DECISION **2016 NSUARB 196**
M07563

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF an appeal by **DAVID OWEN CARRIGAN** to the decision of Halifax and West Community Council which approved an Application by Geoff Keddy and Associates and WSP Canada Inc., on behalf of **JOHN GHOSN**, for a Development Agreement to allow for a mixed-use building at the corner of Coburg Road and Seymour Street, Halifax

BEFORE:	Roberta J. Clarke, Q.C., Member Richard J. Melanson, LL.B., Member
APPELLANT:	**DAVID OWEN CARRIGAN** On his own behalf
APPLICANT:	**JOHN GHOSN** Richard W. Norman, J.D.
RESPONDENT:	**HALIFAX REGIONAL MUNICIPALITY** E. Roxanne MacLaurin, LL.B.
HEARING DATE:	September 14-15, 2016
FINAL SUBMISSIONS:	October 6, 2016
DECISION DATE:	**December 1, 2016**

DECISION: **The Appeal is allowed; however, Council is directed to approve the Development Agreement as amended by this Decision in paragraph [270].**

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1.0 INTRODUCTION

[1] Council of the Halifax Regional Municipality ("HRM") amended the Halifax Municipal Planning Strategy ("MPS") and Land Use By-law ("LUB") on April 5, 2016 to set out site-specific requirements for development of three adjacent properties located at the corner of Coburg Road and Seymour Street and on the west side of Seymour Street in Halifax. The properties are owned by John Ghosn ("Applicant").

[2] Subsequently, on June 28, 2016, Council approved a Development Agreement to be entered into with Mr. Ghosn. The Development Agreement would allow the construction of a mixed multiple unit residential and commercial use building on the property, consisting of no more than 35 residential units on six levels, and limited commercial use on the ground floor, and with underground parking.

[3] On July 14, 2016, David Owen Carrigan ("Appellant"), a resident of a property on the opposite corner of Coburg Road and Seymour Street, filed with the Nova Scotia Utility and Review Board ("Board") an appeal of Council's decision to approve the Development Agreement.

[4] Prior to the hearing on the merits of the appeal, the Board held two preliminary hearings. At the first, held on August 16, 2016, the Board heard a motion from Counsel for HRM to strike certain of the grounds of appeal and to require clarification of other grounds. As a result, the Appellant amended the first ground of appeal to refer to the relevant MPS policy, and the ground relating to citizen participation was struck as it is outside the jurisdiction of the Board.

[5] At the second preliminary hearing, held on September 2, 2016, the Board heard a motion from Counsel for HRM to strike certain documents from the evidence filed by the Appellant, and to strike the report filed by Beverly Miller, a proposed expert on

behalf of the Appellant. The Board issued a decision letter on September 2, 2016, which granted the motion by the Respondent, thus striking certain exhibits contained in the Appellant's evidence, and Ms. Miller's report, as not relevant to the issue the Board has to decide in this proceeding. Ms. Miller was subsequently called as a witness by the Appellant. Unfortunately, she did not seem to be aware of the Board's ruling. As Ms. Miller's proposed evidence was in relation to the report which had been struck, she was not permitted to testify.

[6] The hearing on the merits was held at the Board's offices on September 14 and 15, 2016. Mr. Carrigan appeared on his own behalf. E. Roxanne MacLaurin, LL.B., appeared on behalf of HRM, and Richard W. Norman, J.D., appeared on behalf of the Applicant.

[7] The Notice of Hearing was advertised in the Halifax Chronicle Herald on August 2, 2016, and served on property owners within 500 feet of the proposed development on August 1 and 2, 2016. No persons applied to intervene in the proceeding, and no persons requested to speak at an evening session of the Board scheduled for September 14, 2016. As a result, the evening session was cancelled.

2.0 ISSUE

[8] Pursuant to s. 267(2) of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, as amended ("*HRMC*"), the issue for the Board to determine is whether Council's decision to approve the Development Agreement reasonably carries out the intent of the MPS. For the reasons set out below, the Board finds that the Development Agreement, as currently drafted, does not reasonably carry out the intent of the MPS.

The appeal is therefore allowed; however, pursuant to s. 267(1)(c) of the *HRMC*, the Board directs Council to approve the Development Agreement as amended by this Decision in paragraph [270].

3.0 STATUTORY PROVISIONS AND PLANNING DOCUMENTS

[9] Under the provisions of s. 262(2) the *HRMC*, the decision of Council to approve a development agreement may be appealed:

> **262 (2)** The approval, or refusal to approve, and the amendment, or refusal to amend, a development agreement may be appealed to the Board by
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> (a) an aggrieved person;
> (b) the applicant;
> (c) an adjacent municipality;
> (d) the Director.

[10] Section 209(aa) of the *HRMC* provides:

> **209** (aa) "aggrieved person" includes
>
> (i) an individual who bona fide believes the decision of the Council will adversely affect the value, or reasonable enjoyment, of the person's property or the reasonable enjoyment of property occupied by the person,

[11] There was no challenge to the standing of the Appellant as an "aggrieved person" to appeal the decision of Council in this proceeding.

[12] The grounds on which such an appeal can be made are set out in s. 265(1)(b) of the *HRMC*:

> **265 (1)** An aggrieved person or an applicant may only appeal
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> . . .
>
> (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;
>
> . . .

[13] As noted above, the Board's jurisdiction is limited under s. 267 of the *HRMC*:

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]

[14] The grounds of appeal, evidence and the parties' submissions make reference to many provisions in the Regional Municipality Planning Strategy ("RMPS"), and the MPS, including the Peninsula Centre Area Plan ("PCAP"), which applies to the subject property.

[15] The provisions of the RMPS, MPS and PCAP relevant to this appeal have been attached to this Decision as Appendix "A" for ease of reference.

[16] Central to this Decision are the provisions of PCAP 1.15 which provide:

1.15 Notwithstanding the Medium Density Residential Designation of the south-west corner of Coburg Road and Seymour Street, the Municipality shall consider a residential or mixed use residential and commercial building by development agreement. In considering such development agreements, Council shall consider the following:

(a) appropriate scale, massing and setbacks from neighbouring properties and uses;
(b) reduced building setbacks of up to 1.8 metres (6 feet) from shared property lines provided design features and step backs are incorporated to mitigate potential impacts on neighbouring properties;
(c) appropriate transition of the building with respect to the lower rise buildings along Seymour Street;
(d) no portion of the building, including mechanical equipment and penthouses, shall exceed 20.1 metres (66 feet) in height;
(e) the building shall be constructed of high quality durable materials;
(f) commercial uses intended to serve the local neighbourhood, such as grocery store uses, drug store uses, and personal service uses may be permitted at the ground level;

(g) underground monthly or yearly commercial parking may be permitted provided parking is also provided to a minimum of 1/3 of the residential units;
(h) to promote pedestrian interest, where commercial uses are located at the ground level, the ground level shall have a high level of transparency and there shall be frequent entryways where there are multiple occupancies;
(i) to promote a mix in residential units, a minimum of one third of the residential units shall be 74 square metres (800 square feet) or larger;
(j) all vehicular parking shall be located underground;
(k) no vehicular or service access points shall be located on Coburg Road;
(l) the size and visual impact of utilitarian features such as garage doors, service entries, and storage areas, shall be minimized; and adequate water and sewer capacity to service the development.

4.0 EVIDENCE

4.1 Appellant's Witnesses

David Owen Carrigan

[17] The Appellant went through a series of photographs tendered as Exhibit C-13, which supplemented those photographs submitted as part of Exhibit C-6. These photographs depict certain views of Seymour Street, Coburg Road and Vernon Street.

[18] The Appellant testified the area surrounding the properties subject to the Development Agreement was made up of some fifty buildings. He indicated that with only a few exceptions, the neighborhood consisted of traditional homes having backyards, setbacks and landscaping. Virtually all complied with the height restrictions set out in the MPS and LUB.

[19] The Appellant pointed out certain architectural features, setbacks and landscaping associated with a ten-storey condominium complex located across the street from the proposed development, known as The Carlyle, which features he felt distinguished this building from the design proposed by the Applicant.

[20] The Appellant also addressed parking and traffic congestion issues. He pointed out that Seymour and Vernon streets, which intersect with Coburg Road, do not

align. He spoke of issues with sight lines when vehicles were parked near the intersection of Seymour and Coburg. He raised concerns about additional traffic which he said would be generated by the proposed project when taking existing traffic problems in consideration.

[21] The Appellant highlighted certain traffic flow, parking and safety concerns occasioned by delivery trucks and illegal parking, which he associated, in part, with the Needs convenience store currently located on the subject property.

[22] He testified illegal parking is a constant problem on his street. On cross-examination, the Appellant said he would have to be on the phone all day in order to report all traffic infractions. He also indicated the noise associated with delivery trucks with refrigeration units is a constant nuisance.

[23] The Appellant introduced into evidence a document originating with HRM's Transportation and Public Works Department (Exhibit C-14). It consisted of manual traffic counts with accompanying graphs. Some of the counts were done for Coburg Road at Seymour Street and Vernon Street on June 23, 2015. The Appellant contrasted these actual counts with the estimates in the traffic impact statements done by Genivar Inc. on behalf of the Applicant, which appear in the Appeal Record (Exhibit C-4).

[24] The Appellant testified the planned commercial space in the proposed development could increase the amount of traffic because it could be larger than the existing Needs convenience store. The Appellant provided rebuttal evidence in response to the Applicant's evidence that the space occupied by the proposed commercial space would actually be smaller than the existing Needs convenience store. He stated he had measured the floor space accessible to customers, including the counter area, by

counting the number of floor tiles. He testified this amounted to 1837 square feet, compared to the 2250 square feet of commercial space proposed by the Applicant. On cross-examination, the Appellant conceded he had not measured any storage area.

[25] Finally, the Appellant said the height of the proposed building would prevent him from making effective use of solar panels and would cast a shadow on his property. He also raised concerns about wind effects.

Neil Ritchie

[26] Mr. Ritchie resides five blocks from the subject property on Jennings Street. He testified as to a shift in density on his street. When he originally moved back to HRM approximately eighteen years ago, there were some twenty rental units on the street, consisting of owner occupied dwellings with flats having two or three students. He said this has now become one hundred rental units. With the increase in density, Mr. Ritchie observed an increase in bad behavior, loud parties and altercations between residents and transient renters which have negatively impacted quality of life. He related a tragic personal experience involving an assault on his son. While he acknowledged a need for more density on the peninsula, he wanted to see the Centre Plan unfold rather than site-specific amendments.

