

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF AN APPEAL by **OSCO PROPERTIES LIMITED** from a Decision of Harbour East Marine Drive Community Council for refusal of an application to amend the Land Use By-Law to rezone lands at 538 Pleasant Street, Dartmouth, Nova Scotia, PID 00228361

BEFORE: Richard J. Melanson, LL.B., Member

APPELLANT: **OSCO PROPERTIES LIMITED**
Robert G. Grant, K.C.
Folu Adensanya

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
E. Roxanne MacLaurin, Counsel

HEARING DATE: October 11-13, 2022

FINAL SUBMISSIONS: October 13, 2022

DECISION DATE: **December 12, 2022**

DECISION: **The appeal is allowed.**

Table of Contents

I.	INTRODUCTION	3
II.	ISSUE.....	6
III.	BACKGROUND.....	6
	Board Jurisdiction	6
	The Proposal	10
	HRM Planning Staff's Opinion and Recommendation	12
	Community Council's Reasons.....	12
	Witnesses and Evidence	13
	Letters of Comment and Public Speakers	17
	Site Visit	18
IV.	ANALYSIS AND FINDINGS	19
V.	CONCLUSION.....	42

I. INTRODUCTION

[1] OSCO Properties Limited (OSCO) is appealing a decision of Harbour East Marine Drive Community Council refusing an application to amend the Dartmouth Land Use By-Law to rezone lands at 538 Pleasant Street, Dartmouth, Nova Scotia, PID 00228361 (Property).

[2] After an exhaustive search, OSCO purchased the Property intending to construct a concrete ready-mix facility at this location. The Property is strategically placed to provide ready-mix concrete for anticipated future construction projects. Because of the nature of ready-mix concrete, it must be delivered to construction sites within a window of 90 minutes, with an optimum delivery time of 30 minutes.

[3] An aerial view of the Property in a traffic impact statement prepared by Harbourside Transportation Consultants provides the site context:



[Exhibit O-2, p.41]

[4] The Property, which was formerly a propane tank farm, is abutted by industrial uses, including the former Imperial Oil refinery site, the Canadian National Railway Company tracks, and a private road (Station Road) which leads to the CN railway tracks and beyond. That said, the Property is currently zoned Commercial (C-2), which the Board assumes for the purpose of this appeal, does not allow the construction of a ready-mix facility.

[5] The Dartmouth Municipal Planning Strategy (MPS) does not allow consideration of OSCO's proposed project for the Property through the development agreement process. OSCO therefore applied to rezone the Property to General Industrial (I-2), which would permit a ready-mix facility. While OSCO does not appear to fully concede that the C-2 zone prohibits the construction of its proposed facility, both parties agreed that is not the issue before the Board.

[6] Halifax Regional Municipality (HRM) planning staff did a detailed team review of the application and the relevant MPS policies. The team review included participation from planning staff, HRM Engineering, HRM Development, and Halifax Water. HRM planning staff concluded that OSCO's proposal was reasonably consistent with the MPS.

[7] Several residents, and a local MLA, opposed OSCO's proposal. They raised issues related to noise, health and safety, and traffic impacts, with some focus on the Property's location across the street from a school. Residents were also concerned about compatibility and not having this area of Pleasant Street revert to heavy industrial use after the closure of the Imperial Oil refinery. The propane tank farm had also been closed for some five years.

[8] Community Council ultimately rejected the application. Its written reasons related to: (i) an alleged failure to satisfy specified harbour-related uses; (ii) potential traffic impacts on Pleasant Street; (iii) potential issues with the safety of the proposed access to the Property, including the lack of a signalized intersection and slow moving trucks entering Pleasant Street at that location; (iv) permitted uses in the I-2 zoning include cabarets, cannabis shops and pawn shops, which could create a risk to the neighbourhood if construction of the ready-mix facility does not proceed, and; (v) the community's desire to move away from industrial uses and the need for a planning strategy review following the closure of the Imperial Oil refinery.

[9] OSCO says that none of the forgoing reasons are supported by the evidence, the MPS, or any other applicable planning principles. The appellant says deference to Community Council does not extend to situations where it misapprehends the nature of the proposal and fails to give plausible, reasonable, and consistent meaning to the MPS in the face of public opposition.

[10] While not advocating for all Community Council's reasons, HRM submits that the decision is reasonably consistent with the MPS. HRM places particular emphasis on compatibility, including concerns about permitted uses beyond OSCO's proposal. HRM also advanced new reasons why the decision was reasonably consistent with the MPS. It put forward a new planning opinion which said that the Property was not located within defined boundaries where industrial expansion is permitted.

[11] The Board agrees with OSCO that Community Council made errors, in fact and principle, when addressing harbour-related issues, traffic concerns, permitted uses beyond OSCO's proposal and the need for potential changes to the existing MPS. As a

result, Community Council's decision was not reasonably consistent with the MPS. Accordingly, the Board must allow this appeal.

II. ISSUE

[12] In this case, the Board must determine whether OSCO has shown, on a balance of probabilities, that Community Council's decision refusing to rezone the Property did not reasonably carry out the intent of the MPS.

