

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by the **WILLIAMS LAKE CONSERVATION COMPANY** from a decision of **CHEBUCTO COMMUNITY COUNCIL** of **HALIFAX REGIONAL MUNICIPALITY** made March 3, 2003, which approved an application by **KIMBERLY-LLOYD DEVELOPMENTS LIMITED** to rezone approximately 156 acres of land known as Governors Brook, from Holding (H) Zone to Residential Development District (RDD) Zone, located between McIntosh Run and Colpitt Lake to permit 870 dwelling units in a mixture of single family, semi-detached, townhouse, apartment buildings and one neighbourhood commercial site

BEFORE: David J. Almon, Panel Chair
Peter W. Gurnham, Q.C., Board Chair
Roland A. Deveau, Member

COUNSEL: **THE WILLIAMS LAKE CONSERVATION COMPANY**
Kathleen Hall, LL.B.
Professor Phillip Saunders, LL.B.

HALIFAX REGIONAL MUNICIPALITY
Michael H. Moreash, LL.B.

KIMBERLY-LLOYD DEVELOPMENTS LIMITED
Michael J. Wood, Q.C.

HEARING DATES: June 14, 15, 16, 17, 18, 2004

DECISION DATE: **November 12, 2004**

DECISION: **Appeal dismissed.**

I INTRODUCTION

[1] This is an appeal by the Williams Lake Conservation Company (the “Appellants”/“WLCC”) from a decision of the Chebucto Community Council (the “Council”) of the Halifax Regional Municipality (“HRM”) made March 3, 2003, which approved an application by Kimberly-Lloyd Developments Limited (the “Applicant”/“Developer”) to rezone approximately 156 acres of land known as Governors Brook, from Holding (H) Zone to Residential Development District (RDD) Zone, to permit 870 dwelling units in a mixture of single family, semi-detached, townhouse, apartment buildings and one neighbourhood commercial site.

[2] In a 1997 application, Midyat Investments Limited applied to rezone the subject parcel from H to RDD, and to enter into a development agreement pursuant to the Halifax Municipal Planning Strategy (the “MPS”), to permit a comprehensive residential development.

[3] This application was rejected by the Council on April 6, 1998. The decision was appealed to the Nova Scotia Utility and Review Board (the “Board”); however, the appeal was withdrawn prior to being heard.

[4] On January 12, 1999, Kimberly-Lloyd Developments Limited (Midyat) reapplied for rezoning from H to RDD and a development agreement.

II **FACTS**

[5] The subject site is located between McIntosh Run and Colpitt Lake. It is part of a 350 acre parcel, nine of which are now zoned RDD and are being developed “as of right.” The present applications before HRM for rezoning and a development agreement relate to 156 acres, of which, approximately 140 acres can be serviced with municipal water and sewer. The remaining 16 acres included in the rezoning application are outside the area that can be serviced, comprising part of an open space dedication under a development agreement, which is not part of this appeal.

[6] There are a number of policy sections in the MPS, one of which sets out statements of policy for the mainland south area of HRM - the Mainland South Secondary Planning Strategy (the “MSSPS”) - which includes the subject site of this appeal. The MSSPS provides the primary policy guidelines for assessing the application through reference to the Generalized Future Land Use Map (the “GFLUM”), which designates the subject site as RDD.

[7] The current zoning of the Kimberly-Lloyd property is H. This zone primarily allows “as of right” detached, one-family dwellings, provided that on-site sewage disposal and water services are provided on the house lots. Other permitted uses include a public park or playground, and a public recreational centre. This zone does not preclude clearing of the entire 350 acres. “As of right” subdivision of the land would require that 5% or 17.5 acres be deeded to the HRM as open space. The remainder could be divided into building lots. Assuming one acre lots, approximately 275 lots could be created.

[8] The subject site is presently undeveloped and comprises areas of rock outcropping, steep slopes and the McIntosh Run flood plain. There are two unofficial but well used trails on the site: one along McIntosh Run, and the second along Governors Brook. Significant natural features include a stand of six to eight foot jack pine, significant escarpments and natural drainage areas.

III APPEAL PROCEEDINGS

[9] On January 12, 1999, Midyat (now Kimberly-Lloyd Developments Limited) reapplied for rezoning from H to RDD and for a development agreement.

[10] In a report dated December 2, 2002, (the "Staff Report") prepared by the Director of Planning and Development, and Gary Porter, Planner II (the "Planner"), they recommended that the Council should approve the proposed rezoning from H to RDD and, subject to the rezoning, the development agreement necessary to permit the residential development.

[11] Attracting a great deal of interest in the community, a Public Information Hearing was held on February 3, 2003, and continued on February 12, 2003. At the end of the second evening, the Council asked the Planning staff to prepare a further report for its meeting on March 3, 2003. That report was requested to clarify comments from the community, to respond to questions posed by councillors, and to provide additional information.

[12] An additional report (the "Supplementary Report"), dated February 28, 2003, was delivered to the Council members at the March 3, 2003 Chebucto Community Council meeting. The motion to approve the rezoning of the Kimberly-Lloyd property from H to RDD was put to a vote. Of the three councillors present, two voted to approve the rezoning, and the motion was carried.

[13] On March 20, 2003, the WLCC appealed from the decision made by the Council. The grounds of appeal are:

1. **Section 250(1)(a)** of the **Municipal Government Act**, R.S.N.S. 1998, c. 18.
2. Chebucto Community Council's decision to allow the amendment and approve the development as described cannot reasonably be said to carry out the intent of the Mainland South Secondary Planning Strategy. Specific policies which are in contravention include, but are not limited to, Policies 1.5.2, 5.2, 7.3
3. Chebucto Community Council's decision to allow the amendment as described herein cannot reasonably be said to carry out the intent of the Municipal Planning Strategy of Halifax, specifically Policy 2.1.4 and the Land Distribution Development Strategy.
4. Chebucto Community Council's decision to allow the amendment as described herein cannot reasonably be said to carry out the intent of the policies of Citizen Participation of the Municipal Development Strategy of Halifax, including but not limited to, Policies 12.4 and 12.5.
5. Such further other grounds as may appear from the record.

IV HEARING

[14] The Appellants were represented at the hearing by Kathleen Hall, Solicitor, and Professor Phillip Saunders. Three witnesses were called to testify in support of their appeal, including Dr. Martin Willison, Dr. Patricia Manuel, and Alan David Taylor.

[15] HRM was represented by Michael Moreash, Solicitor, who called Gary Porter as his only witness, while Chris Lowe gave evidence for the Applicant, represented by Michael Wood, Q.C.

Dr. Martin Willison

[16] Dr. Willison is a well-known professor of Biology and Environmental Studies at Dalhousie University. He was qualified as an expert witness able to give opinion evidence with respect to environmental studies, conservation biology, and wildlife management.

[17] Dr. Willison described the subject site (in comparison to other areas in HRM) as “unusual,” to the point of being “unique.” He claimed that:

. . . from an ecological perspective, I haven't seen anything quite like it, either before or, for that matter, since, although I've seen photographs of areas in northern Ontario that are rather like this, central northern Ontario.

[18] He told the Board that the area of particular interest with respect to the development lies between Colpitt Lake (also known on some maps as Coldbart Lake) and the McIntosh Run, which is the main watercourse draining the area. He referred to a map (Exhibits W-19B and D) which showed areas of environmental sensitivity, specifically relating to exposed bedrock, tree cover, wetlands and streams, and slopes which are 16% and greater (inasmuch that water rushes down these slopes during storms and tends to remove any soil that is present and “also causes cascades which will then do damage down below”).

[19] Dr. Willison explained that the subject site is “predominantly bedrock dominated.” Referring to an article entitled, “A Biophysical Survey of the Williams Lake, Purcell's Cove Back Lands, Halifax County, Nova Scotia,” authored by Art Lynds, Dr. Willison described the granite as a batholith, which is a “big outcropping of granite.”

[20] With respect to the vegetation, Dr. Willison characterized it as:

. . . typical of an area that is very dry and has been exposed to fire; however, there are areas that are wet . . .

[21] Jack pine is the predominant tree cover in the area, which reproduces only following extreme heat conditions such as a forest fire. Dr. Willison emphasized that “. . . you have to have periodic and repeated fire in order to maintain jack pine . . .” He described the unusual feature of the jack pine:

. . . it's found both in the most wet condition that jack pine grows and in the most dry condition that jack pine grows. Jack pine is tolerant of a wide range of conditions but can't grow where the soil is rich because it gets outcompeted by other trees. So it can grow where you've got very thin soils and it's unusually dry, and under some strange circumstances, it also grows in bogs, but growing in a bog is extremely rare . . .

[22] His evidence was that the rocky area of the subject site is covered by the jack pine and that there would be some “direct impact on the jack pine stand within this area proposed for development . . .”

[23] Dr. Willison had particular concern with respect to Policy 7.3, which states that the “city shall protect environmentally sensitive areas,” where development proposals are being considered through rezoning or development agreements. It was his opinion that

the development proposal lies “right in the middle of an environmentally sensitive area as defined.” He noted that the area between Colpitt Lake and the McIntosh Run is an area that will “be blasted to pieces,” and he wondered how one could protect something while blasting it to pieces. He was also concerned that imported soil loaded on top of the blasted bedrock is going to wash down the steep slopes toward the lake and the McIntosh Run, a migratory fish-way, stocked with a declining population of trout, gaspereau and, possibly, eels.

[24] Dr. Willison testified that, in environmental studies, the idea of the precautionary principle is now gaining strength, meaning that:

... in the absence of sufficient scientific evidence to make a very clear decision, then you use the best judgement based upon the best scientific evidence available to you even though it's not sufficient for proof, and you err on the side of caution.

[25] Dr. Willison's evidence was that:

we've got available to us at the moment is the development impacts adjacent to water bodies in an area dominated by granite around Halifax causes severe deleterious impacts on those lakes and water bodies.

[26] He could not say for sure whether there would be an increase or a decrease in the runoff, suggesting that

... there could be an increase as a result of blasting in the water that flows into Colpitt Lake or there could be a decrease.

[27] In his testimony, he also canvassed the Mainland South Stormwater Management Study prepared by Porter Dillon (Exhibit W-22) which covered various points

specifically related to the subject site, including the effects of storm water and sediment, importation of soils to the site, flow dispersion devices, erosion prevention, unique storm water quality problems, and the effects on the fish habitats.

[28] He also gave evidence that the degradation of the McIntosh Run is due, predominantly, to developments in the watershed, chief of which was the establishment of the Bayers Lake Industrial Park, which necessitated Halifax slate being ground up, changing the acidity of the water. As well, he said that periodic overflows of raw sewage at the Roches Pond Pumping Station have an impact on the McIntosh Run.

