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Item No. 13.1.4
Harbour East Marine Drive Community Council
October 14, 2021

TO: Members of Harbour East - Marine Drive Community Council

-Original Signed-

SUBMITTED BY: _____
Kelly Denty, Executive Director, Planning and Development

DATE: August 18, 2021

SUBJECT: **Case 22579: Request for possible amendments to the Dartmouth LUB to mitigate impacts on Residential uses from Commercial uses**

ORIGIN

On September 5, 2019, the following motion was passed by Harbour East - Marine Drive Community Council:

“That Harbour East Marine Drive Community Council request a staff report to outline and make recommendations on potential land use by-law amendments to mitigate impacts on residential uses in District 6 from commercial activity where these uses are in close proximity. The report should consider but not be limited to impacts such as noise, dust and vibration.”

LEGISLATIVE AUTHORITY

Sections 220 and 225 of the *Halifax Regional Municipality Charter*, SNS 2008, c 39, Part VIII, Planning & Development (*Charter*).

RECOMMENDATION

It is recommended that Harbour East - Marine Drive Community Council direct staff to:

1. Continue to enforce the existing Noise By-law; and
2. Monitor ongoing applications for changes of land uses within the Waverley Road Plan Designation to determine the efficacy of existing land use mitigation regulations.

BACKGROUND

Development Context – District 6

District 6 is located in Dartmouth and includes parts of North Dartmouth inside the circumferential highway, west of Albro Lake Road, the Burnside Business Park, residential neighbourhoods off Montebello Drive, Caledonia Road, Waverley Road, and a mix of commercial and residential uses in the Woodlawn area. It includes a significant variety of commercial, industrial, retail, office and residential uses of varying densities, frequently very close to each other. This mix of uses has at times contributed to conflict, which previous and current Community Councils and staff have attempted to resolve through reviews of land use policy and non-planning responses including enforcement actions under the HRM Noise By-law.

Development in District 6 is controlled by the Municipal Planning Strategies and Land Use By-laws for Dartmouth and for Planning Districts 14 and 17. A portion of District 6 is within the Regional Centre and is controlled by the Regional Centre Secondary Planning Strategy and Land Use By-law.

History – Land Use Policy

Land use at the south end of Waverley Road, close to its intersection with Braemar Drive, is varied, with lands that had historically been used for industrial or commercial uses adjacent to residential areas. As the area underwent accelerating residential development in the 1980s, concerns about land use conflicts between the established industrial/commercial areas and the newer residential areas became more common.

Development in this area is controlled by the Dartmouth Municipal Planning Strategy and Land Use By-law. In 2007, in response to concerns from residents, HRM initiated a comprehensive planning study to establish a mixed use commercial and residential area on Waverley Road that encourages and supports business while addressing land use compatibility issues with surrounding residential neighbourhoods. Staff brought the results of this study to Regional Council in 2009 with a recommendation to create a new Waverley Road (WR) Designation and related sub-designations and zones.

The planning study recommended that parts of the area now included within the Waverley Road Designation be down-zoned to prevent new industrial uses from being established. Active participation from the owners of lands in the area that had been historically zoned for industrial uses emphasized concerns over fairness and the potential loss of economic capacity that would result from any potential down-zoning. Staff's review of the results of community engagement efforts at that time suggested an emerging community consensus on how land use should be regulated: existing light industrial uses could continue as non-conforming uses, but new businesses should be less intense, with compatibility issues addressed to the level possible through site planning mitigation strategies.

Existing Policy Context

When presented with the results of the comprehensive planning study, Regional Council chose to adopt changes to the Dartmouth Municipal Planning Strategy and Land Use By-law. The Waverley Road Designation established in 2009 encompasses the following 3 sub-designations and 4 zones:

- 1) Low Density Residential (LDR)
 - (a) R-1 Zone

- 2) Neighbourhood (N)
 - (a) C1-A Zone
 - (b) C-1 Zone
 - (c) R-1 Zone

- 3) Mixed Use (MU)
 - (a) C1-B Zone

(b) C-1 Zone

Despite these changes, community concerns about noise, vibration and dust persist, primarily relating to land uses on the periphery of the MU Sub-Designation. Most ongoing complaints have been generated from situations where the C-1B Zone directly abuts a low-density residential use. Staff note that not all C-1B – residential adjacencies have generated complaints.

