DECISION **2018 NSUARB 118**
M08290

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **DOUG MACDONALD** and **ROBERT SERS** from the approval by the Town of Antigonish to rezone lands at 116 Church Street, Antigonish, Nova Scotia, from Residential First Density (R-1) to Residential Second Density (R-2)

BEFORE:	David J. Almon, LL.B., Member
APPLICANT:	**DOUGLAS MACDONALD** and **ROBERT SERS** On their own behalf
RESPONDENT:	**TOWN OF ANTIGONISH** Duncan J. Chisholm, LL.B.
HEARING DATE:	**May 1, 2018**
DECISION DATE:	**June 6, 2018**
DECISION:	**The Board dismisses the appeal of the Town's decision to approve the rezoning of 116 Church Street.**

I INTRODUCTION

[1] Antigonish Town Council (Council/Town) approved an amendment to the Land-Use By-Law (LUB) to rezone a property owned by Francis and Florence Juurlink (Property Owners) at 116 Church Street, Antigonish, Nova Scotia (Subject Property), from Residential First Density (R-1) to Residential Second Density (R-2), which allows for two residential units on a single lot in consideration for subdivision and development as a flag lot.

[2] Dr. Robert Sers and Douglas MacDonald (Appellants) appealed Council's decision to the Nova Scotia Utility and Review Board (Board).

II ISSUE

[3] There is one principal issue in this proceeding:

> **Have the Appellants shown, on the balance of probabilities, that Council's decision to amend the LUB and rezone the land fails to reasonably carry out the intent of the Town's Municipal Planning Strategy (MPS)?**

[4] For reasons discussed in this decision, the Board considers the answer to the question to be "no," and dismisses the appeal.

III HISTORY OF THE PROCEEDINGS

[5] The background of this matter, as stated in the Introduction and contained in the Appeal Record, is outlined below.

[6] The Subject Property has neighbouring houses – both private and rentals – beside it, across Church Street and on Mariner Drive.

[7] A report dated October 10, 2017 (Staff/Nheiley Report) [Exhibit 8, Document 2] was prepared by Brynn Nheiley, Acting Director of Planning and Development Officer (Planner). It was Ms. Nheiley's evidence that there were three reports prepared. The first, dated May 10, 2017, was for the Planning and Advisory Committee and the subsequent two reports, virtually identical, were prepared for first and second reading by Council.

[8] A Notice of Public Hearing by the Town of Antigonish appeared in *The Highland Heart Weekly,* June 1 and 8, 2017 [Exhibit M-2]. The Notice also appeared in *The Casket* June 14, 2017 [Exhibits M-2, M-8, M-10] advising that a public hearing was to take place on Monday, June 19, 2017, at 6:00 p.m., in Council Chambers, 274 Main Street, Antigonish, to consider rezoning 116 Church Street from R-1 to R-2.

[9] On June 19, 2017, a public hearing was held in Council Chambers. The minutes of the meeting indicate that Brynn Nheiley, the Planner, noted the approximate location of 116 Church Street and "provided details regarding the lot, noting it met the conditions for an R-2 Zone." According to the minutes, she then noted various sections of the planning documents that needed to be considered. At its meeting, Council accepted the recommendation of the Planner and approved the rezoning of 116 Church Street from R-1 to R-2.

[10] The Town's Notice of Approval appeared in *The Highland Heart Weekly* the week of September 7 to 13, 2017.

[11] On September 14, 2017, the Board received a Notice of Planning Appeal dated the same date from Douglas MacDonald and Dr. Robert Sers. The reasons for the appeal, as stated in the Appellants' Notice of Planning Appeal, are as follows:

1. They failed to inform affected residents by mail. As a result the residents did not have a chance to appeal.

2. Decision negatively affects the privacy and property values of residents, particularly Robert Sers' residence at 108 Church St.

[Exhibit M-1]

[12] On September 20, 2017, the Appellants provided a more detailed submission as part of the appeal, which was marked as Exhibit M-2:

Re: Appeal of Rezoning 116 Church Street Antigonish

Dear Ms. Jefferson

This is in follow up to anotice of appeal filed by Douglas MacDonald and Robert Sers on September fourteenth, 2017. This was last Thursday.

You had responded to Mr. MacDonald, and mentioned that further materials were needed, and I am providing a more detailed submission in the attached document .

I will also send a fax containing both this letter and other documents that are mentioned in the document I am including with this email.

I understand that your office will publish a notice of this appeal, and that you will supply a list of addresses of concerned parties in the neighborhood. We are responsible to contact these parties, and will also notify the town of our appeal.

I would appreciate any advice re further steps we are required to take.

In particular do we need to send hard copies by mail, ar are faxed documents sufficient?

Yours truly,

Robert Sers

Appeal Of the Rezoning of the Property at 116 Church Street Antigonish

Antigonish

September 19, 2017

This document is intended to supplement the information sent in on the Notice of Planning Appeal Form which was submitted to the Nova Scotia Utility and Review Board on September 14,2017 by email, to Mr. B. Kiley. It was sent in the name of Douglas MacDonald and Robert Sers both of whom are residents of Church Street in Antigonish.

On June 14 we were taken by surprise by the news of the re-zoning at 116 Church Street. It was our first knowledge of this.We were also under the impression that the deadline for appeal was September 15 which was based on information brought to our attention by a fellow citizen of Antigonish. The date came from the Highland Heart. This explains why we sent in the Appeal form as quickly as possible.

