

NOVA SCOTIA REGULATORY AND APPEALS BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **TIMOTHY PECK, JENNIFER MERRELL GILLIS, CATHERINE PECK, DONALD MOORE, CRYSTAL MOORE, ANGELINA COMEAU, KEVIN EVERETT, CONNIE RODGERSON, ELWOOD RAWDING, CARRIE RAWDING, DEBORAH FREEMAN, WILLIAM FREEMAN, KATELYN CROSBY, PAUL DOUGLAS FISHER, LAURA DELL'AGLIO DAIS DA COSTA, DIRK R. MILNE, TERESA A.A. MILNE, HAROLD DUGAS, PAMELA DUGAS, KEVIN PROCTER, DEANNA DOUCETTE and CAITLYN HAYWARD** from a decision of the Town of Digby Council approving a Development Agreement allowing 4576251 Nova Scotia Limited to redevelop lands on Thomas Road for the purpose of constructing three (3) multiple unit residential structures containing a total of seventy-six (76) dwelling units together with the construction of related streets infrastructure on Thomas Road, Digby, Nova Scotia

BEFORE: M. Kathleen McManus, K.C., Ph.D., Panel Chair
Richard J. Melanson, LL.B., Member
Bruce H. Fisher, MPA, CPA, Member

APPELLANT: **TIMOTHY PECK,**
JENNIFER MERRELL GILLIS, et al
Timothy Peck
Jennifer Merrell Gillis

APPLICANT: **4576251 NOVA SCOTIA LIMITED**
James Wallace

RESPONDENT: **TOWN OF DIGBY**
Jonathan G. Cuming, Counsel

HEARING DATE: July 14-18, 2025

FINAL SUBMISSIONS: September 2, 2025

DECISION DATE: October 29, 2025

DECISION: The Appeal is denied.

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1.0 OVERVIEW

[1] On October 17, 2024, Digby Town Council approved entering into a Development Agreement with 4576251 Nova Scotia Limited (Applicant) to permit the redevelopment of lands on Thomas Road (PIDs 30228522 and 30383731) for the purpose of constructing three (3) multiple unit residential structures containing a total of seventy-six (76) dwelling units, together with the construction of related street infrastructure, as proposed in the application and associated site planning and building details dated March 18, 2024 (proposed development).

[2] The Appellants, Timothy Peck, Jennifer Merrell Gillis, Catherine Peck, Donald Moore, Crystal Moore, Angelina Comeau, Deanna Doucette, Kevin Everett, Connie Rodgerson, Elwood Rawding, Carrie Rawding, Deborah Freeman, William Freeman, Katelyn Crosby, Paul Douglas Fisher, Laura Dell'aglio Dais da Costa, Dirk R. Milne, Teresa A.A. Milne, Harold Dugas, Pamela Dugas, Kevin Procter and Caitlyn Hayward (Appellants) appealed to the Board from the decision of Council to approve entering into the Development Agreement with the Applicant.

[3] The subject properties are located on vacant, undeveloped land approximately three acres in size, with modest vegetation and abut the Annapolis Basin. The properties are located generally south of the former Dominion Atlantic Railway right-of-way and Thomas Road, and the extensions of West Street and Third Avenue south of St. George Street. The former Dominion Atlantic Railway right-of-way, owned by the Minister of Natural Resources in Right of the Province of Nova Scotia, abuts the subject properties on their northern boundaries. PID 30228522 has frontage on the east side of the unopened West Street right-of-way and the west side of the unopened Third Avenue right-of-way. PID 30383731 has frontage on the east side of the unopened Third Avenue

right-of-way. Thomas Road extends south and west of St. George Street and crosses the former Dominion Atlantic Railway right-of-way and a small area of the northern portion of PID 30228522. The subject properties are shown in the following zoning map.



[Exhibit P-6, p. 31]

[4] The proposed development will have two four-storey multiple units, each containing 32 dwelling units, and one multiple unit residential structure containing 12 units together. The Applicant is responsible for the construction of “New Cross Street”, whose design and construction must be approved by the Town Engineer. Upon completion, the Applicant will convey to the Town ownership of the “New Cross Street”. The Town is responsible for the construction to extend the unopened right-of-way for West Street and

Third Avenue. The proposed development will be completed in three phases, with the Town and the Applicant coordinating their respective responsibilities. Phase One will include the Applicant's construction of the 12-unit building and the "New Cross Street", and the Town's construction of infrastructure for the extension of West Street. Phase Two will include the Applicant constructing one of the four-storey multiple units. In Phase Three, once the Town begins the construction of the Third Avenue extension, the Applicant may apply for a municipal building permit to construct the second four-storey multiple unit building.

[5] The subject properties are designated as Residential under the Generalized Future Land Use Map (GFLUM), of the Town of Digby Municipal Planning Strategy (MPS). The properties are zoned Residential Low Density (RLD) on the Land Use By-law (LUB) Zoning Map. Development in the general area of the subject properties consists primarily of established low density residential uses.

[6] Discussions between Town officials, including the Town's planner and engineer and the Applicant led to a draft Development Agreement for the proposed development. The Town's planner then presented a report to Town Council recommending the approval of the draft Development Agreement. At its meeting on October 17, 2024, Council approved entering into a Development Agreement with the Applicant. The Town gave public notice of Council's decision on January 6, 2025. The Appellants appealed Council's decision to the Board under s. 247(2)(a) of the *Municipal Government Act*, SNS 1998, c 18 (MGA), on the grounds that Council's decision does not reasonably carry out the intent of the MPS.

[7] The MPS sets out the rules, general guidelines and policies for Council to follow when considering an application for approval of a Development Agreement. As noted by this 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”. Development Agreement appeals under the *MGA* require the Board to review whether the decision of Council “carries out the intent of the municipal planning strategy” (*MGA*, s. 251(2)).

[8] The Courts have held that as the primary planning authority, Council has discretion about how to apply or balance competing MPS 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 MPS. 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 MPS. The standard for evaluating an application for approval of a Development Agreement against the MPS is not perfection. However, Council’s approval must align with an interpretation of the relevant policies that their language can reasonably bear.

[9] The Board finds that Council’s decision to approve the Development Agreement to allow the Applicant to build the proposed development reasonably carries out the intent of the MPS in this case. The appeal is dismissed.

2.0 BACKGROUND

[10] The Appellants appealed Council’s decision under s. 247(2)(a) of the *MGA* within the required appeal period to the Nova Scotia Utility and Review Board. On April 1, 2025, on proclamation of the *Energy and Regulatory Boards Act*, SNS 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*. The Nova Scotia Regulatory and Appeals Board (Board) heard the appeal.

[11] The Appellants stated in their Notice of Appeal that Council's decision does not reasonably carry out the intent of the MPS on several grounds, including that the public engagement was not adequate and that the approval of the Development Agreement was premature or inappropriate because: the land use was not compatible with the surrounding land; creation of excessive traffic hazards during construction and after completion; inadequate school facilities and fire protection; insufficient financial capacity of the Town to provide the infrastructure for the development; and environmental concerns.

[12] At a preliminary hearing held on January 29, 2025, to establish hearing and filing dates for the appeal, the Town advised that it would be filing a motion challenging the standing of several of the Appellants as aggrieved persons to bring the appeal under the *MGA*. The Town requested a preliminary hearing to determine this issue. The Board heard the Town's motion on March 5, 2025, which challenged the standing of the Appellants Paul Douglas Fisher, Laura Dell'aglio Dais da Costa, Kevin Procter, Caitlyn Hayward, and Katelyn Crosby as aggrieved persons. The Appellants opposed the Town's motion and further requested that Deanna Doucette be added as an Appellant. The Appellants also asked that Laura Lee Crosby and Wade Crosby be removed as Appellants and corrections made to the names of two of the Appellants. By decision dated April 10, 2025 (2025 NSRAB 7), the Board dismissed the Town's motion, added Deanna

Doucette, with the consent of the Town, as an Appellant, and approved removing the requested Appellants from the appeal and correcting the names of two Appellants.

