

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **JOHN TAWIL** from a Decision of Halifax and West Community Council to refuse a rezoning application for properties located at 48 and 50 Old Sambro Road, Halifax, Nova Scotia

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

APPELLANT: **JOHN TAWIL**
Nancy G. Rubin, Q.C., Counsel

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
E. Roxanne MacLaurin, Counsel

INTERVENOR: **WILLIAMS LAKE CONSERVATION COMPANY**
Jamie Simpson, Counsel

HEARING DATE: March 30-31, 2022

FINAL SUBMISSIONS: April 14, 2021

DECISION DATE: **June 13, 2022**

DECISION: **The appeal is allowed.**

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I INTRODUCTION

[1] John Tawil is appealing a decision of the Halifax and West Community Council refusing an application to rezone 48-50 Old Sambro Road, Halifax Regional Municipality (Property) from R-2P (General Residential) to R-3 (Low Rise Apartment). The Property is currently vacant. Mr. Tawil intends to build a three-story, 13-unit apartment building if the rezoning is approved. If not, Mr. Tawil can apply to build, as-of-right, two 4-unit buildings on the Property.

[2] Rezoning of the Property would take place through an amendment to zoning map ZM-12 in the Halifax Mainland Land Use Bylaw (LUB). Despite a positive recommendation from HRM planning staff, Community Council denied the requested rezoning application because of concerns related to the accuracy of watercourse setback requirements and environmental concerns.

[3] The appellant says this decision does not reasonably carry out the intent of the Halifax Municipal Planning Strategy (MPS), which includes the Mainland South Secondary Planning Strategy (Secondary Strategy). HRM took no position on the appeal in the sense that it did not advocate for any particular result. It provided helpful submissions on various aspects of the MPS and the rezoning process. The Williams Lake Conservation Company (WLCC) intervened in the proceeding.

[4] WLCC said the Community Council's decision should be upheld because the proposed rezoning was not consistent with the MPS due to the potential impacts of Mr. Tawil's proposal on Catamaran Pond, associated wetlands and a brook, which are all near the Property. The WLCC also raised issues about compatibility with the neighborhood along with traffic concerns. Other concerns raised by public speakers and

letters of comment filed with the Board were the impact of the proposed development on bird and wildlife habitat and the potential loss of a corridor to Long Lake Provincial Park.

[5] The issue of the adequacy of the proposed watercourse setbacks was addressed to the Board's satisfaction, on a factual basis, by the appellant. Traffic concerns were reasonably addressed, in the Appeal Record, by professionals in the field. The building is compatible with neighborhood density, including a larger apartment complex immediately next door.

[6] Community Council reasons related to environmental concerns, or the positions taken by WLCC, and public comments, on this issue, are disconnected from the limited impact, if any, the appellant's requested rezoning would have on the nearby watercourses. No evidence was presented to the Board in this appeal to reasonably conclude the proposed rezoning would result in impacts touching upon environmental or wildlife habitat concerns that were materially different than they would be for current as-of-right development under the LUB.

[7] The Board finds Community Council's decision does not reasonably carry out the intent of HRM's MPS. The appeal is allowed, and Community Council is ordered to approve the requested rezoning.

II ISSUE

[8] In this case, the Board must determine whether Mr. Tawil has shown, on a balance of probabilities, that Community Council's decision refusing to rezone the Property did not reasonably carry out the intent of the MPS.

III BACKGROUND

Board Jurisdiction

[9] The Board notes that the *Halifax Regional Municipality Charter*, S.N.S. 2008, c.39 (*HRM Charter*) establishes that the Municipality has the primary authority for planning (s. 208). Under s. 30 of the *HRM Charter*, a community council stands in the place of HRM Council when considering rezoning applications, and Part VIII - Planning and Development - of the *Charter* applies to decisions of a community council.

[10] An applicant for the approval of a rezoning application may appeal the refusal by a council to the Board (s. 262(1)). The grounds of an appeal of a council's decision to refuse a rezoning application are set out in s. 265(1)(a) of the *HRM Charter*:

Restrictions on appeals

265 (1) An aggrieved person or an applicant may only appeal

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

[11] The Board's remedial powers, and the restrictions on the exercise of these powers, are prescribed by s. 267 of the *HRM Charter* which provides:

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;

...

(2) The Board may not allow an appeal unless it determines that the decision of the 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]

[12] Thus, the Board must not interfere with the decision of council unless the Board determines that the decision does not reasonably carry out the intent of the MPS.

[13] In appeals under the *HRM Charter*, the burden of proof is on the appellant. To be successful, the appellant must establish, on the balance of probabilities, that the decision of council does not reasonably carry out the intent of the MPS. If the appellant fails, then the Board must defer to the decision of council.

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

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

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

[99] ... A plan is the framework within which municipal councils make decisions. The Board is reviewing a particular decision; it does not interpret the relevant policies or by-laws in a vacuum. In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. ... There may be more than one meaning that a policy is reasonably capable of bearing. This is such a case. In my opinion the *Planning Act* dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. The Board should not be confined to looking at the words of the Policy in isolation but should consider the scheme of the relevant legislation and policies that impact on the decision. ... This approach to interpretation is consistent with the intent of the *Planning Act* to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions. ...

[100] ... Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature

limited the scope of the Board's review.... The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course, by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are made. ...

...

[163] ... Planning decisions often involve compromises and choices between competing policies. Such decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions. ... Neither the Board nor this Court should embark on their review duties in a narrow legalistic manner as that would be contrary to the intent of the planning legislation. Policies are to be interpreted reasonably so as to give effect to their intent; there is not necessarily one correct interpretation. This is implicit in the scheme of the *Planning Act* and in particular in the limitation on the Board's power to interfere with a decision of a municipal council to enter into development agreements.

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

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

(1) ... The Board should undertake a thorough factual analysis to determine the nature of the proposal in the context of the MPS and any applicable land use by-law.

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

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

(4) The Board's role is to decide an appeal from the Council's decision. So the Board should not just launch its own detached planning analysis that disregards the Council's view. Rather, the Board should address the Council's conclusion and reasons and ask whether the Council's decision does or does not reasonably carry out the intent of the MPS. ...

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

proposition, that the Council's refusal is inconsistent with the MPS.

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

(7) When planning perspectives in the MPS intersect, the elected and democratically accountable Council may be expected to make a value judgment. Accordingly, barring an error of fact or principle, the Board should defer to the Council's compromises of conflicting intentions in the MPS and to the Council's choices on question begging terms such as "appropriate" development or "undue" impact. ...

