parcel had been made or that a transfer had taken place. Any such agreement would be entirely outside the jurisdiction of the Board. Further, as stated by Counsel for the Applicant in his reply submissions, any negotiations regarding the property are not relevant to what the Board must decide in this appeal.

[231] As noted above, the Board’s powers are restricted by s. 267(1) of the *HRMC*, so this is not a remedy the Board could order. The Board further agrees with Counsel for HRM that such an action does not fall within the role of a planner so Mr. Joudrey could not reasonably be expected to take any action regarding this lot.

## **7.0 CONCLUSION**

[232] The question for the Board to answer in this appeal is “Does the decision to approve the development agreement reasonably carry out the intent of the HRM Municipal Planning Strategy?” The answer is “Yes”.

[233] The Appellant has not met the burden to persuade the Board, on the balance of probabilities, that Council’s decision fails to reasonably carry out the intent of the MPS as a whole, and in particular those policies which address heritage properties, areas, and resources. The policies indicate that Council must exercise discretion with respect to features for such developments which are subjective and can bear differing, yet reasonable, conclusions. In these cases, the Board must, on an appeal, defer to Council’s choices.

[234] The appeal is dismissed.

[235] An Order will issue accordingly.

**DATED** at Halifax, Nova Scotia, this 1st day of June, 2020.

  
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Roberta J. Clarke

  
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David J. Almon

  
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Stephen T. McGrath