2.1 The Board's Jurisdiction and Scope of Review

[13] The burden of proof is on the Appellants to show, on the balance of probabilities, that Council's decision to approve the Development Agreement to permit the proposed development on Thomas Road (PIDs 30228522 and 30383731) was not consistent with the intent of the MPS.

[14] Under s. 247 (2)(a) of the *MGA*, an aggrieved person 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) an aggrieved person;

[15] Under s. 250(1)(a) of the *MGA*, an aggrieved person may only appeal Council's approval of a Development Agreement on the following basis:

Restrictions on appeals

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

[16] 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.

[17] As discussed above, the Board determined in a preliminary motion that the Appellants Paul Douglas Fisher, Laura Dell'aglio Dais da Costa, Kevin Procter, Caitlyn Hayward, and Katelyn Crosby are aggrieved persons under the *MGA*. The Town did not object to the remaining Appellants' status as aggrieved persons.

[18] In municipal planning appeals, the Board follows statutory requirements and guiding principles identified in various Nova Scotia Court of Appeal decisions. The Court of Appeal 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.

(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]

[19] *Archibald* also expanded on the issue of conflicting policies at para 24:

(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]

[20] 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.

[21] Clearly, the Board cannot substitute its own decision for that of Council 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*, RSNS 1989, c 235.

2.2 Council’s Reasons in the Context of an Approval

[22] In this case, Council approved the Development Agreement. The Town provided the Appeal Record including the information before Council and the recommendation of the Town’s planning consultant to approve the application. Following the Board’s usual practice, the Board accepted additional evidence from the parties. Unlike when there is a refusal, the *MGA* does not require written reasons when a Development Agreement is approved, and Council did not provide reasons in this case. There must only be a public notice of the approval, which also indicates the right to appeal. *Archibald* involved the denial of an application, which required written reasons. The Nova Scotia Court of Appeal indicated that focussing, at least in the first instance, on these written reasons, provides a framework designed to ensure that the Board respects its appellate role.

[23] In cases like this one, where there is an approval and no written reasons, the framework for the Board’s review is less apparent. In this context, the Board has often said that Council speaks with one voice. Even where there are written reasons, the

highlighting of councillors' comments, while sometimes providing a context, is usually not helpful in deciding the issue before the Board. Councillors can have many varied reasons for voting in a particular manner. Ultimately, Council's collective decision to approve or deny an application must be considered in the context of the MPS as a whole (see *Boates, (Re)*, 2023 NSUARB 124).

[24] Council received a report from the Town's planning consultant with a recommendation for approval of the Development Agreement. This is ultimately what Council approved. That said, this planning consultant's report was not generated in the abstract, but with significant input from various sources. As discussed in *Heritage Trust of Nova Scotia v AMK Barrett Investments Inc.*, 2021 NSCA 42, the Board's assessment of whether Council's decision reasonably carries out the intent of the MPS is not confined to what happens before Council when its decision is made. The materials before Council, and the recommendation of the Town's planning consultant to approve the application, can provide an initial framework.

[25] In the end, the Board's task where there are no written reasons is succinctly summarized in *AMK Barrett*, at para. 29:

[29] The Board's job is to hear evidence, find the facts and determine whether the outcome – *i.e.*, the Council's approval of the development agreement – was reasonably consistent with the municipal planning strategy as a whole. It is not to micro-manage a *de novo* planning assessment.

[26] Where there are no written reasons, the Board must ultimately address the outcome. The analysis is based on the Appeal Record and the additional evidence and materials put before the Board.

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.

[28] On March 18, 2024, the Applicant filed an application with the Town for a Development Agreement for two vacant properties located on "Thomas Road" which is considered an extension of Thomas Road. The subject properties have a combined area of three acres. The application proposed the development of three multiple unit residential structures for a total of 76 units. Attached to this application was a site plan, servicing plan and building details. The subject properties are designated Residential under the GFLUM and zoned RLD on the LUB's Zoning Map. Policy R 9 of the MPS states that development of multiple unit residential structures within the Residential Designation must be considered by Development Agreement.

[29] Chris Millier of the consulting firm The 4 Site Group acts as the Town's planner. He provided a report dated August 12, 2024 (Millier Report), to the Town's Planning Advisory Committee. The Millier Report summarised the application and the proposed plan, identified the relevant Policies in the MPS for consideration and assessed the compliance of the application for a Development Agreement with the MPS. The Millier Report recommended the application to the Planning Advisory Committee:

Recommendation

A review of the proposed development against the relevant policies and criteria contained in the Municipal Planning Strategy, and in particular policy IM7, indicates that the proposed development is in general conformity with the intent of the Strategy. It is noted that the proposed development will require expenditure of funds by the Town for the construction of street network and infrastructure extensions. The Town has confirmed its willingness to assume the responsibility for these expenditures.

In light of this review it is recommended that:

The Planning Advisory Committee recommend in favour that the Town enter into a development agreement with 4576251 Nova Scotia Limited to permit the development of three (3) multiple unit residential structures to contain a total of seventy-six (76) dwelling units and related streets and infrastructure units as generally represented in the application and associated Site Plan, Servicing Plan and Building Details dated March 18, 2024.

[Exhibit P-6, Tab 3, p. 36]

[30] On August 12, 2024, the Planning Advisory Committee recommended in favour of the application for a Development Agreement and that Council give it First Reading and hold a public hearing. At its meeting on September 3, 2024, Council gave First Reading to the application and directed that a public hearing be held. The public hearing took place on October 7, 2024. There was a large attendance at the public hearing and Council received both written and oral submissions. Several of the Appellants submitted written submissions and made oral statements. Council decided to postpone its vote on the Second Reading of the application until October 17, 2024. On October 17, 2024, Council voted to give Second Reading and to approve the application. Notice of the approval was made public on January 6, 2025.

3.0 ISSUE

[31] In this case, the Board must determine if Digby Town Council's decision approving the Development Agreement does not reasonably carry out the intent of the MPS.

[32] This decision reviews the relevant MPS policies for potential impacts that the proposed Development Agreement would have including: issues about the compatibility of the multiple unit buildings with the existing neighbourhood; the adequacy

of schools, fire protection and road networks; the Town's financial capacity to absorb proposed development costs; public participation; and, environmental concerns.

4.0 WITNESSES AND EVIDENCE

[33] 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.

[34] Under s. 19 of the *Utility and Review Board Act*, SNS 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 Witnesses

[35] Six of the Appellants, Catherine Peck, Kevin Procter, Crystal Moore, Deborah Freeman, Paul Fisher and Jennifer Gillis, testified on behalf of the Appellants. The Appellants also called two witnesses, Gordon Grace and Alex Chapman. Mr. Grace

lives near the proposed development and is a long-time resident of the Town. Mr. Chapman lived in the Town of Digby for approximately five years until October 2024. Mr. Chapman attended the public meeting on October 7, 2024.

[36] James Wallace testified on behalf of the Applicant. Mr. Wallace is a builder and developer with over 30 years' experience who specialises in commercial re-purposing for residential uses and multiple unit housing. He stated that he worked in various provinces in Canada, including British Columbia, Alberta, Ontario and Quebec.

[37] The Town called two witnesses, Chris Millier and Thomas Ossinger. Mr. Millier owns and operates The 4 Site Group, a municipal and urban planning and development consulting firm. As noted earlier, Mr. Millier provided development administration and planning services to the Town of Digby for this application for the Development Agreement because the Town did not have its own planning department. Mr. Ossinger is the Chief Administrative Officer for the Town of Digby and is the development officer for the Town.

