DECISION **2014 NSUARB 205**
M06307

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF HALIFAX REGIONAL MUNICIPALITY CHARTER

-and-

IN THE MATTER OF AN APPEAL by **3244160 NOVA SCOTIA LIMITED, WALK-EH? ENTERPRISES LIMITED, BEVERLY MILLER** and **MAXINE WAGNER** to a decision of Halifax and West Community Council dated June 17, 2014 which approved an application by The Housing Trust of Nova Scotia to amend the Halifax Peninsula Land Use Bylaw by adding the site to Schedule Q, for lands located at 2183 Gottingen Street and 2215 Gottingen Street, Halifax Regional Municipality

BEFORE:	Wayne D. Cochrane, Q.C.
COUNSEL:	**3244160 NOVA SCOTIA LIMITED, WALK-EH? ENTERPRISES LIMITED, BEVERLY MILLER AND MAXINE WAGNER** Howard M. Epstein, LL.B **THE HOUSING TRUST OF NOVA SCOTIA** Nancy G. Rubin, Q.C. Jeffrey D. Waugh, LL.B **HALIFAX REGIONAL MUNICIPALITY** E. Roxanne MacLaurin, LL.B
HEARING DATE:	September 2, 2014
WRITTEN SUBMISSIONS:	September 2, 2014; September 12, 2014; September 15, 2014
DECISION DATE:	**December 12, 2014**
DECISION:	**Appeal dismissed.**

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1.0 INTRODUCTION

[1] The Halifax and West Community Council decided to approve a change in a Land Use Bylaw which will enable (if development agreements are approved subsequent to this appeal) The Housing Trust of Nova Scotia to build two new buildings on two separate, large, lots, each running between Gottingen Street and Maitland Street in Halifax. The buildings would include apartments and commercial space; one would have a maximum height of eight storeys, and the other eleven. Four owners of nearby smaller buildings appealed the decision to the Nova Scotia Utility and Review Board.

[2] The Board, having considered the evidence and submissions of the parties on various points, dismisses the appeal.

2.0 ISSUES

[3] This appeal involves an unusual number of issues:

2.1 Issue 1: Have the Appellants shown on the balance of probabilities that the decisions of Halifax and West Community Council to amend the Land Use By-law fail to reasonably carry out the intent of the Municipal Planning Strategy?

For reasons discussed in this decision, the Board find the answer to this question to be “no.”

2.2 Issue 2: There are two parts to this issue:

2(a): Is MPS Policy 2.3 inconsistent with the *Halifax Charter*?

2(b): Does the Board have a jurisdiction to determine issue 2(a)?

For reasons discussed below, the Board considers the answer to Issue 2(a) to be “no”. It considers the answer to Issue 2(b) is that it is moot: the Board answered Issue 2 (a) by assuming hypothetically, i.e., without finding, that it had such jurisdiction, solely for the purpose of dealing with Issue 2 (a). Having determined that the answer to 2 (a) was “no”, the Board had no need to decide the answer to Issue 2 (b).

2.3 Issue 3: Do alleged procedural errors by Council justify the Board's reversing Council's decision?

In the Board's judgment, for reasons discussed below, the Board considers the answer to this question to be "no."

2.4 Should the Board refer a stated case to the court of appeal?

In the Board's judgment, for reasons discussed below, the Board considers the answer to this question to be "no.

2.5 Should the Board admonish HRM for having allegedly placed incorrect notices of the planning proposal on the properties and in the newspaper?

For reasons discussed below, the Board declines to do so.

2.6 Obsolete legislative references.

For reasons discussed below, the Board recommends HRM consider removing obsolete references (e.g., to "the city", the *Planning Act,* etc.) from its planning documents.

3.0 WITNESSES CALLED BY VARIOUS PARTIES IN THIS PROCEEDING

3.1 Witnesses Called by the Appellants

3.1.1 Beverly W. Miller, MBA, MA, BA

[4] Ms. Miller, one of the Appellants in this proceeding, lives on South Street in Halifax, but owns a property on Maitland Street near one of the subject properties. Among other things, she has taught at five different universities, three in business related matters, and has had a decades-long history of volunteer activity in relation to municipal government, especially with respect to planning issues. Under the Board's rules, if a party wishes to call a witness to present opinion evidence, then the party must disclose this prior to the Board's hearing on the merits. This disclosure includes the provision, before the hearing, of a copy of a curriculum vitae (or CV) for the witness, and a report or a summary of the witness's opinions, for review by opposing parties.

[5] Counsel for the Appellants took no such steps in relation to Ms. Miller.

[6] He did present a document containing CV-like information, but did so at the commencement of Ms. Miller's testimony. While the Board – over the initial objections of Counsel for the Applicant Housing Trust and Respondent HRM – permitted Counsel for the Appellants to commence an examination of Ms. Miller, it ruled that it would not, in the circumstances, permit him to elicit what amounted to expert evidence from her.

[7] Ultimately, the Board concluded that the examination of Ms. Miller, and her answers, were moving precisely in that direction. In ruling, in the course of the hearing, that her evidence was in large measure inadmissible, the Board noted that, given her experience and knowledge in the area of planning, it might well have given serious consideration to qualifying her as an expert witness, had the disclosure rules been complied with. Given, however, that they were not, the Board decided it would give no weight whatever to any aspect of her evidence which might be considered to be in the area of opinion evidence.

[8] In making this ruling, the Board took account of the repeated assertion by Counsel for the Appellants that the Board can exercise more flexibility with respect to evidence than a court, and need not adhere so strictly to either procedural rules or the strict rules of evidence. Without disagreeing with that assertion, the Board considers that a key reason for its rules on expert evidence, and the foundation for its decision to exclude Ms. Miller's evidence, is to try to ensure fairness for all parties. In the Board's judgment, this includes reasonable prior disclosure by parties of expert evidence.

3.1.2 Edward Edelstein, MA

[9] Mr. Edelstein is the president and owner of 3244160 NS Limited, one of the Appellants in this proceeding. The company owns and developed 2169-71 Gottingen Street as an energy efficient building, which, as the date of the hearing, had four

commercial tenants, three of which are non-profits and one of which is a for-profit licensed day care. It also contains six apartments, one of which is handicapped accessible and meets CMHC Affordability Criteria. The company also has an interest in 2157-59 Gottingen Street, which has 2,200 square feet of commercial space and five apartments, all energy efficient.

[10] It also owns 2242 Maitland Street, for which it has submitted plans for a 24-unit residential building which has qualified for CMHC funding because of Affordability Criteria. HRM declined to approve the initial application because the height of the project is 40.9 feet, rather than the 40 feet permitted. He is also the president, owner and founder of EcoGreen Homes (EGH) a general contracting company specializing in energy efficient construction, which has been involved in numerous projects in Ontario, as well as in Halifax and in Siberia.

[11] Among other things, he testified that, in his opinion, the public notice about the proposed development agreement for 2183 Gottingen was inaccurate with respect to height. The notice refers to six storeys (the building's height on Gottingen,) but omits reference to its eight storey height on Maitland. Subsequently, his concern about this was incorporated in the oral and written submissions made by Mr. Epstein on behalf of the Appellants; the Board deals with this concern briefly near the end of this decision.

[12] Mr. Edelstein sees the height of The Housing Trust proposals as "out of scale" with existing structures in the area, testifying more than once that they are "monstrous" and "gross", that he was "outraged" that a property adjacent to his could be allowed so much height, and "astounded" that the Trust's application had been approved. Mr. Edelstein feels that he has complied with what he considers to be the

requirements of the MPS and LUB in carrying out his redevelopment of his property (limiting it, most importantly, to four storeys). He feels he has played by the rules of the game, as he understood those rules to have been written by HRM, and is angry that HRM has now, as he sees it, permitted others to ignore those rules.

3.2 Witnesses Called by the Respondent HRM

3.2.1 Mitchell R. Dickey, MCIP, LPP

[13] Mr. Dickey has a degree in urban and regional geography, is qualified as a full member of the Canadian Institute of Planners, and is a licensed professional planner. He is currently employed by Halifax Regional Municipality as a planner, has worked in planning elsewhere in Nova Scotia, as well as in Ontario and Australia, and has previously given expert evidence in hearings of the Board.

[14] By agreement among the parties, he was qualified as an expert in Land Use Planning, capable of giving expert opinion evidence on land use planning matters including the interpretation and application of the Halifax Municipal Planning Strategy, Peninsula North Secondary Planning Strategy, and the Halifax Peninsula Land Use Bylaw, and the extent to which the June 17, 2014 decisions of council to amend the LUB to include the properties located at 2183 and 2215 Gottingen Street, Halifax, in Schedule Q were consistent with the intent of the MPS.

[15] He was the only person that the Board qualified to give expert evidence in this hearing.

[16] He was the principal author of three reports which were filed in evidence with the Board: a Report to Halifax and West Community Council dated May 6, 2013, entitled “LUB Amendment and Development Agreement – 2183 Gottingen Street, Halifax”; a

second Report to Council, of the same date, respecting 2215 Gottingen; and a "Summary of Evidence," dated August 19, 2014, filed by Counsel for HRM with the Board.

[17] All three reports support the decisions of Council which are the subject of this appeal.

3.3 Witnesses Called by the Respondent The Nova Scotia Housing Trust

[18] Counsel for The Housing Trust called no witnesses.

4.0 FACTS

[19] The Nova Scotia Housing Trust is a non-profit, independent (although Government sponsored) organization, which was formed in 2009. Since that time, it has received more than $3 million from the Nova Scotia Housing Development Corporation, and has bought the subject properties (two large lots each of which is close to half an acre). The now-vacant lots are in the same block of Gottingen Street, but a few hundred feet apart.

[20] The first lot is 2183 Gottingen Street; 23,312 square feet in area, it was the site of the old Metropolitan Department Store (or "Met"), which was demolished in 2011. The second is 2215 Gottingen Street; 22,830 square feet in area, it was the site of a building which accommodated various enterprises over the years.

