

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **MARCHAND DEVELOPMENTS LTD.** from a decision of the West Hants Regional Municipality Council denying a Development Agreement for grouped multi-dwellings on Lot 2A, Windsor Back Road, Three Mile Plains, Nova Scotia (PID 45402831)

BEFORE: M. Kathleen McManus, K.C., Ph.D., Member

APPELLANT: **MARCHAND DEVELOPMENTS LTD.**
Kevin Latimer, K.C.
Sarah Dobson, Counsel

RESPONDENT: **WEST HANTS REGIONAL MUNICIPALITY**
Raylene Langor, Counsel

HEARING DATE: February 12-13, 2025

FINAL SUBMISSIONS: April 7, 2025

DECISION DATE: **May 29, 2025**

DECISION: **The appeal is allowed. The Board directs Council to approve the application, as amended by this Decision.**

TABLE OF CONTENTS

1.0	OVERVIEW	3
2.0	BACKGROUND.....	6
2.1	The Board's Jurisdiction and Scope of Review	7
2.2	Council's Reasons for Refusal	12
2.3	The Proposal and Municipal Planning Approval Process	13
3.0	ISSUE.....	21
4.0	WITNESSES AND EVIDENCE.....	21
4.1	Appellant's Evidence.....	22
4.2	Municipality's Evidence	22
4.3	Supplementary Information.....	23
4.3.1	Letters of Comment.....	23
4.3.2	Public Speakers	23
4.3.3	The Site Visit.....	24
5.0	SUMMARY OF SUBMISSIONS	25
6.0	BOARD'S ANALYSIS AND FINDINGS	27
6.1	Policies Enabling Development Agreements in the Two-Unit Residential Zone, Three Mile Plains Growth Centre.....	28
6.2	Compatibility with Character of the Area.....	39
6.2.1	Existing Pattern of Single Unit Dwellings on Large Lots.....	42
6.2.2	Scale	52
6.2.3	Design.....	55
6.2.4	Density	57
6.2.5	Conclusion on Compatibility	59
6.3	Adequacy of Municipal Water and Sewer Services	60
6.4	Potential Flooding from Stormwater Displacement	70
7.0	CONCLUSION.....	76

1.0 OVERVIEW

[1] Marchand Developments Ltd. (Appellant or Marchand) is appealing a decision made by the Council of the West Hants Regional Municipality, Nova Scotia (Council or West Hants) denying an application for approval of a development agreement to permit a grouped dwelling arrangement of three multi-unit buildings, each containing 29 units, for a total of 87 units on PID 45402831, Windsor Back Road in Three Mile Plains, West Hants Regional Municipality (subject property or proposed development). None of the proposed multi-unit buildings would exceed three storeys in height.

[2] The subject property is located between civic addresses 921 and 927 Windsor Back Road. It is located on vacant, undeveloped land of approximately four acres in size, in a flag lot shape, with approximately 21.5 m (70.5 ft.) of road frontage on the Windsor Back Road. There is a drainage ditch on the eastern boundary of the subject property. The proposed development would be served by one new driveway off the Windsor Back Road, which is a secondary highway under the jurisdiction of the Nova Scotia Department of Public Works.

[3] The subject property is zoned Two-Unit Residential (R-2) under the Generalized Future Land Use Map (GLUM), Map 1-B of the West Hants Municipal Strategy (MPS). It is located within the Three Mile Plains Growth Centre, where central sewer and water services are provided. Grouped dwellings are not permitted as-of-right in the R-2 zone but can be considered by a development agreement in accordance with Policy 5.3.10 of the West Hants Municipal Planning Strategy (MPS). The subject property abuts other properties designated Residential and zoned as R-2 on all sides, except the rear side of the subject property which abuts two properties, one which is zoned Local Industrial (LI) and the other which is zoned R-2. These properties are all within the Three

Mile Plains Growth Centre and include existing residential uses, forested land, and some agricultural uses.

[4] After communication with the Municipality's planning staff other relevant Municipal officials and public meetings, discussions between staff and Marchand led to a draft development agreement for the proposed development (draft Development Agreement). Staff then presented a report to the Municipality's Council recommending the approval of the draft Development Agreement. At its meeting on September 24, 2024, after the Public Hearing, Council refused the application.

[5] Council provided three reasons for refusing the application. First, Council found the proposed development was not compatible with the character of the area with respect to the scale, design and density, "specifically with respect to compatibility with the pattern of existing single unit dwellings on large lots surrounding" the subject property. Council's second reason was that the Municipality's existing water and sewer services to the subject property were not adequate and upgrades to the pump station were required to support this proposal. Council's third reason was the potential for flooding caused by stormwater displacement from the proposed development, which could increase the chance of negative impacts on abutting properties.

[6] Marchand appealed Council's decision pursuant to s. 247(2)(b) of the *Municipal Government Act* and asserts that Council's refusal fails to reasonably carry out the intent of the MPS. The Appellant says that the draft Development Agreement aligns with the policies and objectives of the MPS and its approval was recommended by staff. Marchand further says that Council has not demonstrated that it has good planning reasons for not following staff's recommendation. The Appellant notes that the

Municipality did not call any Municipal staff or expert evidence at the hearing to explain or justify Council's refusal based on applicable MPS policy.

[7] A municipal planning strategy typically sets out the rules, general guidelines and policies for Council to follow when considering an application for approval of a development agreement. The Courts have held that as the primary planning authority, Council has discretion about how to apply or balance competing municipal planning strategy policies and objectives. It may give more or less weight to different factors to advance certain objectives, provided its ultimate decision reasonably carries out the intent of the municipal planning strategy. In reviewing the grounds of appeal, the Board must parse through the applicable policies and complete an interpretative exercise to understand the intent of the municipal planning strategy. The standard for evaluating an application for approval of a development agreement against the municipal planning strategy is not perfection, however, its approval must align with an interpretation of the relevant policies that their language can reasonably bear.

[8] The Board finds that Council's decision to refuse the application for approval of a development agreement to allow Marchand to build the proposed development does not reasonably carry out the intent of the MPS. The Board finds that Council made a factual error in assessing the compatibility of the proposal when it determined that there was "an existing pattern of single unit dwellings on large lots surrounding" the subject property. The Board finds that the existing water and sewer services to the subject property are adequate and the cost-sharing for upgrades to the lift station is not contrary to Policy 16.3.1. Finally, Council's concern about the impact of stormwater management

ignores the mandatory controls in the draft Development Agreement, other municipal legislation and provincial environmental legislation.

[9] The appeal is allowed, and the Board directs the Council approve the draft Development Agreement, as amended by this decision. The Board directs that Section 2.9(b)(iii)b) of the draft Development Agreement be amended to provide that it is a discretionary decision of the Municipality to cost-share any upgrades to the lift station.

2.0 BACKGROUND

[10] Marchand appealed Council's decision under s. 247(2)(b) of the *Municipal Government Act*, S.N.S. 1998, c. 18 (*MGA*) within the required appeal period to the Nova Scotia Utility and Review Board and that Board heard the appeal. On April 1, 2025, on proclamation of the *Energy and Regulatory Boards Act*, S.N.S. 2024, c. 2, Sch. A (*Energy and Regulatory Boards Act*), the Nova Scotia Utility and Review Board was succeeded by the Nova Scotia Regulatory and Appeals Board for all applications under the *MGA*.

[11] Marchand stated that Council's refusal does not reasonably carry out the intent of the MPS on the following grounds:

- a) The Appellant relies on the text of the MPS in its entirety and believes the proposed development for three (3) multi-unit buildings, each containing 29 units, carries out the MPS intent to support residential development in Growth Centres designated within the servicing boundary;
- b) The reasons provided for the refusal with regard to compatibility do not carry out the MPS intent to create more dense residential development within the Three Mile Plains Growth Centre and are not supported by the factual evidence before Council;
- c) In refusing the Appellant's proposal Council failed to properly consider the detailed reports prepared by engineers to address issues related to water and sewer services and stormwater drainage, which reports were reviewed and accepted by municipal staff in recommending approval of the development;
- d) The Decision does not reasonably carry out the intent of MPS policies 5.3.10, 5.3.7 and 16.3.1 and the Development Agreement; and
- e) Such other grounds as may appear from a review of the Record.

2.1 The Board's Jurisdiction and Scope of Review

[12] The burden of proof is on the Appellant to show, on the balance of probabilities, that Council's decision to refuse the development agreement to permit the proposed development on Windsor Back Road in Three Mile Plains, West Hants Regional Municipality (PID 45402831) was not consistent with the intent of the MPS.

[13] Under s. 247 (2)(b) of the *MGA*, an applicant may appeal council's refusal to approve a development agreement:

Appeals to the Board

247 (2) The approval, or refusal to approve, and the amendment, or refusal to amend, a development agreement may be appealed to the Board by

...

(b) the applicant;

[14] The powers of the Board are similarly limited on such an appeal under s. 251 of the *MGA*:

Powers of Board on appeal

251 (1) The Board may

(a) confirm the decision appealed from;

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

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

(d) allow the appeal and order that the development permit be granted;

(e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan.

(2) The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law. 1998, c. 18, s. 251; 2001, c. 35, s. 12; 2003, c. 9, s. 66.

[15] Section 252(2) of *MGA* states that the Board cannot make any decision that commits the council to make any expenditures with respect to a development:

Restrictions on powers of Board

...

252 (2) The Board shall not make any decision that commits the council to make any expenditures with respect to a development. 1998, c. 18, s. 252.

[16] A municipal planning strategy typically sets out the policies for Council to follow when establishing land use designations and zoning, and when considering a rezoning application or request for a development agreement, as in this case. As noted by the Nova Scotia Utility and Review Board in *Dumke, (Re)*, 2024 NSUARB 164 at para. 9, in the context of the review and approval of a development agreement, the process “is not a simple exercise of working through a checklist against the wording of each policy.”

[17] As the primary planning authority under the *MGA*, Council must be afforded discretion about how it applies or balances competing MPS policies and objectives. The Board recognizes the Court’s direction that Council may give more, or less, weight to different factors to advance certain objectives, provided its ultimate decision reasonably carries out the intent of the MPS. In reviewing the grounds of appeal, the Board must review the applicable policies holistically to understand the intent of the MPS. The standard for evaluating an application for a development agreement against the MPS is not perfection or a completed “checklist,” however, the refusal must align with an interpretation of the relevant policies that their language can reasonably bear.

[18] The Board must not interfere with the decision of a council unless the Board determines that the decision does not reasonably carry out the intent of the MPS. In appeals under the *MGA*, the burden of proof is on the appellant to show that the Board should allow its appeal. To be successful in this appeal, the Appellant must establish, on the balance of probabilities, that Council's decision does not reasonably carry out the intent of the MPS.

[19] In municipal planning appeals, the Board follows statutory requirements and guiding principles identified in various Nova Scotia Court of Appeal decisions. The Court summarized the principles in *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27 and more recently in *Cornwallis Farms Limited v. Nova Scotia (Attorney General)*, 2025 NSCA 9:

[49] For the guiding principles under s. 251(2), the seminal authority is *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50, 1994 NSCA 11, Justice Hallett discussed the former Planning Act, R.S.N.S. 1989, c. 346:

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

[100] ... Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review... . The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course, by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the

policies are intended to provide a framework in which development decisions are made. ...

...

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

[50] Though the *MGA* has replaced the *Planning Act*, Justice Hallett's exposition survives with some elaboration by later authorities, including [cites omitted]

[51] In *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, para. 24, this Court summarized the principles that derive from these authorities:

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

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

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

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

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

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

(6) The Board should not interpret the MPS formalistically, but pragmatically and purposively, to make the MPS work as a whole. From this vantage, the Board should gather the MPS' intent on the

relevant issue, then determine whether the Council's decision reasonably carries out that intent.

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

[20] In *Archibald*, at para. 24, the Nova Scotia Court of Appeal discussed how a concurrently adopted land use by-law can be used in the interpretation exercise to help ascertain the intent of the MPS:

(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 *Municipal Government Act* 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]

[21] Also, at para. 24, *Archibald* expanded on the issue of conflicting policies:

(7) ... 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, ¶ 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. [Emphasis added]

[22] As noted in *Archibald* at para. 24(7) Council will have to make choices about "question begging terms" in the MPS such as "appropriate" development or "undue" impact, and the Board must defer to Council barring an error of fact or principle.

[23] This issue of "question begging terms" arose in *Cornwallis* when Council approved a development agreement for a multi-unit residential project in the largely

agricultural Annapolis Valley. On appeal to the Nova Scotia Utility and Review Board, the majority decision dismissed the appeal by a nearby farm owner, in part, after determining that the farm's operations were not "intensive" as that term was used in the relevant MPS policy. In upholding the majority's decision on this point, the Nova Scotia Court of Appeal stated the following, at para. 85, about giving meaning to undefined terms in the MPS:

[85] "Appropriate", "scale", "impact" and "intensive" are undefined in the MPS and LUB. Their flexible meanings are not objectively self-evident. The Council, or the Board on appeal, reasonably may exercise its "permissive" discretion to flesh out these terms and infer from the evidence whether Cornwallis' use of the Pasture was "intensive" under Policy 4.5.24(c).

[24] The Board cannot substitute its own decision for Council's but must review the decision holistically to determine if it reasonably carries out the intent of the MPS. In determining the intent of the MPS, the Board applies the principles of statutory interpretation which have been adopted by the Court of Appeal, as well as the provisions of s. 9(1) and s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

2.2 Council's Reasons for Refusal

[25] Section 230(6) of the *MGA* requires that within seven days of refusing to approve a development agreement, the applicant is notified in writing and given reasons for the refusal:

Adoption or amendment of development agreement

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

[26] Council made its decision refusing the application for a development agreement on September 24, 2024. The Municipality's Chief Administrative Officer communicated Council's decision with reasons to Marchand on September 27, 2024:

- (1) That your proposal entailed a development agreement that would, in Council's opinion, not be compatible with the character of the area with respect to scale, design, and population density, specifically with respect to compatibility with the pattern of existing single unit dwellings on large lots surrounding the subject lot, contrary to Policy 5.3.10 (d) and Policy 5.3.7 (c);
- (2) Council's consideration of Policy 5.3.7 (b) and 16.3.1 (a) (i) with regard to the adequacy of Municipal water and sewer services to the subject lot and the necessary upgrades to the pump station required to support this proposal; and
- (3) That your proposal entailed a development on a subject lot that, in Council's opinion, already appears to have a wet and marshy character, which could displace stormwater and be susceptible to flooding, potentially increasing the chance of negative impacts on abutting lots due to the impervious surfaces proposed in relation to your proposal, contrary to Policy 16.3.1 (f).

