DECISION **2025 NSRAB 12**
M11892

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **GEORGE TSIMIKLIS** from a decision of the Halifax Regional Centre Community Council on September 4, 2024, approving amendments to the Regional Centre Land Use By-law affecting various properties located in Halifax, Nova Scotia

BEFORE:	Bruce H. Fisher, MPA, CPA, Member
APPELLANT:	**GEORGE TSIMIKLIS** Michael C. Moore, Counsel
HEARING DATE(S):	December 18, 2024
FINAL SUBMISSIONS:	February 19, 2025
DECISION DATE:	**April 16, 2024**
DECISION:	**Appeal is dismissed.**

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1.0 INTRODUCTION AND BACKGROUND

[1] George Tsimiklis appealed a decision made by Halifax Regional Municipality's Regional Centre Community Council (RCCC), to amend the Regional Centre Land Use By-law (LUB), to the Nova Scotia Utility and Review Board. That board was succeeded by the Nova Scotia Regulatory and Appeals Board on April 1, 2025, on proclamation of the *Energy and Regulatory Boards Act*.

[2] He was represented by Michael C. Moore. Mr. Tsimiklis did not appear at the hearing, but oral evidence was given by his brother, Stavros Tsimiklis. References to Mr. Tsimiklis in this document may refer to either brother, depending on the context. As he did not request, and was not qualified as such, I did not allow Mr. Stavros Tsimiklis to provide opinion evidence on planning issues. I allowed him to comment on financing issues as they related to his brother's properties.

[3] Halifax Regional Municipality (HRM) was represented by Kelsey Nearing. Joshua Adams, a principal planner for HRM, testified as an expert witness. He was qualified as an expert in land use planning, capable of giving expert opinion evidence in land use planning matters, including intent, interpretation, application of the Regional Municipal Planning Strategy (MPS), Regional Centre Secondary Municipal Planning Strategy (SMPS), and the Regional Centre LUB.

[4] The HRM MPS is the primary MPS for HRM. It authorizes the creation of the SMPS and Land Use By-Law. These were adopted in a series of decisions starting in the Fall of 2019 and were fully adopted by the Fall of 2021. The SMPS creates the Established Residential (ER) designation and five ER zones. The LUB lists the permitted uses for the ER and other Zones.

[5] Two minor housekeeping reviews of the LUB occurred in 2022. A major LUB review, in support of the Municipality's Housing Accelerator Fund (HAF), was enacted in June 2024. This included rezoning basically every ER-1 property to ER-2 or ER-3. Mr. Tsimiklis' ER-1 properties on Young Avenue were moved to the ER-2 Zone. In addition, on September 4, 2024, the RCCC made a series of amendments to the LUB that covered 11 different areas (Amendment(s)). The staff report to the Community Council described the Amendments as "drafting errors" as well as "other changes that were identified as part of routine housekeeping."

[6] Mr. Tsimiklis appealed as an aggrieved person under s. 262(1) of the *Halifax Regional Municipality Charter*. He listed 16 properties in the Regional Centre that he asserted were affected by the Amendments. Based on his appeal, these properties can be clustered into three groups:

- #3050 Gottingen Street and #1596 Robie Street are in the Corridor Zone. Each property abuts the ER-3 zone.
- Five MacLean Street properties (#864, #866, #870, #876 and #880) are zoned as ER-3 and designated as part of the Young Avenue Special Area (YA).
- Nine vacant Young Avenue properties (#819, #823, #829, #835, #849, #853, #857, #863 and Lot 5P) are zoned as ER-2 and designated as part of the Young Avenue Sub-Area A (YA-A).

[7] Mr. Tsimiklis appealed three of the 11 LUB amendments. The specific amendments that he appealed are:

- Restoring limitations for balcony encroachments into an ER or Park Zone, principally affecting the two Corridor properties.

- Exempting low-density residential uses (1-4 units) from the maximum building dimensions, principally affecting the five MacLean Street properties.
- Maintaining unique conditions within the Young Avenue Special Area and Sub-Area, principally affecting the Young Avenue properties.

[8] I have not reviewed or considered the remaining eight amendments except where they specifically related to this appeal.

[9] Mr. Tsimiklis provided diagrams and explanations about the effect of the Amendments on the 16 properties. Much of his evidence focused on how change(s) in the LUB could disadvantage Mr. Tsimiklis' business interests, or those who might occupy a dwelling he constructs. This evidence is not sufficient in itself to demonstrate that the Amendments do not reasonably carry out the intent of the MPS and the SMPS.

[10] The arguments and discussions in this matter can be complex and involve many detailed LUB sections. To succeed in this appeal Mr. Tsimiklis must demonstrate, on a balance of probabilities, that the Amendments do not carry out the intent of the MPS. The Appellant argued that LUB amendments on balcony encroachments, maximum building dimensions and Young Avenue unique conditions, did not carry out the intent of Policy S-30 and Policy S-39 in the MPS.

- I have concluded that Policy S-30 does not apply to LUB amendments. Even if it were determined that Policy S-30 applied, the Appellant failed to show that HRM did not consider the relevant issues outlined in Policy S-30.
- Policy S-39 requires HRM to permit shared housing at a "scale and density that is compatible with the intent" of the zone. The Appellant failed to elaborate on any such compatibility issues. Based on the evidence I have

concluded that the LUB Amendments permit shared housing consistent with the intent of the MPS.

2.0 BOARD'S JURISDICTION

2.1 Board's Jurisdiction

[11] The *Halifax Regional Municipality Charter,* S.N.S. 2008, c. 39 (*Charter*) authorizes the Board to hear appeals from Council decisions to amend a Land-Use By-law, but the Board's authority is limited. Under s. 265(1)(a) of the *Charter*, an appellant may only appeal the amendment of a land-use by-law on the grounds that the decision of the council "does not reasonably carry out the intent of its municipal planning strategy." Similarly, the Board may only allow an appeal if it determines that Council's decision does not reasonably carry out the intent of the strategy (s. 267(2)).

[12] The burden of proof is on an Appellant to show, on a balance of probabilities, that Council's decision to amend the LUB does not reasonably carry out the intent of the MPS. The Board is not permitted to substitute Council's decision with its own. The Board's mandate is restricted to the jurisdiction conferred upon it by the *Charter*.

[13] The extent of the Board's jurisdiction in planning appeals under predecessor legislation was described in *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, 1994 NSCA 11:

> [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 bylaws in a vacuum. In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. ...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] I turn back to the question of what is the intent of the Plan? There is no single intent. Primarily it is to control development of land. This is done by the establishment of policies, many of which are inherently in conflict… Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review of enacting s.78(6) of the *Planning Act.* The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course, by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are to be made. The Plan must be made to work. A narrow legalistic approach to the meaning of policies would not be consistent with the overall objective of the municipal planning strategy.

[14] The Court of Appeal has confirmed that the Board cannot impose its own interpretation of a MPS; that a municipal council's decision is entitled to deference as long as it reasonably reflects the intention of its strategy; that there may be more than one reasonable interpretation of a strategy; and that the strategy must be looked at as a whole.

[15] In *Archibald v. Nova Scotia (Utility and Review Board),* 2010 NSCA 27, Fichaud, J.A., summarized the principles that apply to the Board's review of municipal council decisions in planning appeals:

> [24] The Board then [¶51-62] recounted the provisions of the MGA [*Municipal Government Act*] and passages from decisions of this court that state the principles to govern the Board's treatment of an appealed planning decision. I will summarize my view of the applicable principles:
>
> > (1) The Board usually is the first tribunal to hear sworn testimony with cross-examination respecting the proposal. The Board should undertake a thorough factual analysis to determine the nature of the proposal in the context of the MPS and any applicable land use by-law.
> >
> > (2) The appellant to the Board bears the onus to prove the facts that establish, on a balance of probabilities, that the Council's decision does not reasonably carry out the intent of the MPS.
> >
> > (3) The premise, stated in s. 190(b) of the *MGA*, for the formulation and application of planning policies is that the municipality be the primary steward of planning, through municipal planning strategies and land use by-laws.
> >
> > (4) The Board's role is to decide an appeal from the Council's decision. So the Board should not just launch its own detached planning analysis that disregards the Council's view. Rather, the Board should address the Council's conclusion and reasons and ask whether the Council's decision

does or does not reasonably carry out the intent of the MPS. Later (¶ 30) I will elaborate on the treatment of the Council's reasons.

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

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

(7) When planning perspectives in the MPS intersect, the elected and democratically accountable Council may be expected to make a value judgment. Accordingly, barring an error of fact or principle, the Board should defer to the Council's compromises of conflicting intentions in the MPS and to the Council's choices on question begging terms such as "appropriate" development or "undue" impact. By this, I do not suggest that the Board should apply a different standard of review for such matters. The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. But the intent of the MPS may be that the Council, and nobody else, choose between conflicting policies that appear in the MPS. This deference to Council's difficult choices between conflicting policies is not a license for Council to make ad hoc decisions unguided by principle. As Justice Cromwell said, the "purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council's authority should be exercised" (Lewis v. North West Community Council of HRM, 2001 NSCA 98 (CanLII), If 19). So, if the MPS' intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council's decision reasonably bears that intent.