[21] The Trust is now seeking permission from HRM to construct two large buildings, one on each lot.

[22] Under provisions in the *Charter*, MPS and LUB, such permission involves a number of items, which fall into two key steps. The first step involves the Community Council being asked to designate the properties under Schedule “Q” in the LUB; the second step, taken only after Schedule Q designation has successfully occurred in the first step, would involve asking Council to approve development agreements for the buildings the Trust proposes to build on the two properties.

[23] This proceeding relates to the first step. However, details of particular relevance to the second step (such as the details of the proposed development agreements) were referred to extensively by all parties and their counsel in this proceeding. Apart from their height, many other details (such as “step backs” on upper floors; the addition of balconies; different kinds of residential units, including ground floor townhouses; the proportion of units classified as “affordable”, etc.) about the two proposed buildings appear in the evidence before the Board.

[24] The two lots each run down a slope from Gottingen Street towards the harbour, to Maitland Street. The grade difference means that, for both buildings, the number of storeys on Gottingen is smaller than the number on Maitland, or, to put it another way, the buildings’ apparent heights, as viewed from the sidewalk, would be higher on Maitland than on Gottingen.

[25] The proposed building at 2183 Gottingen Street would be six storeys on Gottingen and eight storeys on Maitland; the building at 2215 Gottingen would be nine storeys on Gottingen and eleven storeys on Maitland.).

[26] As of right, the LUB allows a height of 50 feet above ground on the Gottingen frontage and 40 on Maitland; by comparison, the development agreement for 2215

Gottingen (the higher of the two proposed buildings) would allow a height of 92.3 feet above Gottingen (an increase of 42.3 feet) and 110.5 feet above Maitland (an increase of 70.25 feet).

[27] By early 2011, consultants retained by the Trust were in touch with HRM to discuss various aspects of the proposed developments, including such matters as motor vehicle traffic generation estimates and architectural details. In December 2011, the Trust made a major submission to HRM, followed in December 2012 with a formal planning application by the Trust.

[28] The following month, in January 2013, The Housing Trust held an “open house” at the North End Library (a few blocks from the proposed building sites) to discuss the proposal and receive suggestions from the community.

[29] These discussions led to various modifications of the Trust’s proposal. These included, for 2183 Gottingen Street, the creation of four townhouse family units on Maitland Street, the addition of balconies for most units, and a large rooftop community deck overlooking the harbor. Similar changes were made for 2215 Gottingen Street.

[30] In June of 2013, HRM assigned Mitch Dickey to be the planner for the Applications. In July, the Trust (through its architects, Lydon Lynch) wrote Mr. Dickey to, among other things, summarize the nature of the Trust’s proposed buildings; various aspects of their design, including the mitigation of wind effects; the nature of the various surrounding neighbourhoods and individual buildings.

[31] In August 2013, Ross Cantwell, President of the Trust, wrote a detailed five page letter to Mr. Dickey to update information provided by the Trust in its earlier submissions, dated from 2011 through to April 2013. He summarized both projects, and

provided ten reasons (each with accompanying explanatory text) for why the Trust wanted HRM to "amend the land use bylaw and height precincts" for the two lots. These ten reasons (one of which related to the affordable housing aspect of the proposals) were referred to, in varying degrees at discussions before Council, as well as being referred to during the Board's hearings.

[32] On October 10, 2013, HRM held a Public Information Meeting which discussed the current state of the proposals, including some reference to the alternatives if the proposals were not approved. Mr. Dickey played a key role in this meeting, as did Mr. Cantwell, who reviewed the project for those in attendance. Included among those in attendance were Ed Edelstein, Beverly Miller and Clare Waqué, all of whom spoke in opposition to the project, and all of whom (personally or through associated corporations) eventually appealed Council's decision to approve adding the subject properties to Schedule "Q."

[33] On October 16, Mr. Dickey prepared a staff memorandum supporting the Trust's proposal, which was delivered to the District 7 and 8 Planning Advisory Committee for their consideration. They discussed it on October 28, and again at a special meeting on November 4. The PAC approved the proposal.

[34] On November 6, 2013, David Fleming, the Interim Chair of the PAC, wrote a lengthy memorandum on behalf of the PAC to the Halifax & West Community Council, in effect recommending acceptance, and further asking that the matter be proceeded with speedily to achieve the expected "affordable and market housing benefits…". The memorandum makes reference to a number of detailed recommendations with respect

to the design of the two proposed buildings, matters to be dealt with in development agreements.

[35] Given that the direct subject matter of this proceeding is not the development agreements, but only the LUB change placing the properties in Schedule Q, the Board in this decision simply notes the existence of these recommendations, without exploring them. The document was, however, before Council prior to the joint public hearing, which dealt with both the Schedule Q change and the development agreements.

[36] On April 29, 2014, according to limited evidence before the Board, a motion was approved by HRM Council for a planning study which included the area of Gottingen Street in which The Housing Trust proposal is located. While Mr. Edelstein placed emphasis on this motion (the existence of which, he said, caused him to be "astounded" when Council subsequently made the decision which is the subject of this appeal), the Board received nothing in the way of evidence or submissions in relation to it that led it to conclude that the existence of such a motion, in and of itself, would create an obstacle to Council's approval.

[37] On May 6, 2014, Mr. Dickey prepared on behalf of HRM a planning report recommending that Council approve the Project. On May 20, at a special meeting, Council considered the Dickey report, as well as the memorandum from the PAC prepared by Mr. Fleming. Council decided to:

> …consider approval of an amendment to Map ZM-2 of the Halifax Peninsula LUB and to consider the proposed development agreements needed for the projects at 2183 and 2215 Gottingen Street.

[38] On June 17, Council held a public hearing at which it reviewed written submissions and heard oral presentations from interested citizens. The public hearing was a combined one, dealing with both of the Trust's properties, and discussing both

step 1 (the LUB amendment adding the properties to Schedule “Q”, which is the subject of this appeal) and step 2 (the development agreements).

[39] Mr. Dickey produced two reports for Community Council, one for each lot. Much of the information in each report is similar or identical, given the proximity of the two lots and the similarity of the structures proposed for each.

[40] At the public hearing, Council heard from: Mr. Dickey (as discussed in more detail below); various councillors; Mr. Cantwell on behalf of The Housing Trust; Eugene Pieczonka on behalf of the Trust’s architects, Lydon Lynch; and from a number of citizens, some of whom spoke in favour of the project, and some against. The latter included Ms. Waqué, Mr. Edelstein, Ms. Wagner, and Ms. Miller, all of whom own or have a beneficial interest in property in the area, and all of whom are involved in the present appeal to the Board.

[41] Just one aspect of the range of different public opinions before Council is perhaps illustrated by the fact that Ms. Waqué, a principal of the Bus Stop Theatre (located adjacent to one of the subject properties), spoke in opposition to the Trust’s proposals, while two other persons involved in the performing arts (Bobbie Zahra and Richard Hadley) spoke separately in favour of the proposals. They both pointed to the performing arts lodge component of the proposals as providing needed affordable housing to people within the arts community, who were described as often having limited means.

[42] MPS Policy 2.3.1 (a policy repeatedly referred to in submissions and discussed under “Analysis and Findings” below) refers to, among other things, identifying areas “that provide an opportunity for and will benefit from comprehensive

site planning." Mr. Dickey's staff reports, considered by Council, note opportunities and benefits that might come from comprehensive site planning on the properties:

> The site does represent a substantial opportunity for major infill development that can contribute to the ongoing revitalization of Gottingen Street as a major commercial node.

On a previous page of the report, he refers to…

> This prominent, vacant site is a major gap in the streetscapes of both Gottingen and Maitland Streets, and represents a substantial opportunity for major infill development that can help pre-establish Gottingen Street as a major commercial node and to increase the area population.

[43] Both reports contain the following reference to the neighbourhood:

> The surrounding area is comprised of a diverse mix of commercial, residential, community, and institutional uses within a varied built environment.

More specifically, the surrounding land uses for 2215 Gottingen Street are described in the Dickey report as including:

- a range of commercial, service, institutional and community uses located along Gottingen Street including Dalhousie Legal Aid at 2209 Gottingen Street which is the only abutting property;
- the YMCA and Halifax North Memorial Public Library;
- low to mid-rise residential apartments on Gottingen Street and lower density housing forms on Maitland Street; and
- the former St. Patrick's-Alexandra School site on the cast side of Maitland Street.

The former school site is directly across Maitland Street from the 2215 Gottingen lot, but is a little down the street from the 2183 Gottingen lot, to which the Board now turns.

[44] The uses surrounding 2183 Gottingen include:

- a range of commercial, service, institutional and community uses;
- low to medium rise residential apartments on Gottingen Street and lower density housing forms on Maitland Street; and
- two churches on Cornwallis Street to the south.

[45] With regard to Maitland Street, the block upon which the site is located is largely comprised of vacant lots and the backs of buildings fronting on Gottingen Street.

While there are three houses along this section of the street, including one that is immediately to the south of the subject site, this is not the dominant character of this section of the street.

[46] Directly abutting land uses include:

- an HRM-owned walkway along the southern property boundary that extends from Gottingen Street to Maitland Street across from which there is a two storey mixed use building at 2179 Gottingen Street with ground floor commercial space and a single unit dwelling at 2244 Maitland Street;
- a two storey commercial building to the north at 2193 Gottingen Street that includes a cafe and a hostel;
- a three storey commercial/residential building at 2199 Gottingen Street; and
- a three storey mixed use building at 2203 Gottingen Street that includes the Bus Stop Theatre.

[47] Larger apartment-style buildings in the area referred to in the evidence include Ahern Manor (2313 Gottingen Street), a seniors' residence, described as 9-11 storeys in height; Gordon B. Isnor Manor (5565 Cornwallis Street), another seniors' residence, described as 16 storeys in height.