[29] Dr. Willison told the Board he has always considered the area proposed for development by the Applicant as having “special ecological value,” and that the particular site adjacent to Colpitt Lake “must be kept as it is, as a natural place.”

[30] Under cross-examination, Dr. Willison admitted that he had no specific training in planning matters. He also conceded that he was not an expert with respect to blasting regulations; however, he said he had a

. . . good background in chemistry and physics, and by consequence, [am] able to work things out that relate to . . . chemistry and physics.

[31] He also acknowledged “not being fully aware of all of the regulations that relate to blasting under the **Environment Act**,” although he said he was familiar with some parts of the **Act**.

[32] While acknowledging that there would have to be approvals from officials in the Department of Fisheries and Oceans, and the Department of the Environment with

respect to the impacts of blasting on the fish habitat, he suggested that adequate studies are unavailable at this time, in order to make good decisions. He further suggested that it is a multi-jurisdictional responsibility shared by the municipality, the province, and the federal government. He emphasized that there should be no development in those areas of the McIntosh Run watershed that would clearly have a major impact on the water quality. He added that the research was inadequate with respect to blasting, catch basins dealing with the issue of sediment, and the effect on the fish habitats.

Dr. Patricia Manuel

[33] Dr. Patricia Manuel is a professor at Dalhousie University. She teaches courses in environmental analysis, landscape analysis and landscape ecology. She was qualified as an expert witness able to give opinion evidence with respect to the areas of physical geography, landscape analysis, environmental planning, land use and community planning.

[34] Like Dr. Willison, she described the subject lands as “environmentally sensitive,” in that there are areas of steep slopes which can be “problematic” if disturbed, through forest cutting or excessive traffic, resulting in erosion and water runoff into the adjacent lakes and streams. She also described the habitat value of wetlands which harbour rare, endangered, and unusual plants. She further testified that tree cover is important because the roots hold the soil in place and that this was especially significant

on steep slopes, noting that “the denser the tree cover, the better we have the service from them . . .” As well, she commented on the exposed granite bedrock which is situated geographically in a delicate position between two significant water bodies — the McIntosh Run system and the Colpitt Lake-Williams Lake watershed. She spoke of the granite acting as an aquifer (a water bearing rock) for the local lakes and streams. Precipitation and overland flows run into the swales and ridges of the bedrock, where it then filters down through the vegetation, the mosses, the sedges, and the peat material, which “actually filters and cleanses the water as it goes through.”

[35] In examining the rezoning of the subject site, Dr. Manuel considered the impact on the existing water, sanitary sewer and storm sewer infrastructure, roads, and such “soft services” as schools, recreation and community services.

[36] She described the flow of water — surface drainage — of the Colpitt Lake/Williams Lake system, with the latter lake ultimately draining through an outflow called Lawson’s Brook to the Northwest Arm at the Royal Nova Scotia Yacht Squadron. She noted that the water draining into Colpitt Lake through the overland and groundwater flow is clean because of the lack of development: there is very little siltation in the immediate area of Colpitt Lake.

[37] With respect to the effects of storm water on both the Colpitt Lake and Williams Lake watershed, she referred to two reports: the “Study of Spryfield Watersheds,” conducted by MacLaren Atlantic Ltd. and Canplan Consultants Ltd. (Exhibit W-8), and the

“Investigation of the Aquatic Ecosystem of an Urbanizing Watershed - Williams Lake,” prepared by Richard Scott, in 992 (Exhibit W-9). In the latter report, Dr. Manuel noted that the author suggests that storm water diversion, in the absence of sediment and other pollution controls (in particular, bacteria and sediment) is an option. Among the findings outlined in the MacLaren Report, with which Dr. Manuel agreed, is that diversion of storm water to other systems is not a good idea, because the lakes will be deprived of a source of water, diversion systems are costly, and diversion to salt water may simply transfer problems downstream instead of solving them.

[38] Dr. Manuel reviewed her critique of the HRM's Staff Report, the summary of which states that the application for rezoning is premature and inconsistent with the policies in the Mainland South Secondary Planning Strategy (the “MSSPS”).

[39] She testified that she analyzed the Staff Report with respect to schools, pointing out that neither the Developer nor the HRM staff reviewed the area's capacity to accommodate school children, particularly in the context of recent school closures and existing development pressures, in light of, in her opinion, outdated analyses.

[40] With respect to traffic, she noted that a lot of emphasis was placed on the capacity of Herring Cove Road to accommodate traffic and the capacity of the Armdale Rotary to handle it during peak traffic times, and the effects it will have on local residential streets.

[41] In her evidence, Dr. Manuel referred to a document which was described by her counsel as “another version of the Mainland South planning strategy” which,

apparently, while approved by Council, was not sent as part of the overall plan for approval by the Minister. It dealt with issues of future land use and development regulations in Mainland South and “entails the gradual deterioration of the natural environment and concern of how to grapple meaningfully with environmental issues.” The increased density and the extent of land destruction that will emerge from rezoning to RDD is, in Dr. Manuel’s opinion, not consistent with the intent of the MSSPS. With respect to environmental planning, in her opinion, the H Zone

. . . seems to offer the best possibility right now because there are so many uncertainties around that piece of land with regard to its hydrogeological biophysical functioning and structure, especially with . . . the downstream impacts on Colpitt Lake and Williams Lake are an issue for us.

[42] Regarding the evidence of Chris Lowe (Exhibit W-16), Dr. Manuel reviewed his report prepared for the Applicant.

[43] Under cross-examination, Dr. Manuel confirmed that, assuming all permits were in place and the regulations were complied with, a developer under both the current zoning and the RDD zoning would be entitled to go in and blast whatever rock it desired. She also admitted that there is currently no area on the designated land that is protected, in terms of the jack pine. She also confirmed that there is no current protection for the granite batholith that would be lost if the subject area was rezoned.

[44] From a planning perspective, Dr. Manuel conceded that the Council, when looking at a rezoning application, should assume that, whatever development occurs, will

comply with all applicable federal and provincial regulations, and that any engineering design and construction will meet all required standards.

Alan David Taylor

[45] Alan David Taylor is employed with HRM as a transportation planner and appeared as a witness for the Appellant. He has both a degree in Civil Engineering and a Masters Degree in Civil Engineering. He worked for consulting companies in Ontario until 1996, when he assumed his present position. While he was not formally qualified as an expert with respect to transportation planning, his day-to-day work involves long-range transportation issues (such as planning applications and site development applications). His evidence centred on the impact the proposed development would have on traffic and the road network that would be required to service the proposed development. Throughout his testimony, he referred to a number of memos he had prepared (Exhibit W-24) in the Midyat application dealing with the development in the subject area and the traffic impact study. He dealt with the analysis performance of a number of intersections on the Herring Cove Road, signal warrant calculations, public transit service, and the projected increased in traffic through the Armdale Rotary (the "Rotary").

[46] In a memo to Mr. Porter dated January 7, 1998, concerning the Midyat proposal, Mr. Taylor stated the following:

...

The Armdale Rotary is operating well above capacity, as shown by the lengthy queues on the approaches in the weekday morning and afternoon peak periods. ...In other words - the Rotary is now a constraint, and a replacement would open up development potential. In

addition to problems of the Rotary capacity there are also capacity constraints on Quinpool Road at the intersection with Connaught Avenue (particularly in the morning peak period) and at the intersection of Chebucto Road with Mumford Road. Relief of the Rotary constraints may only move the queues (particularly in the morning peak) a few hundred metres onto the Peninsula and not really solve anything.

When Traffic and Transportation first examined the proposed development we requested the applicant provide a traffic impact study that showed what the effects of the development would be and suggest any changes in the road network required to service the development. For the most part the effects of the development would be acceptable, **but there is a significant exception. Traffic and Transportation are not convinced there is acceptable capacity for this proposed development at the Armdale Rotary.**

...

It is the opinion of Traffic and Transportation that the Armdale Rotary is operating at capacity and no additional development should be permitted that would add to Rotary demand where there are alternative areas for development to occur. No feasible changes to the Rotary were suggested by the consultant that would relieve the congestion. One suggestion is that the Rotary would work much better than it now does if the right-of-way rules were changed to the more usual standard of 'entering traffic must yield to on-the-circle traffic.' Theoretically this could be done by erecting YIELD signs on all approaches but our opinion is that it would be quite hard to get the drivers to follow the new rules instead of operating the way they have for over forty years.

Therefore, in the absence of any feasible method of adding capacity to the Armdale Rotary, it is our opinion that the application for re-zoning fails the test of Policy 4.2 of the Halifax Municipal Development Plan and should not be allowed. [emphasis in original]

[47] Mr. Taylor noted in evidence that the manner in which the Rotary operates (drivers alternating) is different from the way almost all other traffic circles operate around the world (traffic already in the circle has the right-of-way). A partial consequence of this is that the normal objective tests that traffic engineers might traditionally use for evaluating the performance of a rotary do not apply in the circumstance of the Rotary. This caused him to question reports prepared in 1997 by Streetwise Traffic Engineers and in April of 2002 by SNC Lavalin Inc. which provided information on the operation of the Rotary. The reports are referred to by Mr. Porter in the Staff Report.

[48] It is Mr. Taylor's view that the Rotary could operate more efficiently if another operating system were employed:

...

- Q. In order words, if you changed the rules that apply to the rotary, the rotary would no longer be at its capacity, would it?
- A. Right. Yeah. The demands that are on it today could be served much better if we had another operating scheme. [Transcript, p. 426]

[49] Mr. Taylor conceded that he had not made any scientific measurements of lineups at the Rotary, but it was his view that the lineups are unacceptable at peak times based on his knowledge of the Rotary and based on what he had been told by others.

[50] He confirmed that the Rotary handles approximately 55,000 cars a day. There are two other intersections in HRM that accommodate similar traffic volumes, Windsor Street at Kempt Road at the entrance to the MacKay Bridge and Portland/Woodlawn. He conceded that, like the Rotary, there are lineups at these intersections at peak times.

[51] Mr. Taylor acknowledged that it is Council's role to decide what is tolerable, in terms of delays at the Rotary:

...

- Q. You would agree with me, I suggest, that when council is making a decision with respect to a development and it has a traffic consideration of this sort that it may have to take into account a lot more considerations than you would take into account in reaching your conclusion that development should not be allowed?
- A. Correct. They have to consider the whole picture.