We have subsequently learned that the deadline is actually September 22, 2017. We have also had the opportunity to further inform ourselves, hence this supplemental submission.

The subject of the appeal is the decision made by the Antigonish Town Council at its meeting on June 19, 2017. The first part of this meeting was a public hearing regarding requests to change zoning from R1 to R2 for two lots in the town. A copy of the minutes of this meeting is attached. The relevant motion is found on page two of this document.

These lots are at 52 Victoria Street and 116 Church Sreet. This appeal pertains specifically to the changs requested for 116 Church Street.

This appeal will address issues concerning the notice given to residents in the properties adjacent to 116 Church Street, , the compliance with zoning definitions, the potential impact on natural water systems, the potential impact on the neighborhood, consistency with the Antigonish Vision statement and other relevant matters of planning concern.

1) **Notice:** Notice was made in two local newspapers, namely The Casket and The Highland Heart.

   The notice in the Casket was on June 14, 2017. There were two notices in the Highland Heart the first on June 1, 2017 and the second on June 8.

A copy of the notice in The Casket is attached. The wording was identical in both papers.

The Highland Heart is a free newspaper which is distributed online and in various locations in this area. To my knowledge it is not distributed by subscription.

The Casket is included with the weekly advertising flyers.Many households, including my own do not receive the flyers in which the Casket is distributed.

The town planning office stated that it had also placed a notice on the front porch of the house at 116 Church Street. Though I live in the area I did not see this notice. This house is on a busy street where members of the public cannot stop. Furthermore if a person were to see a paper posted on a front porch of a house it is unlikely that they would go up the front walk to see what it was.
The Town of Antigonish Municipal Planning Strategy (MPS) addresses notice seen in the following quote from that document.

Notification
In order to better inform the public of site specific rezonings and development agreements, it is intended that a sign be installed on the site in question indicating that such an application has been received. In certain instances, where such signage would not be effective, surrounding property owners may be informed in writing.
P-8.2.9 In considering rezonings or development agreements, it shall be the intention of Council to require neighborhood notification by the following means:
1. Placement of a sign on the site in question, the size, content and location of which will be determined by the Development Officer.
2. In instances where a sign would not be effective, surrounding property owners shall be notified in writing.
Such notification shall be at the developer's expense and shall be in place prior to any consideration of the proposal by the PAC.

We do not believe that there is a reasonable expectation that the published notices could reach everyone in the time allotted. We also do not believe that posting a notice on the front porch of a house will be seen by many people. The latter is especially true given that most people go by in their vehicles and not on foot.

The second point in the quoted policy above suggests that where a sign may not be effective, the affected residents should be notified in writing. This was not done. The property in question comes to within 500 feet of several properties that could be affected, and it seems reasonanable to expect that changes of this nature should have been communicated to the affected residents and property owners either in the form of a letter, email, fax or a personal contact.

2) Compliance with Zoning Definitions See P-8.2.5 (1) and P_4.1.2 in the MPS

The definition of R1 as laid out in the Municipal Planning Strategy (MPS) is as quoted here:

P-4.1.2 It shall be the intention of Council that the Residential First Density (R1) Zone will apply to the majority of the residential areas of town and shall feature the lowest density of development. Permitted uses in the R1 zone shall include, but not be limited to, single detached residences, duplexes, semi-detached units, home occupations, churches, day nurseries, group homes and bed and breakfasts

In the published notice there is clear reference to "allowing buildings in R1 zones to be used entirely for commercial use." This appears to be inconsistent with zoning policy quoted above. It also could open the door to increasing commercial use of properties in this area which in turn would have a very important impact on the area.

3) Impact on the Natural Water Systems see P-8.2.5 (4) in the MPS

This area has a problem with drainage in lots on the west side of the street. The back part of the lots adjacent to 116 Church street are already swampy and wet, and any new construction in these areas has a serious potential to cause flooding .

In the Staff Report regarding the particulars of this re-zoning application, the water issue is dealt with inadequately. On page two point 4 (the document will accompany this submission) it merely states that "This proposal is not expected to negatively impact natural water systems." Long experience on this street suggests that a much more in depth analysis is needed before considering the rezoning.

4) Impact on the existing neighborhoods See P-8.2.5 (6) in the MPS

This cannot be assessed without the input from people living in the area around the lot in question.

This is not a neighborhood that is entirely converted to houses converted to apartments and rooms for rent. There are still a number of single family dwellings.

The mere presence of houses converted to apartments has had an impact especially in terms of noise and parties; it is noted that because this area is close to the university many of the apartments are rented to students now, and this is the likely source of tenants for any future construction given the area`s proximity to the university.

The concern is that allowing one lot to be subdivided here will likely lead to more and more such re-zonings. This would absolutely impact the character of the neighborhood. There is a difference between houses that maintain their appearance and size while being converted to apartments, and the construction of new buildings specifically as

apartment buildings. The latter irreversibly changes the composition and balance of the neighborhood.

The clear reference to the allowing of properties even in R1 areas to be entirely used for commercial purposes is of even greater concern. This would obviously have a severe negative impact on the neighborhood.

Enjoyment of the properties, their privcy as well as their value are all threatened by this rezoning decision.