Anne-Marie Norton

[27] Ms. Norton was a long-time homeowner in the area, formerly residing near the intersection of Coburg Road and LeMarchant Street, near LeMarchant Towers. She said the neighborhood was originally a stable area, with students renting from homeowners. She described a change with an influx of younger students. She indicated properties were acquired and opened up to student only housing, including her

neighbour's home which was sold for this purpose. Ms. Norton testified there was a lack of support for residents who were being impacted by an increase in the student population. There was no coordination related to bar hours, use of alcohol in residence, university rules and municipal by-laws. Attempts were made to work with the police, municipal councilors and Dalhousie University. In her view, many issues were caused by alcohol consumption. No solutions were found and police became involved on a regular basis. Ms. Norton also spoke of traffic issues related to a convenience store at the corner of LeMarchant Street and Coburg Road, where the size of delivery trucks became an issue.

Graeme Duffus

[28] Mr. Duffus resides on Coburg Road, across the street from the proposed development. He is an architect by profession and has long and extensive experience in that field. It became evident Mr. Duffus was being called primarily to provide opinion evidence with respect to building design and MPS policies. Upon objection raised by HRM and the Applicant, the Board limited the testimony of Mr. Duffus to factual evidence.

[29] Mr. Duffus testified as to his own experiences with the impact of construction noise and disruption occasioned by demolition and excavation associated with a building in the neighborhood, construction near his former office, and recently with construction at a location on Spring Garden Road near his current office. He testified the construction impacts of the proposed development would be significantly greater than the as of right construction impacts prior to the MPS and LUB amendments and that this information had not been before Council for its consideration.

David Woodman

[30] Mr. Woodman said he frequently visits the Appellant. He has been involved in all levels of the grocery business, having worked in the industry for approximately twenty-five years, including grocery stores with pharmacies. He did not have experience in the operation of the Needs convenience store at the corner of Coburg Road and Seymour Street. As was the case with Mr. Duffus, the Board ruled that Mr. Woodman's testimony would be limited to factual evidence.

[31] Mr. Woodman testified as to his own experience with respect to the noise, vibration and fumes generated by delivery trucks with refrigeration units. He also testified about his own experience with "gridlock" while visiting the Appellant when delivery trucks and customers were parked at the Needs convenience store.

Mary Clancy

[32] Ms. Clancy has lived in the neighborhood since 1955, currently living in Embassy Towers on Spring Garden Road. She owns a house with a number of rental units on Coburg Road. She lived in this house from 1978 to 1997 and again from 2002 to 2007. Her property had not experienced issues until recently. She testified she had noticed a change in the behavior of students as indicated by some previous witnesses. Extensive damage had been caused to her units requiring over $10,000 in repairs some two years ago.

[33] Ms. Clancy testified concerning her attempts to renovate her property and attract families, which had not been successful. She attributed this to the behavioral issues of a few unsupervised bad student tenants.

[34] Ms. Clancy also gave evidence related to her knowledge of traffic congestion and safety issues, particularly with respect to where Coburg Road intersects with Seymour and Vernon Streets. She said a fatal injury had occurred there some six or seven years ago. Ms. Clancy said there was heavy pedestrian traffic in the area and students were often distracted by the use of portable devices with ear buds.

Philip Pacey

[35] Dr. Pacey, a former member of the Planning Committee of the Ward II Resident's Association, was involved in the preparation of the PCAP. He was a past chair of the City of Halifax Planning Advisory Committee and a past member of the Halifax Planning Advisory Committee of HRM. He was also a past member of the Peninsula Planning Advisory Committee.

[36] Shortly following the hearing, Dr. Pacey passed away. He participated as a witness in numerous planning hearings before the Board. The Board observes that, despite the challenging issues which were often involved in such matters, he always provided his evidence in a courteous, respectful and thoughtful manner.

[37] Dr. Pacey wrote a letter of comment which was received by the Board on August 31, 2016 (part of Exhibit C-11). This letter of comment set out Dr. Pacey's opinion that the Development Agreement did not reasonably carry out the intent of the MPS, being inconsistent with the RMPS, the MPS and the PCAP.

[38] Dr. Pacey was called as a witness by the Appellant. It became apparent Dr. Pacey was being asked to provide opinion evidence in substantially the same format as contained in his letter of comment. Counsel for HRM and the Applicant objected on

the grounds the Appellant had not followed the requirements of *Rule 13* of the Board's *Municipal Government Act Rules* with respect to the pre-filing of expert reports.

[39] In an oral decision, the Board weighed evidentiary and procedural fairness considerations and exercised its discretion pursuant to *Rule 13* in granting leave to Dr. Pacey to provide expert opinion evidence. The Board's full reasons appear in the record of this proceeding.

[40] The Board advised Counsel for HRM and the Applicant it was prepared to adjourn the hearing following Dr. Pacey's testimony, should Counsel require time to prepare cross-examination or prepare rebuttal evidence.

[41] Dr. Pacey's letter of comment reviewed various policies in the RMPS, the MPS and the PCAP, including the site-specific provisions of PCAP Policy 1.15. He summarized his opinion as follows:

> The approved development agreement would increase traffic and unloading activities at a difficult intersection; it would exceed the height of adjacent residential buildings and the mechanical equipment would be allowed to exceed even the height limit of Policy 1.15; it would remove affordable housing; it would not be required to supply any family housing; its density is unknown, its amenity space is narrow, and it allows a large commercial space. The agreement does not comply with the Regional Municipal Planning Strategy, the Halifax Municipal Planning Strategy and the Peninsula Centre Area Plan. Please allow the appeal.
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> [Exhibit C-11, Dr. Pacey Letter of Comment]

[42] In oral testimony, Dr. Pacey stressed the wording of PCAP Policy 1.15 was not all-encompassing. In his opinion, it specifically referenced the Medium Density Residential Designation of the subject property, but this did not mean the other RMPS, MPS and PCAP policies were no longer applicable to the site.

[43] Dr. Pacey said Policy 1.15 required Council to consider "appropriate scale, massing and setbacks." Dr. Pacey indicated this wording must be read in the context of other MPS policies which discuss compatibility with existing neighbourhoods.

[44] In offering the opinion the mass and scale of this project were not appropriate, Dr. Pacey said the Appellant's evidence indicated most of the neighbourhood consisted of two-storey buildings. As well, the building immediately to the south of the proposed development was 2.5 stories.

[45] Dr. Pacey addressed the Mona Campbell building, an academic building located on Coburg Road immediately behind the subject property. He said he was not aware there had been any amendments to the area height restrictions to allow this five-storey building to be constructed.

[46] In Dr. Pacey's view, the photographs appeared to show the Mona Campbell building was roughly the same height as the existing Needs convenience store building. He thought it must be within the thirty-five foot height restriction in the area and indicated building height measurements were taken in different ways, depending on location.

[47] Addressing PCAP Policies 1.15 (b) and (c), which specify setbacks from shared property lines and transition in relation to lower rise buildings along Seymour Street, Dr. Pacey again referenced the 2.5-storey building immediately to the south of the subject property, along with other low rise buildings in the area.

[48] Dr. Pacey stated one of the schedules forming part of the Development Agreement (Exhibit C-4, p. 329) showed the roof projecting from the fifth storey would be approximately six feet from the neighbouring property to the south. In his opinion, this was not an appropriate setback and transition.

[49] Dr. Pacey focused on PCAP Policy 1.15(d), which says no portion of the building, including mechanical equipment, may exceed a height of 66 feet. He pointed out

that section 2.2.1(c) of the Development Agreement defines height as “excluding mechanical equipment”.

[50] In response to a question from the Board, he said he had considered the wording of section 3.4.1 of the Development Agreement, which references height in relation to attached schedules. This did not change his opinion.

[51] Dr. Pacey was of the opinion that the wording of the Development Agreement allowed rooftop equipment to extend beyond the 66 foot height restriction set out in PCAP Policy 1.15, and was therefore inconsistent with the MPS.

[52] Dr. Pacey stressed PCAP Policy 2.1, which says the ”floor area of grocery stores shall not exceed 1000 square feet and the floor area of drug stores shall not exceed 1400 square feet.” Dr. Pacey disagreed with an opinion expressed by Carl Purvis, who provided expert testimony on behalf of the Respondent. In his expert report, Mr. Purvis had stated PCAP Policy 2.1 was enacted for the purpose of creating a specific zone and was not applicable to this development.

[53] In Dr. Pacey’s opinion, given the overall context of the surrounding words, PCAP Policy 2.1 was a general policy applicable to the Peninsula Centre area. He submitted it established a clear size limit to which commercial areas of the proposed development were subject.

[54] Dr. Pacey testified the plans attached as schedules to the Development Agreement appeared to show 6000 square feet on the ground floor which could be occupied by a grocery store or drug store. While he was not certain of the floor space occupied by the existing Needs convenience store, he provided an estimate of less than 2400 square feet. Dr. Pacey highlighted the traffic and parking concerns raised in the

Appellant's evidence. He indicated the potential increase in the size of the commercial space would exacerbate the problem and was clearly contrary to PCAP Policy 2.1 discussed above.

[55] Dr. Pacey disagreed with Mr. Purvis on how conflicts within the MPS should be resolved. At page 13 of his report, Mr. Purvis indicated the more specific policy should prevail. Dr. Pacey pointed to RMPS Policy G-7, which says when evaluating development agreement applications "in the event of conflicts between policies of this Plan and a Secondary Planning Strategy, the more stringent shall prevail."

[56] Dr. Pacey was of the opinion HRM Council had not considered the existing traffic problems and the adequacy of road networks as required by RMPS Policy G-15.

[57] Dr. Pacey addressed affordability, which is discussed in RMPS Policy S-30, as well as an objective in the MPS relating to residential development which, in his words, "calls for housing at prices which residents can afford." In Dr. Pacey's opinion, the proposed rents to be charged by the Applicant for the new rental units in the proposed development were not compatible with the above objectives.

[58] Dr. Pacey raised PCAP Policies 1.1.1 and 1.1.2, which encourage the retention and creation of dwelling units suitable for families with children or family-type housing. He pointed out that "family-type housing" is a defined term in the MPS and means "a dwelling unit with two or more bedrooms." Dr. Pacey said that providing for a minimum number of 800 square foot units "did not cut it".

[59] In addressing density issues, Dr. Pacey said the population density of the proposed development was unknown, although figures of 75 to 80 occupants had been discussed in evidence. He also pointed out specific density limits in the LUB and indicated

the Development Agreement did not comply with the density aspects of the MPS, which are set out in PCAP Policy 1.1.5.

[60] Dr. Pacey testified amenity space available for the proposed development was of limited use and not in compliance with PCAP Policy 1.1.7.

[61] Dr. Pacey's letter of comment indicated the proposal was not one of the four alternatives set out PCAP Policy 1.1.3, which says the "forms of infill housing permitted in Peninsula Centre shall include: (a) interior conversion; (b) additions to existing buildings; (c) filling in-between existing buildings; and (d) building on vacant lots."

[62] At the completion of Dr. Pacey's testimony, no adjournment was requested. Counsel chose not to cross-examine Dr. Pacey. HRM chose to have its expert address Dr. Pacey's evidence in direct examination the following day.

Andrew Murphy

[63] Mr. Murphy is a chartered accountant who lives in Purcell's Cove. His testimony was limited to factual evidence by the Board.