- Q. Are there any kind of hard and fast technical reasons why this development should not have been allowed because of the impact on the Armdale Rotary, or is that more of a political decision?
- A. How much delay is - - the question, I guess, the council has to ask itself, and I asked myself, how much delay is acceptable? I look at the lineups and I think, 'Nah, this is not acceptable. I want the system to work better. I have an opportunity here to say no to a proposal, and the houses could be built somewhere else where the problems aren't as great.' So I say - - I suggest to council that they not approve this because it's going to make things take longer at the rotary. Council can listen to my suggestion and say, 'Well, I don't - - I don't necessarily agree, you know. We have a lot of good reasons to do this and the cost in terms - - to the public in terms of a longer congested period and few minutes more per driver is worth the upside,' whatever the upside is . . . [Transcript, p. 427]

[52] He confirmed that he had not made an objective study of the traffic situation at the Rotary:

- Q. So in those cases you have technical standards that you apply as part of your profession?
- A. Yeah, what we call warrants, right.
- Q. And there are no such technical standards that apply in the case of the volume of traffic to be permitted or countenanced at a rotary and this sort of thing?
- A. That's right, not at the rotary. I guess the difference is . . .
- Q. So it's a matter of - - it's a matter of judgement, and you indicated earlier that if someone has to - - if people at rush hour have to wait a couple minutes longer, then that's a - - perhaps could be considered as a valid decision by council, could it?
- A. Yeah, that's their job, I guess, is to decide what's's tolerable and what's not tolerable in those kinds of cases. I think the difference is - - or a question like how much delay do we have at the rotary and how much is acceptable or not, we're not likely to kill anybody, but if we overuse marked crosswalks - - people get killed in crosswalks today, so if we overuse them, we're going to have more of that. So we're trying our best to keep the things that really go to public safety on a rigorous level. Things that are less in terms of safety, more in terms of convenience or service, then it's a judgement call, and judgement calls are the job of councillors. [Transcript, p. 430]
- ...
- Q. Mr. Taylor, just on that last point that Mr. Moreash was asking you about, I take it from your answers that the councillors of HRM are in a better position than you to

gauge, you know, how much the public is prepared to put up with in terms of delay at places like the rotary?

- A. I don't know if they're in a better position, but that's their job and not mine.
[Transcript, p. 431]

[53] Mr. Taylor confirmed that, with the exception of an unexplained jump in traffic in 1995, Rotary traffic has been relatively constant for the last 15 years.

[54] Finally, Mr. Taylor confirmed that he was satisfied all other transportation issues, other than the Rotary, could be accommodated with respect to the development.

Gary Porter

[55] Gary Porter was qualified as an expert witness able to give opinion evidence on planning matters, with specific experience in land use planning matters. He appeared as a witness for the Respondent, HRM. He is a full member of the Canadian Institute of Planners and is currently employed as a Planner II with HRM. He was the planner who dealt with the subject application, and authored the recommendations contained in the November 20, 2002, and February 28, 2003, Staff Reports. He recommended the rezoning of the subject property to RDD and approval of the development agreement.

[56] Throughout his testimony, Mr. Porter referred to the reports. He testified that the MPS indicates that services in Mainland South are adequate for 30,000 people, a population figure derived from the Land Development Distribution Strategy of Halifax 1977 (Exhibit W-25).

[57] With respect to the transportation network serving Mainland South, he

highlighted some changes or improvements in the streets or other infrastructure in that area since 1977, as well as some improvement to the Rotary “to allow for a better free flow through there.” He testified as to his own unscientific surveys of the Rotary, particularly with respect to the wait times entering and exiting the Rotary, both in the morning and in the evening. It was his opinion that, taking everything into consideration, “it’s probably going to increase some but not to the level . . . that’s excessive.”

[58] In discussing the nature of the proposed development, Mr. Porter stated that the MPS says that areas zoned “Holding” shall remain that way until such time as municipal services are available.

[59] Mr. Porter reviewed for the Board the policies laid out by the MPS, suggesting a course of action in dealing with the rezoning. In considering the proposed development, Mr. Porter stated that Council must also consider whether the development is consistent with the policies of the MPS as well as the adopted Land Development Distribution Strategy, and consider the impact it would have on sewer, water, transportation system, existing public schools, recreation and community facilities, as well as police and fire protection, all of which he reviewed. When it was suggested to him that the Developer might opt out of entering into the development agreement (should rezoning be granted, in the present application), he was of the belief that there is “an element of trust” between the Developer and HRM, providing comfort to him that the Developer will enter into the development agreement.

[60] In reviewing the application, Mr. Porter applied Policy 4.2 which requires that

the proposal is not premature by reason of the fiscal capacity of HRM to absorb the costs related to the development and the adequacy of the services provided by the HRM to serve the development.

[61] The Staff Report provides an overview of population trends in Mainland South:

Projected Population

The Halifax Municipal Planning Strategy (MPS) contains numerous references to the official City report entitled Land Development Distribution Strategy, 1977. This was adopted by Halifax City Council on April 28, 1977 and provides a context for many of the policies contained in the MPS. That report sets a population of 30,000 as a guideline for Mainland South as this is within the estimated service capacities.

Services were defined as sewer, water, transportation, police, fire schools, recreation, libraries and multi-services. The report goes on to state; 'it is desirable that population growth in Mainland South not exceed 13,000 persons; (i.e., number of persons required to bring total population to 30,000) until such time as necessary services are available to accommodate additional population growth.' The Land Development Distribution Strategy recommendation respecting population for Mainland South is one of the adopted strategy statements in Part III of the Halifax MPS².

Mainland South has not yet grown to the extent contemplated by the MPS. The population has been declining since 1976 when it was 21,844. The 2001 census figures indicate a population of 20,065, down slightly from the 1996 figure of 20,185.

There are approximately 400 vacant, residentially zoned building lots with up to 10,000 square feet of area in Mainland South. While each was not examined to determine if it could be built upon, assuming they all could, an additional population of 1,340 could be accommodated.

There are also [has] a number of larger parcels of land within Mainland South that can be serviced by the existing sewer system. Although an exact acreage has not been calculated, over the last 15+ years, several of these larger parcels have been developed. These include Regatta Point, Melville Ridge, Stanley Park, Forward Avenue extension, MacIntosh Estates, Keyworth Lane and Catamaran Pond Estates. These developments have resulted in approximately 2,000 dwelling units. However, despite this new development, the population level remains constant.

When complete, the Governors Brook development should have a population of approximately 2,756. Based on past trends and existing potential development, the additional population projected for this proposed development project is well within the

planned level of growth for Mainland South. [Appeal Book, p. 78]

[62] The principal concern with respect to services relates to traffic and the principal concern with respect to traffic is the capacity of the Rotary. Mr. Porter, in the Staff Report, outlines his recommendations and findings with respect to traffic including transit:

(f) Transportation System (including Transit)

Mainland South is separated from the Halifax peninsula by the Northwest Arm. There are two accesses to the peninsula from Mainland South - Northwest Arm Drive (connecting to Bicentennial Drive and Bayers Road) and the Armdale Rotary. All traffic leaving or entering Mainland South must use one of these accesses. For the previous application, the developer engaged Streetwise Traffic Engineering (STE) to prepare a Traffic Impact Study (TIS) to determine anticipated levels of traffic generated from the proposed development and their impact on the adjacent road network. This study was updated in 2002 by Dillon Consulting Ltd. which concluded that; *“the transportation conditions outlined in the 1997 Streetwise Traffic Engineering TIS are relevant under existing conditions”*.

STE indicates that 29 percent of the anticipated traffic from the proposed development will use Northwest Arm Drive while 46 percent will travel through the Armdale Rotary. The additional traffic using Northwest Arm Drive is within the capacity of that roadway. There are regular queues on the approaches to the Armdale Rotary in the weekday morning and afternoon peak periods. Queues are an indicator that the rotary is unable to handle the approaching volumes of traffic.

Historical data shows that traffic volumes at the Herring Cove Road approach to the rotary have stayed relatively constant from year to year, with the exception of the 1995 count (see Attachment D). The present average annual weekday traffic (AAWT) volume is approximately 30,000 vehicle trips. This is down from approximately 36,000 vehicle trips in 1995.

This project will add more traffic to the rotary. Based on the projected development of 50 dwelling units per year, 46 percent of which will use the rotary, the average annual weekday traffic volume will increase by 191 vehicle trips. This additional volume represents a very small percentage (less than one percent) of the total traffic volume at the rotary. The increase in traffic will result in longer delays during peak weekday periods but these delays are experienced at other principal access points to the peninsula. However, a one percent increase in volume should increase delays proportionally.

Upon completion of the 12 phases in Governors Brook, the estimated weekday trip generation will be approximately 7270 vehicle trips. If the traffic patterns remain constant, based on the STE predictions, 2108 vehicle trips of this traffic will use Northwest Arm Drive

while 3344 vehicle trips will travel through the Armdale Rotary. This additional traffic using Northwest Arm Drive is within the capacity of that roadway.

Given the phasing of this development, the anticipated annual increase in traffic should not significantly add to delays now being experienced at the rotary during peak periods. As well, it should be noted that the projected amount of traffic generated by the Governors Brook development will not increase volumes to the 1995 levels. It is also likely the net increase will be lower, as some motorists currently using the rotary may shift to other routes or alternative means of transportation if these become more attractive than using the rotary. Further, Bayers Lake Park has created a significant employment, retail and entertainment destination. As the park grows, it is anticipated that more Mainland South traffic will be diverted from the rotary to Northwest Arm Drive.

HRM's GoPlan study examines traffic on a regional basis and recognizes that the capacity of the rotary could be improved with the construction of an overpass. However, this measure has potential land use impacts, particularly in terms of influencing growth on Mainland South. Therefore, the GoPlan recommends further study to determine where growth should be encouraged on a regional basis and consideration of the effect replacing the rotary would have on Mainland South. The GoPlan has been tabled at Council, but has not received any approval.

In arriving at a decision on this application, Council must consider the adequacy of the street network serving this development. If it is not adequate and if the municipality does not have the fiscal capacity to absorb costs relating to the development, a rezoning application may be deemed premature or inappropriate and refused on this basis. While the existing road network in Mainland South is adequate to serve this development, the Armdale Rotary has insufficient capacity to provide free flow condition during morning and afternoon peak times.

Council must therefore determine whether this factor is sufficient justification to deny the application. Consideration has to be given to whether it is unrealistic to expect free flow conditions at all times. Comparison to queues at other entry/exit points to the peninsula must also be considered and to the fact that traffic volumes at the Herring Cove Road approach to the rotary have been as high as approximately 36,000 vehicle trips (average annual weekday traffic (AAWT) volume, 1995).