[48] Each lot is subject to the same designation and zoning provisions under HRM's planning rules. Each, as described by Mr. Dickey in the reports he submitted to Council, and as accepted by the Board:

- lies within Area 8 of the Peninsula North Secondary Planning Strategy;
- is designated Major Commercial;
- is within the Regional Centre and Capital District designations of the Regional MPS;
- is zoned C-2 (General Business) under the Halifax Peninsula Land Use By-law; and
- is subject to a height limitation of 50 feet along Gottingen Street and 40 feet along Maitland Street.

[49] Likewise, Mr. Dickey uses identical text in his two reports to describe what he refers to as the "enabling policy and zoning context" for each lot:

> The site is within that area of Gottingen Street (between Cogswell Street and Prince William Street) identified by the MPS as a major commercial area for Peninsula North and the broader community. MPS policy encourages commercial and residential intensification in this area, in recognition of the street's historic role as a major shopping

> street and to once again strengthen this role. Policy also encourages the development of new housing stock that appeals to all income levels. This application largely concerns a proposed increase in height for the site."

[50] After the close of the public hearing, members of Council asked further questions of HRM staff. Council then voted on a motion (made by Councillor Watts, and seconded by Councillor Mason), that the Council amend the LUB to add the properties to Schedule Q and, after further discussion, the motion was approved.

[51] No motion was presented in relation to approval of the development agreements.

[52] On July 4, the Appellants appealed Council's decision to the Board. The notice of appeal stated the following grounds :

> Section 265(1)(a) of the *Halifax Charter*
> the decision of Council does not reasonably carry out the intent of the Halifax Municipal Planning Strategy (MPS);
>
> Section 240(1)(b) of the *Halifax Charter*
> the MPS does not specify this area as one where a development agreement may be located;
>
> Section 1.6, 2.11, 2.2, 1.4.8, 2.3.1, 2.3.2, 2.3.3, 2.4, 2.9 of the MPS;
>
> Staff and Council failed to show, given the existing Peninsula North 8 zoning, justification for adding these properties to Schedule Q; and
>
> Council and Staff failed to consider neighbourhood stability and compatibility and maintenance of existing neighbourhood form for massing, and height and density

[53] In the course of preliminary hearings and E-mail communications between the Board and the parties, the possibility of suspending the present appeal of Council's LUB decision until after Council had made its decision on the development agreements was raised, as possibly being a more efficient approach to these proceedings, in that it might allow appeals of the LUB decision and development agreements to be combined into

one proceeding before the Board. However, no means to do this procedurally appeared possible, in light of the provisions of the *Charter*.

5.0 SITE VISIT

[54] Accompanied by Counsel for the Appellants and Counsel for the Applicant Housing Trust, the Board member who presided over this hearing carried out a site visit, on foot and by car. He viewed all of the areas identified by the parties prior to the hearing as ones he should see, as well as others referred to by Counsel in the course of the viewing.

6.0 ANALYSIS AND FINDINGS

6.1 Municipal Government Act and Halifax Regional Municipality Charter

[55] Appeals of this type were formerly governed by the provisions of the *Municipal Government Act*, R.S.N.S., 1998, c. 18, s.1, everywhere in the Province. In 2008, appeals relating to property located in HRM were excluded from the jurisdiction of the *Municipal Government Act*, and placed under the new *Halifax Regional Municipality Charter*.

[56] Many provisions in the *Halifax Charter* correspond to provisions which are found in the *Municipal Government Act*. The provisions of the latter act have been explored in earlier decisions of the Court of Appeal, and the Board considers the conclusions in those decisions to be relevant to the interpretation of the *Halifax Charter.*

6.2 Burden of Proof

[57] In this proceeding, as in appeals generally, the Board considers that the burden of proof rests with the Appellants.

6.3 Standard of Proof

[58] The Board has applied the balance of probability as the standard of proof for the determination of facts.

6.4 Applicable Principles of Statutory Interpretation

[59] The Board considers that the liberal and purposive approach to statutory interpretation applies in this proceeding. See, for example: *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board),* [1994] N.S.J. 50 ("*Heritage Trust 1994")*.

[60] Consistent with the *Heritage Trust* purposive approach is the decision of J.M. MacDonald, J., (as he then was) in *MacDonald v. Halifax Investments* (1997),162 N.S.R. (2d) 214 (SC), an application respecting the National Building Code. The Court referred to

> …the dilemma of balancing competing rights in the context of land use legislation . . ."[para. 16]

[61] He went on to refer to community based property rights, saying

> Courts in recent years have endorsed an erosion of individual property rights in favour of land use planning which is primarily designed to benefit the community as a whole. I refer again to Driedger at page 373;
>
> In the past, common law courts assumed that the free use and disposition of property, and contractual freedom generally, benefited not only the owner of the property but also society as a whole. While free markets and free trade remain respectable common law values, courts today are less likely to believe that what is good for property owners is good for society as a whole. In current interpretative practice, the value of protecting the freedom of property owners easily gives way to competing values and goals.
>
> I, as well, refer to Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility & Review Board et al, (1994), 1994 CanLII 4114 (NS CA), 128 N.S.R. (2d) 5; where at paragraph 97, Hallett, J.A., noted:
>
> Therefore, there is case law to support the view that a liberal and purposive approach to the interpretation of planning policies is appropriate. The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality.' " [para. 14]

[62] The Court further noted that the:

> …purposive approach to statutory interpretation is as well embodied in our Provincial Interpretation Act, 1989, R.S.N.S. c. 235, s. 9(5) provides in part:
>
> 9 (5) every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters:
>
> (a) the occasion and necessity for the enactment;
>
> . . .
> (c) the mischief to be remedied;
>
> (d) the object to be obtained;
> . . .
>
> (f) the consequences of a particular interpretation;… [para. 15]

[63]

6.5 Board's Fact Finding Role

[64] In *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115, the Court of Appeal stated that 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…

[65] The focus of the dispute in *Midtown* was a decision by Council to enter into a development agreement, not to (as in the present proceeding) amend a land use bylaw. The Board considers, however, that the direction given by the Court of Appeal in *Midtown* with respect to development agreements has relevance to disputed decisions with respect to the amendment of a land use bylaw. On this point, the Board notes that the applicable provisions of the *Halifax Charter*, like the *Municipal Government Act*, state the same test for disputes respecting decisions to amend land use bylaws and decisions with respect to development agreements.

6.6 Municipal Councils as the "Primary Authority" for Planning

[66] The *Halifax Charter* specifically identifies HRM as the "primary authority" for planning in the Municipality:

> 208 The purpose of this Part is to
> …
> (b) enable the Municipality to assume the primary authority for planning within its jurisdiction, consistent with its urban or rural character, through the adoption of municipal planning strategies and land-use by-laws consistent with interests and regulations of the Province;

[67] The concept of municipal council being the primary authority for planning is not a new one. The *Municipal Government Act* likewise identifies municipal councils as the primary authority. This status of municipal councils was underscored in *Midtown*:

> [46] I reject the opponents' assertion that the Board owed no deference to Council despite the fact that the Board conducted its own full scale hearing. In fact, I believe Council and not the Board to be the primary decision maker when it comes to this type of planning issue. Let me briefly elaborate.
> [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. [per MacDonald, C.J.N.S.; emphasis added]

[68] Likewise, the *Planning Act* (the predecessor of the *Municipal Government Act*) had a similar provision, the Court of Appeal stating (in "*Heritage Trust 1994*") that "the intent" of the *Act* was:

> …to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions...

6.7 Board's Limited Authority in Planning Appeals

[69] In keeping with the concept of municipal councils being the primary authority, s. 265(1) (b) of the *Halifax Charter* (like the *Municipal Government Act* and *Planning Act*

before it), limits the grounds for an appeal to the Board of a decision by Council in relation to proposed rezonings (the subject of this proceeding) or development agreements. The *Halifax Charter* states:

> 265 (1) An aggrieved person or an applicant may only appeal
> …
> (a) an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy;
>
> (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;

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

> 267 (2) The Board may not allow an appeal unless it determines that the decision of 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.

[71] Thus, according to Section 267 (2), the Board must not interfere with a decision by Council in relation to a proposed rezoning, or development agreement, unless it determines that the decision does not reasonably carry out the intent of the MPS. The burden of proof is on the Appellant to establish this.

[72] If an appellant can show, on the balance of probabilities, that a decision by Council does not reasonably carry out the intent of the MPS, the Board must reverse Council's decision. If, however, the appellant fails to meet this standard of proof, it is the Board's duty to defer to Council's decision.

[73] On this point (referring to a development agreement, not to an amendment to the land use bylaw, but nonetheless, in the Board’s judgement, of relevance to the present proceeding), the Court of Appeal remarked in *Heritage Trust 1994*:

> [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 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.

[74] The Court of Appeal in *Heritage Trust* further held, in relation to "development by contract," i.e., development agreements:

> [163] 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 decision…
>
> 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…

[75] In *Archibald v. Nova Scotia,* 2010 NSCA 27, the Nova Scotia Court of Appeal stated a summary of planning law which has been frequently referred to in subsequent Board decisions on municipal planning. Speaking for the Court of Appeal, Fichaud, J.A., said:

> …I will summarize my view of the applicable principles: (1) The Board usually is the first tribunal to hear sworn testimony with crossexamination 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. (BR24 para 12) 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), 2001 NSCA 98, ¶ 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. [emphasis added]

[76] The Board has sorted the issues in this matter into six different groups (listed under "Issues" above). In so doing, it has not exactly adopted the structure used by any of the Counsel, each of whom used somewhat different approaches. Further, the Board perceived some overlap in arguments, even by the same Counsel, between certain issues – for example, some arguments appeared at certain points to be being put forward in relation to Issue 1 and at others in relation to Issue 2.