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

[15] Clearly, the Board is not permitted to substitute its own decision for that of council but must review the decision of council to determine if the decision of council can be said to reasonably carry out the intent of the MPS. In determining the intent of the MPS, the Board considers it should apply the principles of statutory interpretation which have been adopted by the Court of Appeal, as well as the provisions of s. 9(1) and s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

[16] A part of the Intervenor's submission dealt with alleged defects in the process used by HRM planning staff, especially as it relates to an online survey. As well, there were submissions about alleged defects in the HRM planning staff report and presentation to Community Council. The Board notes that it does not review Community Council's decisions for procedural errors. As well, this is a hearing *de novo* and the Board will base its decision on the materials in the Appeal Record and the evidence presented during the hearing.

[17] The Intervenor made reference to documents which have not yet been incorporated into the MPS, such as the Spryfield Vision and the Green Network Plan. The Board has consistently held it does not consider such documents, which do not form part of the MPS, when interpreting its provisions.

[18] The Intervenor also submitted that because the Property was currently zoned R-2P, this had to be consistent with the MPS. Therefore, as that would still be the case if the rezoning application was rejected, Community Council's decision not to rezone had to be reasonably consistent with the MPS. Jennifer Chapman, who was the HRM planner leading the Team tasked with processing the application, did not agree with this proposition when she testified before the Board. She said any denial had to be based on MPS policies addressing rezoning. The Board agrees with this assessment.

[19] Interestingly, HRM raised a similar argument in *Re F.H. Construction Limited*, 2017 NSUARB 153. The Board disagreed with this position. At paras [79]-[88], it stated:

[79] In response, the Appellant argues that the position advanced by HRM would completely nullify an applicant's right to appeal the refusal of a rezoning decision.

[80] Mr. Latimer pointed to Mr. Zwicker's evidence that the example of compelling or directive language cited by Ms. MacIntyre was very fact specific. The Board notes that while Ms. MacIntyre testified there were other examples, none were entered into evidence. Ms. MacIntyre herself indicated they would not be common, and the Board infers this would be a rare situation.

[81] The Appellant says HRM's position is inconsistent with the duty to provide reasons pursuant to s. 225(5) of the *HRM Charter*.

[82] Mr. Latimer argues, while conceding the Board's appellate powers are limited, that the Board must consider the reasons provided by Community Council, and these reasons, and Community Council's decision, must be grounded in planning principles under the MPS. If they are not, the Board has jurisdiction to grant the appeal.

[83] In response to Board questions concerning the implications of HRM's position in rezoning refusal appeals, Ms. MacLaurin agreed that the task of the Board would be to determine if policies compelling rezoning existed where all other policy criteria had been met by the applicant. If not, the appeal would be dismissed.

[84] While accepting HRM's argument would simplify the Board's task in these types of appeals, the Board finds it is not supported by a purposive, pragmatic and functional approach to statutory interpretation.

[85] Firstly, the Board agrees with Mr. Latimer that Community Council's duty to give reasons, when refusing a rezoning application, must be given meaning and infers that something more than an indication that the current zoning complies with the MPS is required from Community Council.

[86] Secondly, HRM's approach would be inconsistent with the Court of Appeal's directions in *Archibald*, that the Board undertake a thorough factual analysis. The only fact which the Board would have to ascertain, pursuant to HRM's approach, would be whether or not the MPS contained mandatory provisions requiring Council to rezone, if the application were compliant with the MPS.

[87] Thirdly, as exemplified in this case, under HRM's approach, the Board would not have to address Community Council's conclusions and reasons at all. Regardless of Community Council's reasons for rejecting the application, the appeal would fail if no mandatory language was found. This would be at odds with the interpretation of the appellate scheme set out in *Archibald*, which undertook a pragmatic and purposive analysis, in relation to the statutory appellate provisions related to the approval or rejection of development agreements.

[88] While it is true that *Archibald* involved a development agreement, and not a rezoning application, can it be said that rezoning applications are so different from development agreement applications, such that the *Archibald* principles are inapplicable? The short answer is no.

[20] The Board has not changed its mind. The refusal to approve a rezoning application must be based on MPS policy grounds related to the rezoning and not simply on the basis that the *status quo* is reasonably consistent with the MPS.

Witnesses

[21] The Board held a virtual hearing on the GoToWebinar platform on March 30 and 31, 2022. Counsel for the appellant called Mr. Tawil, Cesar Saleh, and Jennifer Chapman as witnesses.

[22] Mr. Tawil, in addition to being the owner of the Property, is a mechanical engineer and the current construction manager of the family construction business. Mr. Saleh is a professional civil engineer. He is the Vice-President of Planning and Design with WM Fares Architects. He was responsible for preparing and marshalling the subject rezoning application through the HRM review process. Ms. Chapman is a licensed

professional planner employed by HRM. She was the senior and lead planner of the team assigned to review this application. She prepared a staff report to Community Council dated November 1, 2021, (Staff Report) recommending approval of the rezoning application.

[23] WLCC called three lay witnesses. Murray Coolican is the President of WLCC and has lived on Williams Lake for 11 or 12 years. He has extensive experience in the public, private, and not-for-profit sectors, including having been the Deputy Minister of the provincial Departments of Energy and Business. Deborah Hall is a current director of WLCC. Dr. Melanie Dobson is the treasurer of WLCC. She is a retired Dalhousie University professor in molecular and cellular biology. She has been taking water samples of Williams Lake for 20 years.