Traffic volume at the rotary is currently approximately 30,000 vehicle trips and this development will ultimately add 3344 vehicle trips. The anticipated growth from this development is within the limit set in the MPS as being within existing service capabilities and traffic volumes will still be less than previously experienced. In staff's view this proposal is not premature or inappropriate based on the adequacy of the street network serving this development.

While this development will not cause the efficiency of the rotary to decrease to an intolerable level, at some point, improvements to the rotary will be required. However, these improvements cannot be made in isolation of improvements to the receiving streets in order to maximize overall benefits.

With respect to transit, Mainland South is served by routes 14, 20 and 32. Route 14 travels from Leiblin Park via Dentith and Herring Cove Roads to downtown with stops at South

Centre Mall, Hartlen Avenue and Williams Lake Road. Route 20 travels from Herring Cove with the closest stop to Governors Brook being Drysdale Road. It also stops near Hartlen Avenue and near Williams Lake Road. These routes connect with the Mumford terminal, which links numerous routes around metro. Route 32 provides peak hour service from the South Centre Mall to downtown. The anticipated annual increase in ridership resulting from this development, given the proposed phasing, can be accommodated by the existing transit system and level of service. [Appeal Book, p. 82]

[63] Mr. Porter said that in making his recommendation to Council, he had to make it in the context of all of the relevant MPS provisions, not just those related to traffic. He noted that the population of Mainland South had not yet reached a target of 30,000 as contained in the MPS and would not with this development. He conceded the traffic situation at the Rotary during peak times is not satisfactory, but he did not see this development as causing a huge incremental increase in traffic.

[64] He noted that there were a number of entry points to the City that caused congestion in the Rotary and that congestion at the Rotary was not, for example, a reason for Council to turn down development in Timberlea or near the 103 Highway:

...

MR. GURNHAM: And is it a correct summary of your evidence to say that you looked at the population target, the 30,000, and then sort of made a pragmatic judgement that the rotary is not a very satisfactory situation but this is not a huge incremental change to what really isn't a very satisfactory situation?

MR. PORTER: Well, that's correct. That's - - we've put limitations on the growth rate so that, you know, it won't happen all at once. I think I mentioned earlier in my testimony, you know, we have a number of entry points to the city where there's congestion at rush hour, and development from the Timberlea area, some of that comes through the rotary and it - - you know, none of these traffic congestions have really been a reason to turn down any other development. So in the interest of fairness, I couldn't really do it in this case. [Transcript, p. 626]

...

MR. GURNHAM: So because it's your view to us that you didn't really want to unfairly, I'll use the word, punish this development when there were lots of other impacts on the rotary. And I won't put words in your mouth; I'm trying to understand your reasoning.

MR. PORTER: I think that's generally what - - that has never been a reason to turn down other developments. [Transcript, p. 628]

[65] In the absence of any reliable objective criteria, Mr. Porter said that Mr. Taylor's opinion was a subjective opinion and that Mr. Taylor provided to Council no objective measure of what traffic should be at the Rotary.

[66] It was Mr. Porter's understanding at the time of writing the Staff Report that Mr. Taylor had agreed to live with the recommendations in the Staff Report due to a 50 lot per year development limitation contained in the draft development agreement.

[67] The Appellant raised concerns with respect to a number of other services including sanitary sewer, fire protection and schools. Mr. Porter dealt with these concerns.

Sanitary Sewer

[68] The principal concern raised by the Appellant was the impact of the proposed development on the Roches Pond Sanitary Sewage Pumping Station which overflows into the McIntosh Run several times a year during heavy rain events.

[69] Mr. Porter noted this issue would, in fact, be resolved, as a consequence of the development, either by virtue of requirements in the development agreement which require the developer to resolve the Roches Pond problem, or by virtue of requirements of the Department of Environment that would have to be accommodated through a subdivision

agreement (in the event a development agreement was not entered into) before any development could proceed.

Sewer System (Storm)

[70] It was Mr. Porter's view, based on consultations with staff, that:

... Since 1972, all sewer systems constructed in this area are required to include separate storm and sanitary pipes. The proposed Governors Brook development will include a separate storm system. Only the sanitary sewer system will be connected to the Roches Pond pumping station system.

Storm water will not be permitted to directly discharge into McIntosh Run. Pursuant to the regulations of the NS Department of the Environment and Labour, adequate erosion and sedimentation control measures must be incorporated into the design and construction of the storm sewer system to ensure that the water quality in the Run is not adversely impacted. No significant affect on MacIntosh Run is anticipated.

...

[Staff Report, Appeal Book pp. 81-82]

Water System

[71] Mr. Porter confirmed consultations with the Halifax Regional Water Commission wherein he was advised that the water requirements could be accommodated.

Public Schools

[72] Mr. Porter confirmed advice from the Halifax Regional School Board that potential students could be accommodated by the School Board.

Recreation Facilities

[73] Mr. Porter noted that the two community centres serving the Mainland South

area, the Captain William Spry Community Centre and the Chocolate Lake Recreation Centre, are adequate. They can accommodate anticipated population from the Governor's Brook development.

Policing Services

[74] He confirmed the Regional Police Services had reviewed the proposal and advised there was no policy reason to prevent the project from proceeding.

Fire Protection Services

[75] He confirmed that in order to maintain the present level of services, HRM will require a second fire fighting apparatus and fire fighters to operate at Station 6 at some time in the future.

Halifax Harbour Solutions Project

[76] Finally, he confirmed that part of the harbour cleanup will be a treatment facility in the Herring Cove area which will accommodate this project.

[77] The balance of Mr. Porter's evidence centred on the environmental policies of the MPS with respect to environmentally sensitive areas, with specific emphasis on the areas of tree cover of 40% and greater in density, exposed bedrock, wetland and streams, and slopes 16% and greater.

[78] Taking all of the factors into consideration (Policy 7.3), Mr. Porter felt that a reasonable interpretation of Policy 7.3 was that

. . . some development can occur, but you should be aware of these environmentally sensitive areas and do your best to keep as much as you can.

He emphasized that it was not an “absolute prohibition of development” on environmentally sensitive areas that are privately owned.

[79] Mr. Porter noted that the Developer has determined the location of mature tree stands identified in the MPS and proposes to leave most of the land with mature tree cover undeveloped, although, trees will obviously have to be removed for the streets and where the buildings are going to be located.

[80] He also noted that the majority of the subject site is exposed bedrock which would require extensive blasting which would be regulated.

[81] Wetland and streams, along the McIntosh run, including the flood plain area, will be preserved.

[82] With respect to the slopes, Mr. Porter indicated that the last area of environmental sensitivity are slopes greater than 16 %. There is one apartment site proposed in an area with a slope between 16 and 25%.He also added that the biggest environmental benefit is that the water quality in the McIntosh Run will be improved through treatment. As well, the land along the McIntosh Run will be protected and enhanced for public use.

[83] Under cross-examination by Mr. Wood, Mr. Porter emphasized that the approval of the development does not exempt the developer from any particular standard

that has been adopted with respect to water, sewer, nor any overriding of the federal/provincial regulations. It was his opinion that the rezoning was “reasonably consistent with the applicable policies” of the MPS.

[84] Under cross-examination by Ms. Hall, when asked to comment on the effects of diverting the water from the land, including rainwater, snow, or any precipitation that would fall on the footprint now going into the McIntosh Run rather than Colpitt Lake, Mr. Porter conceded that it is “probably not good,” and that it would probably have some effect on the water levels of Colpitt Lake and Williams Lake.

Chris Lowe

[85] Chris Lowe has worked as a planner for more than 25 years. In addition to working in every province in Canada, he has been involved in many projects in the HRM. He was qualified by the Board as an expert able to give opinion evidence as a land use planner on behalf of the Applicant. He described his approach to the issue of determining the intent of the MPS. Following a thorough review of all the documents concerned, Mr. Lowe told the Board that he reviewed the Generalized Future Land Use Map and the policy objectives and plan objectives as outlined in the MSSPS (Part II). He stated that the designation (RDD) is consistent with Section X - Objectives and Policies of the MSSPS which states that the objective is

The development and maintenance of Mainland South as a predominantly residential area with a diverse mixture of family and non-family housing.

[86] With respect to the application of policy statements to the proposed development, it was his opinion that specific policies should not be treated in isolation, but in a context that allows HRM staff and elected officials the ability to apply reasonable and balanced judgment to the overall context of the project under review. It was his opinion that the overall policy is to allow the type and scale of development that was passed by the Council. He felt that the staff had taken a balanced approach to the interpretation of many policy statements to arrive at a reasonable recommendation to the Council.

[87] With respect to the environmental policy, he told the Board that he would put the environmental provisions “as a lesser policy than the policies we talked about earlier.” Based upon his review of the planning strategy, the environmental policy cannot be a basis for refusing to rezone from H to RDD. Mr. Lowe considers the conclusion by HRM staff that environmentally sensitive areas will be protected by the design of the project, passive and conservation area designations, water bodies, and upgrades to sewage systems, to be reasonable.

[88] Thirteen members of the public also spoke at the evening session of the Board hearing, including: Dr. Andrew Ross, Kathy Legge, Rebecca O'Brien, Phillip Saunders, Raymond Plourde, Neil Baines, Alan Ruffman, Brian Blanchard, Graham Read, Peter Pelham, Dawn Underwood, Kris Allinson, and Lana Wood, all of whom expressed concern about the decision of Council, and some of whom commented on what they perceived as flaws in the review process before Council. Other concerns centred on the

possibility that the proposed development within HRM could destroy known, or potential sites, with disregard for cultural, historical, and archeological significance; lack of sustainable public transportation system which would minimize adverse environmental effects; lack of protection by Council for environmentally sensitive areas when making zoning decisions; concerns for the poor water quality in Herring Cove and the impacts the proposed development will have on it; and an inadequate assessment by city staff of the potential impacts of the proposal on the sewer system, school system, and fire services.

[89] The Board visited the site on the afternoon of June 17, 2004, in the company of the respective counsel and Robert MacPherson, a representative of the Developer. The Board observed the nature and character of the adjacent neighbourhoods, the proposed public street access to the development from Drysdale Road and Theakston Road, as well as walking through the site, noting the terrain, including the tree cover, the exposed bedrock, Governors Brook, the McIntosh Run, Colpitt and Williams Lake, and the general topography of the whole area. The Board also observed the area around the Roches Pond pumping station and the outflow of effluent.