[77] The Board further notes that it sometimes breaks its discussion of each issue (and especially Issue 1), into separate sub-headings; there is frequent overlap among these sub-headings, as well as overlap with other issues.

6.8 ISSUE1: Have the Appellants shown, on the balance of probabilities, that the decisions of Halifax and West Community Council to amend the Land Use By-law fail to reasonably carry out the intent of the Municipal Planning Strategy?

[78] As noted previously, the Board finds the answer to this question to be "no", for reasons it will now discuss, in the light of various decisions from the Court of Appeal.

[79] The Board will now turn to certain specific provisions of the MPS, the LUB, and the *Halifax Charter* which were the subject of repeated discussion before the Board.

[80] Evidence and submissions were particularly focused on MPS Policies 2.3.1, 2.3.2, and 2.3.3, s. 92 of the LUB, and s. 240 of the *Charter:*

> MPS Policy 2.3.1 In order to promote investment in commercial and residential redevelopment and to prevent conflict between new and existing uses the city may,

through the land use by-law, identify areas that provide an opportunity for and will benefit from comprehensive site planning.

MPS Policy 2.3.2 In those areas identified in the land use by-law pursuant to Policy 2.3.1 all residential and mixed residential-commercial development over four units shall be by agreement.

2.3.3 In considering agreements pursuant to Policy 2.3.2, Council shall consider the following:

(i) the relationship of new development to adjacent properties and uses; and, the mitigation of impacts on the amenity, convenience and development potential of adjacent properties through effective urban design and landscape treatment;

(ii) the appropriate integration of the development into the traditional grid street system of the Peninsula;

(iii) the design and layout of the development should encourage vehicular traffic to use Principal Streets and discourage traffic from infiltrating through existing neighbourhoods;

(iv) the creation of high quality design detail at street level through attention to such matters as landscaping, signs, building entrances, and vehicle layby areas;

(v) the provision of high quality open space and leisure areas of a size and type adequate for the resident population;

(vi) residential and commercial densities consistent with municipal services;

(vii) encouraging high quality exterior construction materials such as masonry; and

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

[81] Section 240 of the *Halifax Charter* provides:

(1) The Council may consider development by development agreement where a municipal planning strategy identifies

(a) the developments that are subject to a development agreement;

(b) the area or areas where the developments may be located; and

(c) the matters that the Council must consider prior to the approval of development agreement.

(2) The land-use by-law must identify the developments to be considered by development agreement. 2008, c. 39, s. 240

[82] The “land use by-law” referred to in MPS Policy 2.3.1-2, all parties agree, is s. 92 of the LUB, which states:

> Schedule Q:
>
> In any area shown as Schedule Q, any use shall be permitted which is permitted by the zoning designation of such area, except that any proposed residential or mixed residential commercial development over four residential units may proceed only by Development Agreement pursuant to Policy 2.3.3 of S XI.

[83] S. 240 of the *Halifax Charter* will be the subject of further discussion below under Issue 2, and was a matter of sharp dispute between the parties. For the moment, the Board will note that it allows development by development agreement to occur in certain circumstances, through the MPS, and relates to the MPS policies which are central to this appeal.

[84] Turning to the MPS provisions themselves, one can summarize their interrelationship thusly:

- MPS Policy 2.3.1 says HRM can identify through the land use by-law (or LUB) areas to be developed by development agreement;
- s. 92 of the LUB establishes Schedule Q, which specifically refers to MPS Policy 2.3, and which lists specific areas to be so developed;
- MPS Policy 2.3.2 says areas identified in the land use by-law pursuant to 2.3.1 (i.e., in Schedule Q of s. 92 of the LUB) can be developed through development agreement (and, in particular, that proposals the size of the Trust’s, i.e., over four units, must be so developed);
- MPS Policy 2.3.3 sets out matters to be considered by Council when considering entering into such agreements, and requiring, among other things, that Council consider mitigation of impacts.

[85] The above is an approach which has been used by HRM for many years, certainly since 1995. It was reviewed in detail in the two reports produced by Mr. Dickey for Council.

[86] Before proceeding further, the Board will first note in passing the reference to the word “city” in MPS 2.3.1; this refers, of course, to the former City of Halifax, which has been gone now for two decades, replaced by Halifax Regional Municipality. It is one of a number of references in HRM’s planning documents to various obsolete terms which were repeatedly criticized by Mr. Epstein. The Board will return to this topic near the end of the decision; for the moment it will note that while these terms may sometimes be confusing, their presence is not, in the judgment of the Board, determinative in any way of this appeal.

[87] In the opinion of Mr. Dickey, MPS Policy 2.3.1 is a key policy in this proceeding. The Board considers that this was agreed by all Counsel, including Counsel for the Appellants, although he disagreed sharply as to the actual effect (and even legal validity) of this, and other provisions.

[88] In Mr. Dickey’s opinion, MPS Policy 2.3.1 is a tool for HRM to implement s. 240, and provides the foundation for Halifax and West Community Council to consider applying schedule Q to the subject properties.

[89] Mr. Dickey emphasizes that Council’s placing of the two properties in Schedule Q is not approval of a particular building or buildings, such as those proposed by the Housing Trust:

> Council does not need to consider a specific development proposal when determining whether to apply Schedule Q. Rather it is the nature of a site and the context of surrounding land uses which inform the decision. Inclusion of a site within Schedule Q does not constitute approval of any development, in fact it reduces the range of land uses which can be constructed on an as of right basis, without a development agreement.

6.8.1 Opportunity and Benefit

[90] The Board concludes from the evidence and submissions before it that neither the MPS nor the LUB specifies explicitly the criteria which must be taken into account by Council prior to placing a property in Schedule Q.

[91] Instead, we find that 2.3.1 says Council has to decide if an area provides "an opportunity for and will benefit from comprehensive site planning."

[92] Mr. Dickey lists in his evidence several considerations to be taken into account when evaluating the opportunities and benefits arising from including the subject properties in Schedule Q. The considerations he lists for each property are very similar; the Board will reproduce only those for 2183 Gottingen:

> In evaluating the request under Case 18547 to include the site within Schedule Q of the Land Use Bylaw, I identified the following considerations:
>
> The site is within the Major Commercial land use designation of the Halifax MPS.
>
> The site is located within a mixed use commercial district, characterized by a wide variety of land uses and a diverse range of building types, ages, conditions, and scales.
>
> This prominent, vacant site is a major gap in the streetscapes of both Gottingen and Maitland Streets, and represents a substantial opportunity for a major infill development that can help re-establish Gottingen Street as a major commercial node and to increase the area population.
>
> The C-2 zone allows large scale as-of-right development, with no ability for public input or council control.
>
> The C-2 zone contains no density limits and as of right development could consist entirely of very small studio units.
>
> The development agreement process established for lands under Schedule Q of the Land Use Bylaw provides Council with the ability to prohibit less desirable commercial uses
>
> There are no design controls in the C-2 zone and no requirements for setbacks, stepbacks, or landscaping that would protect the amenity or development potential of adjacent properties.
>
> There are no abutting or nearby residentially-zoned properties and no abutting Municipal registered heritage properties.
>
> Abutting and nearby properties are also eligible for inclusion within Schedule Q.

> Considering the need to ensure an appropriate development on such a prominent site, and given the diverse mix of nearby land uses, the proposed development presents an appropriate and beneficial opportunity for comprehensive site planning. The inclusion of the site within Schedule Q would therefore ensure that council has control over the design and residential unit mix of any project on the site.

[93] The C-2 zone which applies in the area, and which is referred to by Mr. Dickey in the items listed above, is one of the few subjects upon which Mr. Dickey and Mr. Edelstein found any common ground.

[94] Both see C-2 as highly permissive, Mr. Dickey at one point calling it "the most permissive" commercial zone in Halifax. As appears in the above list of items, Mr. Dickey notes the lack of design controls in C-2, as well as a lack of density limits, permitting very small units.

[95] Mr. Edelstein likewise sees the zoning as permitting he says, a "flexibility of design not found elsewhere on the Peninsula, noting that Peninsula North has "no minimum" sizes for apartments. Thus, for example, he was able to include an "artist in residence"' unit in a redevelopment of his property which is only 300 sq. ft.

6.8.2 Height – Medium Rise Buildings

[96] With respect to the matter of height, Mr. Dickey referred to Policies 1.4.8 and 2.9. Both include the term "medium rise":

> Policy 1.4.8 In Area 8 of this Section, the land use by-law shall include a height limit to maintain and promote a *medium rise* form of residential and commercial development for properties designated High Density Residential and Major Commercial and located south of Prince William Street on the west side of Maitland Street.
>
> Policy 2.9 In Area 8 of this Section, a height limit shall be established for the Major Commercial area of Gottingen Street and for the Residential/Commercial/ mix area along Gottingen Street to maintain a *medium rise* building form and to ensure compatibility with surrounding residential properties. [emphasis added]

[97] Counsel for the Appellants presented a complex series of arguments respecting height (and, in particular, the meaning of the term "medium rise") under the

Halifax MPS. For present purposes, the Board will summarize an essential part of that position as being his assertion that the buildings proposed by the Housing Trust are too high: he says that they would be, in his view, more than “medium rise” in the context of the MPS and LUB.

[98] HRM and the Housing Trust emphatically disagree, suggesting that the buildings (if approved at Step 2) that the proposed buildings would not be too high at all in the context of the MPS.

[99] They also argue – at least at certain points – that height is irrelevant given that the subject of this appeal is not the buildings themselves but the Schedule Q designation of the property.

[100] For the purposes of this part, the Board considers that it is at least arguable the decision to allow Schedule Q designation might, given the context of the are in question and the provisions of the MPS, involve Council giving some consideration to the possible heights of projects which might later be proposed for development agreements on property designated in Schedule Q. The Board’s view of this arises in part from its view of the continued relevance of the entire MPS, even when a detailed plan is in existence (on this point, see “HRM and Housing Trust arguments re alleged irrelevance of certain MPS policies,” below).