5) **Consistency With the Antigonish Vision Statement and any other relevant matters of planning concern See P_8.2.5(8) and (9) in the MPS**

The Antigonish Vision Statement reads as follows:

The sustainability goals established in the Town's ICSP can be summarized into a community vision statement. A vision describes a preferred future state and can be used as a tool for future decision making towards specific goals. The community vision statement for Antigonish is shared
both by the Town and County of Antigonish, and has been approved by Municipal Council as such:
Antigonish is a vibrant, safe, diverse, and affordable community, caring in nature, proud in its heritage and committed to sustainability.
Central to this vision are our values of preserving a high quality of life and wellbeing of our citizens, celebrating our heritage and culture, protecting our natural environment, enhancing learning opportunities and working collectively and peacefully to advance prosperity.

Furthermore, in the MPS reference is made to a part of the town being recognized as "Old Town". This section is quoted below:

Old Town
Unlike many older 'colonized' towns in Nova Scotia which feature rigorous street and lot planning, Antigonish has grown in a more organic fashion. Our Main Street for example, is reputed to have started out as a trail leading from William's Point to the foot of Brown's Mountain.
In the area we are choosing to call "Old Town", roads, and development along them, occurred much prior to any land use controls. Not surprisingly, this has resulted in an area of little consistency either of lot size or grouping. This does not diminish the importance of this area as a cultural reminder however, indeed, it defines it.

Therefore, as a means of acknowledging the unique nature & cultural importance of this area and, further, to provide a framework for appropriate development therein, it is Council's desire that this area be identified and designated as "Old Town".

Church Street is one of the oldest streets in Antigonish.

Lastly, Church Street is a Heritage area with several older homes designated as heritage homes.

Clearly the vision is to preserve the appearance and atmosphere of this town`s heritage.

Summary

In summary, the apellants Mssrs. Macdonald and Sers, feel that the rezoning decision has not respected the Town Of Antigonish Municipal Planning Strategy policy in the ways listed above. In particular, we feel that the notification methods were completely inadequate. We feel that it would be reasonable to have contacted the residents within 500 feet of 116 Church Street directly. Without their participation there can be no fair discussion of the various impacts that such zoning changes can cause.

Yours truly

Douglas MacDonald Robert Sers

[Exhibit M-2]

IV INFORMAL SETTLEMENT CONFERENCE

[13] On October 17, 2017, an informal settlement conference was held by Roland A. Deveau, Q.C., Vice Chair of the Board, in Council Chambers in Antigonish. The settlement conference was held pursuant to Section 18 of the Board's *Municipal Government Act Rules*. The session was attended by Dr. Robert Sers and Douglas MacDonald, and the Town of Antigonish, which was represented by its Legal Counsel, Duncan Chisholm, LL.B.; Jeffrey Lawrence, CAO; Dianne Wilson, Deputy Clerk; and Sean Daye, Director of Planning.

[14] A number of issues were settled which were set out in the Board's letter to the parties dated October 24, 2017.

[15] It was agreed by the parties that a number of admissions shall apply to, and may be placed on the record of the hearing on the merits of this appeal including, but not limited to:

> - The Appellants acknowledge that for the purposes of argument at the hearing on the merits, the issue of any nuisance which may be caused from student rental housing on the Subject Property is a matter of enforcement outside the scope of this appeal. The Appellants agree to endeavor to limit their evidence or submissions on this point to the "potential for negative impact on existing neighbourhoods" from such rental housing, as may be contemplated in Policy 8.2.5 in the Municipal Planning Strategy…
> …
> - While Town Council is yet to decide, it is being recommended by staff and the Planning Advisory Committee that the Town amend its policies to provide for written notice to property owners within 100 feet for future applications in relation to rezonings for development agreements.
>
> [Informal settlement conference letter; October 24, 2017]

[16] Any other information discussed among the parties is, of course, confidential, and not disclosed to the Chair presiding at the present hearing.

V HEARING ON THE MERITS

[17] The hearing was held in Antigonish on May 1, 2018. Dr. Robert Sers and Douglas MacDonald, the Appellants, represented themselves. Appearing for the Town was Duncan J. Chisholm, Solicitor. Other than themselves, the Appellants had no witnesses, while Mr. Chisholm called Ms. Brynn Nheiley for the Town.

VI EVIDENCE OF THE APPELLANTS

[18] Dr. Robert Sers resides at 108 Church Street. He spoke to the nature of the neighbourhood where he lives, which consists of both private homes and rental properties.

[19] He took issue with the Staff Report of October 10, 2017, authored by Brynn Nheiley, which stated that, "this proposal…is expected to have minimal impact on the existing neighbourhood, which consists of other properties operated as rental units…"

[20] He testified that, in his opinion, Ms. Nheiley's statement was inaccurate, noting that the area includes numerous private residences, several of which are Registered Heritage Properties. Dr. Sers suggested this is a "factual error," meaning that Town Council made a decision based on erroneous information.

[21] Dr. Sers also noted that none of the homeowners were at the Council Meeting when the motion was passed.

[22] Douglas MacDonald is a neighbour of Dr. Sers, residing at 109 Church Street and he echoed Dr. Sers' comments about the content of the Nheiley Report, in that there is no mention in the Report that there are private residences, and the impact of the zoning amendment on private residences is not specified.