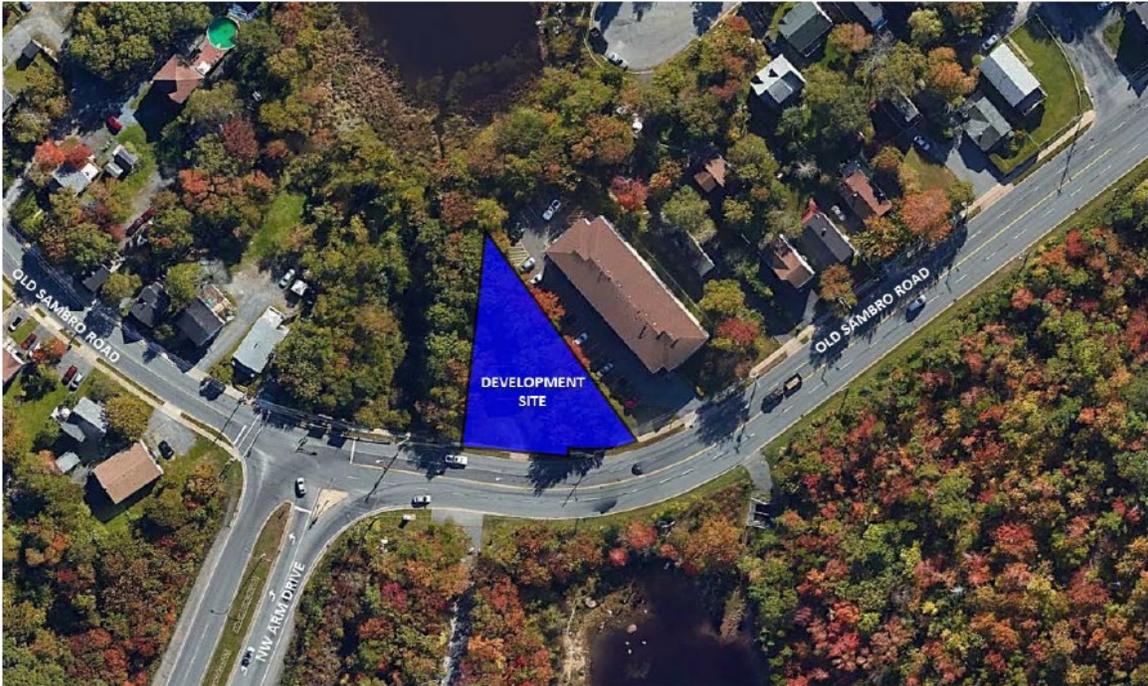
[24] The WLCC called Dr. Martin Willison as an expert witness. He submitted an expert's report dated February 11, 2022. He was qualified to provide opinion evidence with respect to wetlands and ecologically important natural features.

The Proposal

[25] The Property consists of two vacant lots which are both owned by Mr. Tawil. It sits between a property with a three-story apartment building which is zoned R-4 (Multiple Dwelling) and vacant lands owned by the Province which is zoned R-2P (General Residential). The Property is also in the R-2P zone as set out in Map ZM-12 of the LUB.

[26] The Property is near the intersection of the Old Sambro Road and Dunbrack Street and directly across from Long Lake Provincial Park. This portion of Dunbrack Street was formerly known as Northwest Arm Drive. The former name appears in some

of the drawings in the Appeal Record. The site of the proposed development is graphically depicted below:



[27] Mr. Tawil seeks to amend Map ZM-12 of the LUB so that the Property falls within the R-3 (Low-Rise Apartment) zone. If the application is approved, the appellant plans to build a three-story, 13-unit apartment building on the Property. In the R-2P zone, Mr. Tawil can currently, as of right, apply to build two 4-unit buildings on the Property. Details of any construction would be finalized at the permitting stage, where all LUB provisions must be met before a building permit is issued.

The MPS and Staff Review

[28] Based on their analysis, HRM planning staff recommended to Community Council that it consider and give first reading to Mr. Tawil's proposed rezoning application, schedule a public hearing and, ultimately, approve the proposed rezoning. This included a policy review attached to Ms. Chapman's staff report, which is reproduced for ease of reference:

Halifax Municipal Planning Strategy	
Policy	Staff Comment
CITY WIDE POLICIES	
<p>Policy 2.1 Residential development to accommodate future growth in the City should occur both on the Peninsula and on the Mainland, and should be related to the adequacy of existing or presently budgeted services.</p>	<p>Residential development is occurring on both Mainland and Peninsula. The site has no servicing issues.</p>
<p>Policy 2.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.</p>	<p>Implementation Policies 3.1 and 3.2 have been repealed.</p> <p>The MPS allows for the consideration of higher density residential in this area subject to the requirements of the LUB and the R-3 Zone provides controls on height, density and form.</p>
<p>Policy 2.4 Because the differences between residential areas contribute to the richness of Halifax as a city, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods.</p>	<p>Height and scale of the proposal appears to be consistent with surrounding form. The site abuts an existing 3 storey residential building and this proposal would be similar in size to that building.</p>
<p>2.4.1 Stability will be maintained by preserving the scale of the neighbourhood, routing future principal streets around rather than through them, and allowing commercial expansion within definite confines which will not conflict with the</p>	<p>Proposal is similar to in height and mass to nearby buildings.</p>

<p>character or stability of the neighbourhood, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.</p>	
<p>SECTION X: MAINLAND SOUTH SECONDARY PLANNING STRATEGY</p>	
<p>Policy 1.3.1 In areas designated as "Medium-Density Residential" on the Generalized Future Land Use Map Council may zone to permit apartments provided that their height is limited to a maximum of four storeys and in assessing such rezonings Council shall consider compatibility with the existing neighbourhoods and the adequacy of municipal infrastructure.</p>	<p>Site is designated MDR and can be considered for a rezoning to R-3. The site abuts R-4 and R-2P zoned properties. The R-3 zone is scattered about, on other properties on Old Sambro Road.</p> <p>Halifax Water and Development Engineering have confirmed there are no concerns with the adequacy of existing municipal infrastructure.</p>
<p>IMPLEMENTATION POLICIES</p>	
<p>Policy 4.3 More specifically, for those applications for amendments to the zoning bylaw in Mainland South as defined on Map 1, the City shall require an assessment of the proposal by staff with regard to this Plan and the adopted <u>Land Development Distribution Strategy</u>, and that such assessment include the potential impacts of the proposal on: (a) the sewer system (including the budgetary implications); (b) the water system; (c) the transportation system (including transit); (d) existing public schools; (e) existing recreation and community facilities; (f) the provision of police and fire protection services; and any other matter deemed advisable by Council prior to any final approval by City Council.</p>	<p>A) HW and Development engineering have no concerns about proposal</p> <p>B) HW and Development engineering have no concerns about proposal</p> <p>C) Development engineering has requested right-in right-out access from the site to prevent queuing on the public street.</p> <p>D) Schools</p> <ul style="list-style-type: none"> • Elementary—Central Spryfield Elementary School: 67% usage • 7-9 Rockingstone Heights School: 58% usage • High School (English and French Immersion)—JL Ilsley High School: 50% usage (School to be replaced) • Elementary Immersion: John W Macleod-Fleming Tower Elementary School: 134% Usage • 7-9 Immersion: Elizabeth Sutherland School—usage 79 % <p>E) Existing recreation and community facilities appear to be adequate for this use. Long Lake Provincial Park is located across the street and provides access to trails and outdoor recreation facilities.</p> <p>F) Police and fire services as provided and budgeted by Regional Council</p>

Site Visit

[29] The Board conducted a site visit on April 28, 2022, at approximately 1:30 PM. Ms. MacLaurin and Mr. Simpson were present, along with Sara Nicholson of Stewart

McKelvey, who attended on behalf of Ms. Rubin. All participants on the site visit went to the Property in their own vehicles.