[101] The Board notes, first, that the term “medium rise” is not defined for the purposes of these MPS provisions. In MPS Policy 1.4.8 (under the heading “Residential Environments”, exact heights for Area 8 are not specified; instead, it says that the LUB “shall include” a height limit to maintain and promote a medium rise form of residential and commercial development for properties designated high density residential and

major commercial and located south of Prince William Street on the West Side of Maitland Street".

[102] Currently, under Area 8, the as-of-right height limits affecting the properties which are the subject of this appeal are 50 feet on Gottingen Street and 40 feet on Maitland.

[103] Policy MPS 2.9 (under the heading "Commercial Facilities") says

> In Area 8 of this Section, a height limit shall be established for the Major Commercial area of Gottingen Street and for the Residential/Commercial mix area along Gottingen Street to maintain a medium rise building form and to ensure compatibility with surrounding residential properties
> .

[104] Mr. Dickey says the Housing Trust could have simply sought a change to the LUB to increase the height for the subject properties, but there would then be a lack of development controls (as previously discussed) with respect to the buildings erected. Accordingly, as the Board interpreted his evidence, it was his view that if the properties were to be built to a higher height, it would be better to designate them using "Q", followed by development agreements, as the latter would allow the nature of the development to be addressed in detail

[105] Mr. Dickey's evidence refers to MPS Policies 1.48 and 2.9 (quoted above), and then goes on to say:

> These policies establish the goal of maintaining a medium rise building form along this area of Gottingen Street and Maitland Street. Different from other portions of Peninsula North, the policies do not contain an actual numerical height limit. This provides Community Council with discretion as to what comprises a medium rise form. Instead of applying for Schedule Q, and being subject to a development agreement process, the Housing Trust could therefore have applied to amend the height precincts of the Land Use Bylaw in order to allow the height which was being proposed for the site. However subsequent development would have been as of right and under that scenario there would be no opportunity for public input or for the implementation of design controls.
>
> I therefore determined that the application of Schedule Q was a preferable option as it addressed these concerns and that Council could then determine appropriate heights through the development agreement process pursuant to Policy 2.3.3.

[106] Mr. Dickey says that HRM planners as a matter of practice use the terminology of low-rise for up to 5 storeys, medium-rise for 6-12 storeys, and high-rise for over 12. The proposed structures therefore fall within this definition of medium rise. No contrary expert view of what medium rise or mid rise involves was presented to the Board.

[107] Mr. Epstein suggested Mr. Dickey's definition was similar to the HRM By Design standards applying to the downtown core, and that this should not be determinative elsewhere. He made reference to existing buildings of two to four storeys in the area of the subject property. The Board inferred he was suggesting this must be the standard for mid-rise in the Gottingen area.

[108] The Board is unpersuaded, noting first that his focus on the lower buildings ignores the presence of much higher ones.

[109] As well, the Board notes in passing that it looked to definitions in ordinary dictionaries. While it found nothing inconsistent with Mr. Dickey's view, the definitions were generally vague, with no actual numbers. As but one example, the Canadian Oxford Dictionary provides the following definition of "mid-rise":

> Mid-rise – adjective (of an apartment building of a height between low-rise and high-rise; having an intermediate number of storeys

The definitions of low-rise and high-rise were similarly lacking in precision.

[110] The inescapable fact contains no applicable express definition of "medium rise". The Board has already noted above Mr. Dickey's view of what medium rise means, and his comment that he sees the MPS as conferring a "discretion" on Council as to what constitutes a medium rise form in the context of MPS Policies 1.4.8 and 2.9.

[111] In the specific context of the present point in issue, the Board considers that a reasonable inference to be drawn from the MPS is that the concept of medium rise is indeed a matter for the discretion of Councillors. It is yet another of those matters which, as the Court of Appeal said in *Midtown* [para. 47, quoted above] falls "within Council's discretion", as long as it "reasonably reflect[s] the intent of the MPS." The Board finds that it does.

6.8.3 Area

[112] The word "area" appears in various of the provisions of the MPS and *Halifax Charter* under consideration in this appeal. In particular, it appears in MPS 2.3.1-3, and s. 240 of the *Charter*.

[113] As with the height of "medium rise" buildings (discussed above), the word lacks any direct definition in the applicable legislation.

[114] Counsel for the Appellants raised a number of arguments as to its proper meaning.

[115] Some of these arguments relate to the issue of the alleged illegality of the MPS under s. 240; the Board will deal with them later in this decision.

[116] Some, however, relate to the present issue - whether Council's decision reasonably carries out the intent of the MPS. As the Board interprets his argument here, he says that the two properties which are the subject of this appeal are too small to fall within the meaning of the word "area", and accordingly cannot be the subject of development agreements under MPS 2.3.

[117] The Board concludes from the evidence that a variety of different sized properties have been designated under Schedule Q over the years. Some have been

large areas on the order of city blocks; others have been much smaller, down to individual lots.

[118] Counsel for the Appellants says it cannot mean the latter. “Area” must, says Mr. Epstein, mean something more.

[119] In expressing this idea, he used different terms at different times in his submissions - at one point using the term “expansive”, at another “substantial”, at still another “large”, and at yet another “of some magnitude.”

[120] However, exactly what he meant by such terms (or where they came from) never became clear to the Board.

[121] What was clear was that, in Mr. Epstein’s view, the word “area” has a restrictive definition, and the subject properties (each almost half an acre in size) are not big enough fall within that definition. Accordingly any designation of them under Schedule Q fails to reasonably carry out the intent of the MPS as found in MPS Policies 2.1, 2.2 and 2.3.

[122] He put this argument forward in an extensive cross examination of Mr. Dickey on various uses of the word “area” in the *Charter* and planning documents. The Board concluded from Mr. Dickey’s evidence, however, that it was his opinion that the word does not have a single restrictive definition, but is, instead, used in different ways in different parts of the applicable legislation.

[123] The Board finds Mr. Dickey’s opinion persuasive. Indeed, the Board’s examination of the MPS suggests that the word is sometimes used in different ways in the same section, and even in the same sentence.

[124] The Board has examined all of the uses of the word “area” in the *Halifax Charter* and the MPS which Mr. Epstein argued meant that “area” refers to something bigger than the subject lots. It will not catalogue them here, but simply state that none of them satisfied the Board, that on the balance of probabilities, land the size of the subject properties is so small that designating it in Schedule Q would fail to reasonably carry out the intent of the MPS.

[125] The Board also turned to dictionaries to seek the ordinary meaning of “area”. It will not repeat its findings from various sources, but notes that examples of the use of the word included the term “downtown shopping area” (which is consistent with Mr. Epstein’s argument), and the term “kitchen area” in a house (which is decidedly not).

[126] The Board notes here as well the principle stated more than once in the Court of Appeal’s decisions (and most recently in *Archibald*) that the Board:

> (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.

In the present instance, in the view of the Board, the MPS clearly contemplates that Council can place land in Schedule Q, after which it may or may not decide to enter into a development agreement with respect to that land. To argue that an undefined term like “area” *must* have a definition which prevents Council from putting half-acre lots like the present ones into Schedule Q is not, in the Board’s view, a pragmatic interpretation meant “to make the MPS work as a whole.”

[127] The Board will not repeat once again all of the principles contained in the various decisions of the Court of Appeal which are relevant here. It does, just as it did in relation to Mr. Epstein’s arguments with respect to the meaning of “medium rise”,

consider that the term is one which can be left to the discretion of Council, as long as Council's decision appears to reasonably carry out the intent of the MPS.

[128] As with its discussion of the term "medium rise" above, the Board need not find Counsel for the Appellants' interpretation of "area" to be unreasonable; it is sufficient that the Board finds that the Appellants did not establish that HRM's interpretation of "area" fails to reasonably carry out the intent of the MPS.

[129] The Board has no difficulty in so finding.

6.8.4 "COMPREHENSIVE SITE PLANNING"

[130] MPS Policy 2.3.1 says:

> MPS Policy 2.3.1 In order to promote investment in commercial and residential redevelopment and to prevent conflict between new and existing uses the city may, through the land use by-law, identify areas that provide an opportunity for and will benefit from *comprehensive site planning*. [emphasis added]

[131] Central to the discussion in this part is a claim by Counsel for the Appellants that the words "comprehensive site planning", found in MPS Policy 2.3.1, have no meaning, nor does the clause itself.

[132] His arguments with respect to these words seemed to the Board to take more than one form, but the Board does not see any of them as changing the outcome in this proceeding, i.e., none of the arguments persuades the Board that a decision to place the subject properties in Schedule Q fails to reasonably carry out the intent of the MPS.

[133] Accordingly, the Board will deal with the point only briefly.

[134] The words "comprehensive site planning" are not defined in the MPS, LUB, or *Halifax Charter*, and the Board concludes from the evidence that it is not a term of art used by planners. At least at certain points, the Board concludes that Mr. Epstein was

arguing that because these words are undefined in the MPS and are not a term of art, they render the provision meaningless: "… policy 2.3.1 has no meaning."

[135] The words were, he said, "so ambiguous as to amount to impermissible vagueness."

[136] As with parts of some other arguments made on behalf of the Appellants, the Board was left uncertain as to just what consequence, or remedy, would flow from such purported lack of meaning, or "impermissible" vagueness. The Board need not speculate on the point, however, as it does not agree with the assertion that the words, or the provision, are meaningless.

[137] First, the Board does not agree that the simple appearance of three words in sequence – "comprehensive site planning" – somehow necessarily triggers an immediate need for a legislative definition. In the judgment of the Board, It is at least equally reasonable to conclude that the individual words should each simply be given their ordinary meaning.