[64] Mr. Murphy had reviewed the Development Agreement and indicated he believed a plain reading of the document shows that, while there is an upper limit on the number of units allowed, and a minimum requirement for two-bedroom units, there was no actual limit on the size of any individual unit. As there was no schedule in the Development Agreement showing the layout of the units, the wording could authorize the "largest rooming house in HRM".

4.2 Applicant's Witnesses

John Ghosn

[65] The Applicant has been involved in property development since the early 1990s. He acquired a property on Seymour Street in 1996, subsequently purchasing two neighbouring properties. He said the three properties are now a set of flats, a single family home and six small units above a commercial space currently occupied by a Needs convenience store. These three properties are the subject of the Development Agreement.

[66] Consistent with the testimony of some of the Appellant's witnesses, the Applicant testified the demographics of the neighbourhood have changed over the years. Initially, he was able to rent to single mothers, mature adults and young professionals. The neighbourhood became more and more an area of student housing. Students became his tenants as well.

[67] At some point in 2007, the Applicant renovated the single family home in an attempt to rent to families, but was not successful in attracting such tenants. Eventually, with repair costs increasing, student preferences changing, along with changes to the grocery business, the Applicant began considering redevelopment.

[68] The Applicant indicated the proposed development would address all the issues related to safety, parking, noise, garbage and traffic raised by opponents. He further said the proposed rents of $1500.00 per month would be almost unaffordable for most students.

[69] The Applicant said the Needs convenience store currently occupies 3400 square feet on the main floor of the building at the corner of Seymour Street and Coburg Road. With the full basement available for storage, the total space amounted to between

6000 and 7000 square feet. He contrasted this with the anticipated 2250 square feet of commercial space appearing on the latest plans in the Appeal Record.

[70] The Applicant said while the plan of the ground floor shows a total of approximately 4000 square feet of usable space, this did not account for space for washrooms. As well, the three proposed apartments shown on the latest plans would have to be eliminated to have access to this entire ground floor space. He did not deviate from these figures on cross-examination.

[71] In contrast to some suggestions the proposed building would have 75 to 80 tenants, the Applicant estimated there would be an average of 1.5 tenants per unit for an estimated total of 52 tenants. At one point, the Applicant said the tenants would likely be employed. Later, he said while he would not discriminate against anyone, given the rental amount and types of income verification and checks required, he expected the target market would likely be tenants in their mid-fifties and possibly retired, who wanted to be close to the downtown area.

[72] During cross-examination, the Applicant explained that the building immediately to the west of his properties was a five-storey academic building which was four times the size of his proposed development. He indicated none of the properties to the south were used as single-family homes. He said they were all associated with Dalhousie University, Dalhousie student housing and a three-storey rental building. He said the ten-storey Carlyle condominium was located across the street on the opposite corner, with another four-storey building nearby. The Applicant said the only single-family dwellings were to the east of his property.

Kourosh Rad

[73] Mr. Rad is employed as a planner with WSP Canada Ltd. He has been the project manager for the proposed development since 2014. He used a PowerPoint presentation to outline the changes to the proposed development as the project was assessed by HRM staff, and went through the HRM Council and Community Council process, which included public consultation.

[74] In response to a question from the Board, Mr. Rad said the building's mechanical equipment would be located both on the ground and on the rooftop. However, the rooftop equipment would not extend beyond the 66 foot height restriction. He pointed to a rendering of the building in Exhibit C-12 to show the proposed location of the rooftop mechanical equipment and how it would be within the 66 foot height limit.

4.3 Respondent's Witness

Carl Purvis

[75] Mr. Purvis is a professional planner who began his career in this field in 2007. He holds a Master's degree in Urban and Regional Planning. He has been employed by HRM since December 2013, having held his current position of Program Manager, Planning Applications, for approximately four months at the time of the hearing. In this position, Mr. Purvis manages staff and reviews all planning applications filed with HRM. His previous positions with HRM include those of Principal Planner and Major Projects Manager. He has been employed as a planner in four different municipalities, including Sydney, Australia; Calgary; and North Vancouver.

[76] Mr. Purvis was qualified as an expert in land use planning, capable of giving expert opinion evidence on land use planning matters, including the intent of the RMPS,

the MPS, including the PCAP and the LUB, and the extent to which Halifax West Community Council's decision of June 28, 2016, with respect to the Development Agreement, reasonably carries out the intent of the MPS.

[77] Mr. Purvis adopted his report (Exhibit C-9), which addresses a series of policies in the MPS and PCAP, including all those raised by the Appellant in his grounds of appeal. With respect to each policy addressed, Mr. Purvis was of the opinion that the Development Agreement is consistent with the PCAP and MPS as a whole. At the conclusion of his report, he stated:

> In summary, after reviewing the staff reports, the appeal record, and the MPS, and giving consideration to the grounds of appeal it is my opinion that the June 28, 2016, decision of the Halifax and West Community Council with respect to application 18322 reasonably carries out the intent of the Halifax Municipal Planning Strategy.
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> [Exhibit C-9, p. 16]

[78] Following the adoption of his report, as had been ruled upon by the Board when it allowed Dr. Pacey to provide opinion evidence, Mr. Purvis was given the opportunity to provide evidence on matters raised by Dr. Pacey in both his letter of comment and his oral evidence. Counsel for HRM was permitted to review with Mr. Purvis his report, highlighting where issues raised by Dr. Pacey had already been addressed. Mr. Purvis then commented on certain issues in more detail.

[79] Mr. Purvis specifically addressed Dr. Pacey's opinion that Policy 2.1 of the PCAP limited the floor area of grocery stores to 1000 square feet and the floor area of drug stores to 1400 square feet, which restrictions were not set out in the Development Agreement. Mr. Purvis testified planning provisions must be interpreted holistically. He referred to Policy 2.1.2 of the PCAP, which referenced enacting a zoning by-law to create a residential neighbourhood commercial zone. In Mr. Purvis' opinion, the floor area restrictions were meant to apply to this zone and were not applicable to the subject site.

[80] Mr. Purvis pointed to the PowerPoint presentation dated April 5, 2016, made on behalf of the Applicant before HRM Council when it considered the MPS and LUB amendments. In his opinion, page 14 of this presentation clearly showed the intent was not to limit the floor area of the commercial space (Exhibit C-4, p. 299). He said there were limitations on the available commercial floor area in the Development Agreement, given the limits on permissible uses on the ground floor, the size of the lot and the need for functional features such as a recessed lobby, parkade access, mechanical units, elevators, corridors, mail rooms and emergency exit stairwells.

[81] Mr. Purvis said that, because of the orientation of the lot and the goal of maximizing frontage and exposure to pedestrian and vehicular traffic, there was limited use for the rear space. Although not contained in the Development Agreement, he explained this coincides with what the Applicant had proposed, which was to place three apartment units at the western side of the ground floor.

[82] Mr. Purvis addressed Dr. Pacey's comment, which indicated PCAP Policy 1.1.3 limited infill housing to interior conversions, additions to existing structures, filling in-between existing buildings and building on vacant lots. He said that, as the policy utilized the wording "shall include", it left open the possibility other forms of infill housing would be appropriate. When discussing the meaning of infill housing, which he said was not a defined term in the planning documents, generally, he said it could include redevelopment of an existing building.

[83] Mr. Purvis commented on the issues relating to the height of the building raised by Dr. Pacey. Mr. Purvis confirmed the definition of height in section 2.2.1 of the Development Agreement differed from that found in PCAP Policy 1.15(d). However, in

his opinion, the schedules attached to the Development Agreement, which are referenced in the text of the document, conform to the height limit. He further suggested the overall intent would remain the same if the definition in section 2.2.1 of the Development Agreement were deleted or, alternatively, amended to coincide with the policy definition.

[84] In Mr. Purvis' opinion, the intent of the existing wording of the Development Agreement was to include the mechanical equipment in the overall height limit and was not in conflict with the MPS. He said that any changes to the schedules would have to be approved by HRM Council. He was also of the opinion such changes would be substantive amendments requiring another public hearing.

[85] Mr. Purvis was questioned about Policy 2.2.2 of the PCAP addressed by Dr. Pacey, which prohibited rezoning for minor commercial uses in areas not designated as commercial on the Future Land Use Map. He advised the application proceeded by development agreement and not rezoning, so the policy was not applicable. He also pointed out a portion of the subject property was already zoned for neighbourhood commercial use.

[86] With respect to Policy S-30 of the RMPS raised by Dr. Pacey, relating to affordability and social inclusion, Mr. Purvis testified these factors had been considered by HRM Council. He was of the opinion it would not be expected that each individual development would include these elements. These considerations are generally applied through the entire plan. He made the same point in relation to a number of general policies in the context of a specific development. As well, Mr. Purvis testified, to his knowledge, affordability is not a defined term in the planning documents.

[87] Mr. Purvis provided his opinion on Policy G-7 of the RMPS which states, in part, when "evaluating …development agreement applications, in the event of a conflict between the policies in this Plan and a Secondary Planning Strategy, the more stringent shall prevail." Mr. Purvis indicated that in his report he had said where there was a conflict between provisions within a secondary plan, it would be appropriate to apply the more site-specific policy and give it more weight.

[88] Mr. Purvis said Policy G-7 did not conflict with this view, as it addressed conflicts between the RMPS and a secondary plan, and not internal inconsistencies within a secondary plan. There was no similar wording to resolve conflicts between provisions in the same MPS, and Mr. Purvis maintained his opinion as to how such conflicts should be resolved. He further indicated that, in any event, Policy G-15 of the RMPS referenced by Dr. Pacey did not conflict with the MPS.

[89] Mr. Purvis discussed the issue of family-type housing raised by Dr. Pacey. He said there was no requirement that a particular number of bedrooms per unit be stated in a development agreement. He further testified it was not a requirement that family-type housing be available in each and every development in the Centre Plan area. Similarly, he said not every development required amenities for children or families, nor the sight lines described in PCAP Policy 1.2.5. In this case, both the site-specific PCAP provision and the Development Agreement require that one-third of the residential units be at least 74 square meters, providing more diversity in the unit mix. These same policies also addressed what was required for amenities.

[90] Mr. Purvis discussed the density issue which arose from Dr. Pacey's evidence. He said the word "density" was not defined in the MPS. The defined terms

were High Density, Medium Density and Low Density, which were defined more in terms of use relating to form, size and mass as opposed to a specific number of units. As the site-specific amendments to the MPS set out in PCAP Policy 1.15 were specifically stated to be “notwithstanding the Medium Density designation”, density was addressed through the form, height, size and mass of the building.

[91] On cross-examination, Mr. Purvis was asked why the planning department approved the application in the face of PCAP Policy 1.5.4. Mr. Purvis responded this policy directs HRM to amend its zoning by-laws to permit certain uses as of right. The application which is the subject of this proceeding was done through the development agreement process and not by virtue of rezoning, and as such, the policy did not apply.