(8) The intent of the MPS is ascertained primarily from the wording of the written strategy. The search for intent also may be assisted by the enabling legislation that defines the municipality's mandate in the formulation of planning strategy. For instance, ss. 219(1) and (3) of the MGA direct the municipality to adopt a land use by-law "to carry out the intent of the municipal planning strategy" at "the same time" as the municipality adopts the MPS. The reflexivity between the MPS and a concurrently adopted land use by-law means the contemporaneous land use by-law may assist the Board to deduce the intent of the MPS. A land use by-law enacted after the MPS may offer little to the interpretation of the MPS.

[25] These principles are extracted from the decisions of this court in: *Heritage Trust*, ¶ 77-79, 94-103,164; *Lewis v. North West* ¶19-21; *Midtown Tavern*, ¶ 46-58, 81,85; *Can-Euro Investments,* ¶ 26-28, 88-95; *Kynock v. Bennett* (1994), 1994 CanLII 4008 (NS CA), 131 N.S.R. (2d) 334, ¶ 37-61; *Tsimiklis v. Halifax (Regional Municipality),* 2003 NSCA 30 (CanLII) ¶ 24-27, 54-59, 63-64; 3012543 *Nova Scotia Limited v. Mahone Bay Heritage and Cultural Society*, 2000 NSCA 93 (CanLII), ¶ 9-10, 61-64, 66, 84, 86, 89, 91-97; *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality),* 2004 NSCA 59 (CanLII), ¶ 26.

[16] To determine the intent of a MPS, the Board must look to the specific policies which apply to the proposal. Previous decisions of the Court of Appeal and the Board make it clear that the Board must look at the policy provisions and interpret their meaning in a liberal, purposive manner. However, the Board is not to limit itself to specific policies. The Board must consider the entire MPS to determine its intent.

2.2 Statutory Interpretation

[17] The interpretation of a municipal planning strategy follows a well-recognized approach to statutory interpretation described by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament

[18] In a more recent judgment, *Sparks v. Holland,* 2019 NSCA 3, the Nova Scotia Court of Appeal affirmed the ongoing use of the modern principle to interpret legislation:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act,* the object of the *Act,* and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd.(Re),* [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite,* 2012 NSCA 20, and more recently, in Tibbetts. In summary, the *Sullivan* questions are:

1. What is the meaning of the legislative text?

2. What did the Legislature intend?

3. What are the consequences of adopting a proposed interpretation?

[19] The Board applies the modern approach to statutory interpretation outlined in *Rizzo & Rizzo Shoes* when considering municipal planning strategies and land-use by-laws (e.g., *Re Monkman*, 2019 NSUARB 167; *Re Legros*, 2019 NSUARB 148). The use of this approach to interpret municipal legislation has also been accepted in judicial proceedings (e.g., *J & A Investments Ltd. v. Halifax (Regional Municipality)*, [2000] N.S.J. 92 (S.C.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19; *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*, 2017 NSCA 72).

[20] A MPS is typically made up of its enumerated policies, as well as background information and general statements of principle in preamble to the policies. This additional information provides context for the policies and may be considered by the Board in its review. While a municipal council is guided by the policy itself, a preamble to the policy may identify a problem that the policy is intended to solve, as stated by Oland, J.A., in *Can-Euro Investments Ltd. V. Nova Scotia (Utility and Review Board)*, 2008 NSCA 123:

> [47] Moreover, the statement regarding access upon which Can-Euro relies is not found within Policy H-18 itself, but only in its preamble. A preamble to a policy may provide context for understanding the policy; however, it is the policy itself that guides council. In *Kynock v. Bennett*, 1994 NSCA 114 (CanLII), 1994 CanLII 4008 (NS CA), [1994] N.S.J. No. 238 (Q.L.), 131 N.S.R. (2d) 334 (C.A.), the respondent referred to the preamble to a policy in arguing that the Board failed to consider a factor. This Court stated:
>
> > [43] With respect, the council was required to have regard to those matters set out in Policy P-24 in determining whether or not to approve a quarry operation in a mixed use area. The preamble merely identified what problems have given rise to the need for controls but it is Policy P-24 which spells out the matters that Council is to consider. ...
>
> See also *King's (County) v. Lutz*, 2003 NSCA 26 at ¶ 50.

> [48] In my view, in determining whether Council's approval of the Agreement reasonably carries out the intent of the MPS, the Board did not commit any error of law in its approach to the weight, if any, to be given to the preamble to Policy H-18.

[21] The Board must also have regard to the *Interpretation Act,* R.S.N.S. 1989, c. 235, including s. 9(1) and 9(5):

> 9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

3.0 LIMITATIONS ON BALCONY ENCROACHMENTS

[22] Part V, Chapter 1 of the LUB provides general built form and siting requirements for properties in the Regional Centre. Section 94.5 of Chapter 1 includes the general requirements for the encroachment of balconies into setbacks. Its provisions depend on the type of building and the zoning of the lot line it faces.

[23] Prior to the Amendments, s. 94.5(3) allowed the properties owned by Mr. Tsimiklis to encroach into setbacks, stepbacks, and separation distances, to a maximum of 1.5 m at the ground floor and 2.0 m above the ground floor. The Amendments repealed the relevant subsection 94.5(3) and added subsections 94.5(4), 94.5(5) and 94.5(6). Subsection 94.5(5) says in part "… a balcony or unenclosed porch shall not encroach into a required setback or stepback, if it faces a lot line that abuts a lot containing an ER-3, ER-2, ER-1, CH-2, CH-1, PCF, or RPK zone" [Emphasis added].

[24] Mr. Tsimiklis' Young Avenue and Maclean Street properties are ER-2 and ER-3 respectively and back onto each other. His Gottingen Street and Robie Street properties are zoned as Corridor properties but back onto ER-3 properties. A rear balcony or unenclosed porch on those properties, therefore, would face a lot line containing one of the identified zones.

3.1 Evidence and Submissions

[25] Stavros Tsimiklis testified about the impact of the change to the encroachment rules. He discussed how that would affect a hypothetical building on his brother's Robie Street property, emphasizing that the measurements he used were for "simplicity sake" and drawing diagrams to illustrate his points. He often rounded his measurements and measured in ft., whereas the LUB used the metric system. (I have included the metric equivalent in some of the discussion). His Robie Street property is roughly 95 ft. deep and 70 ft. wide. Based on setbacks, prior to the Amendments, a potential building could measure roughly 70 ft. deep and 50 ft. wide and nine stories high. On the rear side of the building two balconies could jut out, encroaching roughly eight to 10 ft. into the setback. Hence, there would be roughly 3,500 ft^2 per floor (50 ft. * 70 ft.) plus about 200 ft^2 per balcony (20 ft. * 10 ft.). He could get as many as four bachelor apartments on one floor. He clarified this is not an exact number as:

- there would be a mix of different sized units,
- there is a requirement for a certain number of two-bedroom apartments,
- the bank needs to be satisfied with the proposal, and
- there are common spaces, hallways and elevators to contend with.

[26] Using his hypothetical example, Mr. Tsimiklis asserted that preventing a balcony encroaching on the setback meant that the size of that potential building would shrink. He argued that instead of a building floor plate that is 70 ft. deep and 50 ft. wide

with balconies jutting out, the building would be scaled back to 60 ft. deep and 50 ft. wide, allowing 10 ft. for the balconies to jut out. This would eliminate 400 to 500 ft. per floor. He insisted that in the current rental market balconies were a necessity, saying “You can't have a 2,000 square foot apartment and no balconies…”. He opined that individuals needed exterior balconies.

> But by having these out, you require the balconies because they're more desirable into the market. The market ... most of those, as you can see now ... Spring Garden Road. The Mills there. Ample balconies. It's just ... people need it now for ... I guess for lifestyle. They need to ... you know, different reasons. They need larger balconies in order to ... also, you have to be marketing, and we started building over there outside the (inaudible) Queens Marque. They all have balconies. People need ... I've been in the market here 45 years, and you have to put a product out that has to be rentable. And if you ... it's all driven by square feet. And this is pushing it, the affordability down and the unit down.
>
> [Transcript, pp. 26-27]

[27] Mr. Tsimiklis was questioned about the cost savings from constructing a smaller building. He stated that the cost savings were minimal and that while there were some savings in materials, costs were not linear. There were fixed costs such as elevators and staircases and the foundation still needs to be poured and framed.