4.2 Supplementary Information

4.2.1 Letters of Comment

[38] Two letters of comment supported the proposed development. One attached a signed petition to show that others in the Town supported the proposal. Five letters of comment opposed the proposed development and expressed the following concerns:

- Density too high for area;
- Traffic volumes and noise;
- Insufficient public consultation and meaningful public participation in considering the proposal;

- Inadequacy of infrastructure and services; and
- Negative impact on property values.

4.2.2 Public Speakers

[39] One speaker registered for the evening session but withdrew the request to speak on the first day of the hearing.

4.2.3 The Site Visit

[40] The Board conducted a site visit on July 17, 2025, immediately after the hearing concluded. The parties did not participate in the site visit, by agreement. By agreement with parties, the Board accessed the lots through the property of Ms. Gillis on Thomas Road. The Board proceeded to the shoreline through the back of Ms. Gillis' property and continued along the shoreline to the first lot (intended for the two, 36-unit buildings, Buildings A and B) and, from there, to the adjoining second lot (intended for the 12-unit building, Building C). The Board observed the shoreline and the cliff immediately next to the shoreline.

[41] The Board returned to Thomas Road and proceeded on foot towards the Trans Canada Trail. It observed the view of the shoreline from the Trans Canada Trail and the embankment on the St. George Street side of the trail. The Board proceeded by vehicle to the end of Thomas Road. It then returned to St. George Street and travelled through the neighbourhood, along St. George Street, West Street, First Street, Third Street and St. Mary's Street and saw the homes of most Appellants. The Board observed the streetscape, housing form and height (predominantly single storey homes but with varying grades), the grade, the view, the street width, street condition (paved and unpaved) and the presence of various trees and shrubs within the view plane. The Board

also went down Queen Street from St. George Street and observed a commercial property which is the only adjacent development to the east of the site.

5.0 SUMMARY OF SUBMISSIONS

[42] The Appellants say they have demonstrated, on a balance of probabilities, that Council's decision to approve the Development Agreement fails to reasonably carry out the intent of the MPS. They state that the evidence establishes "a pattern of inconsistency across every critical aspect of planning" which failed to protect the neighbourhood's character, to ensure adequate infrastructure and safeguards for the environment and to uphold democratic participation (Appellants, Post-Hearing Submissions, p. 13).

[43] The Town submits that the Appellants have not provided evidence which would establish, on a balance of probabilities, that Council's decision to approve the Development Agreement fails to reasonably carry out the intent of the MPS. The Town says that the proposed development would aid in meeting the policy objectives of providing a variety of housing options, accommodating the need for growth and the renewal of residential building stock for Digby residents. The Town says that it was open to Council to weigh and prioritize these objectives and its decision reasonably carried out the intent of the MPS.

[44] The Applicant did not file any post-hearing written submissions.

[45] 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.

6.0 ANALYSIS AND FINDINGS

6.1 Relevant MPS Policies

[46] Before examining the relevant MPS Policies, the Board will first address the Appellants' concerns that the MPS is outdated. They say that Implementation Policy, IM 5, in Section 4.0 of the MPS requires that Council review the MPS no later than every five years, which Council has failed to do. They state that the current MPS was adopted in 2012, and Council had not reviewed it as of the time it approved the Development Agreement. The Appellants also referred to s. 214(1)(c) of *MGA* which requires "periodic review" of the MPS:

Statements of policy in planning strategy

- 214 (1)** A municipal planning strategy must include statements of policy respecting
- ...
(c) the implementation and administration of the municipal planning strategy and the periodic review of the municipal planning strategy, its implementing land-use by-law and the extent to which the objectives set out in the municipal planning strategy are achieved;

[47] The Town agrees that s. 214(1)(c) of the *MGA* requires that it periodically review its MPS, but that neither the *MGA* or the MPS cause the MPS to automatically expire or lapse because a review deadline is missed. The Town says that the MPS, once adopted by Council and approved by the Minister under the *MGA*, remains in force until it is amended or repealed by the statutory process (public hearing, Council hearing and ministerial approval).

[48] The Board finds that the current MPS, which Council considered when approving the application for the Development Agreement, was adopted in 2012. While the MPS may not have been reviewed since 2012, the Board finds that this MPS continues to be in effect and is the applicable MPS for the Board's review of Council's decision.

[49] The Town's MPS is the principal policy document for guiding Council's decision-making in planning decisions. The Town's LUB assists in the implementation of the MPS. As discussed above, the subject properties are designated Residential under the GFLUM and zoned RLD on the LUB's Zoning Map. The MPS requires that redevelopment of multiple unit residential structures within the Residential Designation can only be considered by a Development Agreement.

[50] There are several MPS Policies relevant to this appeal. Section 3.0 of the MPS states the Town's Land Use and Development Control Strategies. Part 3.1 states the objectives for the development and growth of Residential Development. Part 3.2 of the MPS sets out the policies "intended to regulate residential development within the Town." Policy R 1 and Policy R 2 state that it shall be Council's intention to create a Residential Generalized Future Land Use Designation on the GFLUM. Further, it shall be Council's intention to encourage the development of a wide variety of residential uses within the Residential Designation. Policy R 9(a) provides that Council can only consider new residential dwellings containing five or more units on lands designated Residential by a Development Agreement, subject to the criteria in Policy IM 7:

3.0 Land Use and Development Control Strategies

...

3.2 Residential Development Policies

In light of the goals and objectives contained in this Strategy and in particular the Residential development objectives identified in Part 3.1, the following policies are intended to regulate residential development within the Town.

- R 1 It shall be the intention of Council to create a Residential Generalized Future Land Use Designation on the Generalized Future Land Use Map and encourage the development, maintenance and enhancement of a wide variety of residential uses and related compatible uses within this Designation.
- R 2 It shall be the intention of Council to designate areas of the Town which are predominately residential in character and which are appropriate for long term residential development as Residential on the Generalized Future Land Use Map.

...

R 9 It shall be the intention of Council to consider the development of the following uses on lands designated Residential by Development Agreement subject to criteria contained in Policy IM 7, the General Criteria for Development Agreements:

- (a) New residential dwellings containing five (5) or more units;
- (b) Expansion of existing multiple unit dwellings containing four (4) or more units;
- (c) Multiple residential structures located on a single lot;
- (d) Group Homes;
- (e) Boarding and Rooming Houses;
- (f) All development located within the Residential Comprehensive Development District (RCDD) Zone;
- (g) Expansion or alteration of an existing commercial use pursuant to Policy R 11;
- (h) Erection of a wind turbine or a free standing solar panel.

[Exhibit P-10, Tab 2, pp. 31; 33-34]

[51] Policy IM 7, which is referred to in Policy R 9, is found in Section 4.0 of the MPS. Section 4.0 sets the Implementation and Administration policies for the overall development of the Town, including Policy IM 7, which provides:

4.0 Implementation and Administration

...

IM 7 In considering amendments to the Land Use By-law and/or the entering into of a Development Agreement, in addition to the criteria set out in various policies of this Strategy, Council shall consider:

- (a) whether the proposal is considered appropriate in terms of:
 - (i) the adequacy of sewer and water services;
 - (ii) the adequacy of school facilities;
 - (iii) the adequacy of fire protection;
 - (iv) the impact on adjacent uses;
 - (iv) the adequacy of road networks adjacent to, or leading to the development; [sic] and
 - (v) the financial capacity of the Town to absorb any costs relating to the development.
- (b) the suitability with any aspect relative to the movement of auto, rail and pedestrian traffic;
- (c) the adequacy of the dimensions and shape of the lot for the intended use;
- (d) the compatibility with the existing pattern of development and adjacent uses;
- (e) the suitability of the area in terms of steepness of grade, soil and geological conditions, location of water courses, marshes or bogs and susceptibility of flooding;
- (f) any other matter required by relevant policies of this Strategy.