[92] With respect to PCAP Policy 1.15(a), which requires “appropriate scale, massing and setbacks from neighbouring properties”, Mr. Purvis said a maximum height had been established by the site-specific policy. The policy specifically addressed neighbouring properties. Provided the building was beneath the maximum height and had adequate setbacks and transitions to the property to the south, which was of a lower scale, and setbacks in relation to the property to the west, being the Mona Campbell building, which was of a similar scale, in his opinion, it was in keeping with the policy.

[93] Mr. Purvis said there were four buildings immediately abutting or adjacent to the proposed development. Aside from the two properties previously discussed, being the Mona Campbell building and the lower scale property to the south, the property to the east, across Seymour Street, owned by the Appellant, was a lower scale, and the property to the north, across the intersection, was the 10-storey Carlyle condominium. In his opinion, it would be difficult for a planner to say the building was incompatible if it was

within the height limit and had appropriate setbacks and step backs from these adjacent properties.

[94] Mr. Purvis acknowledged while the Mona Campbell building was of similar height, it was not the same mass and usage as the proposed development. In an exchange with respect to the neighbouring Carlyle condominium complex, he said HRM did not differentiate between condominiums and other multi-unit residential buildings based on the status of the occupants as owners or tenants. Mr. Purvis agreed such issues as lot coverage, landscaping, trees, bushes and lawns could all be regulated by development agreement. He also noted when comparing buildings, a planner could consider these types of features.

[95] Mr. Purvis was questioned by the Appellant on the issue of compatibility and scale in relation to numerous MPS policies. While he indicated that planning considerations were not limited to the immediately adjacent buildings, his responses were consistent with giving more weight to the site-specific policies

[96] Mr. Purvis testified he was not an expert on traffic matters. From a planning perspective, he did not believe the proposed commercial space would have a greater impact on traffic than the existing convenience store. Mr. Purvis said the Development Agreement limits the commercial space to the ground floor. Based on submitted plans which do not form part of the Development Agreement, along with information from the Applicant, his understanding was the intent of the Applicant was the commercial space would be smaller than the existing Needs convenience store. Mr. Purvis indicated that traffic issues had been analyzed by HRM's professional engineering staff after receipt of the Genivar Inc. reports.

[97] On cross-examination about the intent of the Applicant, as opposed to what was in the schedules attached to the Development Agreement, Mr. Purvis said the test against which the policy should be considered related to the commercial uses being intended to serve the local neighbourhood. Based on the maximum size allowed, as shown on the schedules, the anticipated size and orientation of the commercial space, and the limits on the types of commercial uses, it would likely be serving the local neighbourhood and as such would meet the test of the policy. He acknowledged people from outside the neighbourhood might use the proposed commercial facility.

[98] Mr. Purvis acknowledged there were a number of retail outlets, such as convenience stores and coffee shops, within walking distance of the existing Needs convenience store. He went on to say, as the population density of the peninsula increases, one could anticipate a corresponding increase in the need for such outlets.

[99] Mr. Purvis addressed shadow and wind effects generally, but confirmed the analyses was of a qualitative, and not a quantitative, nature. He said there were no actual shadow or wind studies undertaken. Mr. Purvis also indicated HRM planning is primarily concerned with shadows cast on public spaces.

[100] Mr. Purvis agreed with the Appellant that the subject neigbourhood is stable, but said this did not preclude new development. He did not see the permitted uses in the Development Agreement as negatively impacting on the area, whether in relation to noise, traffic or quality of life. He distinguished between the allowed use, which planning policies are intended to address, and potential users who would be governed by the enforcement of applicable by-laws.

5.0 LETTERS OF COMMENT

[101] The Board received six letters of comment from members of the public. All of the writers supported the Appellant and were opposed to the proposed development. They expressed concerns that: it is inappropriate for, and erodes the residential nature of the neighbourhood; provides insufficient parking space for residents and commercial vehicles; has insufficient setbacks; includes unneeded commercial space; will increase traffic in an already busy area; provides residential units where no more are needed; is not affordable housing; does not encourage family housing; and, the construction phase will bring dirt, debris, drilling, noise and dangers to the area.

[102] One of the letters, from Dr. Philip Pacey, who testified on behalf of the Appellant, is discussed more fully elsewhere in this Decision.

6.0 SITE VISIT

[103] As the Board advised the parties at the conclusion of the hearing, it decided to undertake a site visit, in particular to view the interior of the commercial operation (the Needs convenience store) at the property. The parties agreed that they need not accompany the Board on this visit.

[104] The Board attended the property on September 21, 2016, in the early afternoon. The Board travelled by car west on Coburg Road to Vernon Street, travelling north on Vernon. The Board also drove north on Seymour Street from University Avenue, and through the intersection at Coburg Road onto Vernon Street. The Board also travelled on foot along Vernon, Coburg and Seymour, viewing the structures on both sides of these streets, including the Coburg Road side of Dalhousie's Mona Campbell building,

and the three properties owned by the Applicant. The Board also observed the parking restrictions on both sides of Seymour Street. The Board used the crosswalk at the east corner of Seymour and Coburg as well.

[105] Additionally, the Board entered the Needs store and viewed the sales area; the cashier's counter area; two closed doors marked "Employees only"; and was able to view into a storage area on the west side of the store through an open door in the store.

7.0 SUBMISSIONS

[106] Written submissions were filed by all parties on September 29, 2016. The Appellant filed reply submissions on October 6, 2016.

7.1 Appellant

[107] The Appellant's position was that Council's decision to approve the Development Agreement does not reasonably carry out the intent of the MPS. The Appellant referenced at least twenty-seven policies in his submissions. He referred to site-specific PCAP Policy 1.15, together with other PCAP policies. The Appellant also used City-wide Objectives and Policies set out in Section II of the MPS to advance his argument. In addition, the Appellant referenced Section I of the MPS and the RMPS.

[108] The issues raised in relation to the above policies can be summarized as follows:

(i) compatibility issues with the residential neighbourhood;
(ii) commercial enterprises and residential neighbourhoods;
(iii) traffic and parking;
(iv) family accommodations;
(v) wind and shadow effects.

Compatibility with the residential neighbourhood

[109] The Appellant submitted the Development Agreement was not consistent with site-specific PCAP Policy 1.15(a), which required Council to consider appropriate scale, massing and setbacks from neighbouring properties. Other policies referenced by the Appellant which discuss scale are PCAP Policy 1.1.5 and City-wide Policy 2.7.

[110] The Appellant also argued the scale and intensity of the proposed development are inconsistent with City-wide Policy 2.1.1 and PCAP Policies 1.1.3 and 1.1.4, which address retention, rehabilitation, infill and compatibility in residential neighbourhoods.

[111] Maintaining the integrity of existing residential neighbourhoods is referenced in City-wide Policy 2.2, while alternative means of encouraging integrated development is discussed in City-wide Policy 2.3. The Appellant submitted the Development Agreement is not consistent with these policies.

[112] The Appellant further said PCAP Policy 1.5.4 helps clarify the intent of the MPS and supported his view that Coburg Road was never intended to host this type of development.

[113] The Appellant submitted the high density of the proposed building, its design features, numerous balconies overlooking Seymour Street, and the proximity of university student accommodations, will only exacerbate the noise and nuisance problem highlighted by certain of the witnesses called by the Appellant. Therefore, the Appellant submitted the proposed development is inconsistent with City-wide Policy 3.3.2.2 relating to unacceptable nuisance such as noise.

[114] The Appellant also said the proposed development does not foster the provision of housing for people with different income levels in ways compatible with the neighbourhood, contrary to the intent expressed in City-wide Policy 2.8.

[115] According to the Appellant, compatibility also encompasses transition issues, which are addressed in site-specific PCAP Policy 1.15(c). The Appellant submitted a step back, six feet from the neigbour's property line on Seymour Street, is not an appropriate transition to the adjacent building, which is two and one half stories high.

[116] The Appellant said the lack of open space and landscaping is contrary to PCAP Policy 1.1.7, which speaks in terms of fostering attractive residential environments by giving special attention to such features.

[117] Finally, site-specific PCAP Policy 1.15(d) specifies "no portion of the building, including mechanical equipment and penthouses, shall exceed 20.1 metres (66 feet) in height." Section 2.2.1(c) of the Development Agreement excludes mechanical rooftop equipment from the definition of height. The Appellant said this inconsistency was not remedied by other provisions in the Development Agreement. Therefore, according to the Appellant, the Development Agreement on its face was not consistent with the intent of the MPS.

Commercial enterprises and residential neighbourhoods

[118] The Appellant said the Development Agreement permits the Applicant to have a much larger commercial space on the ground floor of the proposed development than the existing Needs convenience store.

[119] The Appellant submitted that, since the existing convenience store serves a wide-ranging clientele, a potentially larger commercial enterprise would be contrary to site-specific PCAP Policy 1.15(f), which allows commercial uses "…intended to serve the local neighbourhood..."

[120] The Appellant also referenced City-wide Policy 3.1.1, which says in part "Neighbourhood shopping facilities in residential environments should service primarily local walk-in trade, and should be primarily owner-occupied." Because of the potential size and nature of the proposed commercial use, the Appellant argued the Development Agreement is inconsistent with this policy.

[121] The Appellant submitted the potential size of the commercial space will exacerbate the noise and traffic above the level currently created by delivery trucks and customers attending the existing Needs convenience store, contrary to City-wide Policy 3.3.2.2.

[122] The Appellant said the proposed development would not be allowed if this were a rezoning application because of City-wide Policy 2.2.2. It would therefore not be appropriate to allow the project to proceed by virtue of the Development Agreement.

[123] The Appellant submitted City-wide Policy 2.3 prohibits commercial uses of a City-wide or regional nature, and equates the commercial component of the proposed development to such an enterprise.

[124] Finally, the Appellant referred to PCAP Policy 2.1, which limits the floor area of grocery stores to 1000 square feet, and the floor area of drug stores to 1400 square feet. No such limit is contained in the Development Agreement. The Appellant said site-specific PCAP Policy 1.15 was subject to the square-footage limitations in PCAP Policy 2.1.

Traffic and parking

[125] Aside from the nuisance and noise arguments referenced above, the Appellant submitted the proposed development will increase through traffic and exacerbate traffic volume and traffic safety issues contrary to PCAP Policies 7.1 and 7.2.

[126] The Appellant criticized the traffic studies generated by the Applicant on a number of fronts, including a failure to do actual traffic counts.

Family accomodations

[127] The Appellant submitted the proposed Development Agreement is not consistent with PCAP Policies 1.1.1 and 1.2, which encourage the retention and creation of “dwelling units suitable for families with children” or “family-type housing in Peninsula-Centre” and has no open spaces or amenities, as required by PCAP Policy 1.2.1

[128] The Appellant further said where development agreements include family-type housing units, PCAP Policy 1.2.5 indicates regard must be had “for the provision of opportunities for visual surveillance and supervision of children’s play areas through site designs which maximize the views from windows in the building and from public areas to children’s activity areas.” The Appellant submitted the Development Agreement was deficient in this regard.