[138] Second, the Board, using the liberal and purposive approach, sees a reasonably clear trail leading from the words "comprehensive site planning" in MPS 2.3.1 through to MPS 2.3.2 and .2.3.3, which points to the words as including, and perhaps even meaning, the use of development agreements. Indeed, Mr. Dickey allowed as how he would have preferred 2.3.1 to have simply used the term "development agreement", rather than "comprehensive site planning."

[139] The Board sees this clear trail as follows:

- MPS 2.3.1 refers to identifying "areas that provide an opportunity for and will benefit from comprehensive site planning." These can be identified through the LUB (i.e.,by being placed in the LUB's

> Schedule Q). Council has decided to place the two properties in Schedule Q;
>
> - moving to MPS 2.3.2, we find that it, in effect, says that areas identified in Q can be developed "by agreement." In the context of the MPS, the Board finds this means development agreement;
>
> - moving finally to MPS 2.3.3, we find a list of considerations Council must take into account in deciding whether to enter into such a development agreement.

[140] The Board rejects the argument that the undefined words "comprehensive site planning" somehow render MPS 2.3.1 meaningless. Applying the liberal and purposive approach, it sees nothing upon which it could base a finding that the inclusion of these words means that Council's decision fails to reasonably carry out the intent of the MPS.

6.8.5 HRM and Housing Trust Arguments re Alleged irrelevance of certain MPS policies

[141] Before concluding its discussion of this part, the Board will briefly deal with certain arguments raised by Counsel for the Housing Trust and Counsel for HRM.

[142] The Board notes that at various points Counsel for the Housing Trust (citing the evidence of Mr. Dickey) referred to those policies of the MPS that had been identified by the Appellants in their notice of appeal, saying that:

> …none of the policies cited by the Appellants are relevant to the decision of Council to include the Properties with Schedule Q." (emphasis added).

[143] In similar vein, Counsel for HRM asserts that all the policies referred to by the Appellants (except for 2.3.1 and 2.3.2)

> …are simply irrelevant to the issue under appeal.

[144] To ensure clarity (and to avoid any suggestion in any appeal of this decision that the Board implicitly adopted the above blanket assertions by Counsel for the

Housing Trust and HRM), the Board will here explore briefly its disagreement with these assertions.

[145] The Board's decision to dismiss this appeal makes it clear that the Board agrees with the conclusion of the Housing Trust and HRM that Council's decision reasonably carries out the intent of the MPS. In reaching that conclusion, the Board has decided that, in its opinion, none of the MPS policies cited by the Appellants establish that the HRM decision failed to reasonably carry out the intent of the MPS.

[146] It does not, however, mean that the Board necessarily agrees with all of the arguments put forward by Counsel for the Housing Trust and Counsel for HRM, in their separate and independent submissions.

[147] One of the arguments with which the Board does not agree is the assertion by the Housing Trust or HRM that all the policies (except for 2.3.1-3) are irrelevant or inapplicable to the present situation.

[148] It will briefly explain its view of this by reference to just one of the policies identified in this context by the Trust in its brief, that being Policy 1.6, which is a city-wide policy. It states:

> The city should direct the location of development in a manner consistent with its Program, and economic, social and environmental objectives.

[149] The Trust says MPS Policy 1.6 is "not applicable in the circumstances", referring to the existence of a detailed area plan for Peninsula North that "provides specifically tailored land use policies.". In similar vein, the Trust also says that

> …a general city wide policy … is superseded where there is detailed area plan setting out specific land use policies.

[150] In the view of the Board, earlier decisions of the Court of Appeal make it clear that the MPS is to be read as a whole. Accordingly, the detailed area plan can be a subject of particular focus in this proceeding, because of its specificity to the locale of the subject properties. However, the city-wide provisions of the MPS, including Policy 1.6, remain applicable. As the Board interprets the direction given by the Court of Appeal, the detailed area plan should be read in the context of the city-wide provisions, and vice-versa.

[151] In short, in the view of the Board a city-wide MPS provision is not "inapplicable", or "superceded," or "irrelevant," simply because a detailed area plan exists. There is no doubt that a detailed area plan can, and should, be regarded as of great relevance, but the city-wide provisions are not thereby rendered completely irrelevant.

[152] This, in the respectful view of the Board, correctly reflects the law as stated by the Court of Appeal, and the Board has so instructed itself. In reaching its decision in this matter, it has regarded all provisions which may relate to the subject matter of this appeal – be they in a city-wide or detailed part of the MPS – to be matters to be taken into account.

[153] However, while city-wide provisions cited by the Appellants remain – in the Board's understanding of the law, at least - applicable, those provisions do not lead the Board to the conclusion that Council's decision to approve the LUB change failed to reasonably carry out the intent of the MPS.

6.8.6 Summary on issue 1:

[154] For the Appellants to succeed, it is not enough for the Appellants to show that their interpretation reasonably carries out the intent of the MPS (a point on which the Board need not, and does not, make a finding here)

[155] Instead, for the Appellants to succeed, they must show that the Municipality's actions do not reasonably carry out the intent of the MPS.

[156] In the judgment of the Board, on the balance of probabilities, they have not succeeded in doing so.

6.9 Issue 2: Is MPS Policy 2.3 Inconsistent with the *Halifax Charter*?

[157] Mr. Epstein's arguments on this point are complex and nuanced, and the Board found it impossible to completely summarize them with precision, both with respect to the issues he was identifying, and the remedy or consequences which might flow from them. What follows does not represent a complete catalogue of the arguments he made in relation to this point.

[158] Mr. Epstein says that MPS Policies 2.3.1 and 2.3.2 are "flawed", because they are inconsistent with s. 240 of the *Charter*. For convenience, the Board will quote once again s. 240:

> **(1)** The Council may consider development by development agreement where a municipal planning strategy *identifies*
>
> (a) the *developments* that are subject to a development agreement;
>
> (b) the *area or areas* where the developments may be located; and
>
> (c) *the matters that the Council must consider* prior to the approval of development agreement.
>
> **(2)** The land-use by-law must *identify* the developments to be considered by development agreement. 2008, c. 39, s. 240 emphasis added

[159] Mr. Epstein asserts that s. 240 (1)(b) of the *Halifax Charter* requires that areas to be made subject to development agreement must be explicitly identified in detail in the MPS to a level approaching “certainty”, or, as he also put it, “reasonable certainty”. He does not suggest that this term appears in the *Charter*, but in effect argues that it is the only reasonable inference from it.

[160] An area cannot, he says, be identified through the use of the LUB, as the MPS presently provides. This is a theme to which Mr. Epstein returned to repeatedly in both his oral and written submissions. The fact that the MPS identifies the areas through the LUB “subverts,” he says, a “mandatory direction” in the *Charter* that the areas be explicitly identified in the MPS, and not the LUB. He maintains that:

> What HRM has done is to take the provincial statute direction that areas be identified in the MPS and converted it to an authorization that areas may be identified in and by the land-use bylaw.

[161] The Board concluded that he was ultimately saying it is legally impossible - under any circumstances - to place any property (not just the subject ones) in Schedule Q using the MPS as presently drafted. For example, his written brief says

> …there is no policy in the MPS that validly authorizes the use of Schedule Q.

[162] He see this result as having occurred inadvertently, largely because of the legislative history of the provisions of the *Planning Act, Municipal Government Act, Halifax Regional Municipality Charter,* MPS and LUB which led to the present legislation applying in this proceeding.

[163] Partly in response to an argument by Counsel for HRM which the Board need not explore in this decision, Mr. Epstein referred the Board to section 271 of the *Halifax*

Charter, which provides for the ongoing validity of an MPS or LUB made under earlier legislation, but only "to the extent they are consistent with this act".

[164] Mr. Epstein argues that the MPS provisions in question were adopted under a previous statute, and that the provisions of the *Halifax Charter* are not entirely consistent with it.

[165] The Board agrees with Mr. Epstein's interpretation of the effect of section 271 – in its view, provisions in an MPS or LUB made under a previous enactment (such as the *Planning Act*) survive only if consistent with the *Charter*. However, as the Board further explores below, it disagrees with his assertion that the impugned MPS provisions are indeed inconsistent with the *Charter*.

[166] Various of the positions taken by Mr. Epstein in this proceeding evoked protests from Counsel for HRM and the Housing Trust, but none were louder than in relation to his argument that MPS policy 2.3 is invalid (and, further, that the Board has jurisdiction in relation to that invalidity).

[167] As the Board has previously noted, the Board's task, according to all of the case law from the Court of Appeal, is to determine if Council's approval of a Schedule Q designation for the properties reasonably carries out the intent of the MPS.

[168] Decisions of the Court of Appeal have consistently held that the enabling legislation (in this case, the *Halifax Charter*) can, in appropriate circumstances, be used to help in deciding if a council's decision carries out the intent of the MPS. For example, the Court in *Archibald* said:

> (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.

[169] In this proceeding, however, Mr. Epstein argues that the Board's proper task is more than that. The Board interprets him as saying, in effect, that the Board's proper jurisdiction extends not just to seeing if Council's decision carries out the intent of the MPS, but to seeing if the MPS carries out the intent of the *Halifax Charter*.

[170] Just what he expected the Board to do if it were to find that the MPS failed to do this, however, never, in the Board's judgment, became clear.

[171] For example, in one of his written briefs, he makes vigorous submissions for consideration by the Board on the "invalidity" of MPS 2.3. Not surprisingly, Counsel for The Housing Trust, in their rebuttal brief, described Mr. Epstein as asserting the Board had "…jurisdiction to make a declaration of invalidity" or a "declaratory ruling" respecting the MPS. For their part, they assert that the Board has no such power.

[172] Mr. Epstein, in a further written submission in reply, however, insisted he never intended to assert the Board has such a power, but merely to assert:

> the Board has the power to rule on questions of law that arise during a matter that is legitimately before it.

[173] However Mr. Epstein chooses to frame his arguments, Counsel for the Housing Trust argue that he is attempting to "stretch" the principles found in *Archibald* and other decisions of the Court, to obtain from the Board "through the back door" something which should only properly be obtainable through the Supreme Court.