[28] Mr. Tsimiklis insisted that the encroachment could affect a lot, saying that

> This thing here, this building, if it doesn't generate that much revenue you lose 500 square feet and you don't rent it the building is worth less money. Anybody can figure that one out. I can tell you that right now. If it's less building you're going to get less money and less units. You can't get as much revenue.
>
> [Transcript, p. 37]

[29] The Appellant’s written submission concluded that

> … as prospective tenants prefer exterior projecting balconies the Appellant submits that the amendment to the LUB will result in fewer units being constructed on# 1596 Robie and similarly on # 3050 Gottingen, that the monthly rent to be charged for units will be greater than the rents that would have been charged for units constructed before the amendment to the LUB, that the amount of rents charged to prospective tenants will be less affordable. to prospective tenants and due to the reduced building sizes resulting in fewer units there

> will be less of a mix of housing including shared housing should the amendment become effective;
>
> [Appellant's Written Submissions, p. 4]

[30] HRM Counsel did not cross-examine Mr. Tsimiklis at the hearing. In her closing submission she stated that no "market evidence was provided to support the claim that this amendment will impact profitability of development on his properties". The expert report submitted by Mr. Adams noted that:

> It is also important to note that this proposed change does not negatively impact the density of any given property because the transition requirements, which are expressed in terms of required setbacks and stepbacks, are not being increased. The proposed change simply seeks to reaffirm that balconies are not permitted encroachments into required setbacks and stepbacks in cases where development is occurring next to an Established Residential or Park Zone. A building can be designed with no balconies where it is located at the minimum required setback or stepback in these instances, which does not impact the overall number of units that can be provided in the building.
>
> [Exhibit T-7, pp. 13-14]

[31] The Appellant stated in his submission that tenants prefer exterior balconies and discussed the impact on Mr. Tsimiklis' Robie Street and Gottingen Street properties. He argued that the changes to balcony encroachments would lead to 15% fewer units, making it "more difficult to offer a wider range of housing types to prospective tenants" and leading to higher rents which were "less affordable".

[32] He stated that, for those reasons, "the amendment to the LUB does not reasonably carry out the intent of Halifax Regional MPS i.e. Policy S-30 (a) and (d)".

[33] Policy S-30 is found in Section 3.6 "Housing Diversity and Affordability" (Chapter 3, "Settlement and Housing") of the MPS. It states:

> S-30 <u>When preparing new secondary planning strategies or amendments to existing secondary planning strategies to allow new developments, means of furthering housing affordability and social inclusion shall be considered including:</u>
>
> a) <u>creating opportunities for a mix of housing types within designated growth centres and encouraging growth in locations where transit is or will be available</u>;

> b) reducing lot frontage, lot size and parking requirements;
>
> c) permitting secondary and backyard suites in all residential areas; (RC-Sep 1/20;E-Nov 7/20)
>
> d) permitting shared housing uses of a scale compatible with the surrounding neighbourhood in all areas where residential uses are permitted and minimizing additional requirements beyond those for residential uses; (RC-Aug 9/22;ESep 15/22)
>
> e) Deleted (RC-Aug 9/22;E-Sep 15/22);
>
> f) introducing incentive or bonus zoning in the Regional Centre;
>
> g) allowing infill development and housing densification in areas seeking revitalization; and,
>
> h) identifying existing affordable housing and development of measures to protect it [emphasis added]
>
> [Exhibit T-8, p. 56]

[34] The Municipality filed written evidence and submissions including an expert report by Joshua Adams, a planner with HRM. Collectively, HRM made several points.

[35] First, HRM noted that the Amendments preventing balconies from encroaching into the setback corrected a recent drafting error. Mr. Adams explained in his expert report that:

> … when Regional Centre LUB came into effect in 2021, Section 94 was written in a way that did not permit balcony encroachments into a required setback or stepback when a property was abutting an Established Residential or Park Zone. A separate change to the LUB in 2024 (Case 00462) was drafted with the intent of maintaining this separation, but a drafting error has led to a challenge of interpretation by some applicants looking to develop their properties. The proposed change is intended to give clear direction that balcony encroachments are not permitted into required setbacks and stepbacks in these circumstances
>
> [Exhibit T-7, p. 13]

[36] Second, the Respondent pointed out that Policies S-30 and S-39 are located in the MPS, not the SMPS. The MPS, they stated, is relevant to the extent that

> 1. it is necessary or helpful to the interpretation of relevant sections of the SMPS, and
> 2. it contains policies that directly inform the enactment and amendment of the LUB.
>
> [Respondent's Closing Submissions, p. 5]

They go on to elaborate that:

> … the SMPS is not the subject of this appeal. Rather, the amendments in question are amendments to the LUB. S-30, which directs preparation and amendment of the SMPS, has no direct application to the issue on appeal.
>
> [Respondent's Closing Submissions, p. 5]

Irrespective, they noted that "there is no evidence that these considerations [in Policy S-30] were not adequately addressed in the creation or amendment of the SMPS."

[37] The submissions from HRM and the expert report of Mr. Adams insist that the amendments that disallow balcony encroachments into setbacks are supported by specific provisions of the SMPS. For that support they refer to Section 3.2.2 (Building Envelope) of the SMPS. They note the preamble which talks of transition:

> […]
>
> This Plan supports building envelope controls that:
>
> […]
>
> ▪ provide transitions in scale to low-density residential areas and neighbourhoods, heritage resources and conservation districts, and the Halifax Harbour; […]
>
> Buildings of different heights and scale have varying impacts on their surroundings and the public realm as their heights increase, which may require different standards, depending on the local context. Specific building envelope controls include:
>
> […]
>
> ▪ transitioning between large-scale buildings and more intense land uses when located next to parks and low-rise residential areas through the use of side and rear setbacks and stepbacks. […]
>
> [Respondent's Closing Submissions, pp. 10-11]

[38] They further note that Policy UD-9 "provides specific policy support for the LUB regulations that govern setback and stepback requirements." It states:

> The Land Use By-law shall establish building envelope regulations that support context-specific, human-scaled and pedestrian-oriented environments by:
> […]
>
> g) establishing minimum side and rear yard setback requirements that transition from higher density zones to lower-density zones, as well as from mixed-use commercial,

> institutional, and industrial uses to abutting residential and park zones; […]
>
> [Exhibit T-3, p. 126]

In Mr. Adam's opinion "the proposed amendment seeks to clarify that balconies are not allowed to encroach into this required setback when abutting an Established Residential or Park Zone, which helps to meet the intent of the transition policy that is provided in policy UD-9 g)."

[39] HRM's submission further notes that the "creation or amendment of the SMPS" considered Policy S-30 from the MPS:

> …Restriction on balcony encroachments does not affect the type of housing that may be built on Mr. Tsimiklis' properties. It does not prevent a shared housing use.
>
> More generally, this amendment does not negatively affect housing affordability or inclusion. This amendment does not impact the density of development allowed under the LUB.
>
> …
>
> This amendment does not restrict the ability to construct units in the low to moderate income range that would support the intent of the SMPS and Regional Plan to further housing affordability.
>
> [Respondent's Closing Submissions, pp. 12-13]

3.2 Analysis and Findings

[40] In reviewing this matter, I considered the evidence and the arguments. Mr. Tsimiklis testified that the balcony encroachment will reduce the density of future projects on his Robie Street and Gottingen Street properties, meaning fewer units or higher rents, thus affecting affordability. He demonstrated this by presenting a hypothetical example of a building on his Robie Street property.

[41] I accept that the Amendments for balcony encroachments might, depending on design considerations, have an impact on a building constructed on the Robie Street lot. That might mean fewer rental units available for sale, that the rental units available might be more expensive, or that the units are less attractive to potential renters. Mr.

Tsimiklis provided only a hypothetical example and the calculations he discussed were approximate. On the basis of that evidence, I cannot conclude what, if any, impact the change would make on the use of this hypothetical property nor can I extrapolate as to if, or how, it might impact other properties in the Regional Centre. Further, it is not clear to me that the examples Mr. Tsimiklis provided involve affordable housing as discussed in the MPS or relate more to the general affordability of housing.

[42] Regardless, it is not enough for Mr. Tsimiklis to demonstrate that his business or his property is impacted. Simply demonstrating that the Amendments might reduce a potential housing project size, affect its viability, or increase potential rents, does not mean the intent of the MPS has not been followed. The law is clear that the Board can only reject the Amendments if they were contrary to the intent of the MPS. In other words, the evidence must not just show that a building might be smaller than it would be otherwise, but rather that the Amendment that causes that reduction does not reasonably carry out the intent of the MPS.

[43] Mr. Tsimiklis argues that the lower size afforded his hypothetical property goes against the intent of Policy S-30 in the MPS. It is here that I must focus my efforts and determine if the amendment goes against the intent of the MPS. I consider that there are three questions that I must address. They are:

- Does Policy S-30 apply to LUB Amendments or does it apply, as the Respondent says, to a secondary plan?
- Is Policy S-30 mandatory or permissive?
- Ultimately, does the LUB amendment fail to reasonably carry out the intent of the MPS?