Wind and shadows

[129] The Appellant submitted no studies or tests were done with respect to wind and shadow effects. The Appellant said this was contrary to City-wide Policy 8.6.

7.2 Respondent

[130] The Respondent submitted the applicable principles related to the Board's role in this matter are set out in *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, which establishes the parameters of the Board's jurisdiction, as well as the burden of proof which rests on the Appellant.

[131] The Respondent submitted the Appellant had failed to show, on a balance of probabilities, that the decision of Council does not reasonably carry out the intent of the MPS.

[132] The Respondent said Council canvassed the various MPS policies and made choices in relation thereto. The Respondent submitted it was not intended that every development would satisfy each and every MPS policy.

[133] The Respondent submitted Mr. Purvis' report refuted all the arguments raised by the Appellant on a point by point basis. The Respondent submitted that, as a qualified expert, his opinion should be accepted and given considerable weight before the Board.

[134] The Respondent placed particular emphasis on the PCAP site-specific Policy 1.15(a) through to (e) and submitted the Development Agreement addressed all aspects of this policy.

[135] With respect to appropriate mass and scale, the Respondent submitted the policy choice and parameters were decided when Council approved the site-specific

amendments, which allowed a 66 foot building to be placed on the subject property with direction as to the required setbacks from the shared property lines. Given the permissible setbacks from the sidewalk, Council did not intend extensive landscaping.

[136] The Respondent pointed out the site is not bound by the Medium Density designation because of PCAP Policy 1.15. As such, allowable density would become a function of the form of the building.

[137] The Respondent addressed height issues by indicating the 66 foot height was specifically permitted by the MPS, provided the mitigating features such as setbacks, step backs and recessed balconies discussed in Mr. Purvis' evidence were in place, and as set out in the Development Agreement.

[138] If there was any ambiguity as to whether the Development Agreement allowed mechanical equipment to extend beyond 66 feet, the Respondent submitted, given the clear intent of the Applicant and Council, such ambiguity could easily be rectified by the Board's powers to amend, by either deleting section 2.2.1(c) of the Development Agreement, or replacing the word "excluding" in this provision with the word "including".

[139] The Respondent submitted there were already activities in the neighbourhood associated with the existing commercial use at the subject property. One would expect to see the activities depicted in the Appellant's photographs associated with such a use.

[140] The Respondent submitted the two traffic studies supplied by the Applicant, which were reviewed by HRM's traffic engineering department, indicated no noticeable impact on the street network.

[141] The Respondent said the Appellant's position relating to student housing was contradictory. Opposition was expressed to the demolition of an existing affordable student housing building, without providing an affordable alternative. On the other hand, the ills of having affordable student housing, related to noise and nuisance, form a large part of the Appellant's evidence.

[142] The Respondent said the Appellant submitted the Applicant has not provided sufficient family-type accommodations, yet evidence elicited at the hearing showed it was not possible to attract families to the neighbourhood.

[143] The Respondent submitted, as expressed by Mr. Purvis, that HRM regulates the use, and not the user. Therefore, HRM cannot dictate the rent the Applicant will charge. Housing needs for a variety of income levels can only be addressed under the MPS through such things as built form.

7.3 Applicant

[144] The Applicant submitted HRM is the primary authority in planning matters. The Appellant has the burden of proof, on a balance of probabilities, of establishing the decision of Council to enter into the Development Agreement does not reasonably carry out the intent of the MPS. The Applicant further alluded to the Board's limited jurisdiction in an appeal of this nature.

[145] The Applicant reiterated the position advanced by the Respondent, and set out in Mr. Purvis' evidence, that "planners regulate use, not the user." This concept made irrelevant any arguments and disputes as to the number of estimated residents in the proposed building, or whether or not students would be the primary target tenants.

[146] The Applicant submitted compatibility issues had been fully addressed by Mr. Purvis and Mr. Rad. By way of contrast, the Applicant described Dr. Pacey's evidence as "pure advocacy", which should be afforded little weight.

[147] In the Applicant's submission, the scale and mass of the proposed building were similar to nearby buildings such as the Mona Campbell building and the Carlyle condominium. The Applicant also said there was a clear transition from the proposed development to the lower-rise dwellings on Seymour Street.

[148] The Applicant submitted the proposed commercial space did not give rise to the concerns raised by the Appellant, as the floor plans indicated a smaller commercial space than the existing Needs convenience store.

[149] The Applicant further said the size of the commercial space was academic, since Council did not impose any limit in the site-specific provisions of PCAP Policy 1.15. As well, any nuisance issues should be addressed by means of by-law enforcement and not the Development Agreement or the MPS.

[150] It was the Applicant's position the Appellant had not discharged the burden required to set aside the decision of Council.

8.0 ANALYSIS AND FINDINGS

8.1 Applicable Legal Principles

[151] The Respondent and Applicant have cited case law which the Board agrees summarizes the general legal principles which provide the framework for the Board's analysis.

[152] In *Archibald*, the Court of Appeal did an extensive review of planning case law, and set out a summary of planning principles applicable to this type of matter. Fichaud, J.A., delivered the Court's judgment and said:

> [24] …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.

[153] Section 208(b) of the *HRMC* mirrors the wording set out in s. 190(b) of the *Municipal Government Act*, discussed above. The Court of Appeal's direction that the municipality is the primary authority in planning matters is equally applicable to this case.

[154] The role of Council as the primary authority in planning matters, and the manner in which planning policies should be interpreted, was further elaborated upon and discussed, in the context of a development agreement, in *Heritage Trust of Nova Scotia et al. v. Nova Scotia (Utility and Review Board) et al.,* 1994 N.S.J. 50 (NSCA). The Court of Appeal held as follows:

> In reviewing a decision of the municipal council to enter into a development agreement the Board, by reason of s. 78(6) of the Planning Act, cannot interfere with the decision if it is reasonably consistent with the intent of the municipal planning strategy. 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. This Court, on an appeal from a decision of the Board for alleged errors of interpretation, should apply the same test. This is implicit in the scheme of the Planning Act and the review process established for appeals from decisions of municipal councils respecting development agreements. <u>There may be more than one meaning that a policy is reasonably capable of bearing</u>. 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…
>
> . . .

> …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 by 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. The Plan must be made to work. A narrow legalistic approach to the meaning of policies would not be consistent with the overall objective of the municipal planning strategy. The Planning Act and the policies which permit developments by agreement that do not comply with all the policies and by-laws of a municipality are recognition that municipal councils must have the scope for decision-making so long as the decisions are reasonably consistent with the intent of the plan. Very often ascertaining the intent of a policy can be achieved by considering the problem that policy was intended to resolve. [Emphasis added]

[155] As Council is the primary authority in planning matters, the *HRMC* limits the grounds of appeal to the Board pursuant to s. 265(1)(b), as well as the Board's powers on appeal pursuant to s. 267(2).

[156] The Board must not interfere with Council's decision to enter into the Development Agreement unless it determines that the decision does not reasonably carry out the intent of the MPS.

[157] The Board's limited ability is further addressed in *Heritage Trust*, where the Court of Appeal stated:

> …The Planning Act imposes on municipalities the primary responsibility in planning matters. The Act gives the municipal council the authority to enter into development by contract which permits developments that do not comply with all the municipal by-laws (s. 55 of the Act). In keeping with the intent that municipalities have the primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (s. 78 of the Act). 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… 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…[Emphasis added]

[158] This appeal also raises the issue of site-specific amendments to the MPS, which have contemporaneously been incorporated by reference into the LUB, in the context of determining the intent of the MPS.

[159] Amendments to the MPS cannot be appealed to this Board. Therefore, the appropriateness of the site-specific MPS amendments is not relevant to this appeal.

[160] The Appellant, supported by Dr. Pacey's evidence, appears to submit that any conflict issues should be resolved in favour of the more stringent requirements, in keeping with Policy G-7 of the RMPS, which states:

> When evaluating amendments to Land Use By-laws or development agreement applications, in the event of conflict between the policies of this Plan and a Secondary Planning Strategy, the more stringent shall prevail.

[161] As submitted by the Respondent, this policy relates to actual conflicts between the RMPS and the MPS, including the PCAP. It is noteworthy that no similar provision is found in the MPS to address conflicts within the MPS itself.

[162] The site-specific amendments to the MPS preceded the Development Agreement and were made specifically in contemplation of the Development Agreement.

[163] The site-specific amendments are also the most recent expression in the MPS of Council's intent in relation to development of the subject property. These amendments have no application elsewhere in the PCAP planning area.

[164] It follows then, and the Board finds that, if there are potential conflicts or inconsistencies between the site-specific amendments in PCAP Policy 1.15 and the PCAP or the MPS as a whole, the site-specific policies should be the primary touchstone against which the Development Agreement is measured.

[165] On the other hand, if there are any conflicts between the site-specific amendments and the RMPS, the more stringent policy would be applicable.

[166] The Board finds PCAP Policy 1.15 does not conflict with the RMPS.

8.2 Analysis

Commercial enterprises and residential neighbourhoods

[167] PCAP Policy 1.15 allows Council to "consider a residential or mixed use residential and commercial building by development agreement."

[168] Further direction is provided by PCAP Policy 1.15(f), which indicates "commercial uses intended to serve the local neighbourhood, such as grocery store uses, drug store uses, and personal service uses may be permitted at the ground level."

[169] Section 3.3.3 of the Development Agreement specifies the allowable commercial uses as follows:

> 3.3.3 The following are permitted commercial uses:
> (a) Grocery Store;
> (b) Drug Store;
> (c) Commercial Parking Lot; and
> (d) personal service uses.

[170] Schedule "C" attached to the Development Agreement is a site plan which shows the building's footprint, but there is no layout of the ground floor where the commercial space will be located.

[171] A number of iterations of proposed plans for the development are found in Exhibit C-12, which include ground floor layouts. The last revisions to the ground floor layouts are dated November 10, 2015 (Exhibit C-12, p. 105).

[172] The November 10, 2015 ground floor layout shows commercial space occupying 2250 square feet. There is no indication on the floor plans as to whether ground floor commercial space will be utilized for a grocery store, a drug store or personal services, all of which would be permitted, pursuant to the Development Agreement and PCAP Section 1.15.

[173] Much of the argument relating to noise, traffic and whether the commercial uses were intended to serve the local neighbourhood centred on the submission that the commercial space could potentially be much larger than the existing Needs convenience store. Local residents who testified spoke of current noise and traffic concerns.

[174] The Appellant tried to establish the existing Needs store occupied 1837 square feet, while the proposed ground floor commercial space would occupy as much as 6000 square feet. However, the Appellant's calculations for the existing Needs store did not account for storage space, some of which the Board was able to observe.

[175] As well, not all the ground floor space in the proposed building could reasonably be expected to be useable space, as confirmed by the evidence of Mr. Purvis and the Applicant.