[174] In opposing Mr. Epstein's position, Counsel for HRM and the Housing Trust rely on the combined effects of the decisions of the Court of Appeal, along with the strict limitations in the *Halifax Charter* on the right of appeal to the Board, and on the Board's powers on appeal. The following brief excerpt from a written submission by Counsel for the Housing Trust summarizes their view of the Appellants' position:

> 59. In this appeal, the Board is tasked with determining whether the decision of Council is reasonably consistent with the MPS. The task is not to determine whether the MPS is consistent with the provisions of the *Charter.*

[175] Counsel for the Appellants argues that the Board has been "extremely timid" in evaluating its powers, and urges the Board to recognize a jurisdiction for itself well beyond that which the Board has previously perceived it to be – or, as he would argue, misperceived it to be.

[176] On this point, the Board acknowledges that the jurisdictions of administrative tribunals, while very much circumscribed in comparison to that of courts, have occasionally been seen to be broader than traditionally conceived. For example, at one time, it was considered that the Workers Compensation Appeal Tribunal did not have authority to apply the *Charter* of Rights and Freedoms in a proceeding; in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur,* [2003] 2 SCR 504, 2003 SCC 54, however, the Supreme Court of Canada decided otherwise.

[177] On the other hand, it is also true that that Counsel for the Housing Trust and HRM had no difficulty in marshaling extensive quotations from decisions of the Court of Appeal to support their arguments that Mr. Epstein's position is unjustifiable under the current law. They also quoted to similar effect previous decisions of the Board.

[178] At one stage in the drafting of this decision, the Board completed a lengthy analysis of the thorough discussions of legislation and case law appearing in oral submissions, and the written submissions of all Counsel on this matter of jurisdiction. However, it has omitted all of this analysis. The reason is that, ultimately, it concluded that it need not determine for the purposes of this proceeding whether the boundaries of

the Board's jurisdiction should be extended (as Mr. Epstein argues), or left as they have been traditionally understood to be (as Counsel for the Housing trust and HRM argue).

[179] Instead, the Board decided it need only assume (purely hypothetically, without evaluating the various arguments, and solely for the purposes of this part of the present proceeding), that it did have jurisdiction to make such a determination. Having made such an assumption, the board then proceeded to interpret the MPS provisions in question in the light of the *Halifax Charter*.

[180] It carried out this task of statutory interpretation using the liberal and purposive approach to which it referred earlier in this decision, and found the Appellants had not established that the challenged provisions of the MPS are inconsistent with the *Halifax Charter*.

[181] That being the case, the question of whether the Board's jurisdiction is wider than it has been traditionally regarded becomes moot: even if the Board had such jurisdiction (which, again, is assumed here only hypothetically), it would not consider it appropriate to exercise it in relation to the impugned provisions of the MPS.

[182] The Board will here briefly outline its reasoning in relation to this finding.

[183] In the respectful view of the Board, the interpretations which Counsel for the Appellants urged upon the Board (not just in this part, but in other parts as well) are restrictive in a way which is not consistent with the purposive approach to statutory interpretation.

[184] Instead, they are more consistent with the strict construction approach, which is now to a large extent considered obsolete. This is a point to which the Board will return below.

[185] Mr. Epstein argued that the MPS provisions themselves must identify, with "reasonable certainty" or "approaching certainty" the properties to which the MPS provisions were to apply. By way of illustration, he referred at various points to the utility of specific addresses, or PID numbers.

[186] However, Counsel for the Housing trust and HRM argue that no provision in the *Charter* – whether expressly or impliedly – requires Council to so identify areas.

[187] Certainly, nothing in the *Charter* – whether in section 240, or elsewhere – expressly says how Council is to identify areas in the MPS for development agreement applications.

[188] Further, Mr. Epstein's argument requires the Board to, among other things, adopt a highly restrictive definition of the word "area." However, this word has no definition within the MPS. In issue 1 (above) the Board has already explored at some length its views with respect to the restrictive, or narrow, definitions of words in the LUB, such as "area", "medium rise," etc., which Mr. Epstein urged upon the Board. It will not repeat its analysis here, but considers it to be equally applicable to the present point.

[189] Turning to section 240(1)(a), one finds a requirement that developments subject to development agreement must be identified in the MPS. MPS policy 2.3.2 is responsive, in the Board's judgment, to this requirement:

> In those areas identified in the land use bylaw pursuant to policy 2.3.1 all residential and mixed residential – commercial development over four units shall be by agreement.

[190] MPS policy 2.3.2 says developments subject to development agreement are "residential and mixed commercial" in excess of four units listed in schedule Q. The latter occurs through the reference to areas identified in the LUB under policy 2.3.1.

[191] Section 240 (1)(b) of the *Charter* says Council may consider development by development agreement where MPS identifies the area, or areas, for the developments to be located. In response, MPS policy 2.3.1 sets out the identification of such areas, stating that HRM:

> may, through the land use bylaw, identify areas that provide for and will benefit from comprehensive site planning.

[192] When we turn to section 92 of the LUB, in which schedule Q appear appears, we find a listing of all such areas identified by council. Zoning map ZM-2 shows all the properties which have been identified by HRM as zoned under Schedule Q.

[193] Finally, section 240 (1) (c) lists matters that council "must consider" prior to approving development agreements. In the judgment of the board, MPS policy 2.3.3 is entirely responsive to this requirement.

[194] The consequences of a particular interpretation are a matter alluded to in s. 9(f) of the *Interpretation Act*, and referred to by the Court in *MacDonald v. Halifax investments* (above): Mr. Epstein's interpretation arguably could, as Counsel for the Housing trust point out in a written submission, require frequent amendment to the MPS by Regional Council, together with a further requirement on each occasion that review by the Minister of Municipal Affairs subsequently occur.

[195] In the respectful view of the Board, the interpretations which Counsel for the Appellants urged upon the Board are restrictive in a way which is not consistent with the purposive approach to statutory interpretation.

[196] Instead, they are more consistent with the strict construction approach, which, in the wake of direction from the Court of Appeal and Supreme Court of Canada, is no longer applied in matters of this type by the Board.

[197] In interpreting municipal planning strategies in such decisions as *Archibald* and *Heritage Trust 1994,* the Court cautions against using a "narrow, legalistic approach". It has repeatedly directed that the Board must recognize that municipal councils should have appropriate scope for decision making. The Board infers that the same purposive approach should be taken in interpreting the *Halifax Charter* in circumstances such as the present.

[198] Counsel for the Appellants urges, in the view of the Board, that common words which are undefined in the MPS, LUB, or *Charter*, be given restrictive interpretations. These interpretations are consistent with his view that Council's scope for decision making is much narrower than HRM asserts it to be. For example, he asks that the word "area" (as used in the *Charter* and the MPS) be restricted to mean only "substantial" or "extensive" properties; he then says that, further, these areas must be identified with reasonable certainty in the MPS itself, rather than (as the MPS actually does) in the LUB.

[199] The Board does not find it necessary to find Counsel for the Appellants' narrow interpretations are necessarily unreasonable. However, it does find that the Appellants have failed to show that MPS policy 2.3 is not reasonably consistent with the *Charter*. The Board so finds.

6.10 ISSUE 3: Do Alleged Procedural Errors by Council Justify the Board's Reversing Council's Decision?

[200] Counsel for the Appellants argues that the Board should reverse Council's decision because of procedural errors allegedly committed by Council in the course of its considerations.

[201] He says Council ignored considerations which are relevant under the MPS and focused on irrelevant ones; this is, he says, an "abuse of discretion," and merits the Board's reversing Council on that ground alone.

[202] Among other things, Counsel for the Appellants is unhappy about the fact that Council combined the public hearing for the schedule Q designation and the public hearing for the proposed development agreements. He says that

> …the councillors treated the two matters as one.

Elsewhere, he refers to this approach as the

> inappropriate compression of two distinct matters.

[203] He sees this approach as contributing to what he argues is a much greater error, which is that Council - in making their decision to add the properties to Schedule Q - inappropriately focused on the merits of the development agreements, including, it seems, in particular, its affordable housing aspect. He says the Councillors did this to the exclusion of "everything else", including what he says are "the real policy issues" in the MPS. These include policies in favour of stable residential areas, and policies in favour of a height limit to maintain and promote a medium rise form of residential development, compatibility with surrounding buildings.

[204] Mr. Epstein submits:

> It is apparent on the face of the record that a majority of the Councillors not only took into consideration the DA proposal in considering the Schedule Q motion, but focused on its merits to the exclusion of everything else. Epstein BR-16, paragraph 111…in considering whether to place a Schedule Q designation on an area, the Community Council ought to have limited itself to general Land Use Planning considerations as set out in the MPS Policies.

[205] He was frequently critical of the Councillors' repeated references to affordable housing. While acknowledging that it was "legitimate" for Council to discuss the topic, he faults Council for failing to mainly carry on its Schedule Q discussion in the context of "the general MPS Policies", and discussing whether "these policies are consistent with the use of Schedule Q".

[206] Mr. Epstein concludes that the Board has the authority to reverse Council's decision because Council failed to talk about the MPS provisions which he argues are relevant, before making its decision:

> Ignoring relevant considerations, and also focusing on irrelevant considerations, amounts to an abuse of discretion. It is the submission of the Appellants that the decision of the Community Council does not reasonably carry out the intent of the MPS because the Counsel failed to take the MPS into consideration.

[207] As opposing Counsel noted in various of their submissions, the Board has previously, and more than once, rejected similar or related arguments.