Does Policy S-30 apply to LUB Amendments?

[44] In their submission, HRM argues that Policy S-30 “directs preparation and amendment of the SMPS, [and] has no direct application to the issue on appeal.”

[45] I would comment first on the way the plan is structured. The Regional MPS is the primary Municipal Planning Strategy. The Regional Centre MPS, as its name explains, is the secondary plan for the Regional Centre and is created through the authority of the Regional MPS. In turn, the SMPS authorizes the creation of the Regional Centre LUB. The Amendments that Mr. Tsimiklis is contesting are LUB amendments, not changes to the Regional MPS or the SMPS.

[46] In examining Policy S-30 I note the opening sentence clearly starts with a qualification that restricts the policy to “preparing new secondary planning strategies or amendments to existing secondary planning strategies to allow new developments …”. I find that this language is very direct and explanatory. Policy S-30 applies to secondary plans – either new ones or amendments, but not to LUBs or their amendments. On this basis alone I would find that Policy S-30 can not be relied on as the basis to find that any LUB amendment does not carry out the intent of the MPS. This includes the balcony encroachments and the other Amendments.

Is Policy S-30 Mandatory or Permissive?

[47] Generally, mandatory policies are those which a Council must follow whereas permissive provisions are those that it may choose to follow or not follow. Policy S-30 uses the language “shall be considered”. Chapter 1 (*Introduction*) includes Section1.6 on *Municipal Structure, Implementation and Interpretation*. It explains that:

> The term "shall consider" appears in the context of policies respecting secondary planning strategies, priorities plans. This term denotes the mandatory consideration of these

> strategies and plans but does not commit HRM to any approval, adoption or implementation of these strategies or plans.
>
> [Exhibit T-8, p. 25]

Based on the wording of Policy S-30, I find that the policy is mandatory, meaning that in introducing or amending a secondary plan the Council must consider subsections (a) through (h). Council is not, however, tied to any specific approval, adoption or implementation of a strategy or plan based on whether it follows those policies.

Does the LUB Amendment Fail to Reasonably Carry Out the Intent of the MPS?

[48] The burden of proof is on the Appellant to show that the Municipality failed to reasonably carry out the intent of the MPS. The Appellant has argued that the Municipality failed to carry out Policy S-30 (a) and (d). As I have said, I do not consider that this policy is directly applicable to Council's considerations of an amendment to this LUB. However, to the extent that the policy may inform the implementation of the SMPS, I will examine it in view of my previous conclusion that Council's responsibility is to "consider" Policy S-30, in this case subsections (a) and (d).

[49] Subsection 30 (a) requires Council to consider "creating opportunities for a mix of housing types within designated growth centres and encouraging growth in locations where transit is or will be available" [Emphasis added]. As noted by my emphasis, this includes two items: a mix of housing types, and encouraging growth where transit is, or will be available. The term "mix of housing types" is not defined in the Regional MPS or LUB.

[50] Subsection 30 (d) requires Council to consider "permitting shared housing uses of a scale compatible with the surrounding neighbourhood in all areas where residential uses are permitted and minimizing additional requirements beyond those for

residential uses". Essentially, this subsection focuses on shared housing units, their scale, and additional requirements. Policy S-39 expands on the definition of Shared Housing:

> … While community plans and land use by-laws have traditionally used varying terms to describe different household forms such as special care facilities, transitionary housing or single room occupancies, HRM has adopted the term shared housing to describe such uses. Shared housing use is a broad term that describes a variety of household forms where housing is shared by a group of individuals living under separate leases or agreements where support services may or may not be provided.
>
> [Exhibit T-8, p. 57]

[51] The Appellant has not provided any evidence that HRM did not consider the mix of housing types or availability of transit as described in subsection (a). Nor was there any discussion about whether HRM looked at shared housing, its scale, or "additional requirements beyond those for residential uses" as discussed in subsection (d).

[52] The testimony and submissions I have reviewed are largely silent on these issues. They do discuss affordability, and the term does appear in the opening sentence of Policy S-30, but it is an undefined term in the MPS. (The SMPS provides considerations on affordability in Part 5 on Housing but was not passed concurrently with the MPS). Even if the Appellant clearly demonstrated that the Amendments damaged housing affordability, I do not consider this sufficient to conclude that the Amendments did not reasonably carry out the intent of the MPS.

[53] The Appellant does not demonstrate a connection between the hypothetical smaller size of the Robie Street and Gottingen Street properties and the requirements for Council to consider the issues in subsections (a) and (d). Hence even if it were determined that Policy S-30 applied to LUB amendments, I would find that the evidence does not demonstrate that Council failed to consider the required issues.

4.0 MAXIMUM BUILDING DIMENSIONS

4.1 Evidence and Submissions

[54] In Part V of the LUB there are 19 chapters that provide built form and siting requirements, most of them for specific zones. For example, Chapter 6 deals with the Corridor zones and applies to the Appellants' Robie Steet and Gottingen Street properties. Chapter 9 provides requirements for the ER-1, ER-2 and ER-3 zones. Mr. Tsimiklis' Young and MacLean Steet properties are ER-2 and ER-3, respectively, and fall under Chapter 9. Mr. Tsimiklis has appealed the changes to Maximum Building Dimensions under s. 233 of Part V, Chapter 9 of the LUB. This part of the appeal is particularly relevant for Mr. Tsimiklis' five MacLean Street properties which are zoned ER-3. Four of the properties are 4,800.5 ft^2 (almost 446 m^2 exactly), while the fifth is a slightly irregular shape and is 4,923.7 ft^2 (457.4 m).

[55] Section 233 of Part V, Chapter 9 details the Maximum Building Dimensions for structures. It reads as follows (recent Amendment in emphasis):

> **Maximum Building Dimensions**
>
> **233** **(1)** Excluding any structure below 0.6 metres above the average finished grade, **a low-density dwelling unit,** or any public building use, any main building shall not exceed:
>
> **(a)** except as provided in Subsection 233(2) or 233(3), a building width of 20.0 metres; and
>
> **(b)** a building depth of 30.0 metres.
>
> **(2)** The maximum building width of a townhouse block is 64.0 metres and the maximum number of permitted townhouse units in a townhouse block located in a ER-3 Zone is eight.
>
> **(3)** An addition to an existing main building shall only be permitted in the rear yard but shall not exceed the building width or footprint of the existing main building, if the addition causes the main building to contain
>
> **(a)** more than 2 dwelling units in an ER-2 zone; or

> **(b)** more than 8 dwelling units in an ER-3 zone.
>
> [Exhibit T-3, p. 451]]

[56] Mr. Tsimiklis objects to subsection (1) which limits building width to 20 m and depth to 30 m. He insists this requirement reduces the size of potential multi-unit buildings, thereby reducing the number of potential units. Their smaller scale makes them less viable and pushes up rental prices. This makes the buildings less affordable. He illustrates this by focusing on his five MacLean Street properties, all of them 32 ft wide by 150 ft deep (just under 10 m by 46 m). The Appellant's submission stated:

> The Appellant's properties … are all 32 feet wide X 150 feet deep. … Taking into consideration front yard set back (minimum of 2 metres), rear yard setbacks (minimum of 6 metres) and maximum lot coverage (50%) the approved amendment would exempt a building of 1-4 units from size limits and be permitted a larger building depth than a building containing 5-8 units. For buildings containing 5-8 units a smaller building depth impacts the ability to create reasonably sized units due to the need of internal staircases, entrances and fire exits. The result is reduced floor area for units, smaller unit sizes, fewer family type units, less choice in the mix of unit types and fewer larger family-type units with three bedrooms or more ….
>
> [Exhibit T-6, pp. 2-3)

[57] While Mr. Tsimiklis' properties are not as wide as the 20 m specified in s. 233, at 46 m they are much deeper than the maximum 30 m allowed. In the hearing Mr. Tsimiklis explained that ideally, his intent would be to build a 20-ft-wide by 120-ft-deep structure (roughly 6.1 m by 36.6 m). This would allow for the setbacks on all four sides plus leave extra side space, which makes larger windows more practical. Such a design would equal 2,400 ft^2 (roughly 223 m^2), the maximum area allowed under the 50% maximum lot coverage for his 4,800 ft^2 lots. It would allow him "to achieve the highest lot coverage."