[30] The Board proceeded along Herring Cove Road exiting onto Old Sambro Road. The Board then drove along Old Sambro Road, until just beyond its intersection with Dunbrack Street. The Board parked in a small parking area adjacent to Long Lake Provincial Park. This parking area is on the opposite side of Old Sambro Road from the Property, directly across from it.

[31] The Board crossed Old Sambro Road at a crosswalk at the Dunbrack Street intersection and proceeded to the Property. The Board was able to observe the steady traffic at this intersection and along Old Sambro Road at this location. The Board was also able to observe the slope and the bend in Old Sambro Road from both the north and south. This curve and slope in the road are shown in some of the pictures and drawings in the Appeal Record.

[32] The Board joined Mr. Simpson and Ms. Nicholson in the Property's driveway. They were all joined by Ms. MacLaurin a short time later. The Board proceeded to walk the roughly triangular Property, starting along the southern boundary of the abutting apartment property. The Board reached the vicinity of Catamaran Pond, which was clearly visible and is beyond the Property's boundary.

[33] The Board then walked along the brook, which is on provincial lands outside the Property's northern boundary, until reaching Old Sambro Road. After turning south and reaching a survey marker, the Board followed the Property's edge along Old Sambro Road back to the driveway. The participants then left the Property in their own vehicles.

[34] The Board was able to observe the rugged, stony, steep terrain of the Property, as it slopes down from a flatter area near Old Sambro Road, and the abutting apartment building lands, towards the brook and Catamaran Pond. The Board observed the relatively small size of the Property. The Board was able to see the relative positioning of the Property in relation to Catamaran Pond and the brook. The Board also noted debris strewn on the Property, as well as in the brook, including a shopping cart.

IV ANALYSIS AND FINDINGS

[35] The Board is satisfied that the rezoning proposal meets all of the criteria set out in the MPS which were not the focus of discussion or evidence before the Board in this proceeding. These criteria, including the adequacy of municipal services and infrastructure, were addressed to the Board's satisfaction in the Staff Report. The Board will only address those matters related to MPS considerations raised by Community Council, the WLCC, and through public participation before the Board in the form of letters of comment and virtual presentations.

[36] The Board would further note that while there was considerable public opposition to the proposed rezoning, that is not, in and of itself, a reason to deny an application brought under enabling provisions of the MPS. Public consultation is required under the MPS and is encouraged by the Board. It can be very beneficial to obtain views of citizens on matters that concern their community. That said, only opposition to a proposal that is grounded in policy considerations supported by the MPS can be afforded weight.

[37] The letters of comment and public presentations in this matter were generally consistent with what had been submitted to Community Council by those opposing the rezoning. They were also generally supportive of all the positions taken by the WLCC.

Accuracy of Watercourse Buffers

[38] Section 14QA(1)(a) and (b) of the LUB address watercourse setbacks and buffers. No development permit can be issued for any structure within 20 metres of the ordinary high-water mark of any watercourse. The buffer is increased by one metre for each additional two percent of slope if the slope within the 20-metre buffer is greater than 20%. Pursuant to s. 14QA(6), a development officer must be satisfied that any proposed structure meets the foregoing requirements. If the applicant cannot provide the necessary contour drawing, survey plan, or other professional opinions required by the development officer, construction cannot proceed.

[39] As part of the review process, HRM planning staff requested confirmation that the proposed development for which the rezoning was requested could meet this LUB requirement. Ms. Chapman explained that, while a survey plan would ordinarily not be required until the permitting stage, planning staff were interested in knowing if certain aspects of the proposed development could meet the new zoning requirements. This is presumably for efficiency and use of resources issues for both the applicant and HRM. It would make little sense to proceed with a rezoning application for a planned development that was doomed to failure at the permitting stage.

[40] An architect prepared a drawing, which appears at p. 164 of the Appeal Record, basing the rendering of the slope of the land on LiDAR data. This is topographical

contour data compiled by the government and available online through HRM. The Board is familiar with this data source, which is used extensively by the Halifax Regional Water Commission when there is a dispute as to whether water flows into its stormwater system from any particular property.

[41] The drawing, with accompanying explanatory notes, prepared at the direction of Mr. Saleh, showed that the rear property boundary line was 29 metres from the high-water mark of Catamaran Pond. It did not show the brook on the provincial lands. Public input, especially from WLCC, challenged the accuracy of the LiDAR data and the sufficiency of the drawing. Ms. Chapman was satisfied the drawing was a sufficient indication of compliance with the LUB watercourse setback requirements. Community Council ultimately indicated the “lack of accuracy regarding the watercourse set back requirements due to the slope of the site” raised a sufficient concern to reject the application.

[42] The Board generally agrees with Ms. Rubin’s submission that a rejection based on concerns about the accuracy of the tendered drawing was premature. In a rezoning application, compliance with other applicable HRM bylaws, by the rezoning itself, is a specific requirement by virtue of Policy 4.1 in Part XVI of the MPS. Compliance of a development proposal with the LUB, following approval of the rezoning proposal, is not mentioned as a policy consideration in the MPS. The Board is satisfied, as suggested by Ms. MacLaurin, that Policy 4.1 does provide sufficient policy direction to allow HRM Planning Staff to investigate, and Community Council to consider, in a general sense, whether a proposed development can meet the LUB requirements

[43] A successful rezoning does not authorize the applicant's proposal, which is conceptual in nature, and provided for context. If the final design and engineering plans do not meet the applicable LUB requirements, no building permit will be issued. This decision falls within the purview of a development officer. This is true if the property is rezoned or if Mr. Tawil proceeds with as-of-right development.

[44] Mr. Coolican, in email correspondence to Ms. Rubin, when the WLCC requested cost sharing for a survey to determine the issue, indicated that obtaining a survey at that stage was premature. He admitted the same on cross-examination. In any event, Mr. Tawil ultimately declined to share in the cost of a survey. He provided access to the WLCC to do so, which was declined. Mr. Coolican explained during cross-examination there were other more significant issues to pursue.

[45] Mr. Tawil eventually obtained a survey by a professional engineer dated February 18, 2022. He explained his instructions to the qualified surveyor, which were to determine the watercourse buffer required by the LUB. It is shown as a blue line on the survey plan. It shows, to the Board's satisfaction, that a buffer of 24 metres is required to take account of the slope within the buffer towards Catamaran Pond. No additional buffering, beyond 20 metres, is required in relation to the brook. The Property does not extend into either of these buffers.