[Exhibit M-6, p. 782]

2.3 The Proposal and Municipal Planning Approval Process

[27] Though the Board's role is not to analyse Council's review process, it is informative to establish the background and timelines relevant to this appeal. On October 4, 2023, Chrystal Fuller, a licensed planning professional working for Marchand, filed an application for a development agreement for grouped dwellings on the subject property. The proposed development would have three 3-storey apartment buildings with a maximum of 38 feet in height. Each building would contain 29 units for a total of 87 units. The subject property is a 3.9-acre flag shaped lot fronting on Windsor Back Road in Three Mile Plains. A new vehicle driveway would connect to the Windsor Back Road. The proposal includes underground parking and 1.89 acres of recreation space (totalling 46% of the subject property). Attached to the application was a proposed site plan, floor plans and topographical information for the subject property.

[28] In the application letter, Ms. Fuller wrote that the proposed development was in the Three Mile Plains Growth Centre, one of three Growth Centres in West Hants, which along with the Windsor Plan area, is "where the bulk of future growth is encouraged". She further wrote that Three Mile Plains is identified as having "significant

growth potential” and that it is intended to “accommodate the majority of future commercial growth in West Hants.” [Exhibit M-4, pp. 3-4].

[29] When she filed the application, Ms. Fuller advised that a traffic study would be provided in the coming days. Marchand subsequently provided a traffic impact study assessment to the Municipality, which was prepared by James J. Copeland, P.Eng., RSP1 on October 31, 2023.

[30] On November 2, 2023, a Public Information Meeting was held. The Municipality’s staff and Ms. Fuller, on behalf of Marchand, gave presentations about the proposed development. Several public concerns were raised in this meeting, including “flooding on the subject lot, wildlife and species at risk impacts, significant density change, road access, pedestrian safety, inadequate servicing, underground parking issues, and school capacity.” [Exhibit M-4, p. 232].

[31] As part of the Municipality’s consideration of the Marchand application, Mark Fredericks, senior planner with the Municipality, communicated with different municipal and provincial officials about the potential impact of the proposed development. Mr. Fredericks sought their expert advice on traffic, including access design to the Windsor Back Road from the proposed development, if the existing streets were sufficient or if new infrastructure was required. He also sought their expert advice on other questions including: 1) the adequacy of water and sewer to service the proposed development, or if the proposed development was premature because additional infrastructure was required; 2) the Municipality’s financial capacity to absorb any costs related to the development; 3) if there was a watercourse on the subject property; 4) if there were

species at risk with the proposed development; and 5) the susceptibility of the area to flooding.

[32] On November 20, 2023, Marchand submitted a preliminary servicing review for the proposed development to the Municipality, which was prepared by Jeremy Wyatt, P.Eng., of DesignPoint. This included:

- a downstream wastewater capacity analysis;
- an assessment of the capacity of the existing wastewater lift station in front of civic 948 Windsor Back Road, referred to as Lift Station 407 (LS407);
- preliminary storm drainage calculations to determine the required stormwater detention requirements for the site; and
- a preliminary plan for site grading and the layout of private water, sanitary, and stormwater servicing infrastructure for the proposed development.

[33] On November 29, 2025, Mr. Fredericks emailed Ms. Fuller advising that the Municipal Director of Public Works sought the following additional servicing information from DesignPoint:

1. Can DP confirm the LS407 meet the Municipal Specification requirements of section 6.2.2.5 a) Wet Well Size and c) Emergency Overflows, specifically "a minimum retention capacity of 4.5 hours at peak design flow shall be used. An auxiliary power supply may be used as a substitute for retention capacity at the pumping station."
2. Has an analysis been performed on the downstream collection systems and pumping stations to confirm no adverse effects related to the proposed developments.
3. Given the increased flow to LS407 we will be looking for the developer to fund required SCADA upgrades to this lift station including continuous level monitoring (via level transmitter). We would like DP to comment on the necessary upgrades that would be necessary to have this included. [Emphasis added in original]

[Exhibit M-6, p. 814]

[34] On December 21, 2024, Ms. Fuller provided DesignPoint's response to the Director's questions. In response to emergency overflows, DesignPoint stated its opinion that the station did not currently meet the Municipal Specifications requirement of 4.5

hours of retention capacity at pre-development peak flows. DesignPoint noted that the station had a generator receptacle for a mobile generator unit, which met the auxiliary power supply requirements. DesignPoint stated that “further upgrades would require additional negotiations between the developer and Municipality, as it is not inherently in the specification.” DesignPoint said that as the Municipal Specifications did not require an upgrade of supervision control and data acquisition (SCADA), any upgrades would have to be negotiated between Marchand and the Municipality [Exhibit M-6, p. 897].

[35] On January 9, 2024, Mr. Fredericks advised Marchand that the Director of Public Works said DesignPoint’s answers “do not adequately address” Public Works’ “concerns with the added sanitary flows” to the Municipality’s current system [Emphasis in original]. The Director also said that Marchand would be required to install specified upgrades to the lift station, including an emergency generator and upgrade the current SCADA panel, and be responsible for all the costs and installation [Exhibit M-6, p. 895]. Marchand recommended that the Municipality share 50% of the cost of the upgrades because “these upgrades will not only benefit the proposed development but the surrounding community and future growth in the area” [Exhibit M-6, p. 1052]. The Director of Public Works ultimately agreed that Public Works would pay the costs related to upgrading the SCADA panel because this benefitted the surrounding properties which utilize municipal services as well as the proposed development.

[36] The specified upgrades to the lift station upgrades and cost responsibilities are found in section 2.9(b)(iii) of the draft Development Agreement:

2.9 Servicing

...

(b) Water and Sewer Services

...

- (iii) Except as may be varied by the Municipal Engineer in writing:
- a) The Owner shall Install a generator hookup at the LS407 lift station and provide the Municipality with a fixed on-site generator. The electrical transfer panel must be a permanently dedicated (not portable) emergency generator and will need to be a turn-key package. This system must meet Municipal specifications for full backup power to operate both pumps at full capacity. Installation will include a concrete pad for the generator and control wiring. The generator must be capable of automatically starting during a power interruption and must be connected into the Municipal Supervisory Control and Data Acquisition (SCADA) system. Specifications and shop drawings shall be approved by WHRM before approval.
 - b) The Owner shall upgrade the current SCADA panel to allow for additional input and output control including generator run status (on/off), fault indication, status of power source. The level transmitter must be permanently installed in wet well and connected to the Municipal SCADA system. The Department of Public Works will require confirmation of a SCADA connection and availability to connect and communicate with the Municipal system.
 - c) All costs of the generator hook up will be the responsibility of the owner. The cost of purchasing the new SCADA panel will be the responsibility of the Municipality. All installation costs associated with these requirements will be the responsibility of the Owner.
[Emphasis added]

[Exhibit M-4, pp. 330-331]

[37] Marchand submitted a watercourse assessment and species at risk screening report to the Municipality, prepared by McCallum Environmental Limited on November 29, 2023. This report concluded that the drainage ditch on the subject property was not a watercourse. The report also provided recommendations for mitigating potential impact on species at risk.

[38] In his June 13, 2024, Staff Report to the Planning and Heritage Advisory Committee, Alex Dunphy, the Municipality's planner, now guiding the application, suggested the committee recommend that Council give a First Reading and hold a Public Hearing about entering into the draft Development Agreement with Marchand.

[39] The Staff Report noted that none of the buildings would exceed three storeys in height, that there would be a central open space and that “landscaping buffering surround the buildings to help separate the buildings from existing lower density development in the area.” The Staff Report also noted that the MPS’ overall intention for properties designated Residential in the Three Mile Plains Growth Centre is to “accommodate a variety of residential developments with multiple housing types.” The report stated that the subject property abutted other properties zoned R-2 which were “all within the Three Mile Plains Growth Centre and include existing residential uses, forested land, and some agricultural uses.” [Exhibit M-4, p. 311]. The report advised that under the MPS, the size of the proposal had to be considered by a development agreement, in accordance with criteria in Policy 5.3.10 and Policy 16.3.1 of the MPS. Staff advised that Marchand’s proposed development satisfied these criteria, in part, because: 1) the proposed buildings are grouped and located to conserve the existing natural features of the site; 2) it was compatible, in scale and traffic generation, to the area; 3) the proposal was not premature; 4) no municipal costs related to the proposal were anticipated; 5) Nova Scotia Department of Environment and Climate Change verbally confirmed there was no watercourse on the subject property; 6) Marchand will follow the recommendations for mitigation of potential impact on species at risk; 7) the stormwater management plan provided assurances that “the pre and post development flows of surface water would be maintained at neutral or better.”; 8) a stormwater management plan would be required at permitting; and 9) various officials, municipal and provincial, were satisfied that all concerns identified were addressed in the draft Development Agreement [Exhibit M-4, p. 313].

[40] On June 13, 2024, the Planning and Heritage Advisory Committee recommended in favour of the application and that Council give it First Reading and hold a Public Hearing.

[41] In a Staff Report to Council dated June 25, 2024, which was in error addressed to the Planning and Heritage Advisory Committee, staff recommended to Council that it give First Reading and hold a Public Hearing to consider entering into a development agreement with Marchand for the proposed development. The report attached its Staff Report dated June 13, 2024, to the Planning and Heritage Advisory Committee. The report additionally advised of the public concerns raised at the November 2023 Public Information Meeting as including: "...flooding on the subject lot, wildlife and species at risk impacts, significant density change, road access, pedestrian safety, inadequate servicing..." [Exhibit M-4, p. 167]. The Staff Report said that Public Works Engineering Division would pay the cost of a SCADA panel, with Marchand being responsible for any other required upgrades, because "this upgrade would benefit not only the proposed development but also surrounding properties which utilize municipal services." [Exhibit M-4, p. 168]. The report concluded with a supporting recommendation of Mark Phillips, the Municipality's Chief Administrative Officer, noting that the development proposal complied with the overall intent of the MPS, met the direction of the Land Use By-law and was the style of housing encouraged within the growth centre:

CHIEF ADMINISTRATIVE OFFICER REVIEW

I support the recommendation that Council give 1st Reading to the proposed development agreement. The report highlights the compliance with the overall intent of the WHMPS and meets the direction of the West Hants Land Use Bylaw. Further, the development represents the desired style of housing encouraged within the growth centre of the WHRM.

[Exhibit M-4, p. 168]

[42] At its meeting on June 25, 2024, Council postponed the First Reading until July 23, 2024, and asked staff to obtain written confirmation from the Department of Environment and Climate Change's that there was no watercourse on the subject property. On July 15, 2024, the Municipality received written confirmation from the Department of Environment and Climate Change that the watercourse depicted on the Municipal mapping did not meet the provincial definition of a watercourse. On July 23, 2024, Council gave First Reading and directed that a Public Hearing be held to consider entering into the draft Development Agreement.

[43] On September 24, 2024, Council held the Public Hearing and Second Reading of the application. In a Staff Report to Council dated September 24, 2024 (Staff Report September 2024), staff recommended that Council should give Second Reading and approve entering the draft Development Agreement. The report advised that Council had several options: 1) approve the agreement as drafted or direct revisions to it; 2) refuse to enter into the agreement; or 3) request further information. The Staff Report included the Chief Administrative Officer's review which continued to support the approval of the application:

CHIEF ADMINISTRATIVE OFFICER REVIEW

Staff appear to have answered all questions from Council to-date regarding the Development Agreement. Further, the review process from staff has resulted in a favorable recommendation based on compliance with existing policy and authorizations from provincial departments.

Pending any further comments during the public hearing process or further review by Council I support the recommendation.

[Exhibit M-4, p. 300]

[44] On September 24, 2024, after holding the Public Hearing for the Marchand application, Council did not approve the development agreement at Second Reading.

Marchand was advised of Council's decision by letter dated September 27, 2024, as well as Council's reasons for its decision.

3.0 ISSUE

[45] The Board must determine if the West Hants Regional Municipality Council's refusal to enter a development agreement with Marchand reasonably carries out the intent of the MPS.

4.0 WITNESSES AND EVIDENCE

[46] It is well established that the Board can consider new evidence introduced by the parties during the appeal that was not presented to Council in its analysis of the matter. The importance of factual context for the Board's review was noted in the decision of the Court of Appeal in *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115, where MacDonald, CJNS, stated:

[50] ...the fundamental question therefore becomes: Can it be said that Council's decision does "not reasonably carry out the intent of the MPS"?

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

[47] Under s. 19 of the *Utility and Review Board Act*, S.N.S. 1992, c. 11, the Nova Scotia Utility and Review Board operated under relaxed rules of evidence (and this continues to be true for this Board under s. 27 of the *Energy and Regulatory Boards Act*). All witnesses, to some degree, relied on hearsay and offered opinions beyond their qualifications. There were generally no objections to the admissibility of these statements, and the Board was able to weigh the evidentiary value in the normal course. The Board found the evidence of the witnesses to be helpful and credible, unless stated otherwise.

4.1 Appellant's Evidence

[48] Marchand called three witnesses, Chrystal Fuller, Raymond Rice, P.Eng., and Jenifer Tsang. At the hearing, Ms. Fuller, a licensed planning professional, was qualified, without objection, as an expert capable of giving opinion evidence about land use planning, including the interpretation and application of the MPS and Land Use By-laws and the consistency and inconsistency of council decisions with municipal planning strategies. Mr. Rice was qualified, without objection, as an expert witness to give opinion evidence in municipal and environmental engineering matters. Prior to the hearing, Mr. Rice filed an expert report dated December 4, 2024 [Exhibit M-11, p. 29]. Ms. Tsang was qualified, without objection, as an expert witness to give opinion evidence on land use planning matters, including the interpretation and application of the MPS and Land Use By-Laws and the consistency and inconsistency of council decisions with municipal planning strategies. Prior to the hearing, Ms. Tsang filed an expert report dated December 4, 2024 [Exhibit M-11, p. 3].