[208] The Board has repeatedly held that the only issue over which the *Act* gives it jurisdiction is whether a decision by a Municipal Council (be it a "yes" , as here, or a "no"), is one which reasonably carries out the intent of the MPS. The process Council chose to take in reaching its decision is, the Board has said, irrelevant to the Board's evaluation, and something over which it has no jurisdiction. That approach is illustrated in the following submission by Counsel for The Housing Trust:

> In Federation of Nova Scotian Heritage v. Peninsula Community Council, 2005 NSUARB
> 105, affirmed 2006 NSCA 115 (referred to as *Midtown Tavern*) the Board rejected another argument advanced by Mr. Epstein to over-reach the Board's powers. Mr. Epstein, representing the Appellants in Midtown Tavern, urged the Board to consider errors in Community Council's procedure. Citing the leading case of Maskine v. Halifax County, 118 N.S.R. (2d) 356, the Board made clear that the only relevant issue before it was whether Council's decision failed to reasonably carry out the intent of the MPS. The Board held at paragraph 137:

> In the result, the Board finds that it is the effect of the *Municipal Government Act*, together with such decisions as Maskine, that the Board has only limited jurisdiction in appeals of the type presently before it. In the view of the Board, if a party were to establish that council had misconducted itself in a matter (whether with respect to fairness, natural justice, or, as Mr. Epstein would argue, an action of such grievous significance as to amount to a "flouting" of the M.P.S.), the only remedy for such a procedural error would be through judicial review. i.e., through recourse to the Supreme Court, not to this Board. [Emphasis added]
>
> Federation of Nova Scotian Heritage v. Peninsula Community Council, ("Midtown Tavern") 2005 NSUARB 105, affirmed 2006 NSCA 115

[209] In repeatedly making findings such as those quoted above by Counsel for the Housing Trust, the Board has considered that it has been complying with the direction given to it in the case law, and in particular, by the Court of Appeal in such decisions as *Maskine.*

[210] The Board notes as well that even if it thought it had a supervisory role in relation to the conduct of municipal council meetings - which it does not – the Board considers that meetings of municipal council are not like, for example, a trial before the Supreme Court. In such trials, there is ordinarily an expectation that the evidence to be taken into account by the judge is evidence which is disclosed in the court room itself, either by way of oral evidence, or by way of written documentation which has been filed.

[211] With respect to the conduct of a municipal council, on the other hand, councillors may well – and many would argue that they should, and indeed must – take into account information which they receive from a variety of sources and in a variety of contexts. For example, such information may arise from discussions which may occur far from the Municipal Council Chamber – including not just discussions with fellow councillors, but comments from citizens on the sidewalk.

[212] In short, the sum total of councillors' proper discourse on a particular topic is not to be found exclusively in the minutes of a Council meeting.

[213] The Board notes that *Midtown Tavern* was referred to by both the Counsel for Housing Trust and Counsel for the Appellants.

[214] In that case, the Court of Appeal upheld the Board's decision, as Counsel for the Housing Trust pointed out; however, it is also true, as Counsel for the Appellants pointed out in reply, that the Court did not, in rendering its decision, comment upon the Board's interpretation of *Maskine*.

[215] The Board, having considered the arguments by all Counsel, sees nothing to persuade it to change its mind with respect to its long-standing interpretation of *Maskine*. It will leave it to the Court – in any appeal of this, or a subsequent Board decision on planning - to provide further clarification on the point, if that be necessary.

6.11 Issue 4: Should the Board refer a stated case to the Court of Appeal?

[216] The Appellants ask the Board to refer the issue of the Board's jurisdiction to the Court of Appeal by way of a stated case for clarification of the Court's view of the law. Referring to, it seems to decisions of the Board, or of the Court of Appeal, or perhaps both, he describes the present state of the law as a "puzzling array," a "mix of cases," which creates a "baffling situation." As previously noted, he suggests the Board has been "extremely timid" in asserting greater jurisdiction in relation to planning appeals.

[217] He argues that its jurisdiction is "ripe for determination" by way of a stated case to the Court of Appeal.

[218] Section 31 of the *Utility and Review Board Act* does permit such a reference to occur. Having reviewed all of the submissions on this point from the parties, however, the Board declines to do so. In the view of the Board, if its perceptions of the direction

given by the Court of Appeal, as embodied in this and earlier decisions, are mistaken, they can be corrected through the ordinary remedy of the Appellants seeking to appeal this decision.

6.12 Issue 5: Should the Board admonish HRM for having allegedly placed incorrect notices of the planning proposal on the properties and in the newspaper?

[219] Mr. Edelstein and Counsel for the Appellants describe the notices in the Chronicle-Herald and the signage on the property itself as inaccurate. The notices said a six storey building is proposed for 2183 Gottingen (the civic address for the property); while the building would indeed be six storeys on Gottingen, the notices omit reference to the building being eight storeys on Maitland, downhill from Gottingen.

[220] Unlike his criticisms of the allegedly "irrelevant considerations" forming the subject matter of Council's discussions (which, it will be recalled, he said justified the Board reversing Council's decision on that ground alone), Counsel for the Appellants does not assert that the Board has, as a result of the notices' failure to mention the eight storeys on Maitland, any power to reverse Council's decision.

[221] He does, however, ask that the Board:

> …admonish the Municipality as to the importance of meaningful and effective public participation in the Land Use Planning Process…which cannot be achieved absent accurate public notice as to what is under consideration BR-15, paragraph 103.

[222] The Board has concluded it does not agree. When, as here, an amendment to the land use by-law is proposed, s. 221 (3) (d) of the *Halifax Charter* requires that the notices provide a "synopsis." Synopses are, by definition, brief. That it is important that the synopses appearing in planning notices (whether published in newspapers or

posted on buildings) be reasonably accurate and complete - while still being brief - is, the Board thinks, self-evident.

[223] However, it sees nothing in the evidence before it to cause it to believe that HRM does not accept this importance. Further, it sees nothing in the evidence which would cause it to believe that HRM commonly errs with respect to such notices. Accordingly, it sees nothing to be gained by the Board "admonishing" HRM on the point, and declines to do so.

6.13 Issue 6: Obsolete legislative references

[224] The *Planning Act* was repealed in 1998, and was replaced by the *Municipal Government Act*; with respect to HRM, and, since then, the *Municipal Government Act* has itself been replaced by the *Halifax Regional Municipality Charter*. In his oral and written submissions, Mr. Epstein noted critically that policies still found in the MPS "refer to the *Planning Act* as if it were still in effect."

[225] Mr. Epstein repeatedly suggested that the Halifax MPS requires an overhaul. In so saying, the Board infers he is of course not just referring to the obsolete legislative references, but also to his allegation that HRM's MPS Policy 2.3 is invalid under s. 240. In this decision (as discussed at length in Issue 2, above), the Board has not agreed with his argument on this point.

[226] The Board does, however, agree with Mr. Epstein's criticisms of the obsolete references in HRM's MPS and LUB to municipal bodies (such as the City of Halifax) or provincial statutes (such as the *Planning Act*) which have not existed for many years. This can create needless confusion, especially on the part of ordinary citizens who may

try to read, and understand, these documents. The Board suggests that the time has come for HRM to at least consider doing something about it.

7.0 SUMMARY AND CONCLUSIONS

[227] The several Appellants in this appeal ask the Board to order the reversal of a decision by Halifax and West Community Council approving a change in the LUB enabling (if development agreements are approved subsequent to this decision) The Housing Trust of Nova Scotia to construct two large new buildings on Gottingen street. In this decision, the Board has decided to decline to make such an order.

[228] In reaching its decision, the Board adopted most, but not all, of the arguments presented by Counsel for the Applicant, the Housing Trust of Nova Scotia, and the for the Respondent, HRM.

[229] A relatively large number of different arguments were raised by the various parties in the course of the extensive oral and written submissions received by the Board. The Board has concluded that it is not a practical possibility to comprehensively and succinctly summarize all of the issues and arguments raised by the parties. To the extent that the Board does not in this decision explicitly deal with an argument raised by a party, but the Board's decision is inconsistent with it, it may be taken that the Board did not accept the argument in question.

[230] With respect to Issue 1, the Board finds (using the liberal and purposive approach to statutory interpretation, as directed by the Court of Appeal) that the Appellants did not establish that the decisions of Halifax and West Community Council to amend the LUB fail to reasonably carry out the intent of the MPS.

[231] With respect to Issue 2, the Board assumed purely hypothetically that it had jurisdiction to determine whether MPS Policy 2.3 is inconsistent with the *Halifax Charter*. The Board concluded, using the liberal and purposive approach, that the Policy in question is not inconsistent with the *Charter*. Having so concluded, the Board considered that there was no necessity for it to make an actual determination of its jurisdiction.

[232] With respect to Issue 3, the Board concluded that the alleged procedural errors by HRM Council do not justify the Board's reversing Council's decision. Implicit in this finding is a related one, that the Board lacks jurisdiction to deal with such errors in any event.

[233] With respect to Issue 4, the board declined to refer a stated case to the Court of Appeal on the jurisdictional issues raised by the Appellants.

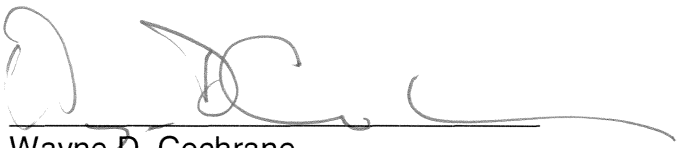
[234] With respect to Issue 5, the board declined to admonish HRM for having allegedly placed incorrect notices of the planning proposal on the properties and in the newspaper.

[235] With respect to Issue 6, the Board agrees with Mr. Epstein's criticisms of the obsolete references in HRM's MPS and LUB to municipal bodies (such as the City of Halifax) or provincial statutes (such as the *Planning Act*), neither of which has existed for many years. HRM's failure to update the MPS and LUB can create needless confusion, which can be avoided through simple amendments. The Board has no jurisdiction on the point, but suggests that the time has come for HRM to consider doing something about it.

[236] The appeal is dismissed.

[237] An order will issue.

DATED at Halifax, Nova Scotia, this 12th day of December, 2014.



Wayne D. Cochrane