III. BACKGROUND

Board Jurisdiction

[13] The Board notes that the *Halifax Regional Municipality Charter*, S.N.S. 2008, c.39 (*HRM Charter*) establishes that the Municipality has the primary authority for planning (s. 208). Under s. 30 of the *HRM Charter*, a community council stands in the place of HRM Council when considering rezoning applications, and Part VIII - Planning and Development - of the *Charter* applies to decisions of a community council.

[14] An applicant for the approval of a rezoning application may appeal the refusal by a council to the Board (s. 262(1)). The grounds of an appeal of a council's decision to refuse a rezoning application are set out in s. 265(1)(a) of the *HRM Charter*:

Restrictions on appeals

265 (1) An aggrieved person or an applicant may only appeal

(a) an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the Council does not reasonably carry out the intent of the municipal planning strategy; [Emphasis added]

[15] The Board's remedial powers, and the restrictions on the exercise of these powers, are prescribed by s. 267 of the *HRM Charter* which provides:

Powers of Board on appeal

267 (1) The Board may

(a) confirm the decision appealed from;

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

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

...

(2) The Board may not allow an appeal unless it determines that the decision of the 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. [Emphasis added]

[16] Thus, the Board must not interfere with the decision of council unless the Board determines that the decision does not reasonably carry out the intent of the MPS.

[17] In appeals under the *HRM Charter*, the burden of proof is on the appellant. To be successful, the appellant must establish, on the balance of probabilities, that the decision of council does not reasonably carry out the intent of the MPS. If the appellant fails, the Board must defer to the decision of council.

[18] In municipal planning appeals, the Board follows statutory requirements and guiding principles identified in various Nova Scotia Court of Appeal decisions. The Court summarized the principles in *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27 and, more recently, *Heritage Trust of Nova Scotia v. AMK Barrett Investments Inc.*, 2021 NSCA 42:

[23] I will start by summarizing the roles of Council, in assessing a prospective development agreement, and the Board on a planning appeal.

[24] In *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50, 1994 NSCA 11 ["*Heritage Trust*, 1994"], Justice Hallett set out the governing principles:

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

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

...

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

[25] These principles, enunciated under the former *Planning Act*, continue with the planning scheme under the *HRM Charter*. *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, para. 24, summarized a series of planning rulings by this Court since *Heritage Trust*, 1994:

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

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

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

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

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

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

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

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

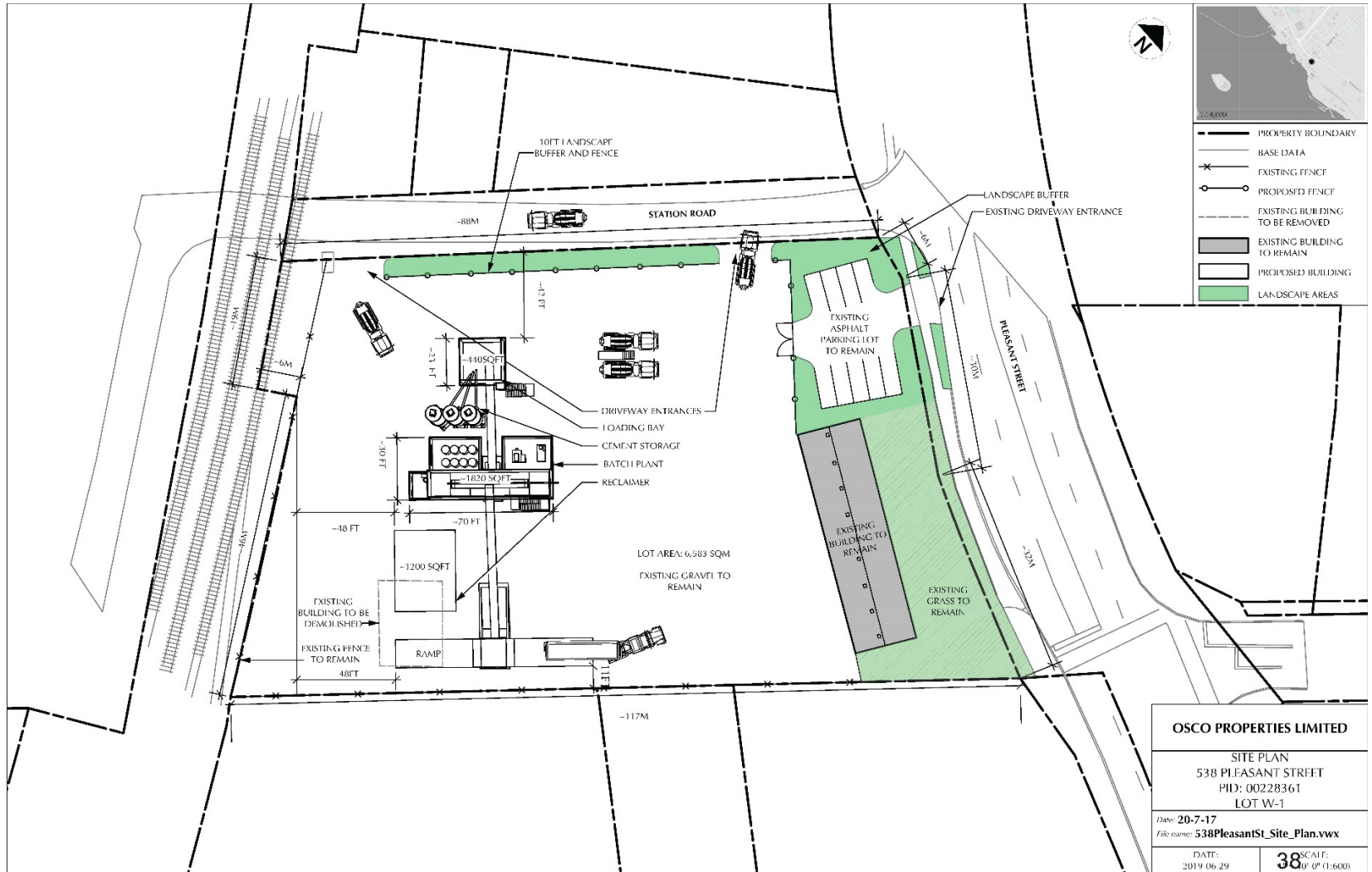
(8) The intent of the MPS is ascertained primarily from the wording of the written strategy. ...