[46] This is further consistent with the original LiDAR-based drawing provided through Mr. Saleh, which appears in the Appeal Record. In fact, this original drawing suggested a buffer of 25 metres around Catamaran Pond. While WLCC's submissions supported Community Council's decision on this point, the ability to meet the LUB watercourse requirements was not seriously challenged in the evidence presented by

WLCC. Dr. Williston said he could not tell if the buffer requirements were met but has no expertise to give an opinion on the issue.

[47] The Board is satisfied that the survey results show that the Property is not located within the watercourse buffer required by the LUB. Therefore, uncertainty surrounding this issue cannot form a basis for denying the proposed amendment, as from the Board's perspective, on a factual basis, on a balance of probabilities, there is none.

Environmental, Wildlife, and Green Space Concerns

[48] The second reason Community Council refused the rezoning application was due to "the environmental implications regarding health of the watersheds". The Staff Report to Community Council indicated "no environmental implications were identified". While Ms. Chapman and her colleagues assessed the environmental concerns raised by public input, no MPS environmental policies were identified in the Staff Report. Given this, perhaps not surprisingly, Community Council did not refer to any MPS policies. Community Council reasons did not address what environmental implications to the watershed would arise if the rezoning application was granted.

[49] Community Council had received considerable information from the public, and the WLCC, about their concerns respecting the Williams Lake Watershed, which includes Catamaran Pond and the nearby brook. There was technical and scientific information from Dr. Dobson outlining her monitoring of the water levels and water quality in the Williams Lake Watershed. She has been doing this work on a volunteer basis for some 20 years. These reports outlined deteriorating water quality and decreasing water levels in the Williams Lake watershed. Presumably, Community Council accepted that this information, along with information on differences between the R-2P and R-3 zones,

and the potential impacts of construction, established a valid reason for the concerns expressed in its decision.

[50] The WLCC did not seek to qualify Dr. Dobson as an expert. The Board allowed Dr. Dobson to testify about the reports she had filed with Community Council. These reports were in the Appeal Record as a matter of law, and it was helpful to the Board, pursuant to s.19 of the *Utility and Review Board Act*, to have Dr. Dobson available to comment on them and be subject to cross-examination.

[51] While not qualified as an expert in this proceeding, Dr. Dobson is a highly educated person who spoke in a manner which clearly demonstrated an analytical scientific mind. She said that Catamaran Pond acts as a buffer for the Williams Lake watershed. That said, she was careful not to overstate her views. She indicated her data was observational and she could not prove a cause-and-effect relationship between more intensive development surrounding Williams Lake and the observations she made about water quality and water levels. There was a potential correlation as the time frame of her observations coincided with more intense development. There was also some discussion about the number of hot summers in the last few years and the potential impact on water levels.

[52] Dr. Dobson conceded there was a lack of quantifiable data in evidence about waterflow at each point of the watershed and flowing into Catamaran Pond. She also indicated water levels have dropped in concert with the annual rain levels. There was also no quantifiable data to show the impacts, if any, runoff from developments around Williams Lake have had on water quality.

[53] Dr. Dobson answered questions from Ms. Rubin about the HRM Environmental and Sustainability Standing Committee report (ESSC Report). The ESSC Report considered Dr. Dobson's data and concluded that development in the area had not had a significant impact on water levels. It concluded that the primary reason for the lower water levels may be leakage caused by the deteriorating condition of a dam. As well, the ESSC Report indicated it was unclear if water level changes had impacted water quality.

[54] In the end, Dr. Dobson was unable to establish that development in general, and, more importantly in this appeal, the proposed development which could flow from a rezoning approval in particular, will impact the water level or the water quality of the Williams Lake watershed.

[55] While Dr. Willison is not an expert in planning matters, his expert's report dated February 11, 2022, raised a number of MPS environmental policies which were not discussed in the Staff Report to Community Council. He raised the City-Wide MPS Policy 8.5. as well as Policies 7 to 7.3 of the Secondary Strategy. These are reproduced for ease of reference:

8.5 The City shall establish standards, insofar as it has the power, for maintaining lake systems and their watersheds in a healthy state. These standards should address the infilling of lakes or their tributaries, the preservation of natural resources which are visually or ecologically complementary to those lakes and their tributaries, the control of discharges into lakes or tributaries resulting from public or private developments which would cause long-term degradation of the water quality, and the prevention of any other environmentally damaging effects.

[Exhibit T-3, p. 42]

7. ENVIRONMENT

Objective: Identify and protect environmentally sensitive and ecologically valuable natural features.

7.1 Environmental sensitivity shall be considered as of the degree of susceptibility of natural areas to deleterious effects of urban development. Areas of high sensitivity are identified on the Environmental Sensitivity Maps.

These maps shall be used as general resource documents in evaluating zone changes and contract development applications.

7.1.1 Pursuant to Policy 7.1 the following features are used to identify such areas:

- (a) tree cover - 40 percent and greater in density;
- (b) exposed bedrock;
- (c) wetlands and streams;
- (d) slopes - 16 percent and greater.

7.1.2 Lands within 100 feet of the water's edge of any water body shall be considered to be environmentally sensitive and the Land Use By-law shall require a higher standard for new single-family lots adjacent to watercourses.

7.2 The Environmental Sensitivity Map may be used in assessing the effects of capital work to be undertaken by the City.

7.3 Where development proposals are being considered through rezoning or development agreement, the City shall protect environmentally sensitive areas.

[Exhibit T-3, p. 188]

[56] Like Dr. Dobson, Dr. Willison said Catamaran Pond acted as a buffer for the Williams Lake watershed. He said that because the water leaving Catamaran Pond was silt-free, while the water entering the brook into Catamaran Pond was contaminated with silt, it was "...reasonable to presume that the wetland ecosystem associated with Catamaran Pond..." was responsible for the water quality improvement.

[57] Dr. Willison also summarized the ecosystem benefits of wetlands, including mitigation of stormwater flows, protecting water quality, providing vegetation buffers to stabilize stream banks and slopes, and providing nutrients for the core area. He also stated that wetlands are unstable and unsuitable for building.

[58] The Board summarizes the other key points of his February 11, 2022, report as follows:

- The proposed building will occupy much of the Property and there will be "virtually no permeable surface" between the hard surfaces and the provincial lands where the brook flows;

- It is not clear how construction of the proposed building could be done without encroaching on the watercourse buffer; it would be difficult to meet the objectives for on-site stormwater management;
- Catamaran Pond is identified as an environmentally sensitive significant natural wetland and stream in the Secondary Strategy;
- The proposal cannot meet the 100-foot buffer provided in Policy 7.1.2 and fails to protect this environmentally sensitive area pursuant to Policy 7.3;
- Building an apartment building with a large footprint, infilling, with the paved areas and lack of vegetation is not consistent with protecting and enhancing environmentally sensitive areas such as Catamaran Pond and the brook; and
- Preserving the R-2 zone with buildings with a smaller footprint would be more consistent with the protection of Catamaran Pond and the brook.