[23] Mr. MacDonald recounted how an elderly neighbour was affected by the student rentals in the neighbourhood and noise from parties. Both Dr. Sers and Mr. MacDonald commented on the inadequacy of the handwritten Rezoning Notice posted on the Subject Property, acknowledging that "not one of the residents managed to pick up on the information that was posted."

[24] Mr. Chisholm questioned the Appellants asking, "if the Brynn Nheiley Report had indicated that this area consists of 50% residential, 50% rental," would he and Dr. Sers still oppose the appeal. Mr. MacDonald replied:

> No, if Town Council when they made their decision, was aware that 50% of the homes in that area were private homes, if in fact if it goes back and the evidence is re-presented to them, you know, we might want to have an opportunity to talk about our neighbourhood but if they—if this goes back and you know, with the proper information, we'll accept the decision. All we're saying is they weren't given accurate information.

[Sound Track 1, 35:29]

[25] He added:

> Yes, our biggest concern is the impact on the neighbourhood. That's our overall concern and in particular, on certain people that are very close, elderly people, and our concern is that that was not adequately informed, that issue, in the report. That the information presented in the report was misleading in terms of impact.
>
> [Sound Track 1, 38:01]

[26] Mr. Chisholm asked:

> And when you say impact on the neighbourhood, is your biggest concern in relation to that, a noise issue?
>
> [Sound Track 1, 38:24]

[27] Mr. MacDonald replied:

> …Security would be another for older people you know who sometimes have woken up in the neighbourhood with someone in their living room, trash, there's lots of aspects to having students living in the neighbourhood and probably noise is the big one but there's lots of other ones too.
>
> [Sound Track 1, 38:35]

[28] Dr. Sers added:

> May I add something to that? The impact gets worse when the neighbourhood becomes unbalanced. Having students in a neighbourhood when it has a variety from…from seniors to families, when it's in a balanced neighbourhood there is an impact, but when the demographic balance tips to when it starts to become a great majority of students, then that impact goes up exponentially.
>
> [Sound Track 1, 38:57]

[29] Mr. MacDonald testified that at some point the neighbourhood becomes nonviable for private residences, noting:

> It is a historic part of the Town. And my guess is, that it's right on the tip of being nonviable for people who live there and this will tip it over. Now, it's questionable for some people and I think this addition will tip the balance and people will move. It will become a totally student neighbourhood.
>
> [Sound Track 1, 39:29]

VII EVIDENCE OF THE RESPONDENT

[30] Brynn Nheiley is a Registered Professional Planner for the City of Hamilton, Ontario, where she presently resides. She was formerly employed as Acting Director of Planning and Development Officer with the Town of Antigonish from December 2015 to October 2017, and is the author of a Planning Report prepared for the Planning Committee and Council recommending rezoning of the Subject Property, dated August 11, 2016. [Exhibit 10]

[31] Ms. Nheiley was qualified by the Board as an expert in land-use planning, capable of giving expert opinion evidence on land-use planning matters including the intent of the Town's MPS and LUB and the extent to which Council's decision respecting the LUB amendment in the present appeal reasonably carried out the intent of the MPS.

[32] Ms. Nheiley gave evidence by way of video conference and testified, while referring to her Report, that there is no correlation between flag lot development and nuisance issues.

[33] With respect to concerns related to potential nuisance that any new housing development might bring, she testified that there are very specific requirements laid out for the development of flag lots, so "very high standards" need to be met in order for a flag lot to receive approval for development. She testified that this would include visual barriers for the sake of privacy, storm water management requirements "above and beyond what is typically permitted." In her Report, Ms. Nheiley reviewed the relevant policy provisions as they appear in the MPS and Implementation Policy, Policy 8.2.5 of the MPS. She testified that Policy 8.2.5 outlines the provisions to be followed when

Council amends the LUB. In effect, it is a check list to ensure that the amendment conforms to the requirements. Questioned by Counsel, she reviewed each of the sections in the Staff Report, agreeing with its recommendations.

[34] With respect to the potential for negative impact on existing neighbourhoods, a major concern of the Appellants, she responded:

> The amount of development that would be permitted on this site, if it were to be developed as a flag lot, would be the addition of two residential units. It is an appropriate neighbourhood to locate that additional development because it is close to a major traffic route as well as to amenities such as the grocery store and the university. Where there are a number of properties surrounding this site, it's consistent with, …other properties in the area.
>
> [Sound Track 2, 21:03]

[35] Under further questioning by Mr. Chisholm, Ms. Nheiley acknowledged that there are a number of residential properties surrounding the Subject Property.

[36] Ms. Nheiley also acknowledged that the Subject Property is within the "Old Town." She cited the Antigonish Vision Statement as a broad statement referring to a vibrant, safe, diverse and affordable community. In her opinion, that is a key aspect that any potential development would be supportive of, in that it would add additional housing to the Town which, in her opinion, struggles with having adequate housing for both the student population as well as the permanent population. She testified that, in her opinion, if this site were to become developed as a flag lot property, it would be "positively contributing to the affordability and the diversity" of housing available in the community.

[37] As it is located within Old Town, Ms. Nheiley testified that any development that is to take place on the Subject Property would have conditions pertaining to the architectural qualities that are to be developed, so that any structure that is to be developed on a flag lot would be controlled by design guidelines of the LUB, relating to

such things as the pitch of roof and colour schemes "in keeping with traditional housing throughout the Town of Antigonish."