[19] While the foregoing cases involved development agreements, the same principles apply to rezoning applications. Clearly, the Board is not permitted to substitute its own decision for that of council but must review the decision of council to determine if the decision of council can be said to reasonably carry out the intent of the MPS. In determining the intent of the MPS, the Board considers it should apply the principles of statutory interpretation which have been adopted by the Court of Appeal, as well as the provisions of s. 9(1) and s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

The Proposal

[20] OSCO seeks to rezone the Property from Commercial (C-2) to General Industrial (I-2) so it can construct a concrete ready-mix production facility. The production of concrete involves the storage and initial mixing of water, cement, aggregate, and potentially supplementary cementing materials such as fly ash or slag. The cement is not manufactured at a ready-mix facility. Like the other raw materials, it is purchased from other suppliers and delivered to the site. The ready-mix process involves moving the cement, water, aggregate, and any additional cementing materials, to a building where it is mixed and delivered to concrete mixing trucks. Once loaded, the mixing trucks are dispatched to construction sites. While not necessarily the final design, the general layout of the proposed facility is shown in site plan found in the Appeal Record, which is reproduced below:

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[Exhibit O-2, p.38]

HRM Planning Staff's Opinion and Recommendation

[21] The Appeal Record, which is before the Board as evidence in accordance with ss.266(1) of the *HRM Charter*, includes correspondence and discussion related to HRM Planning staff's team review. This review ultimately led to a staff report and presentation to Community Council where HRM Planning staff set out their analysis of the application. While much of the policy analysis is not in dispute, the complete copy of this analysis is attached as Appendix A to this decision.

[22] HRM Planning staff came to the following conclusion and recommendation to Community Council:

Staff have reviewed the proposal in terms of all relevant policy criteria and advise that the proposal is reasonably consistent with the intent of the MPS. A lower intensity industrial use provides the opportunity for transition between the residential and commercial uses nearby to the large scale industrial. The land use by-law provides adequate provisions for buffering, landscaping, screening, and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries. There are environmental site controls required by the Municipality, Halifax Regional Water Commission (HRWC), and Nova Scotia Environment (NSE) for the proposed development. The Industrial Approval process through NSE sets site specific requirements including noise, dust control, stormwater management and controls for groundwater/surface water protection from facility operations that are in excess of those of the Municipality. Therefore, staff recommend that Harbour East-Marine Drive Community Council approve the proposed LUB amendment.

[Exhibit O-2, p.151]

Community Council's Reasons

[23] *Archibald* emphasizes the importance of Community Council's written reasons for the refusal in providing a framework for the Board in exercising its appellate jurisdiction (although the Board is not confined to these written reasons in deciding this case). Community Council's written reasons are set out in a letter from HRM's Acting Municipal Clerk:

...As stated in the motion below, the application to rezone 538 Pleasant Street, Dartmouth, from the C-2 (General Business) Zone to the 1-2 (General Industrial) Zone to allow a concrete ready-mix facility was denied by Harbour East Marine Drive Community Council for the following reasons:

- Regional Municipal Planning Strategy (RMPS) policies EC-5, EC-12, EC-13, EC-14, and EC-22 reference to Harbour Designation - The proposed concrete ready-mix operation does not satisfy the specified harbour-related uses.
- Traffic - Community Council noted the potential traffic impacts of the proposed concrete ready-mix operation on Pleasant Street, a four lane corridor which is the primary transportation route for South Woodside and Eastern Passage, including the following concerns:
 - the proposed access to the property will not be located at a signaled intersection; and
 - the sightline considerations in the Traffic Impact Study do not consider the impacts of slow moving trucks on the flow and safety of traffic on Pleasant Street.
- The proposed I-2 rezoning also allows for cabarets, cannabis and pawn shops and these uses are a risk to the community if the proposed industrial use is not approved by the province.
- Harbour East Marine Drive Community Council further noted:
 - the history the community has with industry;
 - the community's desire to move away from industrial uses; and
 - the need for a community specific planning strategy for South Woodside as the original RMPS and policies for the area were drafted prior to Imperial Oil's closure and the opportunities that exist for the area including access to the harbour.