[176] On this point, while the evidence dealt with estimates, to the extent it is relevant, the Board places greater weight on the evidence of the Applicant that the Needs convenience store occupies approximately 3400 square feet of useable space on the main floor, and the proposed building would have in the vicinity of 4000 square feet of ground floor commercial useable space, exclusive of washrooms.

[177] There is insufficient evidence to establish the proposed commercial space will be considerably larger than the existing Needs store. There is also insufficient evidence to establish the new commercial space will exacerbate the noise and traffic issues outlined in the Appellant's submissions. Consequently, the Board finds the Development Agreement, as it relates to the proposed commercial space, is not inconsistent with City-wide Policy 3.3.2.2, relating to unacceptable nuisance.

[178] Noise generated from delivery trucks and their refrigeration units was also raised as a nuisance issue. In this regard, laying aside the lack of evidence as to whether there will be more deliveries with the proposed development, Section 3.11 of the Development Agreement restricts deliveries to the daytime hours between 8:00 a.m. and 7:00 p.m.

[179] The Appellant also took the position the Development Agreement was deficient because the commercial space would not be owner-occupied. He referred the Board to Policy 3.1.1.

[180] City-wide Policy 3.1.1 does not direct that every neighbourhood shopping facility be owner-occupied. As well, as site-specific PCAP Policy 1.15 contemplates commercial space in a larger scale multi-unit residential building, it is reasonable to assume the intent of this policy was not to require that the commercial component be owner-occupied.

[181] With respect to City-wide Policy 2.2.2, raised by the Appellant, as the matter before the Board is not a rezoning application, and commercial uses are specifically contemplated by PCAP Policy 1.15, the Board agrees with the Respondent that this policy has no application.

[182] The Board also finds the Development Agreement does not contemplate commercial use of a City-wide or regional nature, as those terms are defined; thus, City-wide Policy 2.3 has no application.

[183] The Board agrees with Mr. Purvis' opinion, as expressed in his oral testimony, that because of the types of permissible businesses which are specifically referenced in PCAP Policy 1.15(f), the size of the ground floor commercial space, its likely

orientation and limitations on useable space, the Development Agreement is reasonably consistent with the intent of PCAP Policy 1.15(f) and City-wide Policy 3.3.1, relating to local walk-in trade.

[184] PCAP Policy 2.1, referenced in the Appellant's submissions, indicates, in part, the "floor area of grocery stores shall not exceed 1,000 square feet, and the floor area of drug stores shall not exceed 1,400 square feet." This is addressed in the context of "neighbourhood convenience stores" which are, in the PCAP, by definition, "a grocery store or drug store."

[185] The Appellant says because the Development Agreement does not expressly incorporate this size limitation, in either the body of the Agreement, or its schedules, it is inconsistent with the intent of this policy.

[186] The Respondent emphasizes Mr. Purvis' opinion that PCAP Policy 2.1 was enacted for the purpose of creating the Residential Neighbourhood Commercial Zone, to which the maximum floor areas would apply. As this project is proceeding by way of development agreement, in Mr. Purvis' opinion, PCAP Policy 2.1 is not applicable.

[187] Both the Respondent and the Applicant submit that the intent of PCAP Policy 1.15(f) was to remove the floor area restrictions for the subject property.

[188] In determining the meaning of PCAP Policy 1.15(f), and whether Council intended the floor area restrictions set out in PCAP Policy 2.1 to apply to the proposed development, the Board notes the matter was addressed in the materials before Council when it approved the amendments to the MPS on April 5, 2016.

[189] The staff report dated February 8, 2016, prepared by Bob Bjerke, Chief Planner and Director, Planning and Development, says:

> The R-2 Zone, which applies to 1460, 1462, 1470 and 1474 Seymour Street permits R-1 (Single Family Dwelling) Zone uses and two unit dwellings. The RC-1 Zone, which applies to 6124 Coburg Road and 1474 Seymour Street, permits R-1 and R-2 Zone uses and apartment houses with up to 4 units, grocery store uses no larger than 92.9 square metres (1,000 square feet) and drug store uses no larger than 130 square metres (1,400 square feet).
>
> [Exhibit C-4, p. 244]

[190] The staff report goes on to state:

> Although the subject site is designated MDR, 6124 Coburg Road is zoned RC-1, which permits grocery stores and drug stores up to a maximum size. The proposed amendment to the MPS will remove the size limitations for these uses and also permit personal service uses, such as a hairdresser, tailor or drycleaner, as well as long term commercial underground parking. The applicant had originally requested a larger expansion to the types of commercial uses permitted. However, any further expansion to the types of commercial uses should encompass a larger area and should not be considered on a site by site basis.
>
> [Exhibit C-4, p. 246]

[191] As well, Mr. Rad's PowerPoint presentation, made on behalf of the Applicant before Council on April 5, 2016, indicates the proposed Development Agreement has "no limit on size of Commercial use."

[192] While it is clear HRM staff and the Applicant intended the wording of PCAP Policy 1.15 would eliminate the size restrictions related to grocery stores and drug stores, the issue remains whether the wording accomplishes this purpose, and whether this was the intent of Council in approving the MPS amendments.

[193] As stated in *Archibald*, intent is to be primarily derived from the wording of the relevant policies. The wording of PCAP Policy 1.15 does not include floor area restrictions. This is the primary policy directive for this particular site.

[194] As well, prior to the amendments to the MPS and LUB, the property which currently houses the Needs convenience store was zoned RC-1, which is the Neighbourhood Commercial Zone discussed above. The amendments to the LUB were made contemporaneously with the MPS. As discussed in *Archibald*, this is a circumstance where the LUB may assist in the interpretation of the MPS.

[195] Section 95(4) of the LUB, which is the site-specific amendment, states:

> Council may permit a residential or mixed use residential and commercial development at 6124 Coburg Road and 1460, 1462, 1470 and 1474 Seymour Street in accordance with Policy 1.15 of Section VI of the Halifax Municipal Planning Strategy.

[196] No floor area limitations are expressed. It incorporates PCAP Policy 1.15, which does not have express floor area restrictions.

[197] Considering all the foregoing, the Board concludes the intent of PCAP Policy 1.15(f) was to eliminate the floor area size restrictions attributable to grocery stores and drug stores for this particular property.

[198] As well, the Development Agreement allows for personal service uses. There is no corresponding floor area restriction for this type of commercial use in the PCAP.

[199] The Board therefore finds the lack of floor area restrictions in the Development Agreement does not mean Council's decision to approve it does not reasonably carry out the intent of the MPS.

Traffic and parking

[200] Council had before it two traffic studies which indicated the proposed mixed use residential and commercial development would not have significant impacts on the existing traffic in the area.

[201] Traffic issues were raised during the public hearing when Council considered the MPS amendments.

[202] The Appellant criticized the traffic studies, in part, for only providing estimates and not actual traffic counts. The Board notes the purpose of the Genivar

reports was to address the potential traffic impacts of the proposed development. Since the development has not been constructed, this necessarily involves estimates.

[203] While the Appellant introduced evidence of actual traffic counts conducted by HRM staff, no traffic report was in evidence which provided different traffic impact estimates. On the other hand, the Genivar reports were reviewed and analyzed by HRM professional engineering staff.

[204] The Board further notes PCAP Policy 7.1, referenced by the Appellant, relates to a direction to carry out a study with respect to the transportation network. This policy is not applicable to the Development Agreement, as it merely directs that a study be undertaken for the Peninsula Centre area.

[205] The Appellant also refers to PCAP Policy 7.2, which says HRM is to "continue to attempt to reduce the incidence of through traffic on residential streets in the Peninsula Centre area where such streets are not equipped to handle volumes of traffic of a level suited for arterial streets." There was no evidence presented at the hearing with respect to what volumes of traffic are suitable for arterial streets. The evidence from traffic reports which were available indicated the traffic impact would not raise a concern.

[206] Policy G-15 of the RMPS was raised by the Appellant and in the opinion evidence provided by Dr. Pacey. Policy G-15 states in part:

> In considering development agreement applications pursuant to the provisions of this Plan, in addition to all other criteria as set out in various policies of this Plan, HRM shall consider the following:
>
> (a) That the proposal is not premature or inappropriate by reason of:
>
> . . .
>
> (iv) the adequacy of road networks leading to or within the development; and
>
> . . .

(b) That controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

(i) type of use;
(ii) height, bulk and lot coverage of any proposed building;
(iii) traffic generation, access to and egress from the site, and parking;
(iv) open storage; and
(iv) signs;

[207] This provision was raised primarily in the context of traffic issues; the other factors listed are addressed elsewhere in the Development Agreement.

[208] Firstly, the provision indicates it is applicable to development agreement applications made pursuant to the provisions of the RMPS. There are a number of provisions under the RMPS that provide for development agreement applications pursuant to the RMPS itself. It is to these types of applications that Policy G-15 applies.

[209] In any event, given the evidence relating to existing traffic provided at the public hearing, combined with the Genivar evidence with respect to the estimated impact of the proposed development, the Board concludes it cannot be said Council did not consider the traffic impact of the proposed development. There is therefore no basis for holding the Development Agreement is inconsistent with the MPS by virtue of RMPS Policy G-15.

[210] The Board finds there is insufficient evidence to establish the traffic implications of the proposed Development Agreement do not reasonably comply with the MPS.

Family accommodations

[211] PCAP Policy 1.1.1 directs HRM to "encourage the retention and creation of dwelling units suitable for families with children." PCAP Policy 1.2 directs HRM to "encourage the retention and creation of family-type housing in Peninsula Centre."

[212] The PCAP defines family-type accommodation as "a dwelling unit containing two or more bedrooms."

[213] The Board agrees with the opinion expressed by Mr. Purvis that these policies do not require that each and every development in the PCAP area must contain family-type accommodations, nor does it mean that every existing building which can accommodate families must be maintained.

[214] The policy directive for the subject property is set out in PCAP Policy 1.15, which does not specifically require "family-type accommodation", as the term is defined in the PCAP.

[215] Mr. Purvis was of the opinion that a unit size of 74 square metres is generally considered a family-type unit; not specifying a specific number of bedrooms, provided for greater flexibility.

[216] PCAP Policy 1.15(i) promotes a mix of residential units by requiring that "a minimum of one third of the residential units shall be 74 square metres (800 square feet) or larger." This requirement is specifically incorporated in the Development Agreement.

[217] Floor plans showing the actual number of bedrooms for each unit are therefore not required. The intent of the MPS is achieved by the language in the Development Agreement.

[218] The Board further finds that PCAP Policy 1.15 allows a proposed development of such massing and lot coverage so as to preclude any significant open space and amenities or outdoor play areas for children. Therefore, a failure to provide for those same amenities, or a failure to provide for the items set out in PCAP Policies 1.2.1 and 1.2.5 in the Development Agreement, cannot be said to be a failure to reasonably carry out the intent of the MPS, as had been advanced by the Appellant.