V THE LAW - SCOPE OF REVIEW

[90] The Nova Scotia Court of Appeal has considered the standard by which this Board must review a council's decision. Clearly, the Board is not permitted to substitute its own decision for that of Council. The Board's mandate is restricted to the jurisdiction conferred upon it by the **Municipal Government Act**, R.S.N.S. 1998, c. 18 (formerly the

Planning Act), as noted by Hallett, J.A., in **Kynock v. Bennett et al.** (1994), 131 N.S.R.(2d) 334 (C.A.) and **Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility and Review Board et al.** (1994), 128 N.S.R.(2d) 5 (C.A.). The extent of the Board's jurisdiction in planning appeals is described in **Heritage Trust** at pages 34 - 35:

In reviewing a decision of the municipal council to enter into a development agreement the Board, by reason of **s. 78(6)** of the **Planning Act**, cannot interfere with the decision if it is reasonably consistent with the intent of the municipal planning strategy. A plan is the framework within which municipal councils make decisions. The Board in reviewing a particular decision; it does not interpret the relevant policies or bylaws in a vacuum. In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. This court, on an appeal from a decision of the Board for alleged errors of interpretation, should apply the same test. This is implicit in the scheme of the **Planning Act** and the review process established for appeals from decisions of municipal councils respecting development agreements. There may be more than one meaning that a policy is reasonably capable of bearing. This is such a case. In my opinion the **Planning Act** dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. The Board should not be confined to looking at the words of the Policy in isolation but should consider the scheme of the relevant legislation and policies that impact on the decision . . .

This approach to interpretation is consistent with the intent of the **Planning Act** to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions . . .

Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review of enacting **s. 78(6)** of the **Planning Act**. The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are to be made. The Plan must be made to work. A narrow legalistic approach to the meaning of policies would not be consistent with the overall objective of the municipal planning strategy. The **Planning Act** and the policies which permit developments by agreement that do not comply with all the policies and bylaws of a municipality are recognition that municipal councils must have the scope for decision-making so long as the decisions are reasonably consistent with the intent of the plan. Very often ascertaining the intent of a policy can be achieved by considering the problem that policy was intended to resolve.

The Court of Appeal further held at page 52:

The **Planning Act** imposes on municipalities the primary responsibility in planning matters. The **Act** gives the municipal council the authority to enter into development by contract which permits developments that do not comply with all the municipal bylaws (**s. 55** of the **Act**). In keeping with the intent that municipalities have primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (**s. 78** of the **Act**). Planning policies address a multitude of planning considerations some of which are in conflict. Most striking are those that relate to economics versus heritage preservation. Planning decisions often involve compromises and choices between competing policies. Such decisions, are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions . . .

Neither the Board nor this court should embark on their review duties in a narrow legalistic manner as that would be contrary to the intent of the planning legislation. Policies are to be interpreted reasonably so as to give effect to their intent; there is not necessarily one correct interpretation. This is implicit in the scheme of the **Planning Act** and in particular in the limitation on the Board's power to interfere with a decision of a municipal council to enter into development agreements . . .

[91] The role of the Board in discerning the intent of an MPS was further canvassed in the Nova Scotia Court of Appeal decision of **Mahone Bay Heritage and Cultural Society v. 3012543 Nova Scotia Ltd.**, [2000] N.S.J. No. 245.

VI ANALYSIS AND FINDINGS

[92] The **Municipal Government Act** states that municipalities are to have “the primary authority” for planning. **Section 190(b)** of the **Act** states:

s. 190 The purpose of this Part is to

. . .

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

[93] This appeal is brought pursuant to **s. 247(1)** of the **Municipal Government Act**, which states:

- s. 247 (1)** The approval or refusal by a council to amend a land-use by-law may be appealed to the Board by
- (a) an aggrieved person;
 - (b) the applicant;
 - (c) an adjacent municipality;
 - (d) a village in which an affected property is situated;
 - (e) the Director.

[94] **Section 251(2)** of the **Act**, however, places a strict limit on the authority of the Board to allow such an appeal:

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

[95] The test for the Board is whether or not Council's decision reasonably carries out the intent of the MPS. It is necessary to review the various policies, determine their intent, and ascertain whether Council's decision was reasonably consistent with the intent of the MPS.

[96] The burden of proof is on the Appellant to establish, on a balance of probabilities, that in the words of **s. 251(2)**, ". . . the decision of council . . . does not reasonably carry out the intent of the municipal planning strategy."

[97] To ascertain the intent of the MPS, the Board turns to the objectives and policies as outlined in Section X - MSSPS, which provides the primary policy guidelines for assessing the application. Policies 8.1 and 8.2 state:

- 8.1 The Generalized Future Land Use Map shall be considered as the expression of intent of the City of Halifax for a future land use pattern, based on the policies outlined in this Strategy.
- 8.2 The areas for future land use shown on the Generalized Future Land Use Map shall be governed primarily by the objectives and policies which correspond to the primary use shown. All other objectives and policies shall apply as appropriate, but shall be subordinate to the primary objectives and policies.

[98] The Generalized Future Land Use Map of the MSSPS designates the subject site as RDD and states:

- 1.5 Areas designated as “Residential Development District” on the Generalized Future Land Use Map shall be residential development areas planned and developed as a whole or in phases under a unified site design, providing a mixture of residential uses and related recreational, commercial and open space uses, with an emphasis on a mix of dwelling unit types.
- 1.5.1 Pursuant to Policy 1.5, the Land Use Bylaw shall provide a new zone, the Residential Development District, within which “Low-Density Residential” development and public community facilities shall be permitted and other development shall be permitted only under the contract development provisions of the Planning Act and the requirements in Schedule I.

[99] The property is in the Holding (H) Zone permits single unit dwellings development with on-site services. The H Zone is intended to allow for development in several unserviced areas of HRM until such time as services are available.

[100] Policy 2.1.4 of Section II of the Halifax MPS applied the H Zone designation to the subject area at least until a secondary plan for the Mainland South area is approved.

Policy 2.1.4 states:

- 2.1.4 In accordance with Policy 2.1.3, the City shall permit only limited development with on-site services in that portion of the Mainland South area indicated on Map 1 and this shall be accomplished by Implementation Policy 3.6.

[101] Implementation Policy 3.6 also states:

- 3.6 In accordance with Section II, Policy 2.1.4 the City shall establish a holding zone to be in effect at least until such time as the detailed area plan for Mainland South is adopted and approved as an amendment to this plan.

[102] The detailed area plan for the MSSPS was adopted in 1987. It included Policy 1.5.2, which extended the existence of the H Zone within the RDD designation until such time as municipal services are available. Policy 1.5.2 states:

- 1.5.2 Notwithstanding Policy 1.5.1, Policy 2.1.4 of Section II shall remain in force and the City shall maintain a Holding Zone until such time as municipal services are available.

[103] In the Staff Report, the Planner states that 140 of the 156 acres requested to be rezoned to RDD can be connected to the existing sanitary sewer system. The Planner further states, and the Board so finds, that, as these lands can be serviced, rezoning to RDD is not inconsistent with Policy 1.5.2.

[104] In addition to the aforementioned, Council also must consider a wide range of factors which go beyond what may be considered under standard zoning practices. The MPS includes factors which provide guidance and identify matters for Council to consider when deciding on rezoning applications. These factors are included in Policy IM - 4.2 and 4.3, which state:

- 4.2 The City shall review the proposal to determine that it is not premature or inappropriate by reason of:
- i) the fiscal capacity of the City to absorb the costs relating to the development; and
 - ii) the adequacy of all services provided by the City to serve the development.
- 4.3 More specifically, for those applications for amendments to the zoning bylaw in

Mainland South as defined on Map 1, the City shall require an assessment of the proposal by staff with regard to this Plan and the adopted Land Development Distribution Strategy, and that such assessment include the potential impacts of the proposal on: (a) the sewer system (including the budgetary implications); (b) the water system; ©) the transportation system (including transit); (d) existing public schools; (e) existing recreation and community facilities; (f) the provision of police and fire protection services; and any other matter deemed advisable by Council prior to any final approval by City Council.

[105] The Appellant raised a number of concerns with respect to the adequacy of services, including sanitary sewer, fire protection and schools. The Board notes that no witnesses, with any material knowledge of these issues, were called by the Appellant. On the other hand, the Appellant called evidence to contradict the evidence of the Staff Report (and Mr. Porter) with respect to issues related to transportation and traffic, and the adequacy of environmental protection measures.

TRANSPORTATION AND OTHER SERVICES

Services, Other Than Transportation

[106] The Board is satisfied that Mr. Porter made adequate inquiries with respect to those services and was entitled to rely on the advice provided to him by the various agencies and departments as noted in the Staff Report including the Halifax Regional Water Commission and the School Board. Mr. Porter, and Council, are also entitled to rely on the provincial environment authorities with respect to sewer and storm water management, see paragraph 163, below. The Board finds that Council properly concluded that the development was not premature by reason of services, other than transportation,

in compliance with the provisions of Implementation Policies 4.2 and 4.3.

Transportation

Positions of the Parties

[107] The Appellant takes the position, based on the evidence of Mr. Taylor, that the Rotary is not adequate to service the development and, therefore, the decision of Council is not reasonably consistent with Policies 4.2 and 4.3.

[108] HRM noted the MPS contemplates a population of up to 30,000 in Mainland South and even with this development that target will not be achieved.

[109] HRM further noted that since 1977 there have been significant improvements in Mainland South's traffic infrastructure including the widening of Herring Cove Road and the construction of Northwest Arm Drive.

[110] It is HRM's position that the Rotary does not fall within the provisions of Implementation Policy 4(2)ii ". . . services provided by the City to serve the development." Mr. Moreash, on behalf on HRM, argued that provision does not apply to an asset like the Rotary which is removed from the development and serves a much wider population other than Governor's Brook. He compares the Rotary to Quinpool Road and Chebucto Road. Those streets are not considered to be services provided to serve that land or to serve the development. The Rotary, he argued, should fall into the same category. He distinguished it from a service that takes place at the site such as, for example, fire service, police service, or a road or intersection adjacent to the site.

[111] HRM noted that Mr. Taylor is a traffic engineer, not a planner, and compliance with planning policies is, appropriately, a matter for planning experts to deal with and the Board has the opinion of Mr. Porter that the decision of Council is reasonably consistent with the MPS. Counsel noted that Mr. Taylor did not have any objective evidence of the effect the additional population from Governors' Brook would have on queues and waiting times at the Rotary. He was, basically, working with information he had been told.