[Exhibit O-2, p.249]

Witnesses and Evidence

[24] OSCO supplemented the Appeal Record through oral evidence from David Bancroft, Tracey Dobson and Paul Moore. Mr. Bancroft is OSCO's General Manager. He is a professional engineer who has a lengthy history in the concrete ready-mix business. With the assistance of photographs, videos and renderings, he provided a detailed description of the proposed Pleasant Street facility. Mr. Bancroft also provided detailed evidence about how a ready-mix plant operates, including the operation of concrete ready-mix trucks. He discussed the types of neighbourhoods where some ready-mix facilities are currently located. He also addressed why, in his view, the Property was well-suited for the proposed use.

[25] Ms. Dobson is an Operations Manager with OSCO. She also has worked in the ready-mix industry for a long time. Her evidence focused on the training and safety record of OSCO's truck drivers. She discussed the operating speed of ready-mix trucks.

Ms. Dobson also addressed the truck dispatch process and the anticipated number of trucks which would leave the facility each hour.

[26] Mr. Moore is a real estate broker with extensive experience in sourcing commercial and industrial properties for clients. OSCO retained him to locate a property for a proposed concrete ready-mix facility. He described his efforts, which occurred over a long period of time. In the end, there were few available industrial properties in HRM. Few fit the selection criteria for a concrete ready-mix facility and those that might have been suitable were not for sale. Although not zoned industrial, the Property fits the other selection criteria, including the size of the lot, its location near a truck route in the target construction area, and a fair proportion of vacant land. The Property was eventually purchased and access to Station Road was obtained from CN.

[27] OSCO also filed four experts' reports with the Board. W.S. Langley, M.Eng., P.Eng., F.A.C.I., F.C.S.C.E., was qualified, by agreement, as a Professional Engineer, specializing in materials, particularly concrete and cement, capable of giving opinion evidence regarding raw materials used to manufacture concrete, which of those materials are regulated as hazardous to human health, the risk of neighbourhood exposure to hazardous materials associated with proximity to a ready-mix plant, and the technical considerations that apply to site selection for ready-mix plants within a certain proximity from the delivery point of its product. Dr. Langley filed a report on these topics, the final version of which was dated September 30, 2022. HRM chose not to cross-examine Dr. Langley.

[28] Michael MacDonald, P.Eng., Senior Transportation Engineer, Principal of Harbourside Transportation Consultants, was qualified, by agreement, as a Professional

Engineer, specializing in transportation, capable of giving opinion evidence regarding transportation planning, traffic engineering and municipal design, including the interpretation and application of traffic impact studies and statements, the adequacy of the street network for purposes of vehicle and pedestrian movement and safety, access routes and access to and from development sites and mitigation measures to ensure pedestrian and traffic safety around operational facilities. Mr. MacDonald's report dated September 12, 2022, addressed these topics, many of which had been addressed in the reports he had prepared for HRM staff and contained in the Appeal Record. HRM also chose not to cross-examine Mr. MacDonald.

[29] Martin Villeneuve, P.Eng., was qualified, by agreement, as a Professional Engineer, specializing in acoustics, capable of giving opinion evidence regarding the impacts of noise and sound on locations where individuals normally live, work or partake in recreation. He is an acoustical engineer with Englobe. He reviewed and signed a report prepared by Elizabeth Rogers, B. Tech (Env.), CET, who is with the same firm. A report dated September 13, 2022, addressing certain issues related to noise impacts, was admitted without objection and, again, HRM declined cross-examination on the contents of the report.

[30] Margot Young MCIP, CSLA, APALA, was qualified, by agreement, as a Senior Planner and Landscape Architect, capable of giving opinion evidence on land use planning, its purpose and application; rezoning and its general effects upon communities; compatibility and incompatibility of different land uses; the interpretation and application of traffic impact studies and statements related to development proposals and the adequacy of the street network, access routes and access to and from development sites; the

interpretation of municipal planning documents, including regional and municipal planning strategies, land use by-laws and subdivision by-laws, and; whether or not Council's decision is reasonably consistent with the intent of the municipal planning strategy.

[31] Ms. Young had been retained by OSCO to shepherd the rezoning application through the Community Council process. In this capacity, she had already provided an opinion on many of the foregoing issues which was in the Appeal Record. She filed a report with the Board dated September 13, 2022, addressing the topics raised in her qualification statement. She provided a further report dated October 2, 2022, responding to certain points raised by HRM's planning expert. Ms. Young was cross-examined by HRM.

[32] HRM supplemented the Appeal Record with a report dated September 23, 2022, authored by Luc H.J. Ouellet, MCIP, LPP. Mr. Ouellet is a Planner III, Community Policy Program, with HRM. He was not involved in processing the OSCO application before Community Council. He was qualified, by agreement, as an expert in land use planning, capable of giving expert evidence on land use planning matters, including the interpretation and application of the Regional Municipal Planning Strategy (RMPS), the MPS and the Dartmouth LUB and the extent to which the July 13, 2022, decision of Community Council was reasonably consistent with the intent of the MPS.