[58] Under the LUB, the maximum depth is 30 m (almost 100 ft.) whereas he wishes to build to 36.6 m (120 ft.). This also means the total ft^2 for his potential building falls from 2,400 (20 ft. by 120 ft.) to 2,000 (20 ft by 100 ft). For a four-storey building, the

total floor area would fall from 9,600 (4 * 2,400) to 8,000 (4 * 2,000), a nearly 17% drop. Mr. Tsimiklis explained that the Amendments apply if he built a building with five to eight units but not if he built a building with one to four units. He argued that the reduction in depth meant that instead of building eight units on a property, he could only build six to seven units but, because he still needed the same amount of revenue from the property, the average rent would increase:

> 9,600 minus 8,000 [square feet] is going to be approximately 15 percent drop in area which will yield 15 percent less revenue, which means in order to make it economically viable either way … because the shell is the same and the structure are the same. At 15 percent you have to charge extra revenue to get it. So if you go seven (inaudible) six units god help everybody. If you go seven [units] you're still at 2,057 [$2,857 rent]. That's $357 [extra rent] a month.
>
> [Transcript, p.62]

[59] Mr. Tsimiklis saw the proposal as raising rents. Rent for a seven-unit building would be 15% higher and a six-unit building would be 30% higher. He said the affordability of the development would be "severely impacted" saying:

> People can't ... they're not all professors or highly paid professionals here. Lawyers, planners, URB chairs. They don't have that kind of money to pay this. I mean I'm not saying. I'm just commenting. But they can't afford this.
>
> [Transcript, p. 51]

[60] As with the issue of balcony encroachment, Counsel referenced Policy S-30 (a) and (d), saying the amendment to s. 233 is "inconsistent with and does not reasonably carry out the intent of Regional MPS Policy S-30 (a)" because HRM staff reports:

> … did not adequately address or identify issues in detail related to how some existing property configurations may be impacted by the amendment more so than others, including the 5 Properties on McLean. The HRM Staff Reports did not specify how development could be limited on the existing narrower 5 Properties on McLean. The HRM Staff Reports did not identify or highlight applicable objectives and policies of the Halifax Regional MPS and therefor HRM Staff and/or the RCCC were not aware of and therefore did not address the applicable objectives and policies of the Halifax Regional MPS. The amendment as it

> applies/affects more than 4 units i.e. 5-8 units would result in fewer family type units with three (3) bedrooms or more which is inconsistent with and does not reasonably carry out the intent of Halifax Regional MPS Policy S-30 a) i.e. a strategy to create opportunities of a mix of housing types;
>
> [Appellant's Written Evidence, p. 6]

[61] Appellant's Counsel further argues that the proposed amendment is inconsistent with and does not carry out the intent of Policy S-39 (a), saying that "shared housing uses contemplated for buildings to be constructed on the five properties on McLean Street would be subject to reduced building size limitations" and "that the amendment amounts to an additional control and an additional barrier to the creation of shared housing". For reference, Policy S-39 (a) reads as follows:

> S-39 HRM supports the development of complete communities with housing resources that are appropriate and adequate for current and future residents. While community plans and land use by-laws have traditionally used varying terms to describe different household forms such as special care facilities, transitionary housing or single room occupancies, HRM has adopted the term shared housing to describe such uses. Shared housing use is a broad term that describes a variety of household forms where housing is shared by a group of individuals living under separate leases or agreements where support services may or may not be provided. In supporting the provision of shared housing uses HRM
>
> (a) shall, through the applicable land use by-laws, permit shared housing forms in all zones that permit residential uses at a scale and density that is compatible with the intent of the applicable zones. Additional controls beyond those for dwelling units shall be minimized to reduce regulatory barriers for shared housing developments;
>
> [Exhibit T-8, p. 57]

[62] In response, HRM made a number of points regarding maximum building dimensions. HRM argued that the changes do not add restrictions but "loosens some restrictions for buildings that are one to four units". Mr. Adams pointed out that the amendment did not add any new restrictions:

> Those restrictions are not new. So the maximum building dimensions are in the by-law today. So they would apply to all new buildings within the established residential 3 zone. So these setbacks were originally brought in during the HAF [Housing Accelerator Fund] amendments that happened in about June of last year.

> So the proposed amendment is actually to remove some of these maximum building dimensions for the smaller-scale uses, the one to four units, but it's actually not adding anything new because the maximum building restrictions are already there in the ER-3 zone.
>
> [Transcript, p. 116

[63] Mr. Adams also pointed out that under the LUB, density is tied to lot size and that s. 231.3 would limit the number of dwelling units on an ER-3 lot, in any event. In the case of a 4,800 ft^2 property, such as the MacLean Street properties, there would be only five dwelling units allowed. Mr. Tsimiklis interrupted to say the allowed number of units was probably "closer to six, but five or six, anyway."

[64] The wording of s. 231.3 is:

> **Residential Density by Lot Area**
>
> **231.3** In an ER-3 zone, a multi-unit dwelling use shall contain no more than
>
> **(a)** 4 dwelling units if a lot is less than 375.0 square metres;
>
> **(b)** 5 dwelling units if a lot is at least 375.0 square metres but less than 450.0 square metres;
>
> **(c)** 6 dwelling units if a lot is at least 450.0 square metres but less than 525.0 square metres;
>
> **(d)** 7 dwelling units if a lot is at least 525.0 square metres but less than 600.0 square metres; or
>
> **(e)** 8 dwelling units if a lot is at least 600.0 square metres.
>
> [Exhibit T-3, pp. 186-187]

[65] In his report, Mr. Adams took issue with Mr. Tsimiklis' conclusion that there was insufficient space. Mr. Adams explained that the maximum building dimensions allowed for individual units that were quite sizeable. HRM had estimated it could easily accomodate 1,574 ft^2 per unit:

> The maximum building dimensions in Section 233(1) of the LUB allow for a maximum building width of 20.0 metres and a maximum building depth of 30.0 metres. This results in a gross floor area of 600 square metres per floor. The ER-3 Zone has a maximum building height of 11.0 metres, with an extra 3.0 metres of height (up to 14.0 metres) allowed for buildings with a sloped roof. This maximum building height can easily

> accommodate a four-storey building. For arguments sake, a new three-storey building in the ER-3 Zone would have a maximum gross floor area of 1,800 square metres with the maximum building dimensions as they are today. Subtracting 35% from this gross floor area to allow building components, such as corridors, stairwells, a lobby, mechanical, electrical, etc. would result in a total floor area of 1,170 square metres, which divided by the 8 units that are permitted in the zone results in a unit size of approximately 146.25 square metres (approximately 1,574 square feet per unit), which is a sizeable unit in the context of current construction trends in HRM. A four-storey building, which can also be accommodated within the ER-3 Zone as-of-right, would allow for even more floor area per unit using the same maximum building dimensions.
>
> [Exhibit T-7, p. 18]

[66] Mr. Adams described the maximum building dimensions as not "necessarily restricting density" as there were other restrictions such as maximum bedroom counts that are "very tightly controlled within the ER-2 and the ER-3 zones". Rather, the maximum building dimensions provide "a little bit more urban design control on some of the newer units that haven't traditionally been allowed within these areas."

> So we want to make sure we have some control over the urban design over the built form to ensure that new development is still compatible with these low-rise areas, but that is not as important for one- to four-unit buildings because that's typically what the neighbourhoods already consist of.
>
> [Transcript, p. 127]

And along the same line he stated:

> Then the maximum building dimensions are really more of a ... you know, more of a built form approach to ensuring that, you know, again, development is more in line with the scale. So if we're starting to see new eight-unit buildings that, you know, people are tearing down three, four houses and doing something really that is not in keeping with the scale of the neighbourhood that would be concerning to us, and so that's why we impose these maximum building dimensions that, you know, you can have eight units, you can have your 20 bedrooms, but you can't go up and blow up, like, an entire, you know, street, necessarily, and do a giant building. You'd have to do it in certain segments or do something that's more in character with the neighbourhood.
>
> [Transcript, p. 160]

[67] Under cross-examination Mr. Adams disagreed that the maximum building dimensions were a "control over the type of unit because of the size of the unit":

> **A.** I wouldn't necessarily agree with that, no. I think, like, the maximum building dimensions are very generous as they are. So you know, you could build units with all types of different sizes. Again, the limiting factor on the type of units is going to be the maximum bedroom

> counts probably more than the maximum building dimensions, but the ... like, the bedroom counts aren't being amended as part of this package. It's just the building dimensions.
>
> [Transcript, p. 133]

[68] Further, Mr. Adams said he believed that, when the original section on maximum building dimensions was written, it was applied to smaller one-to-four-unit buildings in "error" and the "proposed amendment is just bringing the LUB text into accordance with the policy". He points to Policy E-5.5 in the SMPS, which enables the restriction on multi-unit buildings (defined in the LUB as having at least five dwelling units), but not smaller buildings:

> Policy E-5.5 (RC-May23/24;E-June13/24)
>
> To support residential infills that respect the context of low-rise neighbourhoods, the Land Use By-Law shall establish additional built form requirements for townhouses and multi-unit dwellings, including maximum building dimensions, requirements for entrances, windows, façade articulation, as well as driveways and parking location to support streetscapes that are active and welcoming to pedestrians.