[Exhibit P-10, Tab 2, pp. 47-48]

[52] The Board finds that the intent of the MPS is to encourage a wide variety of residential uses within the Residential Designation including multiple unit residential dwellings when the relevant policy criteria are satisfied. The intent of the MPS is also to consider the impacts and compatibility of residential development on existing neighbourhoods. The Applicant'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. The Board will now consider the Appellants' grounds of appeal alleging that Council's decision to approve the Development Agreement does not reasonably carry out the intent of the MPS.

6.2 Adequacy of Public Participation in Process

[53] In its Notice of Appeal, the Appellants stated that "such an important decision as rezoning from low density to high density requires successful community engagement. The Town Council offered one public meeting on October 7, 2024, and did not address any of our concerns."

[54] At the hearing, the Appellants acknowledged that they thought the Town's public participation policy was part of the MPS and already in evidence. After consideration, the Board allowed Administrative Policy number 2023-04 entitled *Public Participation Program Policy* (Participation Policy) to be entered as evidence. The Participation Policy was created to fulfill the participation requirements of s. 204 of the *MGA*.

[55] There was considerable discussion at the hearing around public participation and what was required under the Participation Policy, the *MGA*, and the MPS and how those requirements related to the meetings of the Planning Advisory Committee, Council and the public hearing for the proposal. The Appellants were clearly frustrated with what they saw as a lack of engagement and notification on the part of the Town. Several witnesses described being unaware of the proposal and finding out by chance, such as when a neighbour “came to my door” or overhearing “a couple of people in the store talking about it”. The Participation Policy requires notice by mail of any proposed Development Agreement to properties within 30 metres of the subject property. However, the right-of-way on the Trans Canada Trail essentially formed a roughly 30 metre buffer between the proposed project and the neighbouring homes. Mr. Ossinger confirmed that no one was mailed a notification about the proposal.

[56] The public hearing, on October 7, 2024, was described by one witness as “packed”. Mr. Procter explained that there was “[a]nger, disappointment, and somewhat disbelief that this was going to happen and there had been no notification.” Mr. Ossinger, described the public hearing as “crowded”, saying that it included individuals “that didn’t even really understand what they were there for” and that while the hearing “should be orderly as much as possible” he “thought it was chaotic”.

[57] In their final submissions, the Appellants note that it “seems unethical, inappropriate, and deeply concerning that residents living within 30.5 metres were not notified” of the proposal. The Town, however, argues that the Board has no jurisdiction to review the procedures for notice and public engagement.

[58] The Board has dealt with procedural issues such as public engagement in numerous matters [see: *Municipal Board Halifax (County) v. Maskine*, 1992 CanLII 2469 (NSCA); *Cornwallis Farms Limited (Re)*, 2024 NSUARB 120; *Community For Responsible Development For District 1 (Re)*, 2023 NSUARB 37 (*Canning*); and *Tawil (Re)*, 2022 NSUARB 95]. The Board's consistent position has been that, except possibly where such procedures are embedded in the MPS, it has no jurisdiction to overturn municipal council decisions based on alleged procedural errors. The Board's sole authority in the matter before it is whether the Town's decision was consistent with the intent of the MPS. In cases where the procedures are embedded in the MPS, the Board left open the potential it could consider whether a council's failure to adequately address them reasonably carries out the intent of the MPS. However, this is not such a case, as the policies being discussed were not included within the MPS. Therefore, the Board concurs with the Town that such procedural issues are outside the Board's jurisdiction.

[59] The ultimate issue before the Board is whether council's decision does or does not reasonably carry out the intent of the MPS and not the adequacy of the process to arrive at its decision. If Council made factual errors or errors in planning principles that might result from the process followed, the Appellants can raise them before the Board. The Board notes that this is a hearing *de novo* where wider public notice was provided. There were many Appellants from the neighbourhood who were able to marshal evidence and advance submissions like those made to Council, with more detail, and subject to cross-examination. Therefore, in this proceeding, the Board had a full record when determining whether Council's decision does or does not reasonably carry out the intent of the MPS.

6.3 Adequacy of School Facilities

[60] The Appellants argue that the Town did not provide evidence of any school reports to show there was any consideration of whether the proposed development would put an excessive burden on the existing school services.

[61] Under Policy IM 7(a)(ii) of the MPS, Council must consider whether the proposal is considered appropriate in terms of the adequacy of school facilities. In his report, Mr. Millier stated his opinion that the proposed development would generate a school age cohort of between 9 and 12 individuals. He concluded that this was a modest addition to the existing school enrolment profile. He testified that he followed a modelling “rule of thumb” in the absence of actual facts, since the buildings are not yet in existence. He said that because the majority of the dwelling units are single-unit dwellings, he concluded that there would be a modest amount of family occupancy.

[62] The Town argues that the Appellants bear the burden of proof, and they provided no evidence to contradict Mr. Millier’s finding that an increase of an estimated of 9 to 12 children would not put an excessive burden on the existing school facilities.

[63] The Appellants did not obtain a report or call any school official to contradict the determination by the Town’s planner, Mr. Millier. He determined that the existing school facilities could adequately handle an increase in the children caused by the proposed development. Accordingly, as Mr. Millier’s evidence appears logical, and has not been contradicted, the Board finds no basis to determine that Council’s decision about adequacy of the school facilities did not reasonably carry out the intent of the MPS.

6.4 Adequacy of Fire Protection

[64] Under Policy IM 7(a)(iii) of the MPS, Council must consider whether the proposal is considered appropriate in terms of the adequacy of fire protection. The Appellants assert that the fire protection services are not adequate for the proposed development.

[65] In his report, Mr. Millier referred to the Fire Service commenting favourably about the adequacy of fire protection. He wrote:

Policy IM7(a)(iii), Adequacy of Fire Protection

The proposed development calls for the construction of a looped street pattern, enabling access by emergency service vehicles. The street profiles will meet the Town's municipal specifications and will be approved by the Town Engineer.

The Fire Service have commented positively that the proposed development will provide for the extension of water services, including new hydrants. Concern has been raised regarding the proposed four (4) storey height of the building. It is noted that the structures are proposed to be constructed using Insulated Concrete Foundation (ICF) process and will meet all Building Code requirements.

[Exhibit P-6, Tab 3, pp. 33-34]

[66] Mr. Millier testified that he relied on the Digby Fire Department who advised they believed that they had the ability to properly provide fire protection services, after advising that a fire hydrant needed to be relocated. He testified that the statement in his report about concern for the four-storey building was a reference to public concerns when opposing other applications proposing four-storey buildings.

[67] The Appellants did not obtain a report or call an expert to contradict the determination by the Digby Fire Department that the fire protection services were adequate for the proposed development, which will provide for the extension of water services, including new hydrants. Accordingly, the Board finds no basis to determine that Council's decision about adequacy of fire protection did not reasonably carry out the intent of the MPS.

6.5 Adequacy of Traffic and Road Networks

[68] Under Policy IM 7, Council, before entering into a Development Agreement “shall consider:”

(a) whether the proposal is considered appropriate in terms of:

... (iv) the adequacy of road networks adjacent to, or leading to the development;
and
...

[69] Throughout the appeal, the Appellants referred to increases in noise and traffic both due to the construction phase and the number of new residents living in the area. They question whether the existing road networks can handle the increased traffic.

In their final submission they stated, “the roads aren’t currently adequate” and that:

No traffic reports have been filed with evidence and it is clear that the patterns of the neighbourhood will change in terms of roads, housing patterns and loss of green space patterning.

[Appellant’s Closing Submissions, p. 12]

[70] The Appeal Record filed by the Town included a report from Chris Millier to the PAC. With respect to traffic and Policy IM 7 Mr. Millier wrote:

Intersections of new streets with St. George Street, including signage and traffic control requirements, will meet municipal specification. The new construction will complete the historic Town street grid in this area. The proposed development will generate increased traffic movements on St. George Street and the connecting network. No traffic impact assessment has been prepared however it is anticipated that the increased movements can be accommodated by the existing network.