4.2 Municipality's Evidence

[49] The Municipality called four witnesses, Adam Pearce, Nicole Hubley, Deborah Swinamer and David Israel. These witnesses were residents of properties within 500 feet (150 metres) of the subject property. Each of these witnesses also submitted letters and attended the Public Information Meeting to express their concerns about the compatibility of the proposed development. They expressed concerns that to date, the Municipality had done nothing to encourage or allow for growth in the area of the subject lot. They said there are no sidewalks and no multi-unit dwellings of any significant size, density, or scale in the surrounding area. They also described the flooding that they had

seen in or near their own residences and expressed concerns that features of the proposed development, such as the underground parking, the pitch of the building roofs and the paved parking areas would worsen the existing flooding and drainage issues.

4.3 Supplementary Information

4.3.1 Letters of Comment

[50] The Board received nine letters of comment, which included a letter from David Israel, a letter from Deborah Swinamer, three letters of comment from the same individual and letters from four other individuals. Since the Municipality called David Israel and Deborah Swinamer as witnesses at the hearing, their written comments are not included in this summary.

[51] All the authors were opposed to the proposed development and expressed the following concerns:

- Increased flooding and storm water issues from the proposed development;
- No confidence a storm water management plan would work;
- Traffic volumes and noise;
- The street should only be single family dwellings; and
- It does not provide affordable low-income housing.

4.3.2 Public Speakers

[52] Three speakers registered for the evening sessions. Stephen Elliott, who lives at 959 Windsor Back Road, next to the subject property, spoke first against the proposed development. He said he could not see how this development would benefit the community in any meaningful way, and it would worsen existing infrastructure issues. He expressed his concerns that the residents of the proposed development would not like or

appreciate the rural environment, which included hobby farms. Shawn Johnson lives at 960 Windsor Back Road and expressed concerns about the impact on his property and others by the proposed development. His concerns include issues of flooding (including in his own residence), environmental issues, existing municipal infrastructure not meeting current needs and road safety. Mr. Johnson said that the area was approved for R-2 development and not for three-storey multi-apartment units. Craig Comeau lives at 969 Windsor Back Road and sold the subject property to Marchand. He expressed concern about water drainage from the proposed development, the impact from infill used to build up the subject property to allow underground parking and the buildings. He said that Marchand does good builds, however this proposal should be located elsewhere.

4.3.3 The Site Visit

[53] I conducted a site visit on April 19, 2025. The parties did not participate in the site visit, by agreement. At the hearing, the Appellant advised that there was no civic address for the property, but it was located between 921 Windsor Back Road and 927 Windsor Back Road. At Exit 4 of Nova Scotia Highway 101, towards Ellershouse/Newport/St. Croix, I travelled along Highway 1 until I came to the intersection with Windsor Back Road. I travelled along Windsor Back Road and stopped in front of the Marchand property located between 921 and 927 Windsor Back Road. I walked around all four sides of the subject property, which included a view of the drainage ditch. I resumed driving on Windsor Back Road toward its intersection with Three Mile Plains Road. I turned right on Three Mile Plains Road and then right onto Swinamer Drive. Swinamer Drive is a cul-de-sac, and I turned right back onto Three Mile Plains Drive. At the intersection of Three Mile Plains Road and Highway 1, I turned right onto Highway 1 and continued driving until I

was again at the intersection of Highway 1 and Windsor Back Road. I noted the location of the properties of Adam Pierce, Nicole Hubley, Deborah Swinamer and David Israel.

5.0 SUMMARY OF SUBMISSIONS

[54] Marchand says it has demonstrated, on a balance of probabilities, that Council's refusal to approve the draft Development Agreement fails to reasonably carry out the intent of the MPS. Marchand refers to the Board's decision in *Homes (Re)*, 2003 NSUARB 119 at para. 60 to assert that, where relevant MPS policy criteria are satisfied, the decision to refuse an application is "on its face" inconsistent with the MPS. The Appellant says that the Board held in *Armco Capital Inc. (Re)*, 2021 NSUARB 147 (*Re*) that when Council's decision disregards the recommendations of its own staff, there's a burden on Council to demonstrate "good planning reasons" for doing so.

[55] The Appellant says that the intent of the MPS is clear, and the draft Development Agreement aligns with its policies and objectives. The draft Development Agreement includes control mechanisms to maximize compatibility with the surrounding area while furthering the objective for higher density residential growth. Further, staff's clear and consistent view throughout was that they recommended approval of the draft Development Agreement.

[56] Marchand says that in making its decision, Council did not focus on the Growth Centre policies and whether the Development Agreement carries out the intent of those policies. Council's failure to do so resulted in a decision that fails to reasonably carry out the intention of the MPS. Marchand notes that the Municipality did not call any Municipal staff or expert evidence on the hearing to explain or justify Council's decision based on the applicable MPS policies. Marchand says that its application met the relevant

criteria and, the Municipality has presented no good planning reasons justifying Council's refusal.

[57] The Municipality submits that Council had good planning reasons to proceed against the advice of its staff in refusing the draft Development Agreement. The Municipality says that jurisprudence makes clear that Council is not bound by staff's acceptance of certain information and assurances or their interpretation of certain MPS policies in any event, nor are they bound to accept the information provided by the Applicant or its experts in exercising their legislative discretion. The Municipality further submits that there is no requirement that Council's "good planning reasons" for denying an application must come from expert evidence or from its planning staff. The Municipality argues that so long as Council's "good planning reasons" for refusing the application can reasonably be supported by the language of the MPS and the facts, then the Board should not disturb Council's decision.

[58] The Municipality submits that based on the totality of the information before it, and after weighing competing MPS policies, Council determined that the proposed development was not appropriate for the subject lot at this time. Council determined that the proposed development's bulk, scale, and density was not compatible with the character and rural nature of the area considering the present local context. Council found that the proposal was not sensitive to the needs of those being served, or the broader community of Three Mile Plains. The Municipality says that Council's refusal to approve the Marchand's draft Development Agreement is consistent with the intent of the MPS and supported by any reasonable interpretation or weighing of the relevant MPS policies,

including policies: 3.2, 4.1.1, 5.3.7 (d) and (h), 5.3.10(d), 16.3.1(a)(i), 16.3.1(a)(v), and 16.3.1(c), (f) and (h).

[59] The Board's findings of fact are incorporated into each section of this decision's Analysis and Findings. The documentary evidence filed before the hearing is clear from the record. I found the evidence of the witnesses to be helpful and credible.

6.0 BOARD'S ANALYSIS AND FINDINGS

[60] The Court of Appeal's judgment in *Archibald*, discussed earlier in this decision, emphasizes the importance of Council's written reasons for the refusal in providing a framework for the Board exercising its appellate jurisdiction (although the Board is not confined to these written reasons in deciding this case).

[61] As discussed above, the Municipality's planning staff recommended that Council approve entering into the development agreement with Marchand at all stages of the application process. The Board notes its comments in *Armco (Re)*, about guiding principles for its review when Council has not followed the recommendations of its planning staff:

[41] The Board recognizes that municipal councils are not bound by the recommendations of planning staff when considering planning applications and has repeatedly confirmed this in past decisions. The Board also recognizes the fact that a development is consistent with a municipal planning strategy does not automatically mean that a municipal council's refusal to approve the development is inconsistent with the strategy. As discussed above, the principles derived from Court of Appeal decisions confirm that there may be more than one conclusion that reasonably carries out the intent of a municipality's planning strategy.

[42] However, a municipal council should not arbitrarily dismiss the recommendations of its planning staff. When a municipal council disagrees with its professional planners, there should be good planning reasons to do so and these reasons must be rooted in the municipality's planning strategy (see *Re Bona Investments Limited*, 2009 NSUARB 58 at para. 75; *Re Griff Construction Limited*, 2011 NSUARB 51 at para. 146; *Re Rodgers*, 2013 NSUARB 131 at para. 109; *Re Abruzzi Properties Incorporated*, 2017 NSUARB 111 at para. 116; and *Re MacNeil*, 2021 NSUARB 78 at para. 59).

[*Armco*, paras. 41-42]

[62] In *MacNeil (Re)*, 2021 NSUARB 78, the Board emphasized that when Council does not accept the recommendation of their planning staff, there must be good planning reasons to do so that are rooted in the MPS:

[59] The Planner recommended approval of the Land Use By-Law amendment. There is nothing which requires Council to accept the recommendation of planning staff, but as noted in other decisions of the Board (for example, *Re Bona Investments Limited*, 2009 NSUARB 58, and *Re Griff Construction Limited*, 2011 NSUARB 51), there must be good planning reasons to do so. The Board considers that such reasons must be rooted in the MPS. In this matter, the only expert evidence presented to the Board at the hearing was from the Appellants. CBRM did not call any witnesses, including any expert witnesses, challenging the evidence of its own planner, who was called as a witness by the Appellants in support of their position.

[60] The Board finds that there do not appear to be any good reasons for Council to have rejected the staff recommendation. CBRM did not identify any policy direction in the MPS for denying the proposed LUB amendment. The fact-finding mission discussed in *Archibald* did not uncover facts or opinion evidence, much less supporting reasons provided in the denial letter, or the rationales expressed during the deliberations which could be tied to the relevant MPS policy, as a basis for the denial.

[63] The Board is mindful that both *Armco (Re)* and *MacNeil (Re)* were decided in the context of staff recommending approval of a land use by-law amendment and not a development agreement.

[64] Bearing these principles in mind, the Board will consider the issues raised by Council in its refusal of the application for a development agreement.

6.1 Policies Enabling Development Agreements in the Two-Unit Residential Zone, Three Mile Plains Growth Centre

[65] As discussed above, the subject property is zoned R-2 under the Land Use By-law and is located within the Three Mile Plains Growth Centre. The subject property is close to Three Mile Plains Cross Road and Highway 1 (Trunk 1). The Windsor Back Road connects with the Three Mile Plains Cross Road and Highway 1 in the shape of a triangle (Windsor Back Road Triangle) and this area is in the Three Mile Plains Growth

Centre. Various witnesses and counsel referred to the Windsor Back Road Triangle as the “triangle area”

[66] Grouped dwellings, as proposed by Marchand, are not permitted as-of-right in the R-2 Zone but can be considered by development agreement in accordance with Policy 5.3.10 of the MPS. The MPS provides the policy context through which the proposed development agreement must be viewed.

[67] Part 3.0 of the MPS states the Municipality’s vision for development and growth. Section 3.1 of the MPS describes its use of “a controlled development approach to achieve a settlement pattern which accommodates a wide range of land uses in a compatible and efficient manner.” It also distinguishes between urban and rural development and describes Growth Centres as a component of urban development:

3.0 DEVELOPMENT VISION AND GOALS

3.1 Vision

...

This Strategy uses a controlled development approach to achieve a settlement pattern which accommodates a wide range of land uses in a compatible and efficient manner. To accomplish this, the Strategy distinguishes between urban and rural development. The urban component consists of Growth Centres, which will be serviced with municipal water and sewer, and the rural one of Villages, Hamlets and resource areas. To reduce sprawling development in resource and environmentally sensitive areas, the focus for the majority of growth will be the Growth Centres and, to a lesser extent, the Village and Hamlets. Such concentrated development also allows for more efficient and cost-effective provision of municipal services and infrastructure such as streets and water and sewer services. [Emphasis added]

[Exhibit M-8, p. 12]

[68] Section 3.2 of the MPS also sets out a list of general goals of development:

3.2 General Goals

- Maintain a "quiet, rural atmosphere" as desired by respondents to the 2002 Plan Review Survey.
- Encourage more dense development in the Growth Centre designation within servicing boundaries.

- Encourage large-scale commercial and industrial development to locate in the Growth Centres and industrial parks, and work with the Town of Windsor to maintain commercial service centres for both West Hants and the Town.
- Encourage development which does not place undue strain on the existing facilities or financial resources of West Hants.
- Recognize the poor supply of potable water in West Hants and identify potential sources of water.
- Allow for flexibility in development standards to provide alternate development solutions.
- Promote the protection of the natural environment, watercourses and environmentally sensitive areas through land use controls and setback requirements.
- Provide a variety of community and neighbourhood recreational sites.
- Identify areas with constraints for development because of soil conditions, topography, risk of flooding, subsidence or other conditions. [Emphasis added]

[Exhibit M-8, p. 12]

[69] The subject property and most of the surrounding lands are designated Residential on "Map 1: the Generalized Future Land Use Map" (GFLUM) of the MPS with the northern corner being designated Commercial Core/Commercial Development District. These designations are shown more clearly on "Map 1-B", which is the GFLUM for the Three Mile Plains Growth Centre. The Growth Centre consists of four GFLUM designations: Commercial Core, Community Uses, Residential, and Commercial Development District [Exhibit M-11, pp. 67 and 69].

[70] Section 3.3 of the MPS explains the intent for creating Growth Centres in general and Section 3.3.1 explains the intent for the Three Mile Plains Growth Centre:

3.3 Growth Centres

Growth Centres are intended to accommodate most of the future non rural development which will occur in West Hants, thereby relieving development pressure from non-renewable resource lands. It is expected that a full range of municipal services, including water and sewer, recreation facilities, street lights and sidewalks, will eventually be provided in these communities as they become necessary. Concentrated development makes the provision of such services more economical. Because of the expense involved in constructing, extending and maintaining municipal water and sewer infrastructure, these services will be provided only in the two existing Growth Centres of Three Mile Plains and Falmouth, as well as the Windsor-West Hants Joint Industrial Park.

3.3.1 Three Mile Plains

The Three Mile Plains Growth Centre, located adjacent to the Town of Windsor, is fully serviced with municipal water and sewer and has the capacity to accommodate a considerable amount of new commercial and residential development.

Three Mile Plains Development Objectives

- Accommodate the majority of future commercial growth in West Hants.
- Permit an urban residential growth pattern which includes higher density development.
- Enable vacant land behind existing homes and businesses to be developed as needed.
- Address traffic concerns on Highway 1 by ensuring commercial driveway accesses are better defined through width, landscaping and other land use by law requirements.
- Allow for the development of small lots to make better use of existing infrastructure.