[69] Mr. Adams acknowledges that Policy S-39 has implications for shared housing under the LUB but insists that the LUB complies with Policy S-39:

> Shared housing is permitted in residential zones at a scale and density that is compatible with the intent of the applicable zones, as discussed below. Likewise, there is no evidence that the amendments impose controls over and above those for dwelling units located in the same zones.
>
> [Respondent's Closing Submissions, p. 6]

4.2 Analysis And Findings

[70] The Appellant appealed recent amendments to s. 233 of the LUB that exempt buildings in the ER-3 Zone with one to four units from the maximum building dimensions of 20 m by 30 m. He intended to construct a building of 20 ft (6.1m) by 120 ft (36.6m) with eight units. He claims the amended requirement will decrease the allowable depth of the building from 120 ft (36.6 m) to 100 ft (30m), a roughly 15% decrease in size, meaning the number of units must be reduced from eight to seven, or possibly six. As

costs are not linear, he expects rental prices to rise and affordability to be affected. He argues that not everyone is able to afford what will be higher prices. The Appellant's argument is that the amendment does not follow the intent of the Regional MPS Policies S-30 (a) and (d) and S-39 (a).

[71] Before I discuss the relevant policies, I wish to clarify the Amendments and the evidence. The Amendment introduces an exemption for the maximum building dimensions for low-density dwelling uses (i.e. buildings with one to four units). It has no impact on buildings that are five to eight units in size that Mr. Tsimiklis would ideally like to build and which he based his evidence on. Further, I would note that existing LUB restrictions on lot area (in s. 231 of the LUB) mean that because four of his MacLean Street properties are under 450 m^2, he may only build five units on them. The fifth property is just over 450 m^2 and is allowed to have six units. While he is concerned that the recent amendment prevents him from building eight units, he is not currently allowed to do so on the properties he has referred to. He admitted this in the hearing. The specific amendment under appeal does not affect five-to-eight-unit buildings.

[72] As with the issue of balcony encroachments, the Appellant has argued that these changes violate Policy S-30 (a) and (d). As I discussed more fully earlier, Policy S-30 does not apply to LUB amendments but to secondary planning strategies that are either new or amended. For this reason alone, I would find that Council's decision did not violate Policy S-30.

[73] That aside, the Policy requires the Municipality to consider the relevant issues but is not a mandatory "action". As I discussed, the subsections refer to a "mix of housing types", transit availability, "permitting shared housing" of a scale compatible with

the neighbourhood, and “minimizing additional requirements”. All of these things “shall” be considered by the municipality. I do not have clear evidence demonstrating that the Municipality did not consider these specific issues. Conversely, the August 12, 2024, Report to the Regional Centre Community Council goes into extensive discussion of shared housing, its relationship to Policy H-6, and the need to permit it in all zones “at a scale that is similar to the permitted residential uses in that zone”. It is clear to me that Council considered the scale of shared housing and thus satisfied the requirements of Policy S-30 (d). I have no difficulty concluding that the Municipality considered the mix of housing types as, through their actions, they exempted low-density dwelling uses. Transit availability for the properties was not discussed at the hearing. Shared housing use has not been affected by the Amendment, except to the extent that shared housing with less than four units is now exempt from the maximum building dimensions. As the change made no distinction between shared and non-shared housing I can see no issue of compatibility with the surrounding neighbourhood. There are no additional requirements, rather there are now fewer requirements. On the key issues that the Municipality was required to consider, it either considered them, or the issue was moot. Thus, even if Policy S-30 did apply to the LUB, I would find that the Municipality met the requirements of the Policy.

[74] The Appellant has also argued that the exemption for one to four-unit buildings from the maximum building dimensions in s. 233 of the LUB contravenes MPS Policy S-39 (a) as it is “an additional control and an additional barrier to the creation of shared housing”. That policy supports “housing resources that are appropriate and adequate for current and future residents”. Policy S-39 (a) begins with “shall, through the

applicable land-use bylaws". Thus, Policy S-39 (a) denotes a mandatory "action", not a consideration. And it is aimed specifically at the LUB, not secondary plans. Hence, it differs significantly from Policy S-30. Policy S-39 (a) sets out two basic requirements that must be followed in the LUB.

[75] First, the LUB must "…permit shared housing forms in all zones that permit residential uses at a scale and density that is compatible with the intent of the applicable zones." [Emphasis added]. This policy depends on the "intent of the applicable zones". One must understand the intent of the ER-3 Zone and whether shared housing is allowed in that zone at a "scale and density" that is compatible with that intent. The Appellant did not discuss these specific issues. Despite this, I have made a "thorough factual analysis to determine the nature of the proposal in the context of the MPS and any applicable land use by-law", with the benefit of the evidence, the Appeal Record, and the relevant provisions of the MPS and LUB.

[76] The intent of the ER-3 Zone is best understood by reviewing MPS Chapter 2 on Urban Structure. Policy E-1 (a) establishes the ER-3 Zone:

> The Established Residential 3 (ER-3) Zone shall apply broadly to lands that have not been zoned as ER-2, including some lands that were formerly zoned ER-1. The ER-3 Zone shall permit low-density residential uses, townhouses, low-rise multi-unit buildings up to 8 units depending on a lot size, backyard suites, and other accessory uses. The ER-3 Zone shall also permit existing dwellings at the time of this Plan coming into force to internally convert to a multi-unit dwelling, and shall also allow rear additions to existing buildings to support more units. (emphasis added).
>
> [Exhibit T-7, p. 9]

[77] This enabling policy speaks of "low-density residential uses, townhouses, low-rise multi-unit buildings up to 8 units depending on a lot size, backyard suites, and other accessory uses". This provides context for the scale and density that is seen as compatible with shared housing. I will discuss interpretations of scale and density in

greater depth in the next section. The issue here is whether the Amendments disallow shared housing uses in the ER-3 zone even though they are compatible with the scale and density of the residential uses. I do not see how this can be so. The Amendment does not distinguish between low-density buildings that are shared and those that are not shared. Nor does the Amendment disallow any shared housing uses. If there are compatibility issues here that tie to the intent of the zone the Appellant has failed to elaborate on them.

[78] Second, the LUB shall minimize additional *"*controls beyond those for dwelling units … to reduce regulatory barriers for shared housing developments*"*. In this instance the Municipality has reduced controls by adding an exemption for "low-density dwelling use". Controls on shared use housing have clearly not been increased. Hence, I find that the Municipality has respected Policy S-39 (a) and has not failed to reasonably follow the intent of the MPS.

[79] I also noted the concurrent amendments to the definition of "small shared housing use", which were not appealed. Small shared housing is permitted in the ER-3 Zone under Table 1B of the LUB. Prior to the amendments small shared housing use was defined as a maximum of 10 bedrooms. The amendments updated this to 20 bedrooms, the same number allowed for an eight-unit building in the ER-3 Zone under s. 57(1). This suggests that the amendments may, by providing for a similar number of bedrooms, have allowed for greater compatibility with the scale and density of residential uses in the zone.

5.0 UNIQUE CONDITIONS – YOUNG AVENUE SUB-AREA (YA-A)

[80] Young Avenue is within the South End Halifax Precinct. Policy E-5 of the SMPS directs the establishment of the Young Avenue (YA) Special Area within the

precinct to “maintain the unique built form characteristics” of the neighbourhood. The preamble says the area is established to:

> • support the existing character of the neighbourhood;
> • disincentivize the demolition of buildings located on existing large lots; and
> • maintain the larger than average lot areas, frontages, dimensions, and front yard setbacks present in the area.
>
> [Exhibit T-3, p. 85]

[81] The preamble further states that:

> Characterized by stately large homes, the special area will permit internal conversions to **multi-unit …** dwellings to encourage the preservation of the existing large homes. In addition, dwellings containing up to four units will also be permitted on existing vacant lots with special lot dimension and building design controls that support Young Avenue’s unique character.
>
> [Exhibit T-3, p. 85]

[82] Policy E-9 requires that, within the Young Avenue Special Area, the LUB “shall” establish the Young Avenue Sub-Area (YA-A). Section b) of the Policy states:

> …
>
> b) establish the Young Avenue Sub-Area A (YA-A) to permit the development of multi-unit dwellings, containing up to five (5) dwelling units, on lots that existed and were vacant on September 18, 2019, provided that the lots are:
>
> i) re-subdivided to reflect the larger than average lot areas, frontage, and dimensions that characterize the area; and
>
> ii) developed with a built form that resembles one large single-unit dwelling with dimensions, setbacks, and building design that reflect the characteristics of the large homes that distinguish the area.
>
> [Exhibit T-3, p.86]

[83] The YAA is shown in Schedule 3C of the LUB. It consists solely of Mr. Tsimiklis’ nine Young Avenue properties. The relevant portion of Schedule 3C that shows the Sub-Area is illustrated here with the Special Area shown as YA and the Sub-Area as YA-A:

5.1 Evidence and Submissions

[84] Table 1B of the LUB lists the permitted uses by zone. The Amendments made changes to Table 1B that affect the Young Avenue Sub-Area, mostly through the addition or modification of footnotes to the table. These changes affect provisions for two-unit dwelling use, three-unit dwelling use and small shared housing use.