Wind and shadows

[219] MPS Policy 8.6 says:

> The City should make every effort to ensure that developments do not create adverse wind and shadow effects. The means by which this policy shall be implemented shall be considered as part of the study called for in Part III.

[220] The specific policy directive is to conduct a study of general application. It does not prescribe what must be done in relation to each individual application. While Mr. Purvis indicated the concern is primarily with HRM public spaces, this is not set out in the planning documents.

[221] In any event, PCAP Policy 1.15 allows for the construction of a 66 foot high building with significant lot coverage. The Board finds that any wind and shadow effects created by the specifically allowed use cannot reasonably be interpreted as not carrying out the intent of the MPS.

Compatibility with the residential neighbourhood

[222] The Board has considered the Appellant's submissions, and the various policies cited therein, and the proposition that the Development Agreement is not consistent with the MPS because the proposed development is not compatible with the residential neighbourhood.

[223] With the exception of the height limitations discussed in more detail below, the Board rejects the Appellant's position and finds that the Development Agreement is not inconsistent with the MPS with respect to compatibility issues such as scale, intensity, massing, setbacks, step backs, transitioning, amenities, infilling and the character of residential neighbourhoods in the area of the proposed development.

[224] What constitutes the "neighbourhood" is not clearly defined in the MPS or the PCAP. It is a flexible concept, depending on what aspects of the MPS or site-specific PCAP Policy 1.15 are being considered. The Board accepts that the term "neighbourhood" consists of more than the immediately adjacent properties, and can encompass the general area described by the Appellant in this matter.

[225] The concept of neighbourhood is also not limited to a particular street. In this case, the subject property is located at the corner of Seymour Street and Coburg Road, where Coburg Road also intersects with Vernon Street. The actual civic address, which, at one point, was stressed by the Appellant, has no relevance in this context.

[226] Regardless of any precise definition of neighbourhood, PCAP Policy 1.15, allows for a 66 foot high residential building to be erected on the subject property, with specified minimum setbacks of up to six feet from shared property lines. It is reasonable to conclude the policy direction of Council, as expressed in the MPS, is that a building of the scale, density and intensity, such as proposed in the Development Agreement, would be compatible with the existing residential neighbourhood.

[227] The site-specific amendments were approved for the very purpose of allowing a residential building of this size and scale to be constructed. As is evident from the reports before Council, and from much of the public input opposing the MPS

amendments, Council was fully aware that, absent these amendments, the proposed development would be inconsistent with the MPS, including the PCAP.

[228] The Board's role is not to second guess policy choices when Council decides to amend the MPS. These amendments must be given meaning consistent with a pragmatic and functional approach.

[229] An interpretation that the height of the building is incompatible with the neighbourhood, because it is 66 feet high, while some fifty other properties in the area fall within a thirty-five foot height limit, would ignore the fact that a 66 foot high building is specifically allowed on the subject property by virtue of PCAP Policy 1.15(d).

[230] The proposition that the massing of the building is not appropriate, because of setbacks which come within six feet of neighbouring property lines, would ignore the fact that such setbacks are specifically allowed on this particular property by PCAP Policy 1.15(b).

[231] The premise that the proposed development is inconsistent with other generally applicable policies which address retention, rehabilitation, infill, and the integrity of the existing neighbourhood, would effectively neuter site-specific PCAP policy 1.15, which specifically allows for a project of the type and scale contemplated by the Development Agreement.

[232] The issue of density was the subject of some debate. In the final analysis, whether the proposed building would have 52 tenants, as suggested by Mr. Ghosn, 75 tenants, as indicated by Mr. Keddy during a public presentation, or 80 tenants, as suggested by the Appellant, the fact remains PCAP Policy 1.15 allows for a building 66

feet in height, with a minimum of one-third of the units being 74 square metres (800 square feet).

[233] This means Council made the policy choice to substantially increase the permissible density in relation to this particular project. The Development Agreement, which allows 35 units, in this context, is not inconsistent with Council's policy direction.

[234] PCAP Policy 1.15(a) does require "appropriate scale, massing and setbacks from neighbouring properties and uses". Specific direction is provided relating to scale and setbacks by specifying the height limit to be 66 feet by virtue of PCAP Policy 1.15(d), and establishing the minimum setback at six feet pursuant to PCAP Policy 1.15(b).

[235] Massing is a somewhat broader concept than scale and setbacks, and relates to the entire form of the proposed building. The issue is addressed in a more discretionary manner as part of the requirement that there be "appropriate transition of the building with respect to the lower rise buildings along Seymour Street." Unlike height and setbacks, no specific direction is provided in PCAP Policy 1.15 with respect to transition.

[236] Transition necessarily has adjacent buildings as its reference points. Given the wording of the policy, which specifically references Seymour Street, while mindful of the fact that the Appellant's home is on the other side of Seymour Street, the Board considers the focus is primarily on the adjacent 2.5 storey building on the same side of Seymour Street.

[237] While the Appellant, supported by Dr. Pacey's opinion, submitted the step backs are not adequate, a determination of what are appropriate step backs essentially involves a value judgment where more than one reasonable outcome is possible.

[238] The evidence is that the sixth floor penthouse will not be visible from the street. There is a proposed step back for the fifth floor. Consequently, the Board finds Council's determination of an appropriate transition is a decision that reasonably carries out the intent of the MPS, in the context of PCAP Policy 1.15.

[239] With respect to Policy 3.3.2.2, which says "no use shall entail an unacceptable nuisance such as odour or noise", the evidence disclosed there was an existing degree of behavioural problems, which had coincided with an increase in density from traditional single family homes to a larger degree of student housing.

[240] The Appellant said a higher density building, replacing existing student accommodation, would exacerbate the problem.

[241] Evidence was presented as to who the potential building tenants would be. Proposed rents were before Council and in evidence before the Board. This said, the Board ought not to speculate who the project's tenants will be. The Board cannot speculate whether they will be noisier than what exists today, or whether they will create more or fewer behavioural problems.

[242] The Board agrees with the Respondent that land use planning is primarily directed at controlling usage. Other larger scale residential complexes are located in the area, such as the Carlyle and LeMarchant Towers.

[243] Larger scale residential complexes, in and of themselves, are not uses which violate Policy 3.3.2.2. The Board is not persuaded that the particular residential use permitted by PCAP Policy 1.15 would create an unacceptable nuisance.

[244] The Board therefore finds that the proposed Development Agreement reasonably carries out the intent of the MPS with respect to any nuisance arising from the occupants of the residential units.

[245] The Appellant took the position that the Development Agreement is inconsistent with PCAP Policy 1.1.7, which says special attention should be given to open space and landscaping in new developments to ensure useable amenity space.

[246] The Board agrees with Mr. Purvis' opinion that by approving site-specific PCAP Policy 1.15, Council provided the policy direction that there would be limited amenity space available for a project on the subject property. As such, it is this site-specific policy which provides the greatest degree of direction as to Council's intent in this matter.

[247] Given the foregoing, the Board finds that the decision to approve the Development Agreement with limited amenity space reasonably carries out the intent of the MPS.

[248] The Appellant submitted the approval of the Development Agreement was not consistent with MPS Policy 2.8, which directs HRM to foster the provision of housing for people with different income levels, while paying particular attention to groups with special needs.

[249] This is a policy directed at HRM as a whole. The Board agrees with the opinion provided by Mr. Purvis that the policy "does not require the integration of units for those groups which have special needs in each individual project." [Exhibit C-9, p. 10]

[250] The Board further notes the Development Agreement requires units of different sizes. The Applicant proposes to charge different rents, depending on the size of the unit. This could allow for persons with different income levels to rent the units.

[251] Having found in favour of the Respondent and Applicant with respect to all issues addressed in the foregoing, the Board still must consider PCAP Policy 1.15(d), which says "no portion of the building, including mechanical equipment and penthouses, shall exceed 20.1 meters (66 feet) in height."

[252] Section 2.2.1(c) of the Development Agreement says:

> (c) Height means the vertical distance of the highest point of the roof, excluding any mechanical rooftop equipment, above the mean grade of the finished ground adjoining the building along the principle street. [Emphasis added]

[253] Section 3.4.1 of the Development Agreement provides the "building's exterior design and Height shall be developed as illustrated in the Schedules."

[254] The Board cannot discern any mechanical equipment being shown in the schedules to the Development Agreement. When asked to show the placement of the mechanical equipment, Mr. Rad pointed to a rendering which is not in the schedules to the Development Agreement, indicating the proposed location of the mechanical equipment would not result in a violation of the height limit.

[255] The rendering to which Mr. Rad alluded is not incorporated in the Development Agreement. This means the Development Agreement, as drafted, could permit the height of the building to exceed 66 feet, inclusive of the mechanical equipment, contrary to PCAP Policy 1.15(d).

[256] Mr. Purvis testified that, in his opinion, any change to the maximum height of the building would require the approval of Council, and would not be a minor amendment, as that term is defined in the Development Agreement.

[257] The height limit was also a significant issue before Council when the MPS amendments were approved.

[258] The Board therefore finds that, on this point, the decision to approve the Development Agreement does not reasonably carry out the intent of the MPS.

[259] It is apparent from the record, including the testimony of Mr. Rad and Mr. Purvis, and the Applicant, who deferred to Mr. Purvis on this point, it was not the intent in drafting the Development Agreement to allow the Applicant to construct a building which exceeded 66 feet, inclusive of the mechanical equipment. The Respondent submitted that, if there was any ambiguity created by Section 2.2.1(c) of the Development Agreement, the section could be remedied by deleting the definition entirely, or replacing the word “excluding” with the word “including” therein.

[260] Pursuant to s. 267(1)(c) of the *HRMC*, the Board may:

> (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]

[261] Based on the evidence, the Development Agreement appears to have allowed for a greater building height than prescribed in PCAP Policy 1.15(d) in error. The Board accepts the Respondent’s submission and orders that Section 2.2.1(c) of the Development Agreement be amended by replacing the word “excluding” with the word “including” therein. In this way, the definition in the Development Agreement will be consistent with the wording in PCAP Policy 1.15(d).

[262] The Board is mindful of the Court of Appeal's decision in *Can-Euro Investment Ltd. V. Nova Scotia (Utility and Review Board)*, 2008 NSCA 13, where the Board was held to be in error in allowing an appeal and then making what were described by the Board as minor amendments to a development agreement.

[263] The Court of Appeal was of the view that an appeal should not have been allowed by the Board in the first place, if all that was required were minor amendments.

[264] *Can-Euro* is distinguishable in that the amendments in that case, limiting business hours and certain types of commercial uses, did not address matters which were specifically prescribed by the relevant policies. In this case, given the importance of the height restrictions, the specific direction in PCAP Policy 1.15, and Mr. Purvis' opinion that a change in height would be a substantive amendment, the Board concludes that the height issue is not a minor matter.