[Exhibit M-8, p. 13]

[71] The Board finds that the Growth Centre of Three Mile Plains has been identified as the area where most of the non-rural growth, residential and commercial, in the Municipality will occur. This allows for the protection of the rural, agricultural parts of the Municipality. Section 3.3.1 establishes the MPS's goal to allow and promote higher density development in Three Mile Plains in areas which do not place undue strain on the services and financial resources of the Municipality.

[72] Part 4.0 of the MPS sets out general land use policies, including those about housing. Section 4.11 states that Council acknowledges it is important to encourage housing which is diverse in type, such as smaller lots and setbacks, clustered developments and multiple-unit development in appropriate locations, to meet the needs of all residents. The MPS has specific policies to encourage this housing diversity:

4.0 General Land Use Policies

...

4.11 Housing

Council acknowledges it is important to encourage the provision of housing that includes all residents in West Hants regardless of socio-economic status, age or physical or mental disability. Demographic changes, such as an aging population, smaller household size and

a growing number of single-parent families mean that a community needs to enable diverse housing types to satisfy the housing needs of its population. Housing must be available for seniors and individuals in the community with special needs. Housing choices and the affordability of those choices can be increased by providing flexible development standards allowing for smaller lots and setbacks, narrower streets, clustered developments and opportunities for multiple-unit development in appropriate locations. Secondary suites can provide a solution for those wishing to keep elderly or dependent family members nearby and can increase affordable housing options for the greater community. By regulating the size and appearance of these suites, Council can ensure they have minimal effect on the overall built form and are compatible with the neighbourhood. (As amended by File #22-13 January 10, 2023) [Emphasis added]

Policy

As a result, it shall be the policy of Council to:

4.11.1 encourage the provision of housing adequate to meet the needs of all residents in West Hants. Council will encourage affordable housing, special-needs housing and rental accommodation to develop in a manner that is sensitive to the needs of those being served and the entire community.

4.11.2 provide for the development of a range of housing types in West Hants.

4.11.3 include flexible development standards which encourage innovative housing development in the Municipal Planning Strategy and Land Use By-law.

4.11.4 permit secondary suites within and accessory to single and two-unit dwellings in all zones, with regulation regarding the size, location and appearance of secondary suites to ensure the use remains small-scale and compatible with the neighborhood.

[Exhibit M-8, p. 22]

[73] Section 5.1 of the MPS states that it “encourages most of the future non-rural growth” in the Municipality to be in the designated Growth Centres of Three Mile Plains and Falmouth. There are specific policies for a range of residential growth in the Three Mile Plains Growth Centre:

5.3 Three Mile Plains Growth Centre – Residential Policies

A range of housing types and densities is considered appropriate for the Three Mile Plains Growth Centre. To allow for this, three residential zones will be applied: Single Unit Residential; Two Unit Residential; and Multiple Residential.

The majority of residential land in the Three Mile Plains Growth Centre will be zoned Two Unit Residential (R-2) which permits one and two unit dwellings and mini homes. Mobile homes will not be permitted except in manufactured home parks which will be considered by development agreement. As in the previous planning documents, only the Hillcrest Drive and Kendall Lane areas will be zoned solely for single detached dwellings. New multiple residential development will be considered through rezoning.

...

Multiple Unit Residential

Multiple unit residential development is to be encouraged in appropriate areas of the Three Mile Plains Growth Centre where municipal services are available. New multiple unit buildings under three storeys in height will be considered through rezoning. Since building height is sometimes an issue for neighbours, multiple unit dwellings with more than three storeys will be considered only by development agreement, allowing Council more control over details of the development. Council also wishes to closely control the development of grouped dwellings; therefore, these projects also will be considered by development agreement.

Policy 5.3.5 *It shall be the policy of Council to encourage the efficient use of existing municipal infrastructure such as water, sewer and streets within the Three Mile Plains Growth Centre by allowing for the development of multiple unit dwellings where such development is compatible with adjacent uses.*

Grouped Dwellings

Council wishes to provide increased flexibility in development requirements to allow for alternative housing trends and forms. Council is particularly interested in facilitating development that accommodates the needs of an aging population, including allowing for a range of housing types as part of a complex. Grouped dwellings, which may consist of a number of single or two unit dwellings, townhouses or apartment buildings on a single lot, are a form of multiple residential development. This type of development differs from conventional subdivision and development where individual lots are created and only one main building whether a single home or an apartment building is permitted on each lot. In addition, cluster developments, where buildings are concentrated in specific areas of the site, can reduce servicing costs and mean there is more land available for recreation and open space or for protection of wildlife habitat and sensitive environmental features. To adequately control the scale and design of such developments, they will be considered by development agreement. To ensure that this process is not used for situations where a property owner wishes to place a second or third dwelling on a lot without subdividing, Council intends to restrict grouped dwelling development to medium or larger scale proposals exhibiting comprehensive site planning and design. [Emphasis added]

[Exhibit M-8, pp. 32, 33 & 36]

[74] The Marchand proposal development is considered grouped dwellings which come under Policy 5.3.10, which set out the criteria Council must consider for this type of development:

Policy 5.3.10 *It shall be the policy of Council to consider development of grouped dwellings consisting of six or more dwelling units in the Three Mile Plains Growth Centre by development agreement subject to the following:*

- (a) *the development has frontage on:*
 - (i) *a public street; or*

- (ii) *a right-of-way clearly granted by deed or easement, unrestricted*
- (b) *where access to the development is by a right-of-way as specified in clause (a)(ii), the street along such right-of-way shall be designed by a professional engineer, who is a member in good standing of the Association of Professional Engineers of Nova Scotia and who carries appropriate professional liability insurance, who will certify that the design and construction of the street are adequate to accommodate the traffic generated by the development and access by emergency protection vehicles. Street design and construction plans shall be subject to review by the Municipal Engineer;*
- (c) *building clusters are located so as to conserve existing natural features of the site;*
- (d) *the specific requirements for multiple unit development set out in clauses (b) to (h) of Policy 5.3.7;*
- (e) *the application is accompanied by:*
 - (i) *a site plan drawn to scale showing the proposed number, location and type of buildings, lot coverage, parking areas, vehicular and pedestrian circulation systems within the development, access to the site and open space and recreational areas;*
 - (ii) *other supporting maps showing the topography of the lot including contours at five meter intervals, and significant natural features such as watercourses, wetlands and unique habitat or vegetation; and*
 - (iii) *photo examples, plans or drawings showing the exterior design of the proposed buildings;*
- (f) *any other matter which may be addressed by development agreement; and*
- (g) *Policy 16.3.1*

[Exhibit M-8, p. 36]

[75] Policy 5.3.10 also incorporates the criteria found in Policy 5.3.7 and Policy 16.3.1 as part of the criteria which Council must consider. Policy 5.3.7 and Policy 16.3.1 state:

Policy 5.3.7 *It shall be the policy of Council to consider rezoning land within the Three Mile Plains Growth Centre to R-3 subject to the following:*

- (a) *the development has frontage on an arterial or collector street designated on the Transportation Map (Map 2) if it consists of 12 or more units;*
- (b) *the lot is serviced, or is capable of being serviced, with municipal water and sewer; (Amendment WHMPS 14-01 Effective January 22, 2015)*
- (c) *the development is compatible with the character of the area with respect to building scale and design, traffic generation, population density and similar matters;*
- (d) *existing and proposed streets are adequate to support the development and existing streets will not require major infrastructure improvements as a result of the development; a traffic impact study may be required in accordance with Section 14.6 of this Strategy;*
- (e) *adequate open space or recreational space is provided;*
- (f) *adequate on-site parking is provided;*
- (g) *any other matter which may be addressed in a Land Use By law; and*
- (h) *Policy 16.3.1.*

...

Policy 16.3.1 *In considering development agreements and amendments to the West Hants Land Use By law, in addition to the criteria set out in various policies of this Strategy, Council shall consider:*

- (a) *whether the proposal is considered premature or inappropriate in terms of:*
 - (i) *the adequacy of sewer and water services;*
 - (ii) *the adequacy of school facilities;*
 - (iii) *the adequacy of fire protection and other emergency services;*
(Amendment WHMPS 14-01 Effective January 22, 2015)
 - (iv) *the adequacy of road networks adjacent to, or leading to the development; and*
 - (v) *the financial capacity of the Municipality to absorb any costs relating to the development.*
- (b) *whether the development is serviced, or capable of being serviced, by a potable water supply and either central sewer or an approved on site sewage disposal system;*
- (c) *the suitability with any aspect relative to the movement of auto, rail and pedestrian traffic;*
- (d) *the adequacy of the dimensions and shape of the lot for the intended use;*
- (e) *the pattern of development which the proposal might create;*
- (f) *the suitability of the area in terms of steepness of grade, soil and geological conditions, location of water courses or wetlands, and susceptibility of flooding;*

- (g) *whether the proposal meets the requirements of the appropriate provincial or federal agencies as well as whether it conforms to all other relevant municipal by laws and regulations; and*
- (h) *any other matter required by relevant policies of this Strategy.*

[Exhibit M-8, pp. 33, 34 & 111]

[76] Ms. Fuller, who was qualified as an expert witness in planning at the hearing, wrote the following about the MPS policy context for the Marchand proposal when filing the application:

The West Hants Municipal Planning Strategy provides policy guidance for this area and is Council's statement of intent for future development. The Three Mile Plain Growth Centre is one of three growth centres in West Hants, and along with the Windsor Plan Area, is where the bulk of future growth is encouraged.

...

West Hants has MPS policies that establish growth centres. Part of why Growth Centres were established is because Council in its general goals states that it wishes to "Encourage more dense development in the Growth Centre designation within servicing boundaries". These Growth Centres are intended to reduce development pressures and speculation from residential development on the agricultural and resource lands and focus development in areas with services and amenities. The reduction of sprawl is required to encourage the economical servicing of lands, promote active transportation and support the activities of the rural areas and lifestyles.

[Exhibit M-4, pp. 2-4]

[77] The Staff Report dated June 13, 2024, which was before Council on September 24, 2024, described the overall intent for Growth Centres in the MPS as follows:

West Hants Municipal Planning Strategy

Part 5.0 of the WHMPS contains the overall intention for Growth Centres in West Hants; Section 5.3 outlines the residential policies for the Three Mile Plains Growth Centre. Policy 5.3.10 establishes Council's intention to consider "*development of grouped dwellings consisting of six or more dwelling units in the Three Mile Plains Growth Centre by development agreement*" and the specific criteria to be considered by Council...

[Exhibit M-4, p. 312]

[78] In her expert report, Ms. Tsang writes the following about the MPS intent for the Three Mile Plains Growth Centre:

The MPS identifies two Growth Centres, being Three Mile Plains and Falmouth. The MPS discussion that is specific to the Three Mile Plains Growth Centre establishes that multiple unit residential development is compatible in the area with the statement, *"A range of housing types and densities is considered appropriate for the Three Mile Plains Growth Centre."*

...

It is clear in this section of the MPS that the intent is to allow and encourage *"medium or larger scale proposals"* that involve grouped dwellings consisting of multiple unit residential buildings in the Three Mile Plains Growth Centre. This again reinforces the position that Grouped Dwellings and Multiple Unit Residential developments are considered to be compatible in this area. The degree of compatibility would be reviewed through *"comprehensive site planning and design."* [Emphasis in original]

[Exhibit M-11, pp. 6-8]

[79] Marchand and the Municipality disagree on the MPS' intent for residential development in the Three Mile Plains Growth Centre. Marchand says that the intent of the MPS is clear, as set out in its policies, that higher density development, including grouped dwellings and multiple unit residential dwellings is permitted and encouraged within the Three Mile Plains Growth Centre where municipal services are available and when the policy criteria are met.

[80] The Municipality says that the overarching goals of the MPS, including the preamble in Section 3.2, are to maintain a quiet, rural atmosphere which protects the natural environment and does not put undue strain on the Municipality's existing services or financial resources. The Municipality asserts that the intent of the MPS for housing development allows "Council to control a development pattern that encourages more dense development in appropriate areas within growth centres, that is sensitive to both the needs of those being served, and the entire community." [Emphasis in original]. [Municipality's Post-Hearing Submissions, para. 31].

[81] In its reply submissions, Marchand says that the Municipality is reading the "appropriate areas" into the intent of the MPS. Marchand notes that this phrase does not

appear in any of the MPS policies about residential development in the Three Mile Plains Growth Centre. The preamble of the Multiple Unit Residential policies says those developments are to “be encouraged in appropriate areas of the Three Mile Plains Growth Centre where municipal services are available.” Marchand says “appropriate areas” are those where there are existing, available municipal services. Marchand says that the Falmouth Growth Centre’s MPS development goals, unlike Three Mile Plains Growth Centre, specifically include accommodating “rural lifestyle activities” to the extent that they are compatible with a “moderate density of residential development” [Exhibit M-8, p. 13]. Finally, Marchand says that there was no evidence before the Board which gives planning support to the Municipality’s interpretation that the MPS gives Council the scope to determine “appropriate areas” for residential growth outside of the relevant MPS policies.

[82] Section 3.3 establishes the MPS’ goal to allow and promote higher density development in the Three Mile Plains Growth Centre in areas that do not place undue strain on the services and financial resources of the Municipality. Section 5.3 describes the range of housing types and densities is considered appropriate for the Three Mile Plains Growth Centre. These include multiple unit residential buildings and grouped dwellings of multiple unit residential buildings.

[83] The Board finds that the intent of the MPS for development in the Three Mile Plains Growth Centre includes multiple unit residential dwellings and grouped dwellings of higher density to be encouraged and permitted where there are available municipal services and when the policies criteria are satisfied.

[84] Marchand’s proposed development can only proceed by way of a development agreement. The MPS provides the policies, including specific criteria for

Council's assessment when deciding to approve a development agreement and this assessment in its entirety is examined in determining the appropriateness of the proposal on many issues including compatibility with surrounding land uses.

[85] There is no question Council had discretion, under Policy 5.3.7, to consider the compatibility, and adequacy of servicing and stormwater management of the proposed development which were its basis for refusing Marchand's draft Development Agreement. Council's reasons for refusal will now be discussed.

6.2 Compatibility with Character of the Area

[86] Council's reasons stated that it denied Marchand's application, in part, because the proposal was contrary to Policy 5.3.10(d) and Policy 5.3.7(c) of the MPS. In Council's opinion, the proposal would:

...not be compatible with the character of the area with respect to scale, design, and population density, specifically with respect to compatibility with the pattern of existing single unit dwellings on large lots surrounding the subject lot...