[33] Interestingly, while adding some additional considerations which Community Council could consider, Mr. Ouellet did not directly challenge the conclusions reached by HRM Planning staff with respect to the policies they had considered. He raised two new policy grounds in support of Community Council's decision, neither of which were raised before that elected body, or considered in its reasons. Mr. Ouellet's opinion that Community Council's decision was reasonably consistent with the MPS was primarily

based on an interpretation of the MPS that the area available for industrial expansion in North and South Dartmouth was limited by MPS Policy M-1. He opined that Map 3 contained in the MPS set the boundaries of North and South Dartmouth discussed in MPS Policy M-1, and that the Property was not located within the boundaries shown on Map 3. Mr. Ouellet was cross-examined on his opinions.

Letters of Comment and Public Speakers

[34] The Board received 13 letters of comment, including one in the form of a petition with approximately 74 signatures. The concerns raised by those who were opposed to the project generally mirrored those expressed before Community Council, which the Board has summarized:

- that the activity proposed by OSCO, which would generate loud noise, smells, including exhaust fumes, and dust, should be confined to industrial parks; such a facility should not be built close to an elementary school;
- that the number of slow-moving vehicles from the Property would create traffic congestion and safety issues, including pedestrian safety, especially considering the close proximity of the elementary school; health concerns about the use of silica in cement; and,
- that another vision for the South Woodside area was required with a move away from industrial uses.

[35] In essence, area residents generally shared the view that the proposed use for the Property would seriously impact their quality of life and their vision for the future of South Woodside. They urged the Board to uphold Community Council's decision.

[36] The foregoing issues were also raised by the five public speakers who appeared before the Board at an evening session. One speaker went as far as to compare this type of rezoning, if approved, and the alleged marginalization of the South Woodside residential neighbourhood, with the expropriation of the Africville lands, and the relocation of that community, in the 1960s.

[37] The Board received three letters of comment from companies involved in development. They stressed the need for a concrete facility near where major projects are underway or being contemplated. They said the Property was in a good location to service that need. Minimal impact on adjacent properties was anticipated. A West Bedford development was cited as an example where a ready-mix facility was located next to a residential development.

Site Visit

[38] The Board undertook a morning site visit on Thursday, October 13, 2022. The Board drove across the Macdonald Bridge eventually taking Pleasant Street to reach the Property. The Board proceeded onto Station Road, across the CN tracks, parking alongside gates near the Irving Oil terminal. The Board walked along Station Road for a short distance before returning to the vehicle and proceeding to the parking lot on the Property.

[39] The Board walked along the harbour side of Pleasant Street to the Everette Street intersection, which has traffic lights. The Board crossed Pleasant Street and proceeded up the steep incline of Everette Street until reaching the vicinity of Lyon Street and Trenholme Street. The Board returned down Everette Street turning west onto Grant Street. The Board had to turn back at the corner of Grant Street and Irving Street due to

construction. The Board made its way to Franklyn Street, where it could access Irving Street to return down the hill to Pleasant Street, near the intersection of this street and Highway 111. The Board then proceeded east on Pleasant Street, walking past South Woodside Elementary School. After reaching the 902 Auto Sales property, the Board returned to the parking lot on the Property, driving back to the Macdonald Bridge and the Board's offices.

[40] The Board was able to view the industrial properties surrounding the Property, along with a tire outlet, a tattoo parlour and some residential properties to the west of the Property. The Board was also able to view the traffic at the intersection of Pleasant Street and Highway 111. A slow-moving tanker truck turning left from Station Road to access Pleasant Street was observed. The Board was able to view the relationship between the elementary school, the Property, the available crosswalks, and note the traffic noise generated on Pleasant Street at the time of the site visit. The Board observed the character of the neighbourhood in the area it visited, along with its relationship with the Property. The Board also observed some commercial properties on the north side of Pleasant Street.

IV. ANALYSIS AND FINDINGS

[41] In keeping with the principles in *Archibald*, the Board will address Community Council's reasons first. It will then turn to the new policy interpretations raised in Mr. Ouellet's report. Finally, the Board will address compatibility issues not raised in Community Council's reasons. In addressing Community Council's reasons, the Board agrees with Mr. Grant that *Armco Capital Inc. (Re)*, 2021 NSUARB 147 (CanLII), has many

similarities with this case. As a general proposition, as discussed in *Armco*, the Board has consistently held that municipal councils are not bound by planning staff recommendations. This principle is further supported by the fact that, as discussed in *Archibald*, there may be more than one outcome which is reasonably consistent with the MPS.

[42] In *Armco*, the Board went on to say, at para. 42:

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

[43] Based on general planning principles, the last bulleted item in Community Council's decision letter is clearly not rooted in the MPS. The community's desire to move away from industrial uses following the closure of the Imperial Oil refinery is not expressed in the current version of the RMPS and MPS. It was not open to Community Council to reject OSCO's application based on a perceived need "...for a community specific planning strategy for South Woodside...". Interestingly, as indicated by Ms. Young, the most recent RMPS update was in October 2014, which is approximately one year after the closure of the Imperial Oil refinery. In any event, as discussed in *Armco*, HRM Council can always initiate a review of the RMPS, or the MPS, if it considers the needs of the community have changed. This may, or may not, result in the changes the residents who expressed opposition to this application seek. That said, OSCO is entitled to a decision based on the current version of the applicable policies.