[59] City-Wide Policy 8.4 of the MPS provides general context and requires HRM to "...identify areas of natural significance and natural areas which are environmentally sensitive". HRM is tasked with protecting these areas "...through such means as zoning, development standards, and public education". Mapping has been done to identify "highly sensitive areas".

[60] City-Wide Policy 8.5 requires HRM to establish "standards" to accomplish the goal of environmental protection of lakes and watersheds. This wording implies formal creation and implementation of the criteria which will accomplish the goal. The Board notes the rezoning does not involve infilling of any watershed. The Board agrees with Ms. Rubin and Ms. MacLaurin that this policy has been implemented through the watercourse buffer set out in s. 14QA of the LUB, along with all the various standards

related to stormwater management, grade alterations, and other mandatory aspects of the permitting process.

[61] Regardless of whether it is relatively easy or very difficult to meet these standards, they must be met, or no construction can proceed. Therefore, rezoning from one form of multi-unit residential use to another similar one, in and of itself, does not raise any inconsistencies with City-Wide Policy 8.5.

[62] Secondary Strategy Policy 7.1 establishes Environmental Sensitivity Maps for high sensitivity areas. It became apparent during the hearing that the Property itself was not identified on the Environmental Sensitivity Map. That said, Catamaran Pond is within the boundary of the map. Policy 7.1.2 requires a higher standard for new single-family lots within 100 feet of a water body. The proposal does not involve a single-family dwelling.

[63] The question remains whether there is a distinction between “areas of high sensitivity” and areas which are “environmentally sensitive”. Clearly, Secondary Strategy Policy indicates lands within 100 feet of a watercourse are considered environmentally sensitive whether or not they are identified on the Environmental Sensitivity Map. The Board agrees with Ms. MacLaurin’s submission that a policy hierarchy is established by reading the MPS as a whole. Taking a pragmatic and purposive approach to the interpretation issue, when reading the environmental policies in the MPS as a whole, protecting environmentally sensitive areas such as wetlands and streams goes beyond identifying whether the Property which is the subject of a rezoning application is identified on the Environmental Sensitivity Map. That said, the highest priority protection is

provided to areas of high sensitivity through the specific reference in Policy 7.1.2, which is not applicable in this case.

[64] Policy 7.3 of the Secondary Strategy is more general in nature than the specific requirements in Policy 7.1.2. The appellant submits the two provisions can be read in harmony in that they both express a general intent to protect the environment, while requiring more stringent standards for new single-family homes. This is a reasonable interpretation of the interplay between the two provisions. Community Council can still consider whether the rezoning will impact an environmentally sensitive area outside the single-family home concept.

[65] Section 228 of the *HRM Charter* indicates that the purpose of the MPS is generally to provide policy statements to guide future development. A policy intent expressed in the MPS is generally implemented through bylaws or other methods of controlling development. These include the LUB, and other standards established by the municipality that govern various aspects of construction. The appellant pointed to the watercourse setbacks in s. 14QA of the LUB, and other standards provided by the Lot Grading Bylaw, the Blasting Bylaw, the Tree Bylaw, and the Stormwater Management Standards.

[66] The difficulty the Board has with Dr. Willison's analysis, and the water sampling done by Dr. Dobson, and Community Council's decision, is that they do not show how the rezoning of this particular property will have any environmental impacts that are materially different and more potentially negative than development which can occur as-of-right under the current zoning. In the context of rezoning, as opposed to

approval of a specific project by a development officer, in the Board's view, this is really what the general aspect of Policy 7.3 is meant to address.

[67] Dr. Willison's report suggests the development will be more intense, with a larger impermeable footprint, under the R-3 zone, from an environmental perspective, than what is allowed under the R-2P zone. He acknowledged this was to some extent based on older plans in the Appeal Record. The WLCC argued that the extent of lot coverage was considerably greater under the R-3 zone than the R-2P zone. It submitted Community Council had discretion to decide the extent to which it was comfortable with more intense development when considering environmental concerns. The WLCC submitted that Community Council had ample evidence upon which to base its decision, including the extensive documentation provided by the WLCC. The WLCC submitted the Board should defer to this discretion. While conceptually the Board agrees there may be some element of discretion, the exercise of that discretion must still be grounded in fact and opinions related to those facts.

[68] Lot coverage relates to the footprint of the building itself. Clearly the R-2P zone restricts this aspect to 35 percent (although it must be kept in mind the property consists of two lots, which would probably have to be reconfigured, in an as-of-right development, to meet the parking design criteria), while the R-3 zone has no specific lot coverage restriction. The building's footprint is governed by angle controls, which would allow for greater building lot coverage. That does not end the analysis.

[69] A major concern raised by the WLCC relates to impermeable surfaces. Because of the formulas used to establish setback requirements in the R-3 zone, Mr. Saleh said that the side yard setbacks would be between 10 to 20 feet in the R-3 zone,

while they were established at 6 feet in the R-2P zone. There are also open space requirements, including landscaping, under the R-3 zone which do not exist in the R-2P zone. The landscaping, while perhaps better than pavement, would still involve ground disturbance, as pointed out by Dr. Williston. That said, as the two four-unit buildings allowed on the Property by the R-2P zoning can be three storeys high, Mr. Saleh said the built form combined with the impermeable areas were roughly the same in the two zones.

[70] In the Board's view, the environmental controls in place for R-2P zoning are the same as the R-3 zone with respect to, for example, runoff, construction disturbance issues, stormwater management, tree cutting, clearance, and watercourse setbacks. Any applicable provincial or federal legislation would be the same.

[71] The Board realizes that both the proposed R-3 development and the potential as-of-right development are conceptual drawings, and the proposed apartment design is at a more advanced stage. That said, the setbacks created by angle controls, the requirements for green space, and other design features to address planning staff concerns, such as the positioning of the driveway, could limit the proposed apartment development's impermeable footprint to a similar degree than two four-unit buildings under the R-2P zone.

[72] In this context, runoff towards the brook and Catamaran Pond, which was a major focus of discussion, should not be materially different under both zones. In any event, the stormwater management criteria would apply to both forms of development. There was also a suggestion by Dr. Williston that blasting might be required for underground parking. Mr. Saleh testified his company had never blasted in all the

construction they had undertaken. He said a blasting permit was difficult to obtain and, in any event, all the requirements of the applicable bylaw would have to be met.