[Exhibit M-6, p. 782]

[87] The Staff Report September 2024 described the proposal as an application that:

...seeks approval for a grouped dwellings with 3 buildings, each containing 29 units. The development would total 87 units and the buildings would not exceed three storeys in height. The application describes a central open space and landscape buffer surrounding the buildings to help separate the buildings from existing lower density development in the area.

[Exhibit M-4, p. 299]

[88] When the Municipality's staff provided its recommendation to approve the development agreement, staff provided a report to Council which set out its analysis of the relevant MPS policies in Attachment A (analysis of Policy 5.3.10 and 5.3.7) and in

Attachment B (analysis of Policy 16.3.1). The Staff Report September 2024 provided the following comments about compatibility:

Policy 5.3.7 It shall be the policy of Council to consider rezoning land within the Three Mile Plains Growth Centre to R-3 subject to the following:

CRITERIA	COMMENT
c) the development is compatible with the character of the area with respect to building scale and design, traffic generation, population density and similar matters;	The proposed development is similar in scale to the area, as it is within a designated Growth Centre and the proposal is similar in height to the allowable permitted height in the underlying Two Unit Residential (R-2) zone. The density and style of housing is different than the existing single- and two-unit dwellings in the area. However, the Growth Centre designation shows Council's intent for increased residential development in the area. A Traffic Impact Study (TIS) was submitted to the Municipality and the Provincial Public Works Department (NSDPW). Comments received from the NSDPW indicated that they had no concerns regarding traffic generation based on the submitted TIS.
e) adequate open space or recreational space is provided;	The Development Officer commented that there is adequate open space being provided. This is a requirement in the draft development agreement.

Policy 16.3.1 In considering development agreements and amendments to the West Hants Land Use By-law, in addition to the criteria set out in various policies of this Strategy, Council shall consider:

CRITERIA	COMMENT
(d) the adequacy of the dimensions and shape of the lot for the intended use	The Development Officer commented that they did not have any concern regarding the adequacy of the dimensions or the shape of the lot for the intended use.
(e) the pattern of development which the proposal might create	The Development Officer commented that they did not have any concern regarding the pattern of development which the proposal might create. The proposal is within the Three Mile Plains Growth Centre designation, in which higher density residential development is promoted

[Exhibit M-4, p. 319 & p. 323]

[89] The Staff Report September 2024 provided a summary of staff's determination that the criteria had been met for approving the proposed development agreement, which included compatibility:

In summary, the criteria are met since:

- road frontage on a public street is required in the development agreement;
- buildings are grouped and located to conserve the existing natural features of the site;
- the development is reasonably compatible with the character of the area with respect to building scale and traffic generation; and
- clauses (b) to (h) of Policy 5.3.7 are considered met. [Emphasis added]

[Exhibit M-4, pp. 312-313]

[90] Ms. Tsang's expert report reviewed the MPS context for Marchand's application and Council's reasons for refusing to approve the application.

[91] Ms. Tsang explained the meaning of the land use term "compatibility" as follows:

Compatibility

It is important to note that the land use term "compatibility" does not mean that land uses must be identical or similar to one another. The land use planning term "compatibility" is used in the context of how land uses interrelate to one another based on their characteristics.

For example, a large building may be compatible with a small building depending on characteristics such as: the use contained within the building; the size of the building; the design of the building; the buffering of the building and parking area; the setbacks or landscaping on the property; the orientation of the building and parking on the property; etc. Compatibility is less about the actual measurements of a building and more about the relative impression that a project has on the surroundings and the methods used to enhance or achieve compatibility.

As a general rule, similar categories of land uses are considered to be compatible with one another. For example, residential land uses are usually considered to be compatible with other residential uses, commercial land uses are generally considered to be compatible with other commercial land uses, and industrial land uses are usually considered to be compatible with other industrial land uses.

[Exhibit M-11, p. 6]

[92] Ms. Tsang's report notes that the MPS designates Three Mile Plains as a Growth Centre and states that a "multiple unit residential development is compatible in the area". She writes that Section 5.3 reinforces that the intention for the area is to encourage multiple unit residential development "in appropriate areas of the Three Mile Plains Growth Centre where municipal services are available." She says the MPS acknowledges "that 'building height is sometimes an issue for neighbours' and therefore requires development agreement for buildings greater than three storeys." She concludes that "it is clear in this section of the MPS that the intent is to allow and encourage '*medium or larger scale proposals*' that involve grouped dwellings consisting of multiple unit residential buildings in the Three Mile Plains Growth Centre." She states this intention "reinforces the position that Grouped Dwellings and Multiple Unit Residential developments are considered to be compatible in this area". She notes that the "degree of compatibility would be reviewed" through comprehensive site planning [Exhibit M-11, pp. 7-8].

[93] Council found the proposed development was not compatible with the character of the area with respect to the scale, design and density, "specifically with respect to compatibility with the pattern of existing single unit dwellings on large lots surrounding" the subject property. Consideration of Council's reason will begin with an examination of what is the "area" around the proposed development and if this area has a pattern of existing pattern of land use.

6.2.1 Existing Pattern of Single Unit Dwellings on Large Lots

[94] Policy 5.3.7(c) states that "the development is compatible with the character of the area with respect to building scale and design, traffic generation, population density

and similar matters.” Council’s reasons stated that the proposed development was not compatible with the pattern of existing single unit dwellings on large lots surrounding the subject property.

[95] Marchand disputes Council’s finding there is a pattern of existing single unit dwellings on large lots surrounding the subject property. Relying on Ms. Tsang’s expert report, Marchand argues that the surrounding area of the subject property consists of a wide range of land uses. Marchand says that not all the adjacent lots of the subject property are single unit residential and notes that the adjacent property on the rear property line is zoned Local Industrial. Finally, Marchand states that the surrounding residential lots are mostly in the smaller lot of serviced lots, rather than a pattern of existing single unit dwellings on large lots.

[96] The Municipality submits that there is an “actual pattern of existing single unit dwellings on the large lots in the area.” [Emphasis in original]. The Municipality says that “[r]esident testimony confirms that the overwhelming majority of existing built form development in the Three Mile Plains Growth Centre consists of single unit dwellings situated on lots much larger in relative size to the dwellings.”

[97] In determining whether Council was correct in its finding that the surrounding area of the subject property consists of a pattern of existing single unit dwellings on large lots, it is necessary to review the evidence before the Board.

[98] As noted above, on October 4, 2023, Chrystal Fuller provided a covering letter at the time of filing Marchand’s application. She described the subject property as previously having been a large field, which had recently been subdivided to create the current configuration. She stated that “[h]istorically, this area was typified by agricultural

uses but in more recent years it has become a residential area.” She noted that “the adjacent properties are single unit dwellings with some areas of open spaces” and that there “are also commercial/industrial uses on Three Mile Plain Cross Road.” [Exhibit, M-4, p. 2]. She also stated her belief that the Marchand development could be “integrated into the lower density development of the area.” [Exhibit M-4, p. 4].

[99] In her testimony at the hearing, Ms. Fuller commented on the GFLUM Map 1-B in the MPS. She said that the map showed designations, not zones, that “the bulk of it...is residential...[w]ith a little bit of commercial sort of around Currys Corner area.” [Transcript, p. 34, lines 5-12]. In response to the Municipality’s questions, Ms. Fuller testified that she could not comment if the subject property was “almost surrounded by single-family dwellings on the back end”, as she had not done “a deep dive into what the usage [was]”. She said that “residential is certainly key” as there were “no other apartment buildings”. [Transcript, p. 143, lines 3-11].

[100] In the Staff Report September 2024, as noted above, staff found that the proposed development was “compatible with the character of the area” under Policy 5.3.7(d), as it was similar in scale to the area, it is within a designated Growth Centre, was similar in height to the allowable permitted height in R2, and while its density and style was different than the existing single- and two-unit dwellings in the area, it met Council’s intent for increased residential development in the area. Further, the Development Officer had no issue with the pattern of development which the proposal might create.

[101] In her expert report, Ms. Tsang concludes that Council finding that the “character of the area” had an existing pattern of single unit dwellings on large lots was

inaccurate. She says that the character of the area is diverse in the lot sizes of R-2 zoned properties and the wide range of land uses. She says there is even diversity of the land uses abutting the subject property, where three of the properties are zoned R-2 and the rear property is zoned Local Industrial.

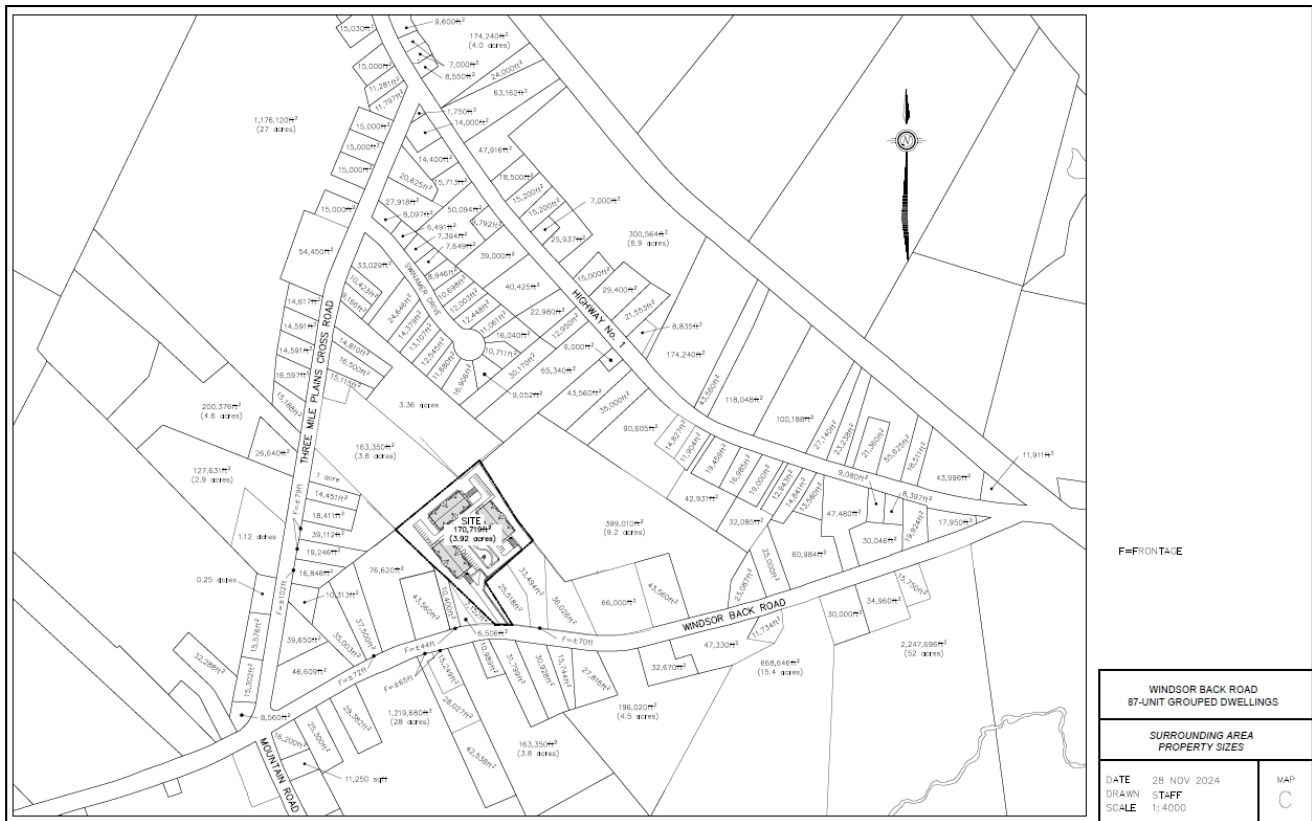
[102] The Board notes that in her expert report, Ms. Tsang indicated the steps that she took to formulate her opinion as “reviewing the Appeal Record and background documents, researching information; meeting with the appellant and their counsel; conducting a site visit, and applying a land use planning analysis.” [Emphasis added] [Exhibit M-11, p. 2].

[103] In her expert report, Ms. Tsang attaches a Map A of Surrounding Area Zoning/ Land Use Map, and indicates the proposed buildings in white:



[Exhibit M-11, Map A, p. 22]

Also attached to her expert report is Map C of Surrounding Area Property Sizes Map:



[Exhibit M-11, Map C, p. 24]

[104] Ms. Tsang describes the information on these maps as follows:

The zoning map and Map C attached to this report illustrates that there are actually a wide range of residential property sizes in the area. There are also other land uses in the area including a Local Industrial zoned use located immediately adjacent to the subject property along the rear property line.

[Exhibit M-11, p. 12]

[105] Ms. Tsang says in her report that a review of compatibility with the “character of the area”, begins with identifying what comprises the surrounding area. Then the area is reviewed for its land uses, buildings and other elements to determine its character. She says that the “surrounding area” of the subject property is the Windsor Back Road Triangle, as the subject property is located within it. She says that her analysis of the character of the surrounding area of the subject property includes both sides of

each road in the Windsor Back Road Triangle. She concludes that there is a variety of land uses in this Triangle which can be summarized as including:

- 1) Two properties zoned M-1 (Resource Industrial) that are a large-scale food operation and a trucking operation;
- 2) Four properties zoned L-I (Local Industrial) which have two trucking and two auto repair uses;
- 3) One property zoned HC (Highway Commercial) which has a farming equipment sales use;
- 4) A community hall on a property zoned I (Institutional);
- 5) Three properties zoned R-3 (Multiple Residential) that contain two-unit dwellings and a commercial use; and,
- 6) The remaining properties are zoned R-2 (Two Unit Residential). [Exhibit M-11, p.8]

[106] During her cross-examination by the Municipality, Ms. Tsang testified that “in land planning you always look at both sides of the street”. When asked to confirm that the “majority of the R-2 lots within the triangle contain single-family dwellings”, Ms. Tsang testified “[a]t quick glance, it appears...but I’ve not done that analysis.” [Transcript, p. 204, lines 16-17; pp. 211-212, lines 17-line 1].