[Exhibit P-6, p. 34]

[71] In their reply to the Town’s submission, the Appellants noted a traffic impact study had not been done and that Mr. Millier’s reliance on “standard estimates” and “a general belief that narrow, and some unpaved local roads could cope is not a responsible basis for approving a project that will dramatically increase traffic.”

[72] At the hearing, Mr. Millier explained his approach to traffic, saying that his “opinion on the adequacy [of the traffic network] was based on the willingness of the design engineer to sign it”. He elaborated:

In this instance the Town actually is doing the infrastructure upgrading itself. It has its own engineer, consulting engineer, and the mandate for that engineer was to design the new infrastructure and the intersection of the new infrastructure to respond to this proposal. Not a just general, Let's build a 22-foot paved road and see what comes.

So the design of the proposal and the infrastructure requirements, including roads - but we did the same with sewer, storm sewer - was done concurrently so that the traffic that the engineer assumed would be necessary to accommodate ... was the design threshold that they adopted for the actual design.

[Transcript, pp. 437-438]

[73] The MPS does not require a traffic impact study. While the Appellants referred to Policy IM 7, they did not tie any specific evidence in current or potential traffic trends to Policy IM 7 or any other policies within the MPS. In this case, Mr. Millier relied upon the design experience of the responsible professional engineer. Council had a rational basis before it for concluding that the proposed development was appropriate when considering the adequacy of street infrastructure. The burden rests on the Appellants to demonstrate that Council's actions did not carry out the intent of the MPS. They did not provide sufficient evidence to meet this burden. Therefore, the Board is unable to conclude that the Town's actions did not reasonably carry out the intent of the MPS.

6.6 Financial Capacity of the Town to Absorb Costs Related to Proposed Development

[74] Under Policy IM 7, Council, before entering into a Development Agreement, “shall consider:”

(a) whether the proposal is considered appropriate in terms of:

...

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

[75] The Appellants argue there are “unaddressed questions about financial costs and benefits”, pointing to recent tax increases and discussions regarding the sale of Town property. They state that the Town “has provided no independent evidence demonstrating its ability to absorb these costs.” The Appellants also assert that it is not within their responsibility or scope “to prove, for example, that the Town has the financial capacity to absorb the costs associated with this project.”

[76] Mr. Millier testified the Town had the financial capacity and resources to deal with their share of the development costs. He stated, “there is no undue or inappropriate or unknown or risk in terms of financial implications to the Town, because they've already identified that opening the right-of-way and creating those streets is something that's in their plans and they have capacity to do.” In addition, the Town argues that the Appellants bear the burden of proof, and they provided no evidence that the Town lacked the financial capacity to absorb the costs.

[77] The Appellants presented no clear evidence of a lack of financial capacity. As such, the Board finds no basis to determine that the proposal is not appropriate due to the Town’s financial capacity to absorb any costs relating to the development.

6.7 Construction and Funding of New Cross Street

[78] The Development Agreement specifies that the Town will be responsible for the construction of the water, sanitary and storm water services for the extensions of West Street, Third Avenue and the New Cross Street. The Applicant will construct the travel surfaces and roadbed for the New Cross Street while the Town will do travel surfaces on the West Street and Third Avenue extensions. A proposed lift station will be constructed by the Town and will be cost shared 50/50 between the Town and the Applicant. Mr.

Ossinger testified that there was a mutual agreement between the Town and the Applicant, not included in the Development Agreement, for a financial commitment from the Applicant.

[79] In its submissions and response submissions, the Appellants raised Policy MI 2 that says:

MI 2 Digby MPS

It shall be the intention of Council that a property owner be responsible for the construction of all proposed extensions of municipal road, sanitary sewer, storm sewer, water and related infrastructure for the purposes of enabling development of private property and that all construction be in conformity with the provisions of the Town Subdivision By-law and related regulations and servicing specifications.

[Appellant's Closing Submissions, p. 10]

[80] The Appellants argue that:

- v. The Town has relied on an informal arrangement to have the developer pay for only half of the sewer and stormwater costs, when it is clear under MI2 that the developer should pay 100%. Mr. Ossinger further testified that the Town wished to retain control of the project, thereby assuming financial responsibility. This approach is in direct conflict with MPS 3.5 MI2, which clearly assigns such responsibilities to the property owner. [Emphasis added]

[Appellant's Response to Town's Submissions, p. 3]

[81] The Board has reviewed this issue carefully. The Appellants take issue primarily with New Cross Street, not the extensions for West Street and Third Avenue. Policy MI 2 does not refer directly to the funding of the infrastructure, but to responsibility for its "construction". More importantly, Policy MI 2 is not mandatory in nature but simply signals that it is the Town's "intention" that a developer bears that responsibility.

[82] Further, while a cost-sharing agreement outside of the Development Agreement may not be enforceable through the development permit, this does not mean that such informal agreements go against the intent of the MPS. Based on the available evidence with respect to Policy MI 2, the Board cannot conclude that the Town's decision did not reasonably carry out the intent of the MPS.

6.8 Compatibility with Character of the Area

[83] The Appellants submit that a proper interpretation of the MPS, in conjunction with the LUB, shows that neither allows a project with the scale and bulk of the proposed development. In essence, it appears to the Board that, in the first instance, the Appellants argue that not only is the proposed development incompatible with the surrounding neighbourhood, but it is not authorized at all at this location by the Town's planning documents.

[84] The Appellants point to the Residential Objectives in the MPS as providing a framework for their interpretation of the interplay between the provisions of the MPS that create the RLD Zone and the provisions in the LUB that implement it. These Residential Objectives include protecting, maintaining and respecting the character of existing neighbourhoods.

[85] The Appellants infer that the highlighted Residential Objectives, as they relate to their neighbourhood, are addressed in Policy R 4 that creates the RLD Zone. The RLD Zone only allows one and two-unit residential dwellings as-of-right. It applies to all existing one and two-unit residential developments at the time the plan was adopted. The RLD Zone also applies to all vacant lands within the Town, except for vacant lands in the Residential Comprehensive Development District (RCDD) Zone and some lands located east of Lighthouse Road and north of the Digby Pines Resort. These as-of-right restrictions are implemented by the creation of the RLD Zone in the LUB.

[86] Policy R 9(a) allows Council to consider "...[n]ew residential dwellings containing five (5) or more units..." on lands designated Residential on the GFLUM "...by Development Agreement subject to criteria contained in Policy IM 7...". The Appellants submit that an interpretation of Policy R 9 (a) that allows for high density residential

development in the RLD Zone makes no sense. At page 11 of their response submissions, the Appellants say that this interpretation of the MPS is an attempt by the Town to use the GFLUM, a planning tool, to circumvent the restrictions in the LUB, a regulatory tool, to "...justify a high-density development in a low-density zone..."

[87] The Appellants suggest that given the types of multiple unit dwellings discussed in the MPS, the scale of the proposed development was not contemplated at all. They say if such a proposed development is authorized at all, without a rezoning application, it can only be considered for lands zoned RCCD or in the Residential Mixed Use (RMU) Zone. Therefore, according to the Appellants, this "...suggests that Council's approval of a high-density Development Agreement in an RLD zone, without prior, rezoning, exceeds the explicit permissions of its own MPS." This argument appears to the Board to call into question Council's ability to consider the proposed project through the Development Agreement process.

[88] The Town's submission on this point is succinct. Referring to s. 2.5(a) of the LUB, the Town says that "...even though the RLD Zone does not permit apartments as-of-right, the LUB/MPS framework allows Council to consider large multiple unit residential projects by DA on RLD-zoned land that lies in the Residential Designation." This submission is consistent with Mr. Millier's oral testimony, when referring to the complimentary MPS policy, he stated:

So in the RCDD ... or sorry, in the residential designation, the Generalised Future Land Use Map tells us it's residential and then we look at the type ... so that's policy R1 and R2. Those are pretty straightforward. Pretty basic.