[73] As discussed in *Armco Capital Inc. (Re)*, 2021 NSUARB 147, in overturning Community Council's decision, where somewhat general environmental concerns were raised, any development must follow all applicable environmental legislation. All applicable municipal standards and Bylaws, including the LUB must be followed. Environmental concerns should not be considered in the abstract but focused on the particular rezoning. The Board is satisfied nothing in the materials before Community Council, or in the evidence before it, establishes that the foregoing relevant legislation, bylaws and standards will be inadequate to address concerns between environmental impacts that might differ, if at all, between the R-2P zone and the R-3 zone.

[74] Neither this Board, nor Community Council, are experts in environmental matters. That said, the Board's fact-finding role and testing of the evidence before it is important. The Board had the benefit of a more detailed presentation of the environmental issues than did Community Council. The technical materials submitted by the WLCC and, in particular Dr. Dobson, were subject to cross-examination.

[75] In this case, it would appear any new environmental impacts created by the rezoning of the Property are speculative at best. To the extent they are based on a perceived inability to meet the relevant standards and bylaws, they are not relevant to the analysis, as the rezoning would have no environmental impact where a proposed development cannot be built.

[76] The Board will briefly address the issue of preserving habitat for wildlife or preserving green space for a potential corridor link with Long Lake Provincial Park. The

only way this could be accomplished is if the Property were not developed at all. Indeed, this is the preferred solution of the WLCC.

[77] The fact remains that the Property can be developed under the current zone. The protection of wildlife habitat and creation of green zones, or wildlife corridors, is not currently a policy consideration for the Property under the MPS.

[78] In the final analysis, this is not a case involving deferral to Community Council based on discretionary choices and value judgments. This is a case where the evidence does not support the position that rezoning will raise environmental concerns that are materially different or environmental controls that are materially less stringent in the R-3 zone as compared with the R-2P zone. The Board finds denial of the application on this basis does not reasonably carry out the intent of the MPS.

Compatibility

[79] Policy 1.3.1 of the Secondary Strategy is the primary enabling policy for the application. It allows council to rezone properties to permit apartments no higher than four storeys in areas designated as “Medium-Density Residential” on the Generalized Future Land Use Map. The Property is in an area which is so designated.

[80] Policy 1.3.1 lists two criteria for consideration which council “shall” consider. They are “compatibility with the existing neighbourhoods and the adequacy of municipal infrastructure”. Community Council did not list either of these criteria in its reasons for denial of the application. The Board must still consider whether compatibility with the existing neighbourhood forms a basis upon which a denial of the rezoning application would reasonably carry out the intent of the MPS.

[81] The Board agrees with Ms. Chapman's assessment that MPS City-Wide Policies 2.1, 2.2, 2.3, 2.4, and 2.4.1 provide context which assist in determining what is meant by compatibility with existing neighbourhoods. The utility of Policies 2.2 and 2.4.1 is impacted by the fact they refer to implementation policies which have been repealed. Nevertheless, the set of policies, in conjunction with Policy 1.3.1 and 4.3 of the Secondary Strategy, address the following factors which are relevant to the Board's analysis:

- There is a clear intent to permit Medium-Density Residential where the Property is located;
- Use or intensity of use different from the existing neighbourhood should be addressed;
- The existing residential character of a predominantly stable neighbourhood should be maintained; and
- As no new streets or commercial development are proposed, stability in this matter is primarily addressed by considering and preserving the scale of the neighbourhood.

[82] The Board starts its analysis by indicating that it will address traffic concerns separately. The Board agrees with Ms. Rubin's submission that the Appeal Record shows that all relevant HRM departments were consulted by planning staff. No concerns were expressed with respect to the adequacy of relevant municipal services. The Board is satisfied that none were raised by WLCC which would carry more weight than the opinions offered by HRM's professional staff to its planning department.

[83] The WLCC said the proposed development was not compatible with the existing neighbourhood. Mr. Coolican said there was only one other apartment building

in the neighbourhood, which predominantly consisted of single-family dwellings. Videos of the area filed by the WLCC provided some visual context.

[84] The WLCC says the built form is predominantly single-family dwellings in an area with considerable open space. This includes the Long Lake Provincial Park across the street from the Property. The WLCC says the proposed apartment building is completely out of place. The public participants said basically the same thing. What constitutes the neighbourhood is not a question which can be answered with great precision. This is particularly the case with this section of Old Sambro Road. The Board acknowledges that a neighbourhood can be wider than the immediately adjacent properties. How far beyond is a matter of judgment. Community Council's decision does not provide any guidance on this aspect. The Board has considered the adjacent properties, along with properties in the vicinity and more generally, on Old Sambro Road.

[85] The Board agrees with the appellant that compatibility with the existing neighbourhood would not form a basis, grounded in MPS policy considerations, for denying the rezoning application. Multi-unit buildings can be developed as-of-right on the Property. The proposed apartment building would only increase the allowed density by five units. Properties in the immediately surrounding neighbourhood are all zoned for multi-residential buildings. There is a three-storey apartment building immediately next to the Property. The provincial lands are vacant but are in the R-2P zone which allows multi-residential buildings. Going a bit further afield, the WLCC videos illustrate other multi-unit buildings in the larger neighbourhood and there are other apartment buildings along Old Sambro Road. The proposed apartment building is consistent with the

immediate neighbourhood and more generally with other neighbourhood development in the Old Sambro Road area.

[86] The R-3 zone provides controls on height. Density is addressed by requiring a mix of bachelor, one bedroom, and two-bedroom units. Form is addressed through angle controls, along with setback and open space requirements. All the foregoing limits the impact on nearby properties. In any event, there are no single-family dwellings abutting the Property and Old Sambro Road already contains a mix of residential unit types.

[87] The WLCC raised issues about the impact of one approval on future applications. It was described in some evidence as the thin edge of the wedge. To some extent, this was raised in relation to the environmental issues. The concern in both instances is that while one rezoning approval may not have a significant impact, it opens the door for future approvals. While built form in an area can be influenced by what has been approved in the past, each application must be considered on its own merits.

[88] The Board has considered the policy direction in Policy 1.3.1 of the Secondary Strategy. It has taken into account the specific considerations in the relevant City-Wide policies. This is not a case where deferral to Community Council's discretion or value judgements is required, as was the case in *F.H. Construction*, which was cited by the Intervenor, since Community Council did not base its decision on this aspect at all. The Board sees no basis for finding that the proposed rezoning should be denied based on a compatibility MPS policy rationale.