[107] As discussed above, the Municipality called four resident witnesses: Adam Pearce; Nicole Hubley; Deborah Swinamer; and, David Israel. Mr. Pearce lives at 39 Swinamer Drive. He has resided there for almost twenty years and testified that his property is within 150 metres of the subject property. He testified that his biggest concerns about the proposed development were flooding and traffic. He testified about developments and properties in his area of Three Mile Plains:

Q. So how would you describe the developments and the properties that are currently in your area of Three Mile Plains?

A. Right. So the vast majority of properties are single family dwellings. There are a few multiple-family dwellings, two-unit, maybe four-unit, and then there are the other developments.

A couple of, like, mechanic garages. There's a truck garage and a community hall, and just outside the triangle we're talking about there ... or is the ... an apple processing plant.

[Transcript, pp. 295-296, lines 16 to line 1]

[108] Ms. Hubley lives at 959 Windsor Back Road. Her property is on the same side of the street as the subject property but does not abut it. She testified that she purchased in 2019 for privacy and quiet. She testified about her concerns for flooding and stormwater runoff, especially because of the recent storms. She also testified that the municipal services were inadequate for the proposal and that there were existing power grid issues. She did not describe her area in terms a pattern of types of buildings or lot sizes.

[109] Diana Swinamer's civic address is 4390 Highway 1 and testified that she lives within 500 feet of the subject property. She said that she has lived at her property for 46 years. She testified that when Swinamer Drive was developed, they purchased the first piece of land so that no one would build behind them and that they use this property to exit by Swinamer Drive. She testified that when she first lived in the area it was rural but that it has slowly built up. Ms. Swinamer said that her concerns about the proposed development were traffic, because Swinamer Drive enters near the blind crest on Three Mile Plains Crossroad and flooding. She testified that pooling of water and flooding on her property had occurred in recent years because neighbours built up their lots with in-fill. She expressed concern about flooding on the Windsor Back Road. She also testified that she did not trust the enforcement provision in Marchand's draft Development Agreement. Ms. Swinamer stated that her neighbouring property entered a development agreement for the operation of a truck and car repair facility. She testified that under the development agreement, the facility was only to operate 7:30 am to 5 pm, but it operates

all hours and days and wakes her in the middle of the night with noise. She said that she has been unsuccessful in her efforts to have the terms of the development agreement enforced. She testified that the proposed development would block her view and it would generate light and noise. Ms. Swinamer did not testify about pattern of existing homes or lot sizes.

[110] David Israel lives at 922 Windsor Back Road, across the street from the subject property. He testified that he has lived there 25 years, first in a mobile home and later built his house. He said that his biggest concerns about the proposed development were flooding, location of the driveway, walking safety, light pollution and disruption during construction. He described the character of the area as mobile homes peppered through the community, old farms houses and hobby farms. He said that most of the houses were one storey and a few were two storeys. He did not testify about any lot sizes.

[111] In a review of the transcript, the Board finds that none of the resident witnesses' testimony supports the Municipality's assertion that the "[r]esident testimony confirms the "overwhelming majority of existing built form development in the Three Mile Plains Growth Centre consists of single unit dwellings situated on lots much larger in relative size to the dwellings themselves." While Mr. Pearce gave his lay opinion that the "vast majority" of the property were zoned R-2, he never provided testimony about the lot size of the R-2 properties of the Windsor Back Road Triangle. The remaining resident witnesses did not comment on the lot sizes of the R-2 zoned properties or attempt to compare the presence of single-unit dwellings to other built forms. Ms. Fuller and Ms. Tsang, both qualified as experts, testified that they could not confirm that the "majority" of

R-2 zoned properties in the Windsor Back Road Triangle included single-family homes, as they had not undertaken that analysis.

[112] The Board concludes that there is no evidence before it that supports the Municipality's assertion that the overwhelming majority of existing built form development in the Three Mile Plains Growth Centre consists of single unit dwellings situated on lots much larger in relative size to the dwellings themselves.

[113] With no evidence contradicting her expert report, the Board accepts Ms. Tsang's findings that there is a wide range of R2 lot sizes in the Windsor Back Road Triangle. The Board accepts her determination that the three nearest residential lots to the west of the subject property range in size from 6506 square feet to 10,400 square feet, there are approximately 94 lots, including the 18 serviced lots on the Swinamer Drive cul-de-sac that range in size generally between 6000 square feet and 24,000 square feet. There are approximately 53 residential properties over 29,000 square feet.

[114] After reviewing Ms. Tsang's expert report, including its maps, and her testimony, the Board finds that the properties zoned R-2 vary in lot size, both for those properties near the subject property and those within the Windsor Back Road Triangle. The Board finds while there are three properties zoned R-2 abutting the subject property, the rear abutting property is zoned Local Industrial.

[115] The Board finds that the appropriate area for consideration for the "character of the area" is the Windsor Back Road Triangle, which includes both sides of each road in this Triangle. The testimony of Mr. Pearce and Ms. Swinamer assisted the Board in understanding what residents, who are living within 150 metres of the subject property, consider land uses in their area. The area that they described is consistent with Ms.

Tsang's expert opinion, including discussing land uses on both sides of each road. The Board further finds, based upon Ms. Tsang's expert report, her testimony and the testimony of resident witnesses, that the area within the Windsor Back Road Triangle consists of a wide range of land uses.

[116] Council is entitled to deference on "questions begging" terms and concepts, which would include considering compatibility of the proposed development with the character of the area for scale, density and design. Council, however, loses this entitlement to deference if its decision was based on a factual error. The evidence before the Board establishes that Council did not properly characterize the character of the area when it assessed the compatibility of the proposed development.

[117] Based on these findings, the Board finds Council erred in its factual determination that there is a pattern of existing single unit dwellings on large lots surrounding the subject property. The evidence establishes that the character of the area is not homogeneous in size of lots or type of land use as described by Council. Even if the Board were to narrow its consideration to R-2 zoned properties in the area, what Council has described is still not an accurate characterization of the area as the R-2 zoned properties vary in lot size. As such, the Board finds that Council's decision to refuse the draft Development Agreement on the basis that it was not compatible with the character of the area, because there is an existing pattern of single unit dwellings on large lots, was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

[118] The Board will now examine the proposal's compatibility with the character of the area with respect to scale, design and density to determine if it does not reasonably carry out the intent of the MPS.

[119] Marchand submits that the Municipality did not file any expert planning evidence to challenge staff's opinion or Ms. Tsang's expert opinion that the proposed development is compatible in scale, design and density with the character of the area. The Board notes that the resident witnesses all testified that the proposal was not a "good fit" for the area.

[120] The Municipality submits that Ms. Tsang's and staff's conclusions on compatibility are based on the assumption that in a growth centre, anything that accords with an area's maximum allowable scale and density is acceptable and that Council should ignore compatibility considerations regarding existing built form and density. The Municipality states that these conclusions and interpretations of Policy 5.3.7(c) are contrary to the MPS' stated goal of using "a controlled development approach to achieve a settlement pattern that accommodates a wide range of land uses in a compatible and efficient manner. The Municipality provided no further argument on scale or design, but did provide more detail on density which will be discussed below.

6.2.2 Scale

[121] In the Staff Report September 2024, staff states that "the proposed development is similar in scale to the area, as it is within a designated Growth Centre and the proposal is similar in height to the allowable permitted height in the underlying Two Unit Residential (R-2) zone" [Emphasis added] [Exhibit M-4, p. 319].

[122] Ms. Tsang explains in her report that the term “scale” in land use planning refers to the apparent size of the land use, as opposed to the actual size, as viewed in relationship to another land use, building or element. She notes that the actual size of a multiple unit residential building is expected to be larger than other forms of residential housing, but its apparent size may be different depending on its site and building design in relation to the character of the area.

[123] Ms. Tsang describes the building heights of the existing land uses in the area as primarily single and two-storeys. She notes that some of the residential lots are narrow in width along their street frontages, which makes the streetscape feel more like an urban serviced neighbourhood than a rural area where houses would be quite far apart from one another. She also observes that some of the existing dwellings are situated quite close to the road with many of them having more than one accessory building.

[124] Ms. Tsang says that she considered the site plan for the proposed development together with the existing land uses and the intent of the relevant sections of the MPS encouraging both commercial and higher density residential development in the area. She says that the three-storey height of the proposal is consistent with the maximum permitted height in the R-2 zone. She states her opinion that the scale of the proposed development has been optimized through its “comprehensive site planning and design” [Exhibit M-11, p. 10] because:

- It is situated on a flag shaped lot behind existing homes which reduces the scale of the proposal on the streetscape as well as the nearest residential dwellings;
- It involves three separate buildings, each three storeys, rather than one or two taller buildings. The height of the three storeys is consistent with the maximum height permitted in the existing R-2 zone;

- It has significant separation distance from existing buildings in the area, the closest residential building being 38 metres from the closest building.

[125] She states that the subject property's configuration reduces the scale of the proposal on the streetscape as well as the nearest residential dwellings and aligns with the third bullet point of the Three Mile Plains Development Objectives, to enable "vacant land behind existing homes and businesses to be developed as needed." She concludes by stating that in her "professional planning opinion" the proposed development "is compatible with the character of the area with respect to scale." [Exhibit M-11, p. 10].

[126] Council did not elaborate on why it considered the scale of the development to be incompatible with the neighbourhood. The Board finds on the evidence before it that the proposed development is compatible in scale with the character of the area with respect to building scale. This is an area with a variety of land uses, including R-3 multiple units. The proposed buildings will be 38 feet in height which is similar to the as-of-right height of 35 feet in the R-2 zone. The location and layout of the proposed development should mitigate the visual impact on surrounding properties. The buildings will be clustered together at the rear of the flag shaped subject property which abuts the property zoned Local Industry. The buildings are set back from the streetscape on Windsor Back Road, away from the two closest residential properties. Also, Section 2.7 of the draft Development Agreement requires that a detailed landscaping plan must be provided at the time of permitting. This plan must provide buffering of native trees, grasses, and shrubs and/or other along the side and rear lot lines which should mitigate the visual impact. As such, the Board finds that Council's decision to refuse the draft Development

Agreement on the basis that it was not compatible on scale was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

6.2.3 Design

[127] In the Staff Report September 2024, staff stated that “the density and style of housing” of the proposed development was “different” than the existing single- and two-unit dwellings in the area, but that the Growth Centre designation showed Council’s intent for increased residential development in the area [Exhibit M-4, p. 319].

[128] In her report, Ms. Tsang states that the “design” of a proposal can refer to both building design and site design. She described the building design as follows:

...the building design of the proposal is shown on architectural renderings as part of the application. The buildings are architecturally designed using varied pitched roof lines, facade articulation, window and door treatments and a variety of exterior materials. These architecture details make the proposal more compatible with the character of the area than if the buildings were to resemble plain block style multiple unit buildings or the industrial buildings in the area which have very little architectural design.

[Exhibit M-11, p. 10]

[129] She finds that “these architectural details make the proposal more compatible with the character of the area” than if the buildings were designed “to resemble plain block style multiple unit buildings or the industrial buildings in the area” which have very little architectural design [Exhibit M-11, p. 10].

[130] Ms. Tsang says the site design also incorporates numerous site design choices that increase the compatibility of the proposal, including:

- the use of small parking areas rather than one large lot;
- landscaping along the driveway and within the yard setbacks;
- meeting and/or exceeding the minimum setbacks in the R-3 Zone;
- providing nearly 4 times the amount of required recreation space in the R-3 Zone;
- and
- integrating a large landscaped recreation open space in the center of the property.

[Exhibit M-11, pp. 10-11]

[131] She notes that the draft Development Agreement requires that the proposal be constructed in accordance with the site plan and these design elements as set out in the Sections entitled: “2.1 Use”; “2.2 Development Location and Design”; “2.3 Site Requirements”; “2.5 Parking”; and “2.7 Recreation Space and Landscaping”. Ms. Tsang concludes that in her opinion the proposal’s design is compatible with the character of the area both in building design and site design.

[132] Marchand states that its proposed development satisfies both compatibility for building design and site design with the character of the surrounding area. Referring to the draft Development Agreement, Marchand notes the proposal must be constructed in accordance with the site plan and the design elements. Relying upon the expert opinion of Ms. Tsang and Municipal staff, Marchand says that its proposed development is compatible with the character of the area with respect to design.

[133] Council did not elaborate on why it considered the design of the development to be incompatible with the neighbourhood. The Board notes that staff found that while the design was different from the existing dwellings in the R-2, it still was compatible in design because of the intent of the Growth Centre. Further Marchand will be required to build the proposed development in accordance with the site plan and all design elements in the draft Development Agreement noted above. As such, the Board finds that Council’s decision to refuse the draft Development Agreement on the basis that it was not compatible on design was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

6.2.4 Density

[134] In the Staff Report September 2024, staff stated the density of the proposal is different than the existing single- and two-unit dwellings in the area. Staff expressed no concerns about density as “the Growth Centre designation shows Council’s intent for increased residential development in the area.” [Exhibit M-4, p. 319]. Staff also expressed no concern about the pattern of development which the proposal might create. The proposal is within the Three Mile Plains Growth Centre designation, in which higher density residential development is promoted.

[135] In her expert report, Ms. Tsang explains that density is assessed in terms of the thresholds of density used in land use planning. She says that low density is generally considered to be single-unit dwellings in the range of one to eight per acre. Medium density is considered housing in the range of nine to 18 units per acre, such as townhouses. High density is anything over 18 units per acre with no upper limit for dense urban areas. After explaining her methodology, Ms. Tsang states her finding that R-2 zoning and the subdivision requirements permit low density residential development as-of-right.

[136] Ms. Tsang says a review of the density of the proposal requires consideration in the context of the MPS. The Three Mile Plains Development Objective permits “an urban residential growth pattern which includes higher density development”. She says that this proposal for 87 units on 3.9 acres equates to about 22 units per acre. She states that the proposal is high density, but it is the “low end of high density” which arguably makes it more compatible with the character of the area than if it was at the high end of the high-density range [Exhibit M-11, p. 12]. She opined that the proposal is compatible with the character of the area with respect to population density.

[137] Marchand notes that staff found the density of the proposal was compatible with the MPS, and Ms. Tsang also found that it was compatible with the character of the area for population density. Further, the draft Development Agreement includes control mechanisms to maximize compatibility with the surrounding area while furthering the objective for higher density residential growth. Also, the subject property can handle the proposed density as there is adequate servicing, and the road network is adequate.