[38] She was questioned by Mr. Chisholm on why the adjacent properties were not given any notice in writing. She testified that the site itself has a very high visibility and is in a high-traffic area and the sign which was placed on the property was placed in a very "visible" location with a large-size font, so it was determined that numerous people, particularly those living in the surrounding community, would have adequate notice because of that sign and the three notices in a newspaper. She felt it was not necessary to take the extra step of a specific mailout.

[39] Under cross-examination, Ms. Nheiley was asked by Mr. MacDonald why it was not identified in her Report that there were private residences in the area in the vicinity of the Subject Property. She responded:

> I suppose that there was indication that there were rental properties in the area, and I can certainly accept that that may potentially have been misinterpreted as not having private owner-occupied residence; however, I am also of the opinion that the private residences surrounding any new development would potentially have an impact and so the, I suppose, precedent of notifying all surrounding residents of any development in the neighbourhood that could potentially cause impact, could be considered excessively onerous in the operations of any municipality.
>
> [Sound Track 2, 28:36]

[40] Mr. MacDonald suggested to Ms. Nheiley, referencing her Report, a reader would not know that there were private residences in the vicinity of the Subject Property, and there was no attempt to talk about the impact on private residences. Ms. Nheiley responded that as with any development, any change anywhere has potential to impact private residences.

[41] Ms. Nheiley was asked how she arrived at the conclusion that there would be "minimal" as opposed to some other level of impact with the approval of the amendment to the By-Law. She responded:

> Just in the nature of any new development anywhere, new people to a neighbourhood, new structures surrounding the visual landscape, those are all potential impacts that can accompany any development anywhere so in that nature of just being a component of development, I recognized that there was impact but being that it would be a maximum of two new residential developments, there would be very few additional people added to the neighbourhood. The size of the property that would permit any new development is consistent with any new residential property located anywhere within the Town and as such, I deemed it to be minimal.
>
> [Sound Track 2, 31:02]

[42] Ms. Nheiley testified that it was not her intention to treat it as if there were no private residences in the neighbourhood. She testified that the Report was written for an audience that "does know the neighbourhood very well." It was originally presented to the Planning Committee which consists of councillors and residents of the Town. In the first and second readings by Council it was presented to councillors who are all very familiar with the Town. It was her point to identify that there is the potential that any new development might be for the purposes of rental use and that would be consistent with other rental use in the neighbourhood.

[43] Ms. Nheiley was asked by Dr. Sers what proportion of the flag lots in Town are actually rented to students. She was unable to respond to the actual number, stating that there is nothing to preclude that being the case in the Subject Property. She testified that it could be the case that if the Property Owners were to subdivide and develop this property as a flag lot, it could very well be their family living in that property, just as easily as it could be used for rental purposes. She clarified that two units in this case, would be

a single structure that would be permitted to have two dwelling units within the structure, noting that there are height limits to a maximum of two storeys, or 35 feet.

[44] It was suggested to Ms. Nheiley by the Chair that, "a minimal impact for her might not be considered a minimal impact for the neighbouring properties in that area." She responded that, "in my professional opinion, minimal impact is no different than any development that would add an additional two residential units anywhere in Town whether that be five lots or a traditional frontage property."

VIII SCOPE OF REVIEW

[45] The appeal involves the decision of Council approving the LUB amendment to rezone the subject lands from R-1 to R-2.

[46] The *Municipal Government Act*, S.N.S. 1998, c. 18, (the "*MGA*") states that municipalities are to have "the primary authority" for planning. Section 190(b) of the *Act* states:

> **190** The purpose of this Part is to
> ...
> (b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character, through the adoption of municipal planning strategies and land-use by-laws consistent with interests and regulations of the Province;

[47] Despite this role as a primary authority, if a municipal council amends or refuses to amend a Land-Use By-Law, s. 247(2)(b) gives an aggrieved person the right to appeal to the Board, the grounds for such an appeal being found in s. 250(1)(a).

[48] Under s. 250(1)(a) of the *MGA*, the grounds for appealing such a decision are limited:

> **s. 250 (1)** An aggrieved person or an applicant may only appeal
> (a) an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy;

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

> **s. 251 (2)** The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

[50] Thus, the Board must not interfere with the decision of council unless it determines that council's approval does not reasonably carry out the intent of the MPS. The burden of proof is on the appellant to establish, on a balance of probabilities, that in the words of s. 251(2), "...the decision of council...does not reasonably carry out the intent of the municipal planning strategy."

[51] The issue to be addressed by the Board in the present appeal is whether Council's decision to approve the LUB amendment fails to reasonably carry out the intent of the MPS. The Board has no jurisdiction to allow the Appellants' appeal if Council "interpreted and applied the [MPS] policies in a manner that the language of the policies can reasonably bear": see *Heritage Trust, infra*, at para. 99 of that decision.

[52] As noted above, if the Appellants can show, on the balance of probabilities, that Council's decision does not reasonably carry out the intent of the MPS, the Board must reverse Council's decision to approve the rezoning of the Subject Property. If, however, the Appellants fail to meet this standard of proof, it is the Board's duty to defer to the decision of Council (see *Heritage Trust, infra*).