The C-1B Zone permits a variety of general commercial and residential uses, including the following as noted in Section 38 (B)(1) of the Dartmouth Land Use By-law:

- (a) R-1, R-1A, R-2, R-3, C-1, S and TH uses as herein set out;
- (b) Commercial uses except:
 - (i) drive-through restaurants;
 - (ii) adult entertainment uses;
 - (iii) cabarets;
 - (iv) amusement arcades;
 - (v) pawn shops;
 - (vi) vehicle service uses; and
 - (vii) recycling depots.
- (c) Existing municipally owned fleet service uses; and
- (d) Uses accessory to the foregoing uses.

DISCUSSION

The question referred to staff from the Harbour East - Marine Drive Community Council queries whether there is a potential planning approach to mitigate ongoing conflict between commercial and residential land uses within District 6. It is staff's understanding that the primary concern, however, is with respect to land use conflicts within the Waverley Road Designation. In its motion, HEMDCC asked for a discussion of potential planning options. Staff offer the following options in response to the Council motion.

Option 1: Prohibit Obnoxious Uses

The Dartmouth Land Use By-law prohibits obnoxious uses in several zones. The definition of "obnoxious use" is:

OBNOXIOUS USE - means a use which, from its nature or operation, creates a nuisance or is offensive by the creation of noise, vibration, glare, electrical interference, fire explosion hazard or by reasons of the emission of gas, fumes, dust, oil, or objectionable odor, or by reason of the unsightly storage of goods, wares, merchandise, salvage, refuse matter, waste or other material.

All but one HRM Land Use By-law (the LUB for Downtown Halifax) includes some kind of prohibition against obnoxious or objectionable uses as defined in the various bylaws. Some, including the Land Use By-law for the Regional Centre, include a general prohibition against obnoxious uses, while others, including the LUB for Dartmouth, tie the prohibition to specific zones, meaning that obnoxious uses are permitted in areas where they are not explicitly prohibited. Obnoxious uses are not prohibited in any of the zones in the Waverley Road Designation. If the bylaw were to be amended to prohibit obnoxious uses in the area in question as described above, the test to determine whether a use is "obnoxious" is somewhat subjective and would be applied by the Development Officer (DO) either at the time of permitting or during the course of any investigations relative to ongoing LUB compliance.

For a proposed use to be considered obnoxious at the time of permitting, the activity would have to be inherently and clearly obnoxious by its very nature. This would also require that the use be considered

obnoxious in every instance, meaning there are no circumstances where the use could be established without contravening the obnoxious use definition in the bylaw.

Staff acknowledge it is possible that a use which is not inherently obnoxious could *become* obnoxious as defined in the by-law subsequent to permit issuance as a result of a change in the intensity or scope of its operations. In those cases, the course of action available to HRM would be a non-compliance investigation and prosecution process relative to the obnoxious use provisions in the land use bylaw.

If the Dartmouth Land Use By-law were amended to prohibit “obnoxious uses” in the C-1B Zone, the provision may have some success in mitigating impacts stemming from new uses not lawfully in place prior to Council’s first notice of its intent to adopt the bylaw change. However, it is very important to note that any existing approved uses would be protected as non-conforming uses pursuant to the HRM Charter and would be permitted to continue based on the existing operational models and current physical extent. Therefore, staff advise that amending the Dartmouth Land Use By-law to add a prohibition against “obnoxious uses” within the C-1B Zone would be of limited value where these new regulations would not apply until a property undertook a change in use or structure.

Whether a use is “obnoxious” is a secondary consideration in the sense that a use has to be permitted in the zone and physically present before any obnoxiousness test could be applied. If a use is permitted by the LUB, a Noise By-law prosecution would not be pursued unless the operation of the use was unreasonable for the type of use in question. As such, altering the list of permitted uses in a zone to remove uses that would be most likely to be obnoxious would have a similar outcome, and would remove the uncertainty of applying a definition of “obnoxious” in relation to a specific application for a development permit.

Option 2: - Text Amendments to the Land Use By-law and Municipal Planning Strategy

HEMDCC could choose to amend the Dartmouth Land Use By-law to change the land uses permitted in the C-1B Zone. Alternatively, HEMDCC could choose to change the zone standards to implement increased buffering or mitigation strategies which may include requiring more fencing or a wider setback from property lines abutting a residential use. This approach could also amend the MPS to require a development agreement for general commercial uses in the Waverley Road Designation. This approach should include a comprehensive planning exercise initiated by the Municipality, to engage the community, but could have the benefit of implementing mitigation strategies specific to a given use and context of a property.