[138] Marchand says the MPS and its policies encourage higher density multi-unit residential development in the area of its proposed development. The Appellant notes that the MPS specifically contemplates that proposals for more than six units and more than 3-storeys in the R-2 zone and these will proceed by way of development agreement. Marchand says that this confirms the intent of the MPS that Council should consider larger scale proposals.

[139] Relying on the testimony of the residents, the Municipality describes the area as a “quiet area with a rural atmosphere that presently contains low-density single-unit residential dwellings.” The Municipality asserts that the proposed development would place high density development of 22 units per acre in an area which only contains low-density single and two-unit residential dwellings.

[140] The Board acknowledges that people can subjectively feel that the proposal is “too large” for the area as expressed by the residents and the public speakers. Or, as suggested by the Municipality’s resident witnesses that while the higher density is promoted by the MPS, density should be limited to two- to three-unit residential dwellings.

[141] The Board notes that Council did not elaborate on why it considered the density of the development to be incompatible with the neighbourhood. Staff reviewed the

matter and determined the proposal was compatible on density and had no concern about the pattern of development which the proposal might create. Staff stated in the Staff Report to Council that while the density is higher than the current adjacent properties, the “Growth Centre designation shows Council’s intent for increased residential development in the area.” Similarly, in her expert report, Ms. Tsang stated her opinion that the proposed development is compatible with the character of the area with respect to population density.

[142] The Board acknowledges that the proposal is a higher density in comparison to the existing character of the area but also finds that it is the intent of the MPS to encourage “higher density” in the Three Mile Growth Centre, in the context of the range of residential housing encouraged, including multiple unit residential in grouped dwellings. The Board finds that, looking at the issue objectively, that Council’s decision to refuse the draft Development Agreement on the basis that it was not compatible on density was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

6.2.5 Conclusion on Compatibility

[143] Taking into account all of the foregoing, the Board finds that Council’s decision to refuse the draft Development Agreement on the basis that it was not compatible with the character of the area with respect to scale, design and density, specifically with respect to the pattern of single unit dwellings on large lots surrounding the subject property, was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

6.3 Adequacy of Municipal Water and Sewer Services

[144] Council's second reason for refusing Marchand's application was based on its consideration of Policy 5.3.7(b) and Policy 16.3.1(a)(i) "with regard to the adequacy of Municipal water and sewer services" to the subject property and "the necessary upgrades to the pump station required to support this proposal." [Exhibit M-6, p. 782]. It is not clear to the Board if Council found the existing Municipal water services and/or its sewer services to be inadequate in addition to the need for upgrades to the lift station. The Board will examine the adequacy of the existing services to support the proposal as well as the upgrades.

[145] Policy 5.3.7(b) provides:

Policy 5.3.7 *It shall be the policy of Council to consider rezoning land within the Three Mile Plains Growth Centre to R-3 subject to the following:*

...

(b) *the lot is serviced, or is capable of being serviced, with municipal water and sewer;*

[Exhibit M-8, pp. 33-34]

[146] As noted above, Policy 5.3.7(h) incorporates Policy 16.3.1 as criterion for Council's consideration. Policy 16.3.1(a)(i) provides:

Policy 16.3.1 *In considering development agreements and amendments to the West Hants Land Use By law, in addition to the criteria set out in various policies of this Strategy, Council shall consider:*

(a) *whether the proposal is considered premature or inappropriate in terms of:*

(i) *the adequacy of sewer and water services;*

[Exhibit M-8, p. 111]

[147] The Board finds that Policy 16.3.1(a)(v) is also relevant to Council's second reason for refusal and it provides:

(v) *the financial capacity of the Municipality to absorb any costs relating to the development.*

[148] Staff provided an analysis of the relevant MPS criteria relating to servicing. This analysis was included in the June 13, 2024, Staff Report and was subsequently appended to the further staff reports submitted to Council, including the Staff Report September 2024. Staff advised that the subject lot could be served with Municipal sewer and water, but the sewer infrastructure would require two upgrades to the lift station near the subject property. The lift station, which also provides service to approximately 20 surrounding properties, would require a generator hook up so the lift station would continue to operate during a power outage. Also, the lift station would require an upgrade to the existing SCADA panel:

Policy 5.3.7 It shall be the policy of Council to consider rezoning land within the Three Mile Plains Growth Centre to R-3 subject to the following:

CRITERIA	COMMENT
(b) the lot is serviced, or is capable of being serviced, with municipal water and sewer	The Public Works Engineering Division stated that the lot is capable of being served with Municipal sewer and water. However, the sewer infrastructure will require two upgrades including a generator hook up for a lift station to be able to operate both pumps with full backup power and an upgrade to the existing SCADA panel to allow for a number of system monitoring functions (ie. generator run status, power source status, and level transmitter). These upgrades have been included as a requirement of the draft development agreement. The developer will be required to cover the cost of the generator hookup and the Municipality will cover the cost of the SCADA panel upgrade.

[Exhibit M-4, pp. 318-319]

[149] Staff commented on the financial capacity of the Municipality in their analysis:

Policy 16.3.1 In considering development agreements and amendments to the West Hants Land Use By-law, in addition to the criteria set out in various policies of this Strategy, Council shall consider:

CRITERIA	COMMENT
(a) whether the proposal is considered premature or inappropriate in terms of: (v) the financial capacity of the Municipality to absorb any costs relating to the development.	<u>The Public Works Engineering Division commented that they would cover the cost of the SCADA panel upgrade, as this upgrade would benefit not only the proposed development, but also surrounding properties which utilize municipal services.</u> This panel upgrade is necessary to support the monitoring and control of the systems which provide municipal services. The developer would be responsible for any other required upgrades. [Emphasis added]

[Exhibit M-4, p. 322]

[150] Section 2.9(b)(iii) of the draft Development Agreement sets out the upgrades to the lift station and the division of costs between Marchand and the Municipality. The Municipality would only pay for the cost of the new SCADA panel and Marchand would pay all other costs for the upgrades on the lift station, including the generator:

2.9 Servicing

(b) Water and Sewer Services

...

(iii) Except as may be varied by the Municipal Engineer in writing:

- a) The Owner shall install a generator hookup at the LS407 lift station and provide the Municipality with a fixed on-site generator. The electrical transfer panel must be a permanently dedicated (not portable) emergency generator and will need to be a turn-key package. This system must meet Municipal specifications for a full backup power to operate both pumps at full capacity. Installation will include a concrete pad for the generator and control wiring. The generator must be capable of automatically starting during a power interruption and must be connected into the Municipal Supervisory Control and Data (SCADA) system. Specifications and shop drawings shall be approved by WHRM before approval.
- b) The Owner shall upgrade the current SCADA panel to allow for additional input and output control including generator run status (on/off), fault indication, status of power source. The level transmitted must be permanently installed in wet well and connected to the Municipal SCADA system. The Department of Public Works will require confirmation of a SCADA connection and availability to connect and communicate with the Municipal system.
- c) All costs of the generator hook up will be the responsibility of the owner. The cost of purchasing the new SCADA panel will be the responsibility

of the Municipality. All installation costs associated with these requirements will be the responsibility of the Owner. [Emphasis added]

[Exhibit M-4, pp. 330-331]

[151] Raymond Rice, P.Eng., filed an expert report addressing the adequacy of Municipal water and sewer services. In his report, he notes that there is a water main on the Windsor Back Road which, according to the as-built information, will connect with a single connection. He discusses the hydrant flow test conducted by Aqua Data Atlantic in October 2023 which indicates there is sufficient capacity in the water system to support the development under fire flow conditions. Mr. Rice also addresses the adequacy of sewer services, noting that DesignPoint conducted both a downstream capacity analysis as well as a pump station capacity assessment. The downstream capacity analysis concluded that the downstream sewers have capacity to convey the additional flow from the proposed development [Exhibit M-11, p. 33, para. 4.3.2.4]. Further, the pump station capacity assessment concluded the pump station had capacity to convey the additional flows from the proposed development [Exhibit M-11, p. 34, para 4.2.4.8].

[152] In his report, Mr. Rice notes that the Municipality's Public Works Engineering Division stated that the subject lot was capable of being served with Municipal water and sewer. He says Section 2.9.(b)(i) of the draft Development Agreement requires that detailed design plans of the water and sewer servicing connections and layout shall be in accordance with the Municipal Services Specifications Manual and shall be submitted to the Municipal Engineer for approval prior to construction.

[153] In his report, Mr. Rice also discusses the lift station upgrades in Section 2.9(b)(iii) of the draft Development Agreement. He says that the upgrades are "not

needed to increase the pumping capacity of the station.” He notes that there is an existing generator connection to allow for station operation with a portable generator. He gives his opinion that “the installation of the generator at this lift station will improve the existing conditions with regard to emergency operations.” [Exhibit M-11, p. 34, 4.3.2 and 4.3.6].

[154] At the hearing, Mr. Rice testified that he did not believe that there was currently a SCADA panel at the lift station. He said the backup generator, which could provide emergency power and operate the lift station, could be installed without a SCADA panel. He testified that it was good practice to have the SCADA installed as it sent communications back to the operators, including as to whether the generator had turned on automatically as it should.

[155] Ms. Fuller testified at the hearing that Marchand believed the upgrades were beyond what was reasonable or required for the development agreement but ultimately agreed to pay for most of the upgrades in order to move the application forward. Mr. Rice testified that the breakdown of the cost agreement in the proposed Development Agreement requires Marchand to pay approximately 80% of the costs and the Municipality 20%. In November 2024, Marchand’s engineer estimated that the total costs would be in the range of \$50,000 to \$70,000.

[156] Marchand submits that Council’s refusal of its application on the grounds that there was no capacity or adequate sewer services, and that the pump station required upgrades, had no basis in evidence. Relying on DesignPoint’s findings, Mr. Rice’s expert opinion and staff’s determination, Marchand submits that there are no adequacy issues because no upgrades to water and sanitary servicing are required for the proposal to proceed. Marchand notes that in Mr. Rice’s expert opinion the upgrades, while

recommended, were not necessary as they were not needed to increase the capacity of the system. Marchand says that its in-house engineer concluded that installation of a permanent generator in the lift station was not required to support the proposed development during a power outage. Marchand argues that the existing lift station meets the Municipal standards to support its proposal during a power outage. Accordingly, Marchand says that the upgrades to the lift station are not required.

[157] Marchand says there was no evidence before Council, or on this appeal, indicating that municipal servicing was inadequate. To the contrary, all available information confirmed there was appropriate water servicing and capacity in both the downstream sewer and in the pump station for the proposed development.

[158] Marchand says that any argument that Council's decision to refuse the development agreement was because of the cost of the SCADA panel does not withstand scrutiny. The Appellant argues that the MPS provides no basis for denying the application for this reason and there is no evidence to support the assertion that this was a legitimate concern of Council. Marchand states that Council's decision on this point does not carry out the intent of the MPS.

[159] Marchand says that the upgrades to the lift station are not capacity upgrades; their purpose is for increasing the resiliency of the system during power outages. The Appellant says that staff reports, and the expert evidence confirm there is adequate capacity and resiliency in the sewer system pursuant to the Municipality's specifications. Notwithstanding this, Marchand notes that it agreed to pay the "vast majority" of the costs for these upgrades as a sign of good faith as it would benefit the entire area through the development.

[160] Marchand submits that it is notable that Council's refusal does not state that the servicing was inadequate or the upgrades were too costly. The Appellant says that there is no evidence that the proposed development is premature or inappropriate with respect to adequacy of sewer and water services.

[161] Marchand says that Policy 16.3.1 of the MPS allows the Municipality to consider the "financial capacity of the Municipality to absorb any costs relating the development", but Council did not cite this policy in their refusal reasons. The Appellant states that Staff never raised financial capacity as an issue. Marchand says that a review of the minutes from the Council Meetings discloses no evidence that this was a concern of Council in considering and refusing the application. Finally, the minutes of the Council Meeting on September 24, 2024 raised no concern about the cost of the SCADA panel, staff's agreement to pay for it, or concern with the financial ability of the Municipality to absorb the cost. The minutes only state that Council discussed "sewer and water capacity and overflow".

[162] Marchand says that if the Municipality decides not to pursue the upgrades negotiated by staff, then Section 2.9(b)(iii) of the draft Development Agreement gives the Municipal Engineer the authority to vary the terms of the upgrades. Therefore, in approving the draft Development Agreement, Council was not binding the Municipality to paying for the SCADA panel.

[163] The Appellant argues that the Municipality did not lead any evidence indicating the cost of a SCADA panel is outside of the authority of staff to negotiate and approve, or that the cost is such that the Municipality lacks the financial capacity to absorb it. Staff provided no comment that the Municipality is incapable of absorbing the cost of

the SCADA panel. Marchand says that it is disingenuous for the Municipality to now cite costs of the SCADA panel as a reason for refusal.

[164] The Appellant refers to the Board's decision in *Brison Developments (Re)*, 2024 NSUARB 81, about Council's consideration of costs as a reason for refusal:

[170] The Board agrees with Brison's submission that with respect to Policy IM-8(p), a rejection is not warranted just because there are potential infrastructure costs that following a re-zoning. There must be an impact on the Town's ability to absorb the costs.

[165] Marchand acknowledges that *Brison Developments (Re)* was in the context of rezoning where there was nothing in the MPS or the subdivision process which required the Town to spend money on the infrastructure. The Appellant argues that *Brison* is applicable for the principle that while Council can consider costs, there is not unlimited discretion to refuse applications because of infrastructure costs that may follow. Council's decision to refuse to absorb a cost must be grounded in an MPS policy.

[166] The Municipality says that the Municipality's Director of Public Works, Todd Richard, determined that upgrades were required. The Municipality notes that Mr. Rice agreed the upgrades were prudent and recommended. The Municipality argues that the Director of Public Works had no authority to bind Council to cost-sharing in the draft Development Agreement. The Municipality says that the cost-sharing clause in the draft Development Agreement is a budgetary decision that is outside of the Board's scope of review. The Municipality says that Council has the final decision on whether it will pay any costs, from \$1 to \$1 million, associated with the proposed development.