[112] The Developer argued that there has to be a concept related to "services" of "serving the development." For example, Counsel for the Developer asked whether parking downtown is a service provided by HRM that serves the development, arguing that, at the very least, the further away a service is from the development, the less the significance of the service to the development. Mr. Wood said that when Council is looking at transportation, it is the immediate road network that requires the most consideration. Mr. Wood noted that the Mainland South population is now, in fact, only 20,000, 10,000 shy of the 30,000 threshold referenced in the Land Development Distribution Strategy. It is the Developer's submission that services that existed in Mainland South in 1977 were adequate, under the MPS, to look after a population that existed at that time. The MPS indicates services are adequate for 30,000 people, well below the projected population for Mainland South, upon completion of the proposed development. Mr. Wood noted the evidence that traffic has been about the same at the Rotary for about the last 20 years and the development will not significantly add to that.

[113] He argued that Council had all of the information in order to make an informed decision.

Findings

[114] Mr. Porter and Council correctly identified the relevant Implementation Policies of the MPS regarding services.

[115] They were properly interpreted by Mr. Porter as meaning that a precondition to the rezoning was that services be available to service the site.

[116] The Staff Report identified all of the various services required to service the site. In particular, it identified issues related to transportation including that “the Armdale Rotary has insufficient capacity to provide free-flow conditions during morning and afternoon peak times.”

[117] Mr. Taylor’s conclusions with respect to Policy 4.2 of the MPS, as noted in his January 7, 1998 memorandum, were not specifically identified in the Staff Report. However, Mr. Porter believed, at the time he wrote the Staff Report, that Mr. Taylor had accepted its wording. Counsel for HRM advised that Mr. Taylor’s memos were included in the materials before Council. Minutes of the public hearing disclose that Mr. Taylor’s conclusions and his January 7, 1998 memorandum were specifically referred to by presenters (Appeal Book, page 57).

[118] In the Board’s view, the Staff Report and the public meetings clearly identified to Council traffic problems associated with the Rotary.

[119] While not necessarily accepting HRM's position that the phrase "services provided by the City to serve the development" cannot apply to the Rotary, the Board does agree Mr. Porter was justified in viewing the Rotary in a different manner than services such as sewer, water and the roads and intersections immediately adjacent to the development, which would exclusively or more directly service the development (see also paragraph 125 below).

[120] The Board notes, with respect to Mr. Porter's evidence, that there are a number of pressures on the Rotary emanating from various traffic corridors in HRM. The Board is mindful of HRM's argument about how far the inquiry about services is to reasonably proceed. For example, Quinpool Road, Chebucto Road and the Willow Tree, are all traffic corridors that are stressed at peak times. Are these services to be included in the consideration of Policy 4.2 and 4.3 in the context of the proposed development? Likely not.

[121] Nevertheless, Mr. Porter, and Council, did consider the impact of the Rotary upon the development. The Board considers this was a reasonable approach under the MPS. Mr. Porter, and presumably Council, in following his recommendation, were influenced by a number of factors, including:

1. The land development strategy referred to in the MPS sets a population target of 30,000 in Mainland South as being within the existing service capacity. Mainland South has not grown to the extent contemplated by the MPS. The 2001 census figure shows a population of approximately 20,000;
2. Since the land development strategy was prepared, Northwest Arm Drive and improvements to Herring Cove Road have been made. Northwest Arm Drive

allows access to Highways 102 and 103 without using the Rotary. Many of the services people seek are now provided in Bayers Lake and elsewhere and are not requiring residents of Mainland South to use the Rotary;

3. There are other pressure points on the Rotary and any improvement to the Rotary cannot be made in isolation of the receiving streets such as Quinpool Road and Chebucto Road;
4. The additional volumes represent a small percentage of traffic at the Rotary. The increase in traffic will result in longer delays in peak periods, but these delays are similar to those experienced at other major intersections in HRM.

[122] The Board also notes Mr. Taylor's evidence that with a change in the mode of operation of the Rotary, it can accommodate significantly enhanced volumes of traffic.

[123] Mr. Taylor, while opposing future development, conceded it was ultimately up to Council to determine what is tolerable or intolerable and to make its determination on a view of the whole development and all of the relevant policies of the MPS.

[124] It is not the role of the Board to substitute its own decision for that of Council; it is, rather, to decide whether Council's decision fails to reasonably carry out the intent of the MPS. The Staff Report and the minutes of the meetings of Council show that Implementation Policies 4.2 and 4.3 were brought to the attention of Council, and the service issues discussed in this hearing and, in particular, the Rotary, including the impact on waiting times, were raised at the public hearings before Council.

[125] The Board has taken into account the factors considered by Mr. Porter and Council as noted in paragraph 121, above, including:

- The Mainland South population, even with this development, will be well below the 30,000 limit to be served by existing services;

- Since the development strategy was prepared, Northwest Arm Drive and improvements to Herring Cove Road have been made. Northwest Arm Drive allows access to areas such as the Bayers Lake Industrial Park where there are services formerly only available on the Peninsula, thereby not requiring use of the Rotary;
- There are many pressures on the Rotary, in addition to this development, and HRM has not held up other development awaiting improvements to the Rotary;
- The Rotary is a facility which neither exclusively or principally serves the development.

[126] The Board notes that the land development strategy prepared in 1977 and quoted at paragraph 59 of the decision states:

It is desirable that population growth in Mainland South not exceed 13,000; (i.e., number of persons required to bring the population total to 30,000) until such time as necessary services are available to accommodate additional population growth.

[127] The Rotary existed in 1977 and a reasonable interpretation of the Plan is that it contemplates a population of 30,000 in Mainland South, based on existing services, including the Rotary. In other words, it is assumed the Rotary could accommodate up to 30,000 in Mainland South under the Plan. This development will not bring Mainland South to the 30,000 threshold. Since the MPS suggests the Rotary is adequate for a population of 30,000, a reasonable interpretation of Policies 4.2 and 4.3 is that the services to be **principally** considered are those such as sewer, schools, and adjacent roads which directly serve or are adjacent to the site. While they were either inadequate or non-existent in 1977, the evidence confirms, in the Board's view, they are sufficient today.

[128] The Board finds, therefore, that Mr. Porter's and Council's conclusion that the provisions of Policies 4.2 and 4.3 were satisfied with respect to traffic, is reasonably consistent with Policies 4.2 and 4.3 of the MPS. In the Board's view, Council reasonably determined that the rezoning satisfies the provisions of Implementation Policies 4.2 and 4.3 noted above.

ENVIRONMENTAL POLICIES

Position of the Parties

[129] The Appellant further submits that the decision of Chebucto Community Council is not reasonably consistent with the Mainland South Secondary Planning Strategy with respect to its failure to address the environmental policies.

[130] The MPS for the entire HRM region sets out the following expression of intent respecting protection of the Municipality's natural environment:

- 8.4 The City shall identify areas of natural significance and natural areas which are environmentally sensitive. The City will protect these areas from environmental degradation insofar as possible, through such means as zoning, development standards, and public education.
- 8.5 The City shall establish standards, insofar as it has the power, for maintaining lake systems and their watersheds in a healthy state. These standards should address the infilling of lakes or their tributaries, the preservation of natural resources which are visually or ecologically complementary to those lakes and their tributaries, the control of discharges into lakes or tributaries resulting from public or private developments which would cause long-term degradation of the water quality, and the prevention of any other environmentally damaging effects.

[131] As it pertains to the area comprising Mainland South, Policy 7 of the MSSPS

contains the following environmental policies:

- 7.1 Environmental sensitivity shall be considered as of the degree of susceptibility of natural areas to deleterious effects of urban development. Areas of high sensitivity are identified on the Environmental Sensitivity Maps. *These maps shall be used as general resource documents in evaluating zone changes and contract development applications.*
- 7.1.1 Pursuant to Policy 7.1 the following features are used to identify such areas:
 - (a) tree cover - 40 percent and greater in density;
 - (b) exposed bedrock;
 - (c) wetlands and streams;
 - (d) slopes - 16 percent and greater.
- 7.1.2 Lands within 100 feet of the water's edge of any water body shall be considered to be environmentally sensitive and the Land Use Bylaw shall require a higher standard for new single-family lots adjacent to watercourses.
- 7.2 The Environmental Sensitivity Map may be used in assessing the effects of capital work to be undertaken by the City.
- 7.3 Where development proposals are being considered through rezoning or development agreement, the City shall protect environmentally sensitive areas.
- 7.4 The City shall require setbacks for new development adjacent to lakes, watercourses or waterbodies for the purposes of maintaining and enhancing a high quality lakes and waterways system for development considered pursuant to Policy 1.5.1.
- 7.4.1 The City shall undertake an analysis of flooding along the McIntosh Run and prepare suitable policy and regulatory controls to protect the watercourse.
- 7.4.2 Pending the completion of the study outlined in Policy 7.4.1, the City shall amend its Land Use Bylaw to require a setback for all new development of one hundred feet from the McIntosh Run.
- 7.5 Environmentally sensitive areas in public ownership should be preserved in their natural state and utilized for limited park and recreation uses.
- 7.6 The City shall attempt to minimize using salt on streets in areas where contamination of groundwater and wells is likely or apparent, and to accomplish this shall identify areas subject to potential contamination as a result of salt use. [emphasis added]

[132] The Board observes that Policies 7.1 and 7.3 clearly direct that these policies apply to both zoning changes and development agreements.

[133] In his testimony, Dr. Martin Willison described his concerns about the environmentally sensitive features of the subject lands. Pursuant to Policy 7.1 and 7.1.1, Dr. Willison referenced the maps (Exhibits W-19B and D) outlining the environmentally sensitive areas in question (see his evidence starting at paragraph 16). The Developer and HRM did not take exception to the evidence of Dr. Willison asserting that the lands contained environmentally sensitive areas.

[134] The Appellant notes that the decision of Council is to rezone all of the subject lands from Holding (H) Zone to Residential Development District (RDD) Zone. While the Appellant acknowledges that Community Council's motion provides that no work should commence on the lands until a development agreement is executed, Mr. Saunders reiterates that the effect of Council's decision is to rezone all of the lands, without exception, to RDD Zone. He adds that, in so doing, Council did nothing under Policy 7.3 to "protect environmentally sensitive areas." Mr. Saunders submits that any protection for the "environmentally sensitive areas" is restricted to that contained in the development agreement which, he asserts, is not under review in this appeal.

[135] Mr. Moreash, counsel for HRM, submits that the zoning of the lands as Holding zone under Policy 1.5.2 implies that a rezoning of the lands must occur at some point in the future (i.e., that point being when municipal services become available). Thus, he asserts that the only question to be determined is one of timing — when will the lands

be rezoned, rather than whether they should be rezoned at all. In his view, the only basis for refusing the rezoning to RDD is that municipal services are not available to the site. If rezoned, he states that the only option is to rezone as RDD zone because of the GFLUM, which designates the future land use of the subject lands as "Residential Development District." In effect, the Board views Mr. Moreash's position as being that Council has little latitude to require environmental protections in such circumstances.