- Two-Unit Dwelling Use – the addition of Footnote 6 allows internal conversions of existing buildings, subject to certain conditions.
- Three-Unit Dwelling Use - the addition of Footnote 6 allows internal conversions of existing buildings, subject to certain conditions. The addition of Footnote 14 to the Two-Unit Dwelling row confirms the right to use Three-Unit Dwellings in the Sub-Area.

- Small Shared Housing Use – the addition of Footnote 23 prevents a small shared housing use from being located in combination with a two, three, four or multi-unit (up to five) dwellings. This appears to be the main source of Mr. Tsimiklis' disagreement.

[85] There were also changes to sections 57 through 60 that affect the bedroom counts for small shared housing units. Some of these changes are technical in nature and have no practical impact on Mr. Tsimiklis' properties. Other changes place limits on the number of bedroom counts by lot or unit. These sections of the LUB cross-reference each other and need to be carefully read to determine the final impact of the changes. Prior to the changes, a small shared housing unit in the YA-A Sub-Area could have six to 10 bedrooms per lot. The addition of sec 57(1)(k) limits such small shared housing units in the ER-2 Zone to 6 bedrooms per dwelling unit and 8 bedrooms per lot.

[86] In his written evidence the Appellant argued that the Amendments "excludes a shared housing use and therefore is inconsistent with and does not reasonably carry out the intent of Regional MPS Policies S-39 and S-39 (a)." In his final submission Counsel also references Policy S-30 (a).

[87] In his written submission, Counsel elaborated, saying that Mr. Tsimiklis believed that prior to the amendments each lot could have two buildings each with up to 10 bedrooms for each shared housing building, for a total of 20 bedrooms. Following the Amendments, there could only be one building per lot with a maximum of eight bedrooms for shared housing. The fewer bedrooms would result in "fewer tenants with the fewer tenants paying higher rent than the rent that would have been paid by tenants if there were 20 bedrooms permitted." He also referenced shared housing:

> It is submitted that should the amendment become effective there would be on each of the 9 Properties on Young, fewer bedrooms resulting in higher rents (increasing the cost of housing with less shared housing use which does not reasonably carry out the intent of the Halifax Regional MPS specifically Policies S-30 a) and d) and S - 39 (a);
>
> [Appellant's Written Submissions, p. 7]

[88] The August 12, 2024, Report to the RCCC explained that the Footnotes to Table 1B provided for unique conditions within YA-A Sub-Area, including allowing internal conversions, permitting five units on a lot, and clarifying that small shared housing units cannot be located in combination with two, three, four or multi-unit dwelling units. It tied the change in Footnotes to the prior rezoning of the Young Avenue Special Area from ER-1 to ER-2, saying "the footnotes related to the Young Avenue Sub-Area need to be brought into the ER-2 column in Table 1B, along with some additional minor administrative changes to the footnotes." At the hearing Mr. Adams described not bringing the Footnotes into the ER-2 column as an oversight by staff drafting the HAF amendments.

[89] Mr. Adams expanded on the shared housing restriction in his expert report noting that:

> With regards to shared housing, it should be noted that small-shared housing is still permitted within the Young Avenue Sub-Area A, but not in conjunction with another dwelling unit (two-unit, three-unit, four-unit, or multi (5) - unit dwellings. This still meets the intent of Shared Housing being permitted broadly across the municipality, and it continues to be a permitted use in this location. This is also in keeping with Policy S-39 a) of the Regional Plan as the proposed changes aim to ensure that Shared Housing continues to be permitted in the ER-2 Zone more generally, and specifically within the Young Avenue Sub-Area A more specifically.
>
> [Exhibit T-7, p. 31]

[90] At the hearing Mr. Adams explained that the ER-2 Zone is limited to two units on a lot but that Policy E-9 "provided the Young Avenue sub-area A to have five dwelling units per lot, even though it's still in the ER-2 zone". He went on to explain the

conditions of Policy E-9 to have the additional dwelling units and that he didn't consider the shared housing restriction in Footnote 23 to be a change:

> So (i) you know you have to re-subdivide, basically, the lots to reflect the larger character, and (ii), any developed in a built form that resembles one large single unit dwelling dimension. Setbacks, building design, that sort of thing.
>
> So if you meet those conditions you can build five units in that sub-area where typically within the ER-2 only two are permitted. So it's providing additional flexibility.
>
> What the ... you know, … footnote [23] is just trying to clarify … that where you can have these additional units they cannot be small shared housing. The policy doesn't speak to allowing small shared housing within this sub-area A, and so right now again there's no change because shared housing is not permitted in a multi in the ER-2 because multis are not permitted.
>
> [Transcript, p. 153]

5.2 Analysis and Findings

[91] The Appellant has appealed recent amendments to the LUB that prevent small shared housing units being built in combination with two, three, four, and multi-unit dwellings in the YA-A Sub-Area. He also believes that the Amendments have restricted the dwelling unit size and number of bedrooms he can construct on his Young Avenue properties. I will discuss what the amendments have really changed, how they relate to the policies that the Appellants cites (S-30 and S-39), as well as any other relevant policies that can indicate whether the Amendments carried out the intent of the MPS.

[92] These Amendments to the LUB are technical in nature and interact with existing and amended sections and, thus, must be read carefully. The relevant amendments for the YA-A Sub-Area fall into two groups: Those that amend the footnotes in Table 1B of the LUB and change the permitted uses for the ER-2 Zone; and the maximum number of bedroom controls that are found in ss. 56 to 59 in the LUB, as well

as the Definition section. As there are many detailed changes, I will restrict my comments to those changes that impact Mr. Tsimiklis' properties in the Young Avenue Sub-Area.

[93] Footnote 23 is significant when considering the rules that apply to the YA-A Sub-Area. This footnote originally applied to the YA-A Sub-Area when it was zoned ER-1. After the Sub-Area was re-zoned ER-2 the footnote was not moved to the ER-2 Zone column. The Amendments added Footnote 23 (itself amended in the process) to the ER-2 Zone for small shared housing use column, reattaching it to the Sub-Area's properties. The amended footnote states that:

> Within the Young Avenue Sub-Area A (YA-A), as shown on Schedule 3C, a small shared housing use cannot be located in combination with a two-unit dwelling use, three-unit dwelling use, four-unit dwelling use, or a multi-unit dwelling use that contains up to 5 units.

[94] Hence the Footnote prevents small shared housing uses from co-existing with other dwelling units in a common building. Footnote 23 applies only to the nine Young Avenue Sub-Area properties. As the only properties to which the Footnote previously applied were moved to the ER-2 Zone, it is reasonable to conclude that an error was made when it was left attached to the ER-1 Zone, rendering it pointless.

[95] Bedroom controls were also amended in the LUB. There are numerous sections that limit bedroom controls within the Regional Centre. Amendments to two of these have affected the YA-A Sub-Area. First, the Amendments changed the definition of a small shared housing unit from a maximum ten units to a maximum 20 units, indirectly allowing additional shared units in some areas of zones ER-2 and ER-3. However, while I note this, it produced no practical impact on the YA-A Sub-Area. (Coincidentally, Section 60 of the LUB limits multi-unit dwellings in the YA-A Sub-Area to 15 units.)

[96] Second, the maximum number of bedrooms in a small shared housing unit within the YA-A Sub-Area also changed. Previously small shared housing units could have up to 10 bedrooms per use and up to 14 to 15 per lot, depending on the lot size. The Amendments added s. 57(2)(k) which limits small shared housing units in the ER-2 Zone to “6 bedrooms per dwelling unit and 8 bedrooms per lot”.

[97] So, the Amendments have allowed fewer bedrooms for small shared housing units per lot in the YA-A Sub-Area. In addition, small shared housing units may no longer be located in combination with other dwelling units. The Appellant argued that the Amendments fail to reasonable carry out the intent of the MPS due to Policy S-30 (a) and (d) and Policy S-39.

[98] As discussed previously, Policy S-30 applies to the development of new secondary planning strategies or amendments to secondary planning strategies and not to LUBs. Based on that alone, I cannot find that the Amendments do not reasonably carry out the intent of the MPS.

[99] Also as discussed, Policy S-30 requires that Council shall consider subsection (a), not that it action it. Subsection (a) requires that Council consider opportunities for a “mix of housing types” and encouraging growth around transit. While Footnote 23 does not refer to either the mix of housing types of transit, the addition in the Amendments of Footnote 6 (which allows internal conversions for up to three dwelling unit buildings in the Young Avenue Special Area) and Footnote 14 (which allows three, four and five multi-unit dwellings in the YA-A Sub-Area) would allow for a mix of housing types. So, while I find that Policy S-30 (a) does not apply to LUB Amendments, even if it did, I would conclude that Council considered a “mix of housing types”. The evidence is

largely silent on the availability of transit. In any event, I find the Appellant has failed to meet the burden of proof that Council failed to carry out the intent of Policy S-30 (a).