Q. Yeah.

A. R9 tells us what to do on the different types of development that are proposed within the residential designation. The Town has a threshold for using re-zoning for up to four units and then development agreements five units or more. Or where you're putting more than one residential structure on a lot or for a number of other reasons. Those are

actually ... that's policy R9, but R9(a) is the applicable bridge, policy bridge, for triggering the development agreement process.

[Transcript, p. 422]

[89] The Board agrees with the Town that the MPS allows a developer to apply for a Development Agreement for any project involving a building with five or more units in any residential zone, including the RLD Zone. The proposed development is on vacant lands designated as Residential on the GFLUM. Policy R 9(a) allows for residential dwellings in the GFLUM Residential Designation to be considered by the Development Agreement process.

[90] The Town submits that the MPS and LUB provisions related to the RLD Zone apply to as-of-right development, but that the MPS, supported by the LUB, has created a different stream, in all residential zones, for new multiple unit buildings with five or more units. This is the Development Agreement process implemented through Policy IM 7.

[91] The creation of four residential zones is enabled by the MPS. In addition to the previously discussed RLD and RCCD Zones, Policy R 5 provides for the creation of a Residential Medium Density (RMD) Zone. Policy R 7 directs the creation of the RMU Zone. Policy R 5 allows for a maximum of four dwelling units in a multiple unit residential dwelling in the RMD Zone. In addition to other potential uses, the RMU Zone also restricts the number of dwelling units in a multiple unit building to four.

[92] Policies R 4, R 5 and R 7 all specifically state they relate to as-of-right development. Policy R 8 about the RCCD Zone permits low, medium and high-density development but there is no as-of-right development contemplated in this zone. A Development Agreement is required for any project in the RCCD Zone.

[93] Policy R 6 says, "...that the development of new multiple unit residential dwellings containing a maximum of four (4) units within the Residential Designation shall be considered by amendment to the Land Use By-law (rezoning)...". As no rezoning is required for the four-unit dwellings authorized as-of-right by Policies R 5 and R 7, the Board finds this provision applies when a proponent is seeking to build a three or four-unit building in the RLD Zone. The rezoning option would likely be the RMD Zone, although the RMU zone could be possible, depending on the context.

[94] The Board does not accept that the foregoing MPS scheme means Council cannot consider a proposed multiple unit project that exceeds four units in the RLD Zone. When interpreting how the various residential policies of the MPS work together, the Board recognizes that the Residential Objectives are a preamble and not a Policy. These objectives discuss a balance between the goal of protecting, maintaining, and respecting existing residential neighbourhoods with the goal of "...providing for a wide range of housing options..." and promoting "...affordability, choice and options for accommodation...". Therefore, preserving the *status quo* is not the only overarching objective of the Residential MPS policies. This is confirmed by Policy R 1 which shows an intent to create a Residential Generalized Future Land Use Designation on the GFLUM. The GFLUM attached to the MPS has Residential, Commercial and Institutional Designations, and makes no distinction between existing development and vacant lands within the Residential Designation.

[95] Policy R 9 (a) provides a clear policy direction on how a developer can seek approval of a multiple unit building with five or more units within lands designated Residential on the GFLUM. Approval must be sought through a Development Agreement

application. There is no restriction in Policy R 9(a) about the maximum number of units in a proposed project. The Board rejects the proposition that Policy R 9(a) can only apply in the RCCD Zone or the RMU Zone.

[96] It is true that Policy R 8 about the RCCD Zone is the only residential policy that specifically refers to high density development. However, since a Development Agreement is required for any development in the RCCD Zone, Policy R 9(a) would be redundant if it only applied to this zone. The RMU Zone restricts as-of-right residential development to four-unit buildings. There is no reason in principle why Policy R 9(a) would apply to allow changes to the as-of-right restrictions on residential development in the RMU Zone but not in the RLD zone.

[97] The Board finds that the MPS scheme envisages that a rezoning application is required to develop multiple unit dwellings of up to four units in the RLD Zone because of Policy R 7. A Development Agreement is required to develop a higher density development containing five or more units in the RLD, RMD and RMU Zones because of Policy R 9(a). The RCCD Zone is comprised of undeveloped lands that have no Town services yet. A Development Agreement will be required for any development in this area.

[98] This MPS scheme makes sense because, for four-unit buildings, if rezoning is approved, one form of as-of-right development is replaced with another form of as-of-right development. However, for potentially higher density developments proposed in the RLD, RMD, and RMU Zones, the Development Agreement process allows Council to consider site-specific circumstances, as well as impose additional or different requirements than set out for the existing zones in the LUB. This additional flexibility can be used when considering the impacts of buildings with five or more units on existing

neighbourhoods and balancing the objectives of protecting existing neighbourhoods while promoting a wide variety of building types in the Residential Designation.

[99] That Council intended that Policy R 9(a) apply to all residential zones is supported by the wording of the LUB. While there have been amendments through the years, the LUB was enacted on May 5, 2012, which is the same date the MPS was adopted. As discussed in *Archibald*, while the intent of the MPS is determined primarily by its language, the reflexivity between the MPS and a concurrently passed LUB can offer some assistance in the interpretive exercise.

[100] In this case, the LUB resolves any doubt about whether Policy R 9(a) is applicable to the RLD Zone. Section 2.5 of the LUB says that the MPS: "...provides that the following uses shall be considered, approved and regulated by Development Agreement: (a) New residential dwellings containing five (5) or more units within the Residential Designation."

[101] This is an administrative provision that is not tied to any specific zone. Certain parts of s. 2.5 of the LUB make specific reference to zones, including the need for a Development Agreement in the RCCD Zone. It therefore follows that the LUB confirms the scheme of the MPS that a proponent can, in the appropriate circumstances, apply for a Development Agreement to build a multiple unit building with five or more residential units in the RLD Zone. This approach is not using the MPS GFLUM mapping to circumvent the restrictions in the LUB. While the MPS and LUB do serve different purposes, as alluded to by the Appellants, in this case the LUB incorporates the MPS policy direction that apartment buildings with five or more units must be considered by the Development Agreement process in all residential zones. Whether Council should grant

such an application is governed by Policy IM 7, which, interestingly, applies to both proposed Development Agreements and proposed LUB zoning amendments.

[102] Policy IM 7 (a)(iv) directs Council to consider “whether the proposal is considered appropriate in terms of...the impact on adjacent uses; ...”. Policy IM 7(d) directs Council to consider the proposed development’s “...compatibility with the existing pattern of development and adjacent uses;...”. The Board notes that there is a focus on “adjacent uses”. “Adjacent” is not a defined term but in planning matters ordinarily refers to nearby properties. When coupled with an “existing pattern of development” the term is wide enough to encompass the properties in the neighbourhood that surround the proposed development.

[103] The Appellants say that the proposed development is not appropriate because of compatibility factors associated with the impact on neighbouring properties and the change in the existing pattern of development. The Appellants’ main points are summarized by the Board as follows:

- The area surrounding Thomas Road can be characterized as a quiet, low-density neighbourhood consisting predominantly of single-family homes, most of which are single-story dwellings.
- The proposed development is too large in bulk and scale, including height and density, describing it as a “stark, incompatible intrusion” in the neighbourhood.
- The proposed development would lead to a loss of privacy, views, sunlight and increased noise and traffic.
- The proposed buildings would not be aesthetically compatible with the surrounding properties.