[44] MPS Policy IP-1(b) allows this application to proceed to Community Council because it proposes to rezone the Property to a use permitted in an immediately adjacent generalized land use designation. The rezoning must not "violate" other policies in the plan.

MPS Policy IP-1(c) sets out 10 factors Community Council must consider when assessing this type of rezoning application.

[45] Mr. Ouellet suggested MPS Policy IP-1(b) should be interpreted through the lens of MPS Policy IP-1(j)(2), which allows “rezonings on/or adjacent the generalized land use boundaries as shown on Map 8 where the effect of the rezoning is to provide more detailed boundary definitions between generalized land use categories.”

[46] Mr. Ouellet says this policy could be interpreted as limiting rezoning applications under MPS Policy IP-1(b) to minor zoning boundary adjustments. The cited policies can not reasonably bear this interpretation. It is not an example of pragmatic, liberal and purposeful interpretation. It is legalistic and formalistic in nature. Leaving aside the issue that Map 8 was replaced by Map 10 without updating the policy, such a limited scope for rezoning under Policy IP-1(b) begs the question why this limitation was not included in that policy. It is not the interpretation which HRM planning staff have routinely given to this set of policies, and it appears from cross-examination that Mr. Ouellet himself does not subscribe to that interpretation.

[47] In the Board’s view, the interpretation tentatively proposed by Mr. Ouellet is an example of reverse engineering to achieve a desired result in the face of a much more reasonable interpretation. This is not the purpose of statutory interpretation, as discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (see: para. 121). The much more reasonable interpretation is that MPS Policy IP-1(b) sets out the general scope of rezoning applications of lands in relation to permitted uses allowed for immediately adjacent properties. MPS Policy IP-1(j) sets out a limited subset for this type of rezoning, as suggested by Ms. Young, which the Board notes, probably does not give

rise to most of the policy factors set out in MPS Policy IP-1(c), which immediately follows the provision about rezonings with a more general scope.

[48] In any event, Ms. MacLaurin, while indicating the debate over the interpretation issue was interesting, conceded the issue was not relevant. She indicated Community Council had decided to consider the rezoning application under MPS Policy IP-1(b). That such an application could be considered by Community Council under that policy was an interpretation Ms. MacLaurin submitted the language could reasonably bear.

[49] Turning to the factors Community Council is directed to consider, MPS Policy IP-1(c)(2) directs Community Council to “have regard” to “provisions for buffering, landscaping, screening, and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries.” MPS Policy IP-2(4)(iv) asks Community Council to consider “the adequacy of transportation networks adjacent to or leading to the development.” Community Council expressed concerns about potential traffic impacts the proposed concrete facility would have on Pleasant Street, including the lack of a signalized intersection at its intersection with Station Road.

[50] While there is undoubtedly a measure of discretion related to traffic issues, again, the Board’s reasoning in *Armco* appears directly applicable. At para. 98, the Board said:

In weighing the evidence, the Board considered one more factor. While the ultimate burden is on the appellant to establish, on a balance of probabilities, that the Community Council's decision does not reasonably carry out the intent of the Municipal Planning Strategy, the Board considers that in the circumstances of a case like this, where the Community Council's decision disregards the conclusions in a professional traffic study (which HRM required Armco to provide), the assessment of that study by HRM's own professional engineering staff, and the recommendations of HRM's professional planning staff, there is some evidentiary burden on the Community Council to demonstrate its “good planning reasons” for doing so. In this case, HRM presented no evidence on the appeal, and its submissions did not explicitly connect the Community Council’s decision to anything in the appeal record that might constitute “good planning reasons” either.

[51] In this case, Community Council had before it a Traffic Impact Statement prepared by Mr. MacDonald, an experienced expert in the field. Mr. MacDonald filed a report with the Board which supplemented the opinions expressed to Community Council. He specifically addressed the issues Community Council had raised in its decision. HRM provided no evidence which rebutted Mr. MacDonald's opinions. While residents expressed anecdotal concerns about traffic, in coming to a determination as to whether traffic issues are a legitimate reason for denying the application, the Board has given substantially more weight to Mr. MacDonald's opinions on the topic.

[52] The evidence, opinion and otherwise, establishes the following key facts:

- Pleasant Street is an arterial roadway between downtown Dartmouth and Eastern Passage. It is the main route to Eastern Passage.
- Pleasant Street is a designated and busy truck route. It is a four-lane roadway in the vicinity of the Property.
- There is a signalized intersection, with a crosswalk, where Pleasant Street intersects with Everett Street. This is the primary access point to South Woodside Elementary School.
- The posted speed limit is 50 km per hour along the front of the Property and 60km per hour east of the Everett Street intersection.
- To access Highway 111, which is approximately 0.5 kilometers from the Property, vehicles would have to turn left across three traffic lanes to access the fourth lane which directs traffic onto the highway. Traffic entering the Property will primarily originate from Highway 111 and turn right from Pleasant Street onto Station Road.