[53] The Nova Scotia Court of Appeal has considered the standard by which this Board must review a council's decision. Clearly, the Board is not permitted to substitute its own decision for that of council. The Board's mandate is restricted to the jurisdiction

conferred upon it by the *Municipal Government Act* (formerly the *Planning Act*), as noted by Hallett, J.A., in *Kynock v. Bennett et al*. (1994), 131 N.S.R. (2d) 334 (C.A.) and *Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility and Review Board et al.* (1994), 128 N.S.R. (2d) 5 (C.A.). The extent of the Board's jurisdiction in planning appeals generally is described in *Heritage Trust* at pages 34-35 (in that instance, the appeal related to a development agreement, but it applies equally):

> [99] 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 bylaws in a vacuum. *In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear*. 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. There may be more than one meaning that a policy is reasonably capable of bearing. This is such a case. In my opinion the ***Planning Act*** dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. The Board should not be confined to looking at the words of the Policy in isolation but should consider the scheme of the relevant legislation and policies that impact on the decision... This approach to interpretation is consistent with the intent of the ***Planning Act*** to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions...
>
> [100] Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review of enacting ***s.78(6)*** of the ***Planning Act***. *The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are to be made. 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 bylaws 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]

[54] The Court of Appeal further held at page 52:

> [164] 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 bylaws (***s.55***

> of the ***Act***). In keeping with the intent that municipalities have 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...

[55] The approach to be followed by the Board was also described by the Court of Appeal in *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115. MacDonald, C.J., stated:

> [47] Despite the Board's detailed hearing, it must be remembered that members of Council are elected and accountable to the citizens of HRM. As such they exercise discretion and are accordingly entitled to deference. As earlier noted, one purpose of the *MGA* is to provide municipalities with autonomy when it comes to planning strategies and development. This decision fell within Council's discretion, provided it reasonably reflected the intent of the MPS. As elected officials, their decisions must be respected. This court has said as much on several occasions. For example in *Tsimiklis v. Halifax (Regional Municipality)*, [2003] N.S.J. No. 64, 2003 NSCA 30, Chipman, J.A. observed:
>
> > para 24 A review of the MPS confirms, as one would surmise, that many of the policies are, to use the words of Hallett, J.A. in *Heritage Trust*, supra, at para. 100 "inherently in conflict." The Board recognized this in its decision. The MPS recognises a number of competing interests necessarily involved in the creation of a workable planning regime and, of necessity, Council must have considerable latitude in striking a balance among those interests in making a planning decision.
> > ...
> > para 64 As I have already pointed out, planning decisions often involve compromises and choices between competing policies which are best made by the elected representatives, so long as they are reasonably consistent with the intent of the MPS. To my mind, read against these policies Council's decision here is reasonably consistent with that intent.
>
> [48] So it is not for the Board to impose its interpretation of the MPS. Instead the Board must defer to Council. Thus, this court in *Kynock v. Bennett et al.*, (1994), 131 N.S.R. (2d) 334 (C.A.) observed:
>
> > para 27 ... Clearly the legislature did not intend to confer a de novo jurisdiction on the board when hearing an appeal from a municipal council decision to enter into a development agreement. The board is functioning in a review capacity and is limited by the jurisdiction conferred on it under the *Planning Act*.
>
> [49] Also this court in *Mahone Bay Heritage & Cultural Society v. 3012543 Nova Scotia Ltd.*, [2000] N.S.J. No. 245, 2000 NSCA 93 concluded:

> para 9 ... The Board also recognized ... that the MPS may be capable of being interpreted reasonably in several ways; there is not necessarily one correct interpretation.
>
> para 10 The Board must look at the MPS as a whole in order to ascertain if the [Council's] decision is consistent with the intent of that MPS.

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

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

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

[53] This would be consistent with the approach taken by this court over the years and as first enunciated by Hallett, J.A. in *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50, Hallett, J.A. noted... [para. 99 of *Heritage Trust*].

[56] While the Court decisions cited above deal with development agreements, the Board considers that the principles outlined by the Court of Appeal apply equally to rezoning applications.

[57] The role of the Board in discerning the intent of an MPS was further canvassed in the decision of the Nova Scotia Court of Appeal in *Mahone Bay Heritage and Cultural Society v. Town of Mahone Bay and 3012543 Nova Scotia Limited*, [2000] N.S.J. No. 245. The Court in *Mahone Bay*, while affirming the principles in *Kynock* and *Heritage Trust,* cautioned that the principles referred to in *Heritage Trust* "were made in the context of the issues raised by the facts of that appeal," and need not be applied "when the intent of the strategy is clear," as the Court found it to be in *Mahone Bay*.

[58] Further, s. 219(1) of the *Municipal Government Act* describes the relationship between an MPS and LUB:

> **s. 219 (1)** Where a council adopts a municipal planning strategy or a municipal planning strategy amendment that contains policies about regulating land use and development, the council shall, at the same time, adopt a land-use by-law or land-use by-law amendment that shall enable the policies to be carried out.

[59] The LUB, or amended LUB, so adopted, is to carry out the intent of an MPS:

> **s. 219 (3)** A council shall not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.

[60] In *J & A Investments Ltd. v. Halifax (Regional Municipality)*, [2000] N.S.J. 92 (S.C.), where the meaning of an LUB was in issue, Justice Davison reasoned that s. 219(1) means that an MPS may be used to help determine the intent of the LUB.