[104] The Appellants referred to the Town's "What We Heard" document dated May 2025, which was admitted during the hearing as Exhibit P-17. This document was generated following a public engagement process related to updating the current MPS. The "What We Heard" document indicates there were comments made at two public engagement sessions including a preference for high density development "near schools, hospitals, and commercial centres" and a preference to avoid "shorelines and historic home clusters." In admitting the document only to the extent it could possibly go to compatibility issues, the Board made clear that it was the current MPS that applied to this matter.

[105] None of the suggested preferences are expressed in the current MPS. The "What We Heard" document does not go directly to compatibility as that term is discussed in the current MPS. It does not help the Board determine the parameters of what was intended by the current MPS. While the Appellants may view the lack of such express restrictions as a gap in the current MPS, it supports Mr. Millier's opinion that the current MPS policies do not contain very restrictive language when assessing a Development Agreement pursuant to Policy IM 7.

[106] The Town's submissions highlight the tension created within the wording of the Residential Objectives between protecting the existing character of the neighbourhood and the other goals of accommodating a variety of housing options and future growth. The Town argues that the Appellants are only focussing on the preservation of the character of the existing neighbourhood. As well, the Town points out that such terms as "respectful of the character of the existing neighbourhood," "undue impact" and "appropriate" development are undefined question-begging terms where

Council's decision must be afforded deference. The Town submits that because of its location some distance from other residential properties, surrounded by the former Dominion Atlantic Railway easement, water and within newly created streets, coupled with the past varied uses of the subject properties, Council's decision complies with the MPS compatibility criteria.

[107] The Applicant did not make any written submissions. However, Mr. Wallace's testimony did provide some information on the proposed development which was useful to the Board when assessing impact and compatibility.

[108] The Board will start its analysis by highlighting the key legal principles at play, arising from the *Archibald* decision and prior Board decisions, when addressing the compatibility issue in this case:

- MPS policies must be interpreted reasonably to give effect to their intent and there is not necessarily one correct interpretation.
- There may be more than one conclusion that reasonably carries out the intent of the MPS.
- Absent an error of fact or principle, the Board should defer to the elected Council's value-laden choices and compromises in the face of conflicting or intersecting policy intentions.
- Deference to Council is not a licence to Council to make *ad hoc* decisions unguided by principle. For example, if the resolution of the policy conflicts is made clear in the MPS, Council is not owed deference. Council's choices must still be based on planning considerations contained in the MPS.
- The bulk, size, scale, character and transitioning features of the project are important to a determination about compatibility.

[109] The Board understands that the Appellants have an honest and deeply held view that this project is simply too large for their neighbourhood. It was a common theme throughout the Appellants' witnesses' testimony that the buildings were too large, too tall and with too many units, so that the project would change the character of their quiet neighbourhood to its detriment.

[110] Mr. Millier's expert planning report and testimony appeared to assess the impacts on adjacent uses and the character of the existing pattern of development primarily from the lens of one residential use compared with another. While pointing to other features about the location, topography and size of the lots in question, he said that the existing pattern of development in the area is residential housing bordered by streets, and this would be the same pattern if the development pattern proceeds. The Board does not accept that this is what is meant by an existing pattern of development. The Board finds that a more reasonable interpretation is that an "existing pattern of development" relates to built form. After all, aside from vacant lands, the existing built form was the basis for the creation of the RLD Zone in the MPS.

[111] The Board finds that the "existing pattern of development" in the area is primarily low-density single-family dwellings, along with some vacant shore lands, and a large commercial depot to the east of the proposed development. This is consistent with the oral evidence, the description of the area in Mr. Millier's report, and was confirmed by the Board's site visit. However, this does not mean that only single-unit or two-unit dwellings can be constructed on the subject lands to be reasonably consistent with the intent of the MPS. The Board has said in past decisions that compatibility does not mean that a new development must be the same height and bulk as an existing development

pattern. Compatibility relates to whether the new development can co-exist within the neighbourhood.

[112] The Board notes that the Appellants' written submissions appear to envisage a development with two four-storey apartment buildings containing up to 76 units. In fact, the proposed Development Agreement envisages two four-storey apartment buildings with thirty-two units each, and a two-storey townhouse type building with twelve units. The total number of units is 76 and it is proposed to situate the townhouses nearest to the shore, behind one of the four-storey buildings, such that the visual impact of the townhouses will be limited from the Appellants' residences. This misapprehension, therefore, has little impact on the analysis.

[113] More important to the analysis is the height of the four-storey buildings. The Appellants appeared to think they would be 60 feet tall. In their final submissions they suggested the four-storey buildings could be up to 58 feet tall. Mr. Wallace testified that his four-storey buildings would be 40 feet tall. This would only be five feet more than as-of-right development in the RLD Zone. The Board has reviewed the drawings attached to the proposed development agreement, and in particular drawing A6 of Exhibit P-6a. This exhibit is made up of digital copies provided by the Town at the hearing because the drawings in the Appeal Record were difficult to read. With the digital files, it is easy to determine that in these drawings the proposed four-storey buildings will be 36 feet from ground level to the fourth-floor finished ceiling level. There is a 14-foot below ground basement.

[114] The height of the roof-pitch from the fourth-floor finished ceiling level to its apex is not shown in the measurements. The drawing shows the floor heights between

the finished ceiling levels measure 8 feet. By simple measurement, the roof pitch height is shown as approximately 1.29 higher than these floor heights. The Board, therefore, extrapolates that the roof pitch, as shown on the drawings, will be just over 10 feet. This means that the best available evidence is that total four-storey building heights, including the apex of the roof pitch heights, as shown on the available drawings, will be approximately 46 feet measured from ground level.

[115] That said, the term “height” is defined in the LUB as follows:

... the vertical distance on a building between the established grade and the highest point of the roof surface of the parapet, or a flat roof, whichever is the greater; the decline of a mansard roof; or the mean level between eaves and ridges of a gabled, hip, gambrel or other type of pitched roof; but shall not include any construction used as ornament or for the mechanical operation of the building, a mechanical penthouse, chimney, tower, cupola or steeple.

[Exhibit P-10, p. 12]

[116] The four-storey buildings have a series of gables shown on the drawings. They appear to be four feet high, and this may be why Mr. Wallace said his buildings were 40 feet high. There was no discussion about the height definition during the hearing. Mr. Wallace may be right that for the purposes of the LUB that his building will be 40 feet high. In any event, from the Board’s perspective, it appears clear that measured to the apex of the pitch of the roof, the four-storey building height will visually be approximately 14 feet shorter, measured from ground level, than the 60 foot height advanced by the Appellants. The Board appreciates the ground level grade may not be the same after construction as it is now and the Applicant must work with a sloping grade that is levelled off in the drawings. That said, leaving aside the issue of views, the visual impact related to bulk, scale and height from ground level will be approximately 46 feet.

[117] Mr. Wallace raised another point in oral evidence which is important when considering the visual impact of the proposed buildings. He said:

The other thing that's been understated is the grade. That is not a gradual slope. My building itself is 58 feet, and over 58 feet we've got 1.7 metres of differential. Over 58 feet. If you look up at St. George, the people who live up on St. George Street are going to be looking over top of the building based on the elevations that we've shot. Or if anything, they're going to see the roof and then have the view above it.

[Transcript, p. 829]

[118] This appears to be where the Appellants may have taken the 58-foot height for the building. Mr. Wallace was adamant that his four-storey buildings were 40 feet tall, and the plans clearly do not show a 58-foot building above ground level. It is not clear whether Mr. Wallace was talking about the grade or slope of the lands in comparison to the properties on St. George Street and a distance related to a building or the height of the buildings if the underground parking is included. In any event, the point Mr. Wallace was making is that because of the grade the visual impact for adjacent properties would not be as significant as was suggested by the Applicants.

[119] Aside from the down sloping grade of the property, which the Board was able to observe during the site visit, Mr. Wallace considered other features to make the development less obtrusive. These included the placement of the buildings within the contours of the land, and movement of the buildings through various plan iterations, to try to alleviate some concerns about the impact on the view from neighbouring properties.