- Vehicles would exit the Property and gain access to Pleasant Street from Station Road, which has no traffic lights.
- Because of the loading and dispatch process described by Ms. Dobson, the maximum number of ready-mix trucks leaving the Property would likely be in the range of four to five per hour.
- Mr. MacDonald used assumptions of six concrete trucks per hour (six in and six out during peak traffic conditions in his September 12, 2022, report). He also accounted for trucks delivering raw materials but indicated they could be scheduled off-peak. All these assumptions are reasonable and, in fact, potentially marginally inflate the amount of truck traffic generated by the facility.
- Over 90 per cent of the traffic generated by the Property will travel to and from Highway 111.
- The truck drivers employed by OSCO are trained professional drivers.
- The sight line distances at the Station Road intersection meet the minimum stopping and decision sight distance requirements of HRM's *Municipal Design Guidelines*.
- There is insufficient traffic generated from Station Road to warrant traffic signals at that location. Station Road is located 80 metres from the signalized intersection at Everette Street. Traffic lights are not required given the volume of traffic and the Everette Street traffic lights will slow down traffic from the east.
- There are a limited number of pedestrians, including a limited number of children, crossing Pleasant Street near the Property. The sight lines are sufficient to allow for safe crossings, particularly given the training of the truck drivers.

- Other commercial uses, such as retail spaces, restaurants, and gas stations, allowed as-of-right on the Property, would generate significantly more traffic, and might lead to more children crossing the street than currently occurs or would be generated by OSCO's proposal. These uses would generally not involve professional drivers.
- There are already slow-moving heavy trucks moving onto Pleasant Street from existing industrial sites such as the Irving Oil Harbour Terminal and the Imperial Oil Marketing Terminal.
- The sight lines at the Station Road intersection provide sufficient distance to allow slow moving trucks driven by professional drivers to move onto Pleasant Street and complete a left or right turn.

[53] Based on the foregoing, which is consistent with the Board's own observations of the traffic flowing on and onto Pleasant Street, the Board accepts Mr. MacDonald's opinion that traffic generated from the property by the proposed ready-mix concrete facility will not create any material traffic congestion or safety issues, and the proposal will not give rise to any material pedestrian safety issues. The Board therefore finds there is no basis in fact, on the evidence presented to it, supporting Community Council's reasons for rejecting the application based on traffic concerns.

[54] As discussed in *Archibald*, deference to Community Council does not give it *carte blanche* to make *ad hoc* decisions unsupported by facts or principle. In this case, there is simply no factual basis for concluding, as Community Council did, that the proposal would generate material traffic concerns. The expert evidence before the Board regarding

the traffic issue was unchallenged. In these circumstances, the resulting decision is not reasonably consistent with the intent of the MPS based on traffic concerns.

[55] Another reason given by Community Council for rejecting OSCO's application is that the proposed ready-mix facility "does not satisfy the specified harbour-related uses discussed in RMPS Policies EC-5, EC-12, EC-13, EC-14, and EC-22." The EC series of policies are found under the Economic Strategy heading of the RMPS. RMPS Policies EC-5, EC-12, EC-13, and EC-14 all relate to the Harbour Designation in the RMPS. RMPS Policy EC-22 is not about the Harbour Designation. It also is inapplicable as it only applies to properties located "...within a 3.8 metre elevation above Canadian Geodetic Vertical Datum." The Property is not located within this elevation.

[56] All the foregoing policies were discussed in HRM planning staff's report to Community Council. It was staff's opinion that the proposed rezoning was reasonably consistent with these provisions of the RMPS. That said, the analysis is somewhat limited.

[57] RMPS EC-5 directs that lands identified as suitable for industrial uses remain available for this purpose while minimizing conflicts with current or future incompatible uses in the vicinity. RMPS Policy EC-12 encourages a range of development opportunities "...including marine dependent industrial uses, residential uses, institutional uses and matters related to environmental improvement and protection." RMPS Policy EC-13 encourages new harbour-related uses and maintaining the economic viability of marine - dependant uses, while mitigating negative impacts on adjacent uses. It also discourages new residential areas that abut lands with intensive marine dependant industrial and commercial uses. RMPS EC-14 asks council to consider potential incompatibility between

new residential uses near harbour related industrial uses and protect the viability of these marine uses.

[58] Ms. Young offered the opinion that the proposed rezoning achieved the goals of this part of the RMPS, saying their main intent was to protect “both the existing and potential future industrial lands adjacent to the Harbour and allow them to operate economically.” Ms. Young said that building a concrete ready-mix facility would protect marine industrial uses. Her primary rationale is that the rezoning would discourage incompatible residential development on the site, which is allowed under the current commercial designation, while acting as a buffer between the Imperial Oil site and the existing neighbourhood.

[59] Mr. Ouellet’s opinion on the issue of the impact of the cited RMPS EC policies is not entirely clear. He quotes the preamble of section 5.3.4 (Halifax Harbour Designation) of the RMPS which discusses the important economic role of port related activities. He says while a concrete ready-mix facility is not permitted in the I-3 (Harbour-Oriented Industrial) Zone, its presence on the Property would not compromise abutting I-3 zoned lands and would generally be compatible with them. He further states there is no inconsistency between RMPS Policy EC-12, which “supports a variety of uses” and the existing commercial zoning. In his view, RMPS Policies EC-13(a) and (b) are not applicable at all but says that policy EC-13(c) related to discouraging residential development near intensive marine dependant intensive uses can be accomplished in other ways. He points to the Commercial Light Industrial (CLI) Zone as a type of transition zoning created in the Regional Centre LUB.