[136] Nevertheless, Mr. Moreash submits that Chebucto Community Council did, indeed, consider various measures in its application of the environmental policies to the rezoning of the subject property, and that the decision of Council is reasonably consistent with the environmental policies. In his view, Council's decision affords protection to the environmentally sensitive areas, especially when viewed in the context of the draft development agreement, which Council reviewed in its consideration of the rezoning application.

[137] In his direct testimony, Gary Porter, planner for HRM, testified about the protection afforded to the rezoned lands, including the conveyance of some of the environmentally sensitive areas to HRM under the proposed development agreement:

- A. Well, I guess that's set out in the supplementary report. The -- it really all hinges on the meaning, I guess, of the word, "shall protect environmentally sensitive areas." The MPS goes on to identify what environmentally sensitive areas are, so that part is fairly clear. The word "protect" we felt did not mean an absolute prohibition of development, and that's really based on the fact that the **Municipal Government Act** only gives the municipality the ability to prohibit development where land conditions would be hazardous to development as opposed to the other way around. In other words, we could probably zone a bog as no development because houses would, you know, perhaps sink into the ground, or if they were on a floodplain or, you know, some reason where the conditions would be hazardous to development. And also the **Municipal Government Act** does not allow a municipality to zone lands so that there'd be no development, except on the condition that they can do it if they intend on purchasing it, and they're required to do that within a certain period of time.

So when you take all those things into consideration, I think a reasonable interpretation of the policy is that some development can occur, but you should be aware of these environmentally sensitive areas and do your best to keep as much as you can.

Q. Okay. And 7.5, how does that fit into your analysis?

A. Well, I guess that kind of reinforces this -- what I was just saying a little bit.

'Environmentally sensitive areas in public ownership should be preserved in their natural state and utilized for limited park area.'

That's essentially telling us or telling the public that we -- any environmentally sensitive areas that we own, we will preserve them in their -- in their natural state. The -- uses the preserve there, not protect. So, you know, I think when you take all these into consideration, that the direction of policy 7.3 is not an absolute prohibition of development on environmentally sensitive areas that are privately owned.

Q. Thank you. Would you just take us through that part of your report that follows that deals with the treatment of tree coverage, exposed bedrock, wetlands and streams and slopes?

A. Okay. There's four -- four features, I guess, that have been identified as environmentally sensitive. And we had the developer identify these areas and plot them on a map in relation to their development, the first one being areas of tree cover greater than 40 percent. Trees will obviously have to be removed here for the streets and where the buildings are going to be. There's a requirement that anything beyond 25 feet from a foundation over, I think it's four inches in diameter not be cut. So there is some tree preservation there. And also, as I mentioned, some of these areas that will be deeded to the municipality contain some significant amounts of trees as well. So, yes, some trees will be lost and some trees will be saved, and some trees will be saved under public ownership.

Q. What's your understanding of any restrictions on the cutting of trees now?

A. Whether the municipality has a by-law to prevent someone from cutting trees?

Q. Yeah.

A. I don't believe we do.

Q. Okay.

A. Okay. Exposed bedrock, there is a lot of -- there is a lot of bedrock there. There's -- we've heard lots of testimony to that -- that effect. It is identified on one of these environmental sensitivity maps. The red area shown here.

Q. And that's map what?

A. This is W-19D. And the exposed bedrock has been coloured in red. The development occurs in this area. Most of it is exposed bedrock. The trees I

mentioned earlier, you can see them identified here in green. Most of this area will be deeded to the municipality of -- that's within the green on their property. The exposed bedrock will -- will have to be blasted for this development to occur, and I guess that's one of the sacrifices to save some of the other features. Wetlands and streams, again, we are getting the land that's along the McIntosh Run, including the floodplain area. So that -- that land will be -- will be preserved in public ownership. And the last area of environmental sensitivity is slopes greater than 16 percent. These -- these were identified on the plan. The slopes -- let me see exactly what it said here. There's one apartment site proposed in an area with a slope between 16 and 25 percent.

'This site was chosen to take advantage of the topography and locate the building so that the parking lot can be provided under a portion of the building. Approximately 4 percent of the site contains slopes in the range of 16 to 25 percent.'

That's 6.24 acres.

'Twenty-nine percent will be disturbed during development ...'

I guess that's .29 percent.

'... 1.74 acres, resulting in 3 percent of the entire site, with undisturbed slopes in the range of 16 to 25 percent.'

The development agreement also requires that where development is in the area of the slopes that a qualified person would have to provide information on stabilization and erosion prevention, et cetera, before a building permit would be issued. So that covers that part. Those are the four areas that the MPS directs us to look at.

BY MR. MOREASH:

Q. Okay. With respect to environment, what, if any, environmental protection benefits result to the municipality from this proposed development? Just kind of a recap because we've talked about some of them but...

A. Yeah. Well, I guess probably the biggest one is that the water quality in McIntosh Run will be improved through treatment of the overflow that goes into it. Much of the land will be deeded to the public and HRM will be in -- okay, this is the best map, W-27, I guess, to show that. This piece of land down here, 190 some acres, will be of public ownership. There'll be no threat of development occurring there. The land along McIntosh Run, the floodplain, will be protected and enhanced for public use. The -- no runoff to -- or no runoff from roofs and streets, et cetera, to Colpitt Lake and the -- and Governors Run, and I guess those would be...

Q. Trees?

A. Well, trees would be saved within the area that would be deeded to the municipality. [Transcript, pages 499-504]

[138] In questioning by the Board, Mr. Porter acknowledged that he relied upon safeguards in the draft development agreement to offset the damage to the exposed bedrock. In other words, he conceded that nothing could be done to protect the bedrock, relying, instead, upon safeguards in the development agreement for the protection of other environmentally sensitive features to recommend approval of the rezoning:

MR. GURNHAM: Yes. I think we've been through this early, and I don't have a lot. But I just want to come back to two issues. One is the exposed bedrock. I just want to make sure I understand your opinion or your evidence to us, and it really is that nothing could be done with respect to the bedrock issue, so you looked for offsetting advantages in the development agreement that affected the environment?

MR. PORTER: I guess essentially that's correct. The developers made the proposal. This was the part of the land that they wanted to develop on, and we tried to make it as best we could for HRM, acknowledging that some of the environmental -- environmentally sensitive area would be lost, and the tradeoff would be some other areas over which we had no control at the time would then come under the control of the municipality.

MR. GURNHAM: And is that, in your judgement, an appropriate way to deal with provisions of 7.1.1, to look for an offsetting environment -- with that in it?

MR. PORTER: I believe that's what the policy suggests that we do. [Transcript, pages 625-626]

[139] Conversely, Mr. Lowe, a planner retained by the Developer, testified that the environmental policies should not be considered in the proposed rezoning. The basis for his submission lies in the original designation of the subject lands as Holding (H) zone, in the context of the lands being designated as "Residential Development District" on the Generalized Future Land Use Map. In his view, the lands must be rezoned when municipal

services become available, without recourse to the environmental policies.

[140] Mr. Wood, counsel for the Developer, like Mr. Moreash, submits, in the context of the lands' designation on the GFLUM, that the timing issue is the only matter to be addressed in the rezoning from Holding zone to RDD zone. In his submission, the environmental policies are subordinated to the overriding policy which intends the subject lands to be occupied for residential purposes under the GFLUM (see Policy 8.2). In his submission, the MSSPS intends that the lands be kept in the Holding zone only until such time as municipal services become available for development of the site. Mr. Wood urges the Board to find that the environmental policies do not apply in the present case.

Findings

[141] In commencing its analysis, the Board is mindful that the subject property is designated as "Residential Development District" on the Generalized Future Land Use Map. Thus, it is clear that the intent of the MSSPS is that the future land use of the site be for residential purposes. In the Board's view, the other policies of the MPS, generally, and the MSSPS, specifically, must be considered in the context of this residential ("RDD") designation. The Board refers to Policies 8.1 and 8.2 which provide, in relation to the property's designation on the GFLUM:

8. GENERALIZED FUTURE LAND USE MAP

- 8.1 The Generalized Future Land Use Map shall be considered as the expression of intent of the City of Halifax for a future land use pattern, based

on the policies outlined in this Strategy.

- 8.2 *The areas for future land use shown on the Generalized Future Land Use Map shall be governed primarily by the objectives and policies which correspond to the primary use shown. All other objectives and policies shall apply as appropriate, but shall be subordinate to the primary objectives and policies. (Emphasis added)*

Thus, other policies in the MPS, including environmental policies, must be subordinate to the “Residential Development District” designation on the GFLUM.

[142] Further, the Board must not overlook the current zoning of the subject lands as Holding zone. Counsel for both HRM and the Developer submit that this particular zoning contemplates, and even requires, the rezoning of these lands once municipal services become available to the site.

[143] The basis for the establishment of the Holding zone is outlined in Policy 1.5.2 of the Mainland South Secondary Planning Strategy:

- 1.5.2 Notwithstanding Policy 1.5.1, Policy 2.1.4 of Section II shall remain in force and the City shall maintain a Holding Zone until such time as municipal services are available.

[144] Section II of the MPS, which contains the City-Wide Objectives and Policies, limits development in the subject area until municipal services become available:

- 2.1.4 In accordance with Policy 2.1.3, the City shall permit only limited development with on-site services in that portion of the Mainland South area indicated on Map 1 and this shall be accomplished by Implementation Policy 3.6.

Implementation Policy 3.6 states:

- 3.6 In accordance with Section II, Policy 2.1.4 the City shall establish a holding zone to

be in effect at least until such time as the detailed area plan for Mainland South is adopted and approved as an amendment to this Plan.

[145] The MSSPS also sets out various policies respecting the protection of environmentally sensitive areas. While these policies, specifically Policy 7.3, require Council to protect such areas, the Board considers that these policies must be read in the context of the entire planning strategy in determining their intent.

[146] The Board must first determine the extent of the “protection” contemplated by the environmental policies and, secondly, how these policies were applied in the context of other policies in the planning strategy.