This approach would impact development rights on all C-1B zoned properties in the Waverley Road Designation, including those that have no apparent conflict with adjacent properties. The result of this approach would be to further down-zone properties within the C-1B Zone to permit only neighbourhood-scale commercial uses, which would be less intense than general commercial uses.

However, if the Dartmouth Land Use By-law were amended to rezone or to amend the permitted uses or zone standards in the C-1B Zone, existing uses would be protected by their status as non-conforming uses and structures, and would be permitted to continue. The changes would only impact new uses that are established or structures that are constructed after the changes are in place. If HEMDCC were to choose this option, staff would recommend undertaking a comprehensive planning process inclusive of a community engagement component.

As changes to the Land Use By-law would only impact new uses and structures, staff also advise that this approach would be of limited value. However, compared to Option 1, amending the list of permitted uses would be a preferable approach, as it would provide greater transparency and predictability than introducing a prohibition against obnoxious uses.

Option 3: Non-Planning Approach

HEMDCC could choose to not take a planning approach to resolving existing conflict. The existing land use policy and zoning was applied after a comprehensive planning process that included a significant community engagement component. The zoning that was applied was a compromise between residents and business owners, after staff receiving considerable feedback from both.

The 2009 changes have been in effect for 11 years. Given the slow pace of development activity in this area, this may not be sufficient time for land use planning changes to be realized or their effectiveness evaluated as a means of improving land use adjacency concerns in the Waverley Road Designation.

Non-planning approaches to resolving the ongoing conflict would include relying on enforcement of the existing Noise By-law, or a review of the Noise By-law to evaluate its effectiveness in minimizing disruption from lawful businesses.

Conclusion:

Staff are proposing Option 3 – take a non-planning approach to resolving apparent land use conflict.

The *HRM Charter* includes protections for both non-conforming uses and non-conforming structures.

Section 253 states:

253 (1) A non-conforming structure, non-conforming use of land or non-conforming use in a structure, may continue if it exists and is lawfully permitted at the date of the first publication of the notice of intention to adopt or amend a land-use by-law.

Changing the LUB to alter permitted uses, including adding a prohibition against obnoxious uses, changing the zone standards or rezoning selected properties, would not cause existing businesses to close or alter their operations, with the result that any existing land use conflict would not be immediately resolved. The Dartmouth MPS also includes additional protections for non-conforming uses, in addition to those provided by the *Charter*, from which existing uses would benefit if the LUB were changed.

Staff note that there are examples of C-1B and residential zone adjacency within the Waverley Road Designation that do not generate complaints. Changing the text of the zone standard would change development rights on properties that are not currently problematic, after a comparatively recent comprehensive planning process. To decrease the intensity of the commercial uses permitted. Several properties within the Waverley Road Designation were downzoned in 2009 and staff are concerned with the fairness of downzoning these properties once again.

A business operating legally and within the parameters of its Development Permit should expect a certain level of confidence that it will be permitted to continue its operations without being subjected to repeated changes to land use policy.

The principal non-planning approach to problem resolution is continued enforcement under the HRM Noise By-law. The Noise By-law tests whether the activity on the site is reasonable for the authorized use being operated. If HRM Compliance Officers find that the disturbance is not reasonable, the By-law applies escalating fines ranging from \$300 for a first offense up to \$10,000 per instance for repeated offenders. If HEMDCC wishes to examine the effectiveness of the Noise By-law, it could choose request that Regional Council direct staff to undertake a review of that by-law.

FINANCIAL IMPLICATIONS

The HRM cost associated with processing this planning inquiry can be accommodated with the approved 2020-21 operating budget for C310 Urban and Rural Planning Applications.

RISK CONSIDERATION

There are no significant risks associated with the recommendations contained within this report.

ENVIRONMENTAL IMPLICATIONS

No environmental implications are identified.

ALTERNATIVES

1. Harbour East Marine Drive Community Council may direct staff to engage the public and return to Council with planning regulation amendments in accordance with Option 1 described within this report.
2. Harbour East Marine Drive Community Council may direct staff to engage the public and return to Council with planning regulation amendments in accordance with Option 2 described within this report.
3. Harbour East Marine Drive Community Council may choose to request that Regional Council direct staff to undertake a review of the Noise By-law.

A copy of this report can be obtained online at halifax.ca or by contacting the Office of the Municipal Clerk at 902.490.4210.

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