[265] The Board therefore allows the appeal on the basis the Development Agreement does not reasonably carry out the intent of specific height limitations set out in PCAP Policy 1.15(d), and orders Council to approve the Development Agreement as amended by this Decision.

9.0 CONCLUSION

[266] In order to succeed in this appeal, the Appellant has the burden of establishing that the Development Agreement approved by Council does not reasonably carry out the intent of the MPS.

[267] The Appellant raised a number of grounds upon which he submits that threshold has been met.

[268] The Board has determined that, with the exception of one provision, the Development Agreement does reasonably carry out the intent of the MPS, which intent is primarily determined by the site-specific amendments found in PCAP Policy 1.15.

[269] The Board finds that the Development Agreement allows for the construction of a building with a height greater than 66 feet, contrary to PCAP Policy 1.15(d), and therefore does not reasonably carry out the intent of the MPS in this one respect.

[270] The Board has determined that it is appropriate to utilize its power to amend, pursuant to s. 267(1)(c) of the *HRMC*, and therefore allows the appeal, but orders that the Development Agreement be amended by replacing the word "excluding" with the word "including" in Section 2.2.1(c) of the Development Agreement, and orders that Council approve the Development Agreement as amended by the Board.

[271] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 1st day of December, 2016.

Roberta J. Clarke

Richard J. Melanson

APPENDIX "A"

RMPS Policies

G-7 When evaluating amendments to Land Use By-laws or development agreement applications, in the event of conflict between the policies of this Plan and a Secondary Planning Strategy, the more stringent shall prevail.

. . .

G-9 When new secondary planning strategies or amendments to existing secondary planning strategies are brought forward for approval, HRM shall consider whether the proposed objectives and policies are consistent with or further achieve the objectives and policies of this Plan.

. . .

G-15 In considering development agreement applications pursuant to the provisions of this Plan, in addition to all other criteria as set out in various policies of this Plan, HRM shall consider the following:

(a) that the proposal is not premature or inappropriate by reason of:
(i) the financial capability of HRM to absorb any costs relating to the development;
(ii) the adequacy of municipal wastewater facilities, stormwater systems or water distribution systems;
(iii) the proximity of the proposed development to schools, recreation or other community facilities and the capability of these services to absorb any additional demands;
(iv) the adequacy of road networks leading to or within the development; and
(v) the potential for damage to or for destruction of designated historic buildings and sites;

(b) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:
(i) type of use;
(ii) height, bulk and lot coverage of any proposed building;
(iii) traffic generation, access to and egress from the site, and parking;
(iv) open storage; and
(v) signs;

(c) that the proposed development is suitable in terms of the steepness of grades, soil and geological conditions, locations of watercourses, marshes or bogs and susceptibility to flooding; and

(d) if applicable, the requirements of policies E-10, T-3, T-9. EC-14, CH-14 and CH-16.

S-30 When preparing new secondary planning strategies or amendments to existing secondary planning strategies to allow new developments, means of furthering housing affordability and social inclusion shall be considered including:

a) creating opportunities for a mix of housing types within designated growth centres and encouraging growth in locations where transit is or will be available;
b) reducing lot frontage, lot size and parking requirements;
c) permitting auxiliary dwelling units or secondary suites within single unit dwellings;
d) permitting homes for special care of more than three residents of a scale compatible with the surrounding neighbourhood;
e) permitting small scale homes for special care as single unit dwellings and eliminating additional requirements beyond use as a dwelling;
f) introducing incentive or bonus zoning in the Regional Centre;
g) allowing infill development and housing densification in areas seeking revitalization; and,
h) identifying existing affordable housing and development of measures to protect it.

City-wide MPS Policies

2.1.1 On the Peninsula, residential development should be encouraged through retention, rehabilitation and infill compatible with existing neighbourhoods; and the City shall develop the means to do this through the detailed area planning process.

2.1.2 On the Mainland, residential development should be encouraged to create sound neighbourhoods through the application of a planned unit development process and this shall be accomplished by Implementation Policy 3.3. It is the intention of the City to prepare and adopt a planned unit development zone subsequent to the adoption of this Plan.

. .

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.

2.3 The City shall investigate alternative means for encouraging well-planned, integrated development.

. . .

2.7 The City should permit the redevelopment of portions of existing neighbourhoods only at a scale compatible with those neighbourhoods. The City should attempt to preclude massive redevelopment of neighbourhood housing stock and dislocations of residents by encouraging infill housing and rehabilitation. The City should prevent large and socially unjustifiable neighbourhood dislocations and should ensure change processes that are manageable and acceptable to the residents. The intent of this policy, including the manageability and acceptability of change processes, shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.

2.8 The City shall foster the provision of housing for people with different income levels in all neighbourhoods, in ways which are compatible with these neighbourhoods. In so doing, the City will pay particular attention to those groups which have special needs (for example, those groups which require subsidized housing, senior citizens, and the handicapped).

. . .

3.1.1 Neighbourhood shopping facilities in residential environments should service primarily local and walk-in trade, and should be primarily owner-occupied. They shall be required to locate at or adjacent to the intersections of local streets rather than in mid-block. Neighbourhood shopping facilities may include one business, for example a corner store or a cluster of businesses. This policy shall serve as a guideline for rezoning decisions in accordance with Implementation Policies 4.1 and 4.2 as appropriate.

. . .

3.3.2.2 No use shall entail an unacceptable nuisance such as odour or noise.

. . .

8.6 The City should make every effort to ensure that developments do not create adverse wind and shadow effects. The means by which this policy shall be implemented shall be considered as part of the study called for in Part III.

PCAP Policies

Definitions:

Family-Type Housing Accommodation	Means a dwelling unit containing two or more bedrooms.
Neighbourhood Convenience Store	Means a grocery store or a drug store.

. . .

1.1.1 The City shall encourage the retention and creation of dwelling units suitable for families with children.

. . .

1.1.3 The forms of infill housing permitted in Peninsula Centre shall include:

(a) interior conversion;
(b) additions to existing structures;
(c) filling-in-between existing buildings; and
(d) building on vacant lots.

1.1.4 For the purposes of this Plan, the concept of compatibility shall be deemed to require that infill housing projects are compatible with and enhance the existing development context of a neighbourhood. The City shall use as a guideline in considering rezonings, zoning amendments or contract agreements the key principle of not significantly changing the character of an area when reviewing infill housing proposals.

1.1.5 Without limiting the generality of Policy 1.1.4 above, the City shall, in reviewing proposals for compatibility with the surrounding area, have regard for the relationship of the proposal to the area in terms of the following:

(a) land use;
(b) scale and height;
(c) population density;
(d) lot size, lot frontage, setback, lot coverage and open space; and
(e) service requirements, including parking.

. . .

1.1.7 Further to Policy 1.1.6 above, open space and landscaping will be given special attention to ensure that amenity space in new development projects is useable and to foster attractive residential environments which address the needs of a variety of household types.

. .

1.2 The City shall encourage the retention and creation of family-type housing in Peninsula Centre.

1.2.1 Family-type housing units should be provided with private open space at grade comprising both soft-surfaced and hard-surfaced areas for the exclusive use of occupants of the building in which said family units are located.

. . .

1.2.5 For development applications which include family-type housing units, the City shall have regard for the provision of opportunities for visual surveillance and supervision of children's play areas through site designs which maximize the views from windows in the building and from public areas to children's activity areas.

. . .

1.5.4 The City shall, for the properties abutting Coburg Road between Oxford and Spring Garden Road, and the properties abutting Robie Street between Pepperell Street and South Street, which are designated as medium-density residential, amend its zoning by-laws to permit interior conversions only of existing buildings, provided that any such dwelling units created in such conversions shall be a minimum of 600 square feet, and provided that there is no change in height or volume of such buildings.

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1.15 Notwithstanding the Medium Density Residential Designation of the south-west corner of Coburg Road and Seymour Street, the Municipality shall consider a residential or mixed use residential and commercial building by development agreement. In considering such development agreements, Council shall consider the following:

(a) appropriate scale, massing and setbacks from neighbouring properties and uses;
(b) reduced building setbacks of up to 1.8 metres (6 feet) from shared property lines provided design features and step backs are incorporated to mitigate potential impacts on neighbouring properties;
(c) appropriate transition of the building with respect to the lower rise buildings along Seymour Street;
(d) no portion of the building, including mechanical equipment and penthouses, shall exceed 20.1 metres (66 feet) in height;
(e) the building shall be constructed of high quality durable materials;
(f) commercial uses intended to serve the local neighbourhood, such as grocery store uses, drug store uses, and personal service uses may be permitted at the ground level;

(g) underground monthly or yearly commercial parking may be permitted provided parking is also provided to a minimum of 1/3 of the residential units;
(h) to promote pedestrian interest, where commercial uses are located at the ground level, the ground level shall have a high level of transparency and there shall be frequent entryways where there are multiple occupancies;
(i) to promote a mix in residential units, a minimum of one third of the residential units shall be 74 square metres (800 square feet) or larger;
(j) all vehicular parking shall be located underground;
(k) no vehicular or service access points shall be located on Coburg Road;
(l) the size and visual impact of utilitarian features such as garage doors, service entries, and storage areas, shall be minimized; and adequate water and sewer capacity to service the development.

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2.1 Neighbourhood convenience stores shall require that a limited distance be travelled and should be located within a residential neighbourhood so as to minimize the use of private automobiles to reach them. They should be located at the intersection of local streets, and should occupy only the ground floor of a building. The floor area of grocery stores shall not exceed 1,000 square feet, and the floor area of drug stores shall not exceed 1,400 square feet.

2.1.1 The City shall not predesignate the location of new neighbourhood convenience stores and shall approve such convenience stores only through a rezoning process to a neighbourhood commercial zone.

2.1.2 Pursuant to Policies 2.1 and 2.1.1, the City shall amend its Zoning By-law to provide for a residential neighbourhood commercial zone which provides for a maximum of four residential units and one neighbourhood commercial use in any given development.

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2.2.2 The City shall deny rezonings to permit a minor commercial use in areas not designated as commercial on the Future Land Use Map of this Plan.

2.3 Commercial uses of a City-wide or regional nature shall not be permitted in Peninsula Centre in accordance with Part II, Section II, Policies 3.2 and 3.2.1 of the Municipal Development Plan.

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7.1 The City shall carry out a study of the transportation network within the Peninsula Centre area and the terms of reference for such study shall include the following:

(i) an emphasis on reducing through traffic on local streets and an emphasis on reducing the volume of traffic on streets which are primarily residential in use and which are not designed as major arterials;
(ii) attention to the requirement for pedestrian circulation particularly as it relates to the location of community facilities; and
(iii) attention to the context provided by the City's overall transportation policies as found in Part II, Section II of the Municipal Development Plan.

7.2 Notwithstanding Policy 7.1 above, the City shall continue to attempt to reduce the incidence of through traffic on residential streets in the Peninsula Centre area where such streets are not equipped to handle volumes of traffic of a level suited to arterial streets.