[120] All witnesses, including Mr. Wallace and Mr. Millier, agreed that the proposed development would bring change to the neighbourhood. In the Board's opinion, this does not mean that Council's approval of the Development Agreement does not reasonably carry out the intent of the MPS. As discussed earlier, there are competing purposes within the MPS expressed in the same residential objectives. One relates to

protecting existing neighbourhoods from undue impacts of higher density development, while another encourages a wide variety of housing options in the appropriate circumstances. The MPS clearly contemplates the possibility of higher density development in any residential zone. The Board is satisfied that the two residential objectives are not mutually exclusive in the circumstances of this case.

[121] In the Board's opinion, from an objective standpoint, the proposed development can coexist with the surrounding neighbourhood for several reasons. The combined lots are larger than most of the surrounding properties. This is not the type of infill development where the buildings will abut or be immediately adjacent to single-family dwellings. There is a considerable buffer between the proposed development and the houses on the south side of St. George Street created by the old Dominion Atlantic Railway easement. There is also a considerable distance between the proposed development and the other homes to the west on Thomas Road. The nearest property to the east, which the Board observed, is also some distance away and is a commercial depot of some type. To the south there is the Annapolis Basin. While the area residents do not agree, from the Board's perspective, this location provides a buffer between the proposed development and the neighbourhood. The transitioning in this case is created by the location of the lands and its topography. While not eliminating them, which is not the test, this assists with both visual impacts and privacy issues.

[122] The distance buffer is enhanced by the slope of the land. While not uniform, there is a noticeable drop in elevation from Thomas Road to the shoreline. There is an even more noticeable drop in elevation between the homes on St. George Street and Thomas Road. Also, the grade of West Street and Third Avenue beyond St. George Street

is very steep. Therefore, while the proposed development will be clearly visible, as Mr. Wallace explained, the impact on water views will probably not be as dramatic as portrayed in some of the photographs provided during the standing hearing, where the buildings were superimposed. While those photographs were considered during an expedited process for the standing hearing, without cross-examination, the Board has given them no weight in the merits hearing. They were not to scale and not independently verifiable. Except by buying the shoreline lands, no property owner's water view can be completely protected from shoreline development. The Board is satisfied that reasonable efforts were made by the Applicant to place the buildings in such a way as to minimize the impact of the four-storey buildings on the water views. The location of the buildings is incorporated into the development agreement.

[123] The new roads themselves will, in essence, create a relatively self-contained residential development. Mr. Wallace was of the view that this would invigorate the area. While that remains to be seen, the creation of what may amount to a new neighbourhood on a large tract of vacant lands is certainly in keeping with the residential objective about diversity of housing options. The Board accepts Mr. Wallace's evidence about the reason for his choice of unit sizes and his target market.

[124] Mr. Wallace described his target market:

I build what I call mid-market housing. Mid-market housing is specifically designed for people who either are single professionals or people who work full-time who contribute to the community and who deserve an opportunity to have a good quality of living.

[Transcript, p. 811]

[125] While unit size is not cast in stone, a change in the number of units would require a substantive amendment to the development agreement. The number of units impacts both the building footprint and the height of the building which are also

incorporated in the development agreement. The limit on the number of units creates pragmatic constraints on the size of the development. Therefore, given these constraints, it is unlikely there would be material changes to how the units are configured that would have a negative impact on the neighbourhood.

[126] There was some discussion about the aesthetics of the development. There are no specific guideposts in the MPS about building aesthetics. Without any specific directions in the MPS, and with the somewhat varied appearance of the neighbourhood properties, the Board does not find that the lack of specifics about this in the Development Agreement means it does not reasonably carry out the intent of the MPS.

[127] Presumably, the Applicant will design the building aesthetics to attract the target market, which is probably a larger consideration than any unenforceable “gentlemen’s agreement,” about features not covered in the development agreement, referenced by Mr. Ottinger.

[128] Traffic issues are discussed elsewhere and are not of a magnitude so that the proposed development is inappropriate at this location. Construction noise is a fact of life when projects of this kind are being built. Mr. Wallace described some of the measures he would take to alleviate dust and noise. In any event, temporary construction issues are not sufficient to render this project incompatible with the MPS.

[129] The Board notes that most of the issues raised by the Appellants before the Board were raised before Council. Council had an opportunity to consider them and, in fact adjourned the initial meeting without deciding the application, so they could be further reflected upon. Council could have weighed the various factors, and which aspects of the MPS’ goals should be given priority, in a different manner, and with a different outcome,

that might also have been reasonably consistent with the MPS. That said, this MPS is not very prescriptive in nature. Having considered the issue, the Board finds that Council's balancing of competing interests and goals in the MPS, and the approval of the Development Agreement, is reasonably supported by those planning principles expressed in the MPS insofar as compatibility and impact on the existing neighbourhood are concerned. The Board finds that Council's decision reasonably carries out the intent of the MPS.

6.9 Environmental Concerns

[130] In their Notice of Appeal, the Appellants stated the proposed development is "along a sensitive coastal area" within the high tide mark and the subject property is "designated on the provincial coastal hazard map as being at risk of flooding". They were concerned because the Town did not have an environmental review of its own but rather relied on Provincial and Federal environmental assessments. They concluded by saying their "overall concern is the lack of environmental study or policy".

[131] As support, they refer to MPS Section 2.2.1 on "Key Environmental Sustainability Issues", in particular Issue 4 on *Storm Surge Protection and Coastal Erosion*. They also refer to the *Statement of Provincial Interest on Coastal Development* and further state the Town failed "to utilize powers granted by MGA Sections 225 and 227 to enact robust environmental bylaws."

[132] The Town argues that municipal jurisdiction over environmental issues is limited and that the Town is entitled to assume that Federal and Provincial regulators will properly assess any issues within their jurisdiction. The Town also states that the

Development Agreement requires the developer to comply with all required Federal and Provincial permits and approvals such as the *Environment Act* and the *Fisheries Act*.

[133] The Board has considered the Appellants' submissions on this issue. The Appellants have not identified any specific policies within the MPS that were not followed. Rather, the Appellants' concerns are with a lack of policy relating to the environment. The identified Issue 4 on Storm Surge Protection and Coastal Erosion recognizes Digby's vulnerability to storm surge and coastal erosion and undertakes to prepare a coastal surge and erosion risk assessment. But it does not create any specific policies restricting development for environmental reasons. While the Appellants obviously feel strongly that there is a serious policy gap in the MPS, the Board can find no evidence that the Development Agreement does not reasonably carry out the intent of the plan.

6.10 Other

[134] The Board received comprehensive submissions addressing many aspects of the MPS. The Board considered all the submissions and the issues raised. Given the approach the Board has taken in determining this appeal, it has not made a complete catalogue or disposed of every point raised by every party. To the extent the Board does not explicitly deal with all aspects of an argument, or a point raised by the parties, it can be assumed the Board did not agree, or the point or argument carried insufficient weight to impact this decision.

7.0 CONCLUSION

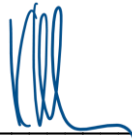
[135] The Appellants have not met the burden of showing, on a balance of probabilities, that Council's decision to approve the Development Agreement was based upon an interpretation of the policies of the MPS as a whole that the MPS cannot

reasonably bear. For the reasons set out above, the Board finds that Council's decision to approval the Applicant's application for the Development Agreement is reasonably consistent with the MPS.

[136] Accordingly, the appeal is denied.

[137] An Order will issue accordingly.

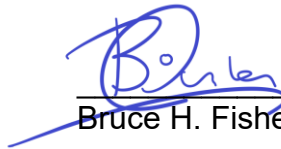
DATED at Halifax, Nova Scotia, this 29th day of October 2025.



M. Kathleen McManus



Richard J. Melanson



Bruce H. Fisher