Traffic

[89] The WLCC says the proposed development will have a negative impact on traffic. This was also a concern raised before Community Council by members of the public, and with the Board in the public participation component of the hearing. The project opponents raised issues about the existing traffic on Old Sambro Road generally; the bend and slope in the road near the Property; and the busy Dunbrack Street intersection. As well, WLCC said the proposed driveway was too close to the Dunbrack Street intersection and there would be issues with access and egress, particularly during rush hours. Concerns were raised about the safety of pedestrian traffic. The WLCC took the position the access and egress control measures suggested by the experts would probably not work in practice and would generate more traffic on nearby streets.

[90] WLCC's evidence on this point was presented by Ms. Hall. She acknowledged she was not an expert in the field of traffic engineering. The Board would note that not all opinions require professional expertise. Where an opinion is based on personal observations of the kind which most persons can make, they do not constitute expert opinion evidence of the type that requires qualification. For example, to offer the opinion that an intersection is busy, or close to a nearby driveway, or that traffic is queuing at certain points in the day, based on observing and experiencing it, does not require any expertise. A technical analysis of the rate of traffic flow, or a comparative analysis with other intersections, and what flows from these observations, from a traffic engineering standpoint, goes beyond lay opinion. To the extent Ms. Hall's opinions ventured into expert opinion evidence, the Board has given them no weight.

[91] The WLCC said City-Wide Policies 9.4 and 9.5 and Secondary Strategy Policies 5.2 and 5.3 were relevant. City-Wide Policies 9.4 and 9.5 address transportation systems that favour pedestrian traffic and minimize environmental effects. Secondary Policies 5.2 and 5.3 seek to minimize through traffic. The rezoning application does not envisage new transportation systems. The Board will discuss the anticipated traffic impacts.

[92] The Board agrees with the WLCC that Old Sambro Road has relatively high traffic volume. It agrees that the intersection of Dunbrack Street and Old Sambro Road is relatively busy. It further agrees with WLCC that the proposed driveway will be relatively close to this intersection. The Board has observed the curve and slope of Old Sambro Road near the Property. The Board does not agree that denial of the rezoning application because of traffic issues would reasonably carry out the intent of the MPS.

[93] The appellant obtained three traffic impact statement (TIS) reports from Michael MacDonald, P.Eng., Senior Transportation Engineer with Harbourside Transportation Consultants. These were reviewed by HRM traffic engineering staff and the responsible provincial government department (NSTIR). It appears, based on Ms. Chapman's testimony, that the reports may not have been before Community Council. She did summarize her assessment of their conclusions.

[94] Regardless, the Board had the benefit of the reports. The Board agrees with Ms. Rubin's submission that all three TIS reports concluded the rezoning proposal would have a negligible impact on traffic, which is what Ms. Chapman indicated to Community Council, based on HRM Traffic Engineering's review.

[95] The key points from the Harbourside reports, and their review by HRM staff and NSTIR, are summarized as follows:

- There are existing operational and capacity problems at the Dunbrack Street intersection;
- The proposed development is expected to generate one vehicle trip out and four trips into the Property during the morning peak hour;
- The proposed development is expected to generate four trips in and two trips out during the afternoon peak hour;
- The project is expected to contribute five or less vehicles to the Dunbrack Street intersection;
- The driveway location meets HRM's requirement of having a 30-metre distance between it and an intersection controlled by a traffic light;
- The driveway location does not meet, and, because of the amount of street frontage, cannot meet, the NSTIR requirements of about 50 metres separation from the intersection;
- The new driveway would be an improvement, since the existing driveway is closer than what is proposed;
- The slope and curve of Old Sambro Road were specifically considered as part of Harbourside's analysis of stopping sight distance and turning sight distance;
- Harbourside concluded the proposal met HRM by Design Guidelines which incorporate the Transportation Association of Canada Geometric Design Guide for Canadian Roads;

- The proposed project would generate an additional one vehicle trip in each of the morning and afternoon from an as-of-right eight-unit project;
- HRM engineering recommended that driveway access be restricted to right in/right out only to prevent queuing and reduce intersection impacts. The appellant agreed with this recommendation; and
- The impact on the access and egress restrictions is expected to impact one car turning in, and one car turning out, in the morning peak and three cars turning in only in the afternoon peak hours.

[96] Mr. MacDonald was not called to provide expert opinion before the Board. Harbourside's TIS reports were accepted by HRM planning staff and form part of the Appeal Record as a matter of law. No expert opinion evidence was presented to challenge the conclusions in the Harbourside TIS reports, or HRM Traffic Engineering's assessment of the analysis and conclusions therein.

[97] While there may be existing traffic concerns, particularly about the Dunbrack Street intersection, based on the information in the TIS reports as assessed by HRM Engineering and outlined above, the Board is satisfied the impacts on the intersection, and traffic as a whole, resulting from the proposed apartment building, will be negligible. This is particularly the case when compared with potential as-of-right development. The Board is further satisfied the proposal has not raised any significant traffic safety or design concerns, other than a potential issue with NSTIR requirements.

[98] The only issue which requires further elaboration relates to not meeting the NSTIR requirement of 50 metres of separation from the driveway on Old Sambro Road to the Dunbrack Street intersection. Mr. Saleh was of the view that because there was

an existing driveway, the property would be exempted from this requirement in an as-of-right development. No evidence was presented about this beyond Mr. Saleh's assertion. That said, the discussion in the Appeal Record appears focused on a new driveway and generally supports Mr. Saleh's observation.

[99] With respect to the proposed new driveway location, an email dated October 23, 2020, from Jason Rae of NSTIR states the new proposed location of the driveway is no longer in NSTIR's area of control. NSTIR was aware of the purpose of HRM staff's consultation on this issue and did not raise concerns or oppose the application. In any event, when final design plans are submitted, formal approval from NSTIR will be required if the driveway falls within its area of control. Otherwise, the HRM standard will apply. The Board is, therefore, satisfied, on the record before it, that traffic concerns were adequately addressed by the appellant. Given the number of trips which will be generated if the development proceeds, the impacts on both vehicular traffic, including through traffic, will be negligible. The same can be said for the impact on pedestrian safety. There is, therefore, no basis grounded in the MPS policies, for denying the rezoning application based on traffic concerns.

V CONCLUSION

[100] The Board is persuaded the appellant met the burden upon it and finds Community Council's decision does not reasonably carry out the intent of the MPS. The

appeal is allowed, and the Community Council is ordered to approve the rezoning application.

[101] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 13th day of June, 2022.



Richard J. Melanson