[147] In its initial report, HRM planning staff reviewed the environmental policies cited above and noted the distinction between the protection to be afforded lands in public ownership (Policy 7.5) versus environmentally sensitive areas in general (Policy 7.1):

Policies 7.1 and 7.5 distinguish between environmentally sensitive areas under “public ownership” which “should be preserved in their natural state”, and environmentally sensitive areas in general which should be protected from “deleterious effects of urban development”. Therefore, *it is reasonable to conclude that environmentally sensitive area(s) should be afforded some level of protection but are not subject to an absolute prohibition of development. The design of the proposed development, and the measures contained in the proposed development agreement afford sufficient protection of environmentally sensitive areas.* [emphasis added]

[148] Following the public information hearing, members of Community Council sought further information from planning staff on the application of the environmental policies, particularly the significance of the word “shall” in terms of protecting environmentally sensitive areas. In its supplemental report, staff wrote:

F. - Use of Word “shall” in Policy 7.3

Further to previous discussion on policy interpretation, Council has asked specifically for

comment on use of the word “shall” in Policy 7.3. Policy 7.3 states:

Where development proposals are being considered through rezoning or development agreement, the City shall protect environmentally sensitive areas.

The word “shall” means mandatory or compulsory. Policy 7.3 creates an obligation by HRM to protect environmentally sensitive areas. In arriving at the interpretation of Policy 7.3, it is the meaning of the word “protect” that gives the direction to this policy. In staff’s view “protect” does not necessarily imply an absolute prohibition. Protection means integration of the development with the environmentally sensitive areas so that as much of the environmentally sensitive areas as possible are retained. [emphasis added]

[149] Upon its review of Policy 7.3, the Board concurs with Mr. Porter and Mr. Lowe that this policy does not contemplate an absolute prohibition of development in the Holding zone. Even though Policy 7.3 is silent on this point, the Board considers that such a finding is implicit in the context of the GFLUM which designates the area as “RDD.” Clearly, the intent of the MSSPS is that residential development is contemplated for these lands, subject to the application of other relevant policies in the planning strategy.

[150] In reviewing Council’s options in considering the rezoning application, the Board is mindful that there appear to be few measures Council had at its disposal to “protect” the subject lands pursuant to the environmental policies of the MSSPS. The subject lands are in private ownership. Under private ownership, the current Developer, or a future owner, can prohibit access by the public to these environmentally sensitive areas. Further, it can choose to remove stands of jack pine or, subject to blasting regulations, flatten outcrops of granite batholith. Viewed against this backdrop, the Board considers that the *status quo* offers little protection to the “environmentally sensitive areas.”

[151] The Board does not share the Appellant’s fear that the subject areas may

suffer greater harm if the Developer chooses to forego the development agreement following the rezoning and proceed with “as of right” development, ignoring the protections set out in the proposed development agreement. While the rezoning may permit more “intense” uses on the subject lands than if developed “as of right,” it is clear that under their present zoning (i.e., Holding Zone), the subject lands are also susceptible to “as of right” development at the same minimal level of protection that exists for RDD zoned lands.

[152] The Board also discounts HRM’s option to rezone only a portion of the subject lands. Even if Council was to consider such an alternative, the portion of rezoned lands would attract no greater protection than that available to the entire property if it was rezoned as proposed. In each case, the level of protection afforded to the rezoned lands would be identical. Further, in the case of a partial rezoning, the portion of lands remaining as Holding Zone could still be developed “as of right,” with the minimal protection that would entail.

[153] Alternatively, Mr. Saunders, on behalf of the Appellant, argued that Council could have zoned the lands differently, in a fashion that was compatible with a residential use, e.g., as Park and Institutional (P) Zone [Transcript pp. 1077-1079]. Even if that submission is correct, this approach ignores the sole task before the Board in this appeal. While it may be useful to review the possible options to place the evidence in its proper context, the ultimate disposition of this appeal should not focus on whether the rezoning should have been refused, or that only a portion of the lands should have been rezoned, or that they be rezoned to something else.

[154] The task before the Board under the **Municipal Government Act** is simply to determine whether the decision of Council to rezone to RDD reasonably carries out the intent of the municipal planning strategy. In making that decision in this instance, Council interpreted the GFLUM as intending a residential use, and applied that finding, in the context of the proposed development agreement. While Council, undoubtedly, had other options before it, the Board concludes that Council's approach was reasonably consistent with the MSSPS.

[155] As previously noted, in determining the intent of the MPS, the Board is required to consider the environmental policies in the broader context of the MPS in its entirety. It must not limit the scope of its review to a determination of what constitutes the best protection for the environmentally sensitive areas in question, without regard to other relevant policies. If the Board's analysis identifies two or more applicable policies, whether they conflict or not, it must limit its review to whether Council's interpretation of the planning strategy (comprising the totality of all policies) reasonably carries out its intent. The Board is not entitled to substitute its own opinion for that of Council. Even if there are other potential interpretations of the municipal planning strategy, those alternative interpretations must defer to Councils' decision, provided it is reasonably consistent with the MPS and the MSSPS.

[156] It bears repeating that Council, not this Board, is charged with the primary responsibility in planning matters. As noted by Hallett, J.A., in **Heritage Trust**, at paragraph 164:

. . . In keeping with the intent that municipalities have primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (**s.78** of the **Act**). Planning policies address a multitude of planning considerations some of which are in conflict. Most striking are those that relate to economics versus heritage preservation. Planning decisions often involve compromises and choices between competing policies. Such decisions, are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions . . .

[157] Following its review, the Board concludes that Council did, indeed, balance the objectives of the environmental policies (Policy 7) with the “Residential Development District” designation of the subject lands on the GFLUM (Policy 8) and the policy establishing the basis for the Holding zone (Policy 1.5.2). In the Board’s view, Council did not, as Mr. Saunders asserted, rely solely on the GFLUM and Policy 1.5.2 in making their decision, to the exclusion of environmental considerations under Policy 7 of the MSSPS. In the planning reports prepared by Mr. Porter, and in the hearing before Council, the environmental concerns were raised. The Board is satisfied that Council considered, and addressed as best it could, the environmental policies in the context of the subject rezoning proposal.

[158] As noted above at paragraphs 150 to 152, the Board concludes that there were few options open to Council in applying the environmental policies in the context of a rezoning. While Policy 7.3 requires Council to protect environmentally sensitive areas during both rezoning and contract development applications, the latter offers more alternatives for fulfilling this objective. In the end, Council determined that protection of the environmentally sensitive areas could best be achieved by rezoning the subject lands to RDD zone, and contemplating that the proposed development agreement contain certain

protections for environmentally sensitive areas on the property.

[159] With respect to a point raised by Mr. Moreash, who stated that the Board should take into account the relationship of trust between HRM and the Developer in assessing Council's rezoning decision, the Board assigns little weight to this factor. While both HRM and the Developer may enter a relationship with the best of intentions, a number of things can occur to frustrate development plans, including, but not limited to, a sale or conveyance of the subject lands to a third party who may not have similar objectives. The Board determines that the existence of trust is irrelevant to the issue under consideration.

[160] In the present circumstances, however, the Board is comforted by Council's reliance on the development agreement, through testimony at the hearing that it would not be economically feasible to develop the lands "as of right," due to the high development costs in relation to the low density development which can be accommodated "as of right" on the subject property (see Dr. Willison's testimony on cross-examination by Mr. Wood, Transcript p. 125). Moreover, the Board considers it significant that Council maintains control over the development agreement despite the rezoning. The final form of the agreement is subject to approval by Council. Failing such approval by Council, the Developer must resort to the prohibitive cost of developing the property "as of right."

[161] In addition to specific concerns about the application of environmental policies in the MSSPS, some of the Appellant's witnesses, and others who spoke at the evening session, also raised concerns about the environmental impact of the proposed rezoning on

ground water, including the possible impact on existing watersheds and the effect of runoff from the proposed development into local watercourses such as McIntosh Run, Colpitt Lake and Williams Lake.

[162] The scope of the Board's jurisdiction in such environmental matters has been canvassed by the Nova Scotia Court of Appeal in **Kynock**, *supra*, where the Court considered an appeal of a decision of the Board involving environmental concerns about a proposed quarry operation. While that proceeding related specifically to a development agreement, rather than to a rezoning, the Board considers the Court of Appeal's findings in **Kynock** to be instructive. The Court concluded that the Board, in reaching its decision, "lost sight" of the fact that it was the Minister of the Environment who had the primary responsibility to determine whether or not a quarry is operated in a manner that complies with the environmental laws of the province. At paragraph 34, Hallett, J.A., noted:

The legislation of this Province puts the primary responsibility for matters affecting the environment with the Minister of the Environment, not with municipalities, municipal councils nor with the Nova Scotia Utility and Review Board. That is not to say municipalities shall not have regard for the environment in their planning policies, only that the primary responsibility for the environment is with the Minister of the Environment.

In reversing the Board's decision, the Court said that the Board cannot interfere with a decision by a municipal council to enter into a development agreement unless the Board decides that "the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy." The Court held that the Board must not limit its review to the environmental concerns:

The Board's function was not to determine if a quarry might be objectionable to the residents or if its operation might violate environmental laws. The latter issue is properly resolved

pursuant to the environmental legislation. [para. 43]

[163] The Board is satisfied that the environmental issues were addressed by planning staff in their report to Council. Further, it observes that municipal officials can rely on the appropriate governmental authorities to monitor the construction and ongoing operation of municipal or private systems, including sewer or wastewater management systems, as noted by the Nova Scotia Court of Appeal in **Kynock**, at paragraphs 41 to 43. Indeed, as noted by Hallett, J.A., in paragraph 34 of **Kynock**, it is provincial environment officials, rather than municipalities, who have primary responsibility for protection of the environment. Thus, municipalities must defer to provincial authorities to ensure compliance with the **Environment Act**, S.N.S. 1994-95, c. 1, in providing such systems are adequate for protection of the public.

[164] Some witnesses also raised concerns about compliance with municipal and provincial regulations or bylaws respecting environmental, sewage and wastewater issues. Such enforcement issues are not within the jurisdiction conferred upon the Board by the Legislature and should be addressed in the appropriate forum, see **Lutz v. Municipality of the County of Kings**, [2003] NSCA 26, paragraphs 54 and 58.

[165] It is the Board's view that Council considered all of the relevant policies in its deliberations and its decision results in an outcome which is reasonably consistent with the intent of the MPS, including the MSSPS, and affords a level of protection to the environmentally sensitive areas.

Conclusion

[166] Having reviewed all of the evidence, the Board finds that the decision of the Chebucto Community Council of Halifax Regional Municipality does reasonably carry out the intent of the MPS. As a result, the appeal is dismissed.

[167] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 12th day of November, 2004.

David J. Almon, Panel Chair

Peter W. Gurnham, Q.C., Board Chair

Roland A. Deveau, Member