[61] The language of s. 219(1) is similar, but not identical to, that which appeared in s. 51(1) of the *Planning Act*, which required Council to "concurrently" adopt or amend the LUB. Referring to s. 51(1) of the *Planning Act*, the Court of Appeal in *Mahone Bay* stated that a review of the LUB may assist in "throwing light on the intent" of the MPS, and therefore used a provision of Mahone Bay's LUB to assist in interpreting the MPS:

> A search for the intent of a municipal planning strategy requires a careful review of the strategy represented by the policies of the municipality and, very often, a review of the By-laws implementing the strategy as the by-laws adopted concurrently with the MPS may assist in throwing light on the intent of the strategy… [para. 95]

IX MPS and LUB in the APPEAL

[62] The Generalized Future Land-Use Map, or GFLUM, which designates future uses for lands covered by the MPS, identifies the property as being in the area designated "Residential."

[63] Within the Residential designation of the GFLUM, six residential zones have been identified, including R-1 and R-2.

[64] The following are the relevant MPS Policies with respect to residential development:

Residential Second Density

In order to allow development designed to accommodate the needs of a changing population base and provide more affordable housing options, it shall be the intention of Council to establish a Residential Second Density (R2) Zone. While no land will be pre-zoned R2, requests for rezoning within the residential designation shall be considered through the amendment process.

P-4.1.3 It shall be the intention of Council to establish a Residential Second Density (R2) zone featuring lots which have no less than 75% of the average frontage of adjacent R1 lots to a minimum of 35 feet of frontage and 3500 square feet of area. Permitted uses shall include, but not be limited to, single and semi-detached units and duplexes.

P-4.1.4 It shall be the intention of Council to consider rezoning a parcel of land within established residential neighbourhoods from R1 to R2 subject to policy P-8.2.5 and provided that, pursuant to P-4.1.3, no more than three adjacent lots are to be created.

[Exhibit M-5; p.12]

[65] In considering amendments to the LUB, Policy 8.2.5 of the MPS, Implementation Policy, is also applicable:

P-8.2.5 In considering amendments to the Land Use By-law, or Development Agreement Applications, Council shall have regard to the following:

1. That the proposal is in conformity with the intents of this Plan and other relevant Town policies or by-laws;
2. Implications for infrastructure and services such as fire protection, water, sewer(s) and road networks;
3. Implications for facilities such as schools, hospitals and recreation amenities;
4. Potential impacts on natural water systems such as contamination, erosion or sedimentation;
5. The potential for negative impact on civically important buildings, sites or streetscapes;
6. The potential for negative impact on existing neighborhoods;
7. Where the amendment is a re-zoning, consideration shall be given to the impact of permitted uses in relation to the location of the site;
8. Consistency with the "Antigonish Vision Statement"; and
9. Any other relevant matters of planning concern.

[Exhibit M-5; pp. 66-67]

X ANALYSIS AND FINDINGS

[66] The thrust of the Appellants' case centered on the perception by them that the Staff Report presented to Town Council incorrectly represented the neighbourhood as "consisting of other properties operated as rental units." Both Dr. Sers and Mr. MacDonald felt that this leads to a false statement that such rezoning would have "little impact on the existing neighbourhood," and requested of the Board that the rezoning be overturned.

[67] Respectfully, the Board is not persuaded by the Appellants' argument and finds there is no evidence to support that Council's decision to amend the rezoning fails to reasonably carry out the intent of the MPS.

[68] This Board and its predecessor Board have expressed the view that a council should have good planning reasons to proceed against the advice of its planner. Often, the Board will hear from a planner whose opinion differs from the advice given council, and the Board then weighs the two expert opinions. In this matter, the Appellants chose not to call an expert planner as a witness, to contradict the evidence of Ms. Nheiley, the sole planning expert, who was called as a witness for the Town. The Board may accept her evidence, but is not obligated to, if the remaining evidence leads to another conclusion.

[69] Regardless of the reasons which may have motivated Council to approve the amendment to the LUB, the test for the Board is whether or not Council's decision reasonably carries out the intent of the MPS. It is necessary to review the various policies, determine their intent and ascertain whether Council's decision was reasonably consistent with that intent.

[70] The GFLUM, which designates future uses for lands covered by the MPS, identifies the property as having a Residential designation. This indicates the intent for the future of the Subject Property is for residential purposes.

[71] In the Staff Report, and in her evidence before the Board, Ms. Nheiley correctly identified the Implementation Policy, P-8.2.5 (see para. 66 *infra*.) which provides a number of criteria which Council considered. The Board will briefly review these criteria in the order in which they appear in the Policy, and which include the comments made by Ms. Nheiley in her Report:

> 1. This proposal is in conformity with the intent of the MPS to enable efficient use of land and to allow for a wider range of housing options.
>
> 2. This proposal has the potential to make more efficient use of existing infrastructure and services.
>
> 3. This proposal is not deemed to have a significant impact on facilities such as schools, hospitals and recreation amenities.
>
> 4. This proposal is not anticipated to negatively impact natural water systems.
>
> 5. This proposal is not expected to have negative impact on civically important buildings, sites or streetscapes.
>
> 6. This proposal, possibly two additional residential units, is expected to have minimal impact on the existing neighborhood, which consists of other properties operated as rental units and in Institutional Lands of Saint Francis Xavier University. The potential to develop the lot as a flag lot will allow for slightly greater density than is permitted, as of right, 1,500 square feet difference in minimum lot size) for typical R-1 lots.
>
> 7. The change of potential use from R-1 Zone to R-2 is marginal in terms to total potential development density.
>
> 8. This proposal is consistent with the Antigonish Vision Statement of being a vibrant, safe, diverse and affordable community, caring in nature, proud in its heritage and committed to sustainability. It supports the statement by potentially growing the resident population, adding to the number of available residential units, thereby relieving demand pressures on housing affordability, contributing to a walkable community, and making efficient use of local resources and infrastructure.
>
> 9. Walkability, diversity and availability of housing types have recently grown as increasing areas of interest and concern in the community. Public engagement sessions have shown that residents are generally interested in housing options that allow them to walk for their daily needs, but many residents find it difficult to find housing that meets their needs, in terms of the size and affordability of housing units at present. This proposal contributes to addressing these related areas of growing interest.

[Exhibit M-8, Document 2]

[72] In her testimony, Ms. Nheiley emphasized that this rezoning was not pertaining to a specific development, noting that:

> At the time that application to develop would be submitted, we would do a full review of the existing and available infrastructure capacity, which any proposed development anywhere in the city would need to not cause any risks to that infrastructure or services. However, I will say that the application to rezone was considered with the presumption that a future application to develop would be made, and we are confident that no risk would be made to infrastructure and that it would be a matter of using the existing infrastructure more efficiently.
>
> [Sound Track 2, 17:40]

[73] With respect to potential impacts on natural water systems, Ms. Nheiley testified that any development application is required to address how storm water will be managed within the property which she suggested would not be unique to the site and would be a requirement of development of this particular site.

[74] In addressing the concerns of the Appellants for the potential for negative impact on existing neighbourhoods, Ms. Nheiley testified that the amount of development that would be permitted on the site, if developed as a flag lot, would be the addition of two residential units. Her evidence was that it is an appropriate neighbourhood to locate that additional development because it is close to a major traffic route, as well as to amenities, such as the grocery store and the University.

[75] Acknowledging that there are a number of residential properties in that particular area, her evidence was that where there are a number of properties surrounding this site and, speculating if it were to become a rental property, it is consistent with other (like) properties in the area.

[76] The Board observes that Ms. Nheiley's Staff Report(s) contain an analysis of the relevant policies outlined in paragraph [71] of this Decision. It provides an

examination of why, in the Planner's opinion, the decision of Council to approve the amendment to the LUB, is consistent with the intent of the MPS.

[77] In the opinion of Ms. Nheiley, who gave expert opinion evidence, and whose evidence was not impugned by any expert evidence of the Appellants, the decision of Council in approving the amendment to the LUB reasonably carries out the intent of the Town's MPS.

[78] It is not the role of the Board to substitute its own decision for that of Council; rather, it is to see if Council's decision reasonably carries out the intent of the MPS.

[79] The Board accepts that the June 19, 2017, minutes of the Town Council and public hearing indicate that the appropriate policies of the MPS were brought to the attention of Council and raised in the public hearing before Council. Council rendered its decision, which the Board finds, reasonably carried out the intent of the MPS.

[80] Clearly, with some justification, the Appellants were displeased at the perception that their neighbourhood, in the view of the Planner, consisted of other properties operated as "rental units" when, obviously, there are at least eight *private* residences in the vicinity of the Subject Property.

[81] It is the opinion of the Appellants that Council made a decision based on erroneous information. As well, the Appellants, both before and during the hearing, voiced their concerns about what they believe to be inadequate notice requirements, with particular reference to the hand-lettered sign posted on the Subject Property, which Dr. Sers testified, "not one (of the residents) managed to pick up on the information."

[82] Following the Nova Scotia Court of Appeal's Decision in *Halifax County v. Maskine*, 118 NSR (2d) 356, the Board has repeatedly held that it has no authority to

reverse a decision by a municipal council because of bad faith or bad procedure, on the part of that council. The Court of Appeal directs the Board to confine itself to evidence relevant to the MPS.

[83] While the Board acknowledges that certain issues about process may be of great concern to a party, such as the allegation by the Appellants that the decision of Council was based on a factual error, if it is not relevant to the decision that must be made by the Board, it cannot be taken into account.

[84] The Board observes that in the settlement conference letter dated October 24, 2017, there is a recommendation "by staff and the Planning Advisory Committee that the Town amend its policies to provide for written notice to property owners within 100 feet for future application relating to rezonings," which should assuage any future concerns about notice.

[85] Finally, the Appellants were not represented by legal counsel and the Board acknowledges the time and effort spent by Dr. Sers and Mr. MacDonald in preparing for this hearing and their thoughtful advocacy on behalf of the Appellants.

XI CONCLUSION

[86] The Board has considered all the evidence, including the testimony, minutes of the meetings relating to the present Application, the enabling policies of the MPS and in particular, the uncontradicted expert evidence of the Planner, and the submissions of Counsel and representatives of the Appellants. The evidence before the Board does not, on the balance of probabilities, show that the amendment to the LUB

does not reasonably carry out the intent of the MPS. Accordingly, the Board dismisses the appeal and upholds the decision of Council.

[87] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 6th day of June, 2018.

David J. Almon