[100] Subsection (d) refers to "permitting shared housing uses of a scale compatible with the surrounding neighbourhood in all areas where residential uses are permitted and minimizing additional requirements beyond those for residential uses" [Emphasis added]. The Appellant did not explain how the changes in shared housing use affected compatibility with the surrounding neighbourhood or whether the Council considered this. I would note that most of the immediate area around the YA-A Sub-Area is zoned ER-2 or ER-3 and also includes the remainder of the Young Avenue Special Area. The Amendments permit shared housing and, while they do not allow small shared housing units to exist in combination with other units, they do not require small shared housing units to be of a different size or configuration. As discussed earlier, the August 12, 2024, Report to the Regional Centre Community Council goes into extensive discussion of shared housing, its relationship to Policy H-6, and the need to permit it in all zones indicating that Council considered the scale of shared housing and thus satisfied the requirements of Policy S-30 (d).

[101] Subsection (d) also refers to minimizing additional requirements beyond those for residential uses. The uses in question are clearly residential so I do not find this wording has any particular application to the decisions made by Council. In summary, even if Policy S-30 applied to the LUB, I would find that Council considered whether the "scale" is "compatible with the surrounding neighbourhood" and that the Amendments reasonably carry out the intent of the MPS relative to Policy S-30 (d).

[102] Policy S-39 (a) has wording similar to Policy S-30 (d), although Policy S-39 (a) applies to the LUB and requires mandatory action. It says:

> shall, through the applicable land use by-laws, permit shared housing forms in all zones that permit residential uses at a scale and density that is compatible with the intent of the applicable zones. Additional controls beyond those for dwelling units shall be minimized to reduce regulatory barriers for shared housing developments; [Emphasis added].

[103] Here again are two concepts we must examine. First, is shared housing permitted "at a scale and density that is compatible with the intent" of the ER-2 Zone? The term "scale and density" is not defined in either the MPS or the LUB. I take scale to refer to the size and massing of properties or buildings. Density is an undefined term in the MPS. In *Cornwallis Farms Ltd and Lindsay MacDonald, Cindy MacDonald and Michale Forsyth* (2024 NSUARB 120) the Board found that density was not a type of dwelling but rather "a function of the number of dwelling units allowed within a specified area, usually measured in units per acre." I accept this definition but consider that density also relates to the population and its relationship to the number of units. I would refer to the references in the Regional MPS' Introduction Chapter that discuss population density, "DU Size", and "higher density development [being] largely explained by smaller household sizes".

[104] To understand the intent of the zone, I examined Chapter 2 on Urban Structure. The start of Section 2.8 of the MPS (*Established Residential Designation*) refers to "retain[ing] the scale of existing **...** residential neighbourhoods while providing opportunities for additional housing units."

[105] Policy E-1 b) establishes the ER-2 Zone:

> The Established Residential 2 (ER-2) Zone shall apply to areas that have been identified as a Proposed Heritage Conservation District Study Area on Map 20, and registered heritage properties in the Established Residential Designation. The ER-2 Zone shall permit single-unit and two-unit dwellings, backyard suites, and other accessory uses. The ER-2 Zone shall also permit existing dwellings at the time of this Plan coming into force to

> internally convert to a three-unit, four-unit, or multi-unit dwelling, and shall also allow rear additions to existing buildings to support more units. [Emphasis added].

[106] The preamble to this policy refers to retaining "the character and scale of these existing neighbourhoods including the preservation and adaptive reuse of registered heritage properties" through "single-unit and two-unit dwellings for new construction" and "internal conversion to three-unit, four-unit, and multi-unit dwellings." Thus, Scale is to be retained while also allowing additional housing units. The number of units is a factor in the "character and scale". The intent includes, but is not limited to, one or two-unit dwellings. Rather it balances this with simultaneously limiting the size of buildings with its ability to house people, while also preserving its character. Also in the SMPS Chapter 2, Policy E-8 talks of maintaining "unique built form characteristics" in the Young Avenue Special Area and Policy E-9 of preserving "larger than average lots, frontages and dimensions that characterize" the Young Avenue Sub-Area. All these factors combine to represent the intent of the zone. As a result, the LUB includes the Built Form and Siting Requirements for the ER Zone in Chapter 9 that regulate maximum building dimensions, setbacks, dwelling units by lot area, lot size; and the maximum bedroom controls in Chapter 2 of the LUB.

[107] Based on the zoning requirement in Policy E-1 (b), I largely agree with Mr. Adams's conclusions that "shared housing is not permitted in a multi in the ER-2 because multis are not permitted." Under Policy S-39 shared housing must be allowed at the "scale and density" that is "compatible" with the "intent of the applicable zones". Footnote 23 disallows shared housing in combination with other housing. As three-, four- and five-unit multi-units are not intended for the ER-2 Zone, the footnote reasonably carries out the intent of the zone and thus the MPS. The remaining question is whether disallowing the

combination of a shared housing unit in a two-unit dwelling goes against the intent of the MPS, as a two-unit dwelling is allowed in the zone. Here I refer back to the broader intent of the zone. A one- or two-unit building is not the sole intent of the zone. One must consider the broader built form requirements. A small shared housing unit in the YA-A Sub-Area may have a maximum of eight bedrooms, whereas a two-unit dwelling on a similar lot may also have a maximum of 8 bedrooms (under s. 57(1)(d)) but must split them between the two units. The density of the two may be the same. Due to the built form requirements like lot considerations, setbacks and height, the scale of the two properties is constrained by the same factors and might be quite similar. Hence, with no evidence to the contrary, I find this Amendment reflects the “scale and density” that is compatible with the intent of the zone.

[108] The second concept in Policy S-39 (d) is that “additional controls beyond those for dwelling units shall be minimized to reduce regulatory barriers for shared housing developments”. The SMPS does not elaborate on such controls or what constitutes “minimized”. The Appellant offered no interpretation of such terms. I have concluded that Footnote 23, because it prevents a small shared housing unit from locating in combination with a non-shared unit, is essentially a dwelling unit control. It limits the type of dwelling unit allowed. The Policy does not limit dwelling unit controls, rather, it limits controls “beyond those for dwelling units”.

[109] Lastly, Policy H-6 in the Housing Chapter states

> The Land Use By-law shall permit shared housing in all residential and mixed-use zones at a scale that is similar to the residential uses permitted in the zone.

I find that this policy is similarly refers to “scale” as did Policies S-30 (d) and S-39 (a). My comments on scale in earlier sections also apply here and I will not repeat them. As with

my previous comments, the changes made by the Amendments related to Footnote 23 do not introduce any changes in the scale of permitted shared housing. The Amendments reasonably carry out the intent of the MPS.

6.0 SUMMARY

[110] The Appellant has appealed Amendments to the LUB that prevent balconies from encroaching into the setback; remove the maximum building dimensions for “low-density dwelling use”; and prevent shared housing units in the Young Avenue Sub-Area from locating in combination with two, three, four and multi-unit dwellings. Mr. Tsimiklis asserts that these Amendments do not carry out the intent of the MPS as reflected in Policies S-30 (a) and (d), and S-39 (a).

[111] The Appellant argues, using hypothetical examples, that the market places a premium on balconies and the restriction on encroachment means that his hypothetical building will have to be designed smaller, with as many 15% fewer units, and/or higher prices. He says this affects affordability. The Appellant argues that this outcome goes against the intent of Policy S-30 (a) and (d) in the MPS. Policy S-30 does not apply to LUB amendments but to secondary planning strategies that are either new or amended and I find that it does not apply to the LUB Amendments. Even should it apply, the available evidence suggests the Municipality considered any relevant issues as required.

[112] The Appellant also considers the Amendment to be an additional control and barrier; therefore, amending the LUB so that maximum building dimensions no longer apply to a “low-density dwelling use” does not reasonably carry out the intent of the MPS, as reflected in Policy S-39. This is based on the belief that multi-use buildings with five or more dwellings may be more expensive due to the maximum building dimensions.

However, the maximum building dimensions requirements for 5-8 unit buildings in the LUB were in effect prior to the Amendments and have not changed. The Amendments simply relieve smaller dwelling units of this requirement.

[113] Lastly, the Appellant argues that changes to Table 1B that prevent shared and non-shared dwelling units from locating together in the Young Avenue Sub-Area fail to follow Policies S-30 (a) and (d) and S-39 (a). Again, I do not find that Policy S-30 is applicable to the LUB Amendments and, if it were, the Municipality did consider the identified issues. I have found that the Amendments do not violate the requirement in S-39 (a) to permit shared housing "at a scale and density that is compatible" with the intent of the ER-2 Zone.

[114] For these reasons I find the Appellant has failed to establish, on the balance of probability, that the LUB Amendments do not reasonably carry out the intent of the MPS. Therefore, I dismiss the appeal.

[115] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 16th day of April, 2025.

Bruce H. Fisher