[167] The Board finds that it is not necessary to determine whether the upgrades to the lift station were necessary or not for the proposed development to proceed. The Municipality and Marchand agreed to include a section in the draft Development

Agreement that required these upgrades to the lift station. The agreement set out the cost-sharing arrangement where the Municipality will pay for the cost of the new SCADA panel and Marchand will pay all of the remaining costs, including installation of the SCADA panel and the purchase and installation of the back-up generator for resiliency of the system during power outages.

[168] The Board notes that Policy 16.3.1(v) provides that the Council shall consider the “financial capacity of the Municipality to absorb any costs relating to the development”. The Board finds that as this is an MPS policy, the Board may review costs to determine the Municipality’s financial capacity to absorb the costs of purchasing the new SCADA panel. The Board notes that while Council did not rely on Policy 16.3.1(v) in its reasons for refusal, the Board will consider it. There was no evidence before the Board about the exact cost of these upgrades. Marchand’s engineer in his November 2024 communications estimated that the costs would be in the range of \$50,000 to \$70,000. Mr. Rice in his testimony gave no dollar amount but opined that the cost-sharing would have Marchand paying around 80% of the costs and the Municipality the remaining 20%. The Municipality provided no evidence as to the cost of the upgrades.

[169] In the Staff Report dated June 13, 2024, which was before Council in its September 2024 meeting, staff considered Policy 16.3.1(v) and raised no concern about the Municipality’s ability to absorb the financial cost of purchasing the SCADA panel because the Public Works Division indicated that they were agreeable to covering this cost. The Municipality provided no evidence which suggested that the Municipality lacked the financial ability to absorb this cost. The Board also notes the Municipality did not direct

the Board to policies in the MPS that require that there will be no cost to the Municipality when agreeing to enter a development agreement.

[170] The Board finds on the evidence before it that the water and sewer system had adequate capacity for the proposed development when functioning with full power. The Board further finds that the lift station upgrades are intended to improve resiliency of the system during power outages for the proposed development as well as benefitting those surrounding dwellings serviced by this lift station.

[171] The Board finds that there was no evidence before it to determine that the Municipality could not absorb the financial cost of purchasing the upgraded SCADA panel for the lift station. As such, the Board finds that cost-sharing for upgrades to the lift station in the draft Development Agreement is not contrary to Policy 16.3.1.

[172] Section 252(2) of the *MGA* prohibits the Board from making any decision that commits Council to make any expenditures with respect to a development. Accordingly, under its power in s. 251(c) of the *MGA*, the Board directs that the Section 2.9(b)(iii)b) of the draft Development Agreement is amended as follows:

2.9 Servicing

...

(b) Water and Sewer Services

...

(iii) Except as may be varied by the Municipal Engineer in writing:

b) The **Municipality may require the** Owner **~~shall to~~** upgrade the current SCADA panel to allow for additional input and output control including generator run status (on/off), fault indication, status of power source. The level transmitter must be permanently installed in wet well and connected to the Municipal SCADA system. The Department of Public Works will require confirmation of a SCADA connection and availability to connect and communicate with the Municipal system.

[173] Taking into account all of the foregoing, the Board finds that Council's decision to refuse the draft Development Agreement on the basis of the adequacy of the Municipal water and sewer services to the subject lot, and the necessary upgrades to the pump station required to support this proposal, was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

6.4 Potential Flooding from Stormwater Displacement

[174] Council's third reason for refusing Marchand's application was that the subject property has a "wet and marshy character" which "could displace stormwater and be susceptible to flooding" which could increase the chance of negative impacts on abutting lots "due to the impervious surfaces proposed", contrary to Policy 16.3.1(f).

[175] Policy 16.3.1(f) provides:

Policy 16.3.1 *In considering development agreements and amendments to the West Hants Land Use By-law, in addition to the criteria set out in various policies of this Strategy, Council shall consider:*

...

(f) the suitability of the area in terms of steepness of grade, soil and geological conditions, location of water courses or wetlands, and susceptibility of flooding;

[Exhibit M-8, p. 111]

[176] The Staff Report September 2024 provided an analysis of the relevant MPS criteria relating to servicing which concluded that the proposed development met the criteria of Policy 16.3.1(f) as the subject property was relatively flat, Nova Scotia Department of Environment and Climate Change confirmed there was not a watercourse on the property and a stormwater management plan would be required at the permitting phase of the development:

Policy 16.3.1 *In considering development agreements and amendments to the West Hants Land Use By-law, in addition to the criteria set out in various policies of this Strategy, Council shall consider:*

CRITERIA	COMMENT
(f) the suitability of the area in terms of steepness of grade, soil and geological conditions, location of water courses or wetlands, and susceptibility of flooding.	<u>The subject lot appears relatively flat.</u> The developer had submitted a Watercourse Assessment and Species at Risk Screening report prepared by McCallum Environmental Ltd. This report was prepared in response to concerns from the public regarding the drainage ditch on the property and the potential for species at risk to be present on the subject lot. <u>The report determined that the drainage ditch on the subject lot does not constitute a watercourse,</u> based on the parameters used to identify watercourses by the Nova Scotia Department of Environment and Climate Change. This was confirmed by a staff member through a phone call with the Province. The developer plans to adhere to the recommendations of the report regarding mitigating potential impacts on species at risk. <u>A stormwater management plan will be required at the permitting phase of the development.</u> [Emphasis added]

[Exhibit M-4, p. 323]

[177] Section 2.8(a) of the draft Development Agreement states that no development permit will be issued until the Municipal Engineer is satisfied that the stormwater management plan “has considered historical flooding patterns and area drainage systems” and that “storm water discharge will balance pre- and post-construction flows to ensure there is no negative impact on downstream properties.” Further, this section states that if Marchand’s stormwater plan does not actually balance “pre-and post-construction flows to ensure absence of such impacts”, then Marchand must “undertake such remediation as the Municipal Engineer may reasonably require” [Exhibit M-4, p. 330].

[178] Section 2.8(b) of the draft Development Agreement requires that all the construction activities comply with all applicable environmental legislation:

(b) The Owner shall undertake all construction activities in accordance with an erosion and sedimentation control plan prepared by a Professional Engineer, unless otherwise directed by Nova Scotia Environment, and also agrees to assume sole responsibility for compliance with all regulations of Nova Scotia Environment.

[Exhibit M-4, p. 330]

[179] As part of its application, Marchand submitted a preliminary DesignPoint stormwater servicing review which concludes that there are several engineering design options that can account for the stormwater flow on the site to balance pre- and post-development. It also included a preliminary servicing concept plan. Municipal Staff accepted DesignPoint's report and noted in their reports to Council that detailed stormwater management plans would be required at the permitting stage. In confirming the proposed development's compliance with the general criteria for development agreements, staff noted the Municipal Project Engineer, among others, has "no concerns which have not been addressed in the Development Agreement." [Exhibit M-4, p. 313].

[180] In his expert report, after reviewing the DesignPoint report and visiting the site, Mr. Rice concludes that "the development can be designed and constructed in such a way to balance pre-development and post-development flows and to eliminate the risk of flooding." [Exhibit M-11, p. 39, 6.5]. In his report, Mr. Rice also notes that he examined the existing culvert under the Windsor Back Road which conveys flows generated by the subject property and several other abutting properties. He found the culvert to be partially blocked and collapsed. He notes that the Nova Scotia Department of Public Works is responsible for the maintenance of the culvert. He says that proper maintenance of the culvert "would alleviate, at least partially, some of the previously observed drainage issues and mitigate any potential localized flooding." [Exhibit M-11, p.39, 5.1.13.7].

[181] Marchand called Mr. Rice to provide rebuttal evidence for elements of the residents' testimony, including where the water runs to and from each resident witness' property. Mr. Rice testified that he had considered the contours of the land in the area when considering stormwater runoff issues. He explained that part of an analysis of a

stormwater management plan required identification of watersheds where the water pools as it drains from the subject property. He testified that the water from the subject property runs away from the resident witnesses' properties, into the drainage ditch and then out to the culvert.

[182] Marchand submits that the draft Development Agreement has mandatory controls requiring a detailed stormwater management plan that balances pre and post development flows. Without the Municipal Engineer's approval, no development permit will be granted. Further, the Municipal Engineer has remedial powers to ensure that the plans in fact balance stormwater flows. The Appellant must comply with all the applicable environmental legislation, by-laws and regulations during permitting to ensure the surrounding environment is not negatively impacted. Marchand says that there is no evidence before the Board that there are inadequate controls in place for stormwater management or that the applicable legislative and regulatory measures will be inadequate to appropriately manage stormwater.

[183] Marchand says that, further to the Board's decision in *Armco (Re)*, where measures are in place to ensure management of stormwater, and there is no evidence before the Board suggesting the measures will be inadequate, denial on this basis does not carry out the intent of the MPS. Marchand says that Council, as a lay body, is not equipped to conclude that the subject property has a wet and marshy character which "could displace stormwater and be susceptible to flooding". The Appellant says that this statement is not based on any engineering evidence before Council.

[184] The Municipality submits that there is a "plethora" of evidence that the stormwater measures may be inadequate to address flooding concerns in the area of

Three Mile Plains. The Municipality provided no expert testimony or staff testimony to support its position. The Municipality relies on the residents' testimony, none of whom were qualified as experts, about rainfall, stormwater and property damage. The Municipality also relies upon extracts from the minutes of Council's meeting where:

Councillor Hart described the area as a "drainage corridor". Councillor Ivey commented on the already "existing water and sewage issues" in the area. Councillor Francis identified an existing development in the area subject to a development agreement that is "causing flood issues already."

[Exhibit M-4, pp. 97-98]

[185] Based on this evidence, the Municipality asserts that: (1) the area is already susceptible to flooding and evacuation orders during heavy rainfall events which are becoming more frequent; (2) the requirements of Section 2.8 in the draft Development Agreement for site drainage are insufficient to address these issues, including a 1 in 200-year storm; and, (3) Section 2.8 does not sufficiently address and mitigate potential negative impact of site drainage on residents and properties, if the proposed development were built. The Municipality also relies on the testimony of Mr. Rice who stated that the July 2023 rainfall event in Three Mile Plains was a storm that fell outside of the 1 in 100-year design standards.

[186] As noted in various decision of the Board and the Courts, Council is entitled to rely on municipal, provincial and federal authorities for compliance with various potential environmental issues, including but not limited to water, wastewater, stormwater, soil erosion, grade, etc., see, for example, *Bennett v. Kynock*, (1994) 1994 NSCA 114; *Fryday et al. v. Halifax Regional Municipality*, 2007 NSUARB 97; *Cameron (Re)*, 2021 NSUARB 8; *Tawil (Re)*, 2022 NSUARB 95; and *Brison Developments Ltd. (Re)*, 2024 NSUARB 81.

[187] Similarly, Council cannot ignore the mandatory controls provided by the various levels of government (*Armco (Re)*, paras 71-72). Under the draft Development Agreement, Marchand must prepare and submit a stormwater management plan for approval by the Municipality. The plan must show that it considered historical flooding patterns and area drainage. Also, under the plan, pre-development and post-development stormwater discharge values must balance. Additionally, Marchand must follow the applicable environmental legislation.

[188] The Board notes that the Municipality did not call evidence to challenge Public Works' positive recommendation for the proposed development. The Municipality did not file any expert engineering evidence challenging DesignPoint's preliminary assessment of stormwater management, staff's recommendation or Mr. Rice's expert opinion. While the Municipality refutes the adequacy of an assessment that does not use a 1 in 200-year design storm instead of a 1 in 100-year storm design, Mr. Rice's uncontradicted testimony was that the use of a 1 in 100-year design storm in DesignPoint's report was the requirement set by the Municipality.

[189] The Board finds that stormwater management was addressed by Marchand with DesignPoint report's preliminary stormwater management plan. Staff considered this report and the draft Development Agreement provisions address on site drainage and staff concluded that stormwater had been satisfactorily addressed in the proposed Development Agreement.

[190] Council's concern about the impact of stormwater management ignores the mandatory controls in the draft Development Agreement, other municipal legislation and provincial environmental legislation. Nothing in the information presented to the Board

suggests that these requirements would be inadequate. Taking into account all of the foregoing, the Board finds that Council's decision to refuse the draft Development Agreement on the basis that the proposed development could displace stormwater and be susceptible to flooding, potentially increasing the chance of negative impacts on abutting properties, was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

7.0 CONCLUSION

[191] Council provided three reasons for refusing the application: 1) the proposed development was not compatible with the character of the area with respect to the scale, design and density, "specifically with respect to compatibility with the pattern of existing single unit dwellings on large lots surrounding" the subject property; 2) the Municipality's existing water and sewer services to the subject property were not adequate and upgrades to the pump station were required to support this proposal; and 3) the potential for flooding caused by stormwater displacement from the proposed development could increase the chance of negative impacts on abutting properties.

[192] For the reasons set out above, the Board finds that Council's decision to reject the Appellant's application for a development agreement is not reasonably consistent with the MPS. The Board finds that Council made a factual error in assessing the compatibility of the proposal when it determined that there was "an existing pattern of single unit dwellings on large lots surrounding" the subject property. The Board finds that the existing water and sewer services to the subject property are adequate and the cost-sharing for upgrades to the lift station is not contrary to Policy 16.3.1. Finally, Council's concern about the impact of stormwater management ignores the mandatory controls in

the draft Development Agreement, other municipal legislation and provincial environmental legislation.

[193] The Appellant has met the burden of showing, on a balance of probabilities, that Council's decision refusing to approve the development agreement was not based upon an interpretation of the policies of the MPS as a whole that the MPS can reasonably bear.

[194] Further to s. 251(c) of the *MGA*, the Board directs that the Section 2.9(b)(iii)b) of the draft Development Agreement is amended as follows:

2.9 Servicing

...

(b) Water and Sewer Services

...

(iii) Except as may be varied by the Municipal Engineer in writing:

b) The **Municipality may require the** Owner **shall to** upgrade the current SCADA panel to allow for additional input and output control including generator run status (on/off), fault indication, status of power source. The level transmitter must be permanently installed in wet well and connected to the Municipal SCADA system. The Department of Public Works will require confirmation of a SCADA connection and availability to connect and communicate with the Municipal system.

[195] Accordingly, the appeal is allowed. The Board directs Council to approve the draft Development Agreement as amended by this Decision.

[196] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 29th day of May, 2025.



M. Kathleen McManus