[60] The reason this part of Community Council's decision creates a difficult analytical framework is because the written reasons do not specify why it determined the proposed concrete plant "does not satisfy harbour-related issues." Mr. Grant described this reason as a *non sequitur*. When the Board asked Ms. MacLaurin whether the denial on this point was related to the fact that the concrete plant is not a harbour-related use, she responded "I believe so. That's correct..."

[61] The primary policy which directs Community Council's assessment of this rezoning application is MPS Policy IP-1(c), which makes no reference to "satisfying specified harbour-related issues." The cited RMPS EC policies speak in terms of encouraging harbour-related uses while minimizing compatibility issues. They are not entirely internally consistent since they also allow for a variety of uses, including residential uses.

[62] To the extent Community Council was saying that a rezoning of the Property can only occur if the proposed use is a harbour-related use, this is clearly an error in principle, as that is not what the quoted EC policies say. That said, as submitted by Ms. MacLaurin when referring to past Board decisions, Community Council is not a court, sitting as a panel to write detailed reasons. As well, it is true, as suggested by Mr. Ouellet, that rezoning the Property for industrial uses is not the only way for a council to protect harbour-related uses. It is also true, as discussed by Ms. Young, that the proposal before Community Council would be consistent with this policy direction by eliminating potential residential conflicts. Mr. Ouellet did not disagree with this proposition. Both Ms. Young and Mr. Ouellet agreed that a proposed concrete ready-mix facility is not inconsistent with the policy direction in RMPS Policies EC-5,12,13 and 14.

[63] The question remains what Community Council meant by this part of its decision. In the end, the Board is satisfied that it meant that rezoning should only be allowed if the proposed use is a harbour-related use. This is not consistent with the intent of the quoted RMPS policies because the existing zoning is not restricted to these types of uses. The proposed use is clearly compatible with harbour-related uses and enhances the protection of such uses by protecting such uses from compatibility issues with residential uses. Therefore, denying the application based on the cited EC policies is not reasonably consistent with the intent of the MPS.

[64] The final reason Community Council gave for denying the proposed rezoning that the Board must address relates to the concern that the proposed I-2 rezoning would allow cabarets, cannabis production facilities, and pawn shops on the Property, should OSCO not obtain the required industrial approval from the Province. This is described as a risk to the community. The nature of the risk is not made clear by Community Council.

[65] Ms. Young addressed this issue in some detail in her September 13, 2022, report. On a factual basis, she says the size of the Property, at 6583 square meters, limits its ability to house warehousing and distribution facilities. She explains that cannabis production facilities are warehouses where cannabis is grown. They are indistinguishable from any other warehouse facility, are provincially licensed, and federally regulated. They do not create odour, dust or noise issues and additional setbacks are required in the I-2 zone where such facilities abut residential areas. She also discussed location features and factors which do not make the site attractive for a cannabis facility.

[66] Ms. Young suggested that pawn shops need to be centrally located, be visible to potential clientele, benefit from access to transit, proximity to their patrons, and tend to

cluster around other retail uses. She said a pawn shop was not the highest and best use for the Property.

[67] Ms. Young said cabarets attract clients interested in late-night music and drinking. These uses are generally clustered together in entertainment districts where patrons can visit multiple establishments on foot. They benefit from easy access to transit and cabs. She said the site was unlikely to attract cabarets and it would not be the highest and best use for the property.

[68] In addition to the foregoing, Ms. Young indicated considerable investment was contemplated to make the Property a concrete ready-mix facility. This would stabilize the site for the foreseeable future. This was the highest and best use for the Property.

[69] Mr. Ouellet did not address the issue of other potential uses in the I-2 zone which might be incompatible with adjacent uses and existing development form in the area. The fact that cabarets and pawn shops are prohibited uses in the C-2 zone, while these uses, along with cannabis production facilities, are allowed in the I-2 zone, was raised in HRM planning staff's presentation to Community Council. From planning staff's perspective, it was not raised as an issue which would mean an approval was not reasonably consistent with the MPS.

[70] Mr. Grant submitted the issue of cabarets, pawn shops, and cannabis production facilities was a complete red herring. He described these as scarecrow options. He said there was no evidence of any intent on the part of his client to do anything with the property except establish a state-of-the-art concrete ready-mix production facility. Mr. Grant submitted his client had invested too much money to turn to another type of project if the rezoning was granted. He also submitted that Ms. Young's evidence that there are

other locations which are much more appealing and functional for these types of establishments went unchallenged.

[71] Ms. MacLaurin submitted that where OSCO applied for a rezoning (and not a development agreement which was not possible in this case), it was reasonable for Community Council to consider other allowed uses in the I-2 zone. This is because, absent a development agreement, there is no mechanism to bind OSCO to the proposed concrete ready-mix facility.

[72] Ms. MacLaurin said the issue of a potential use as a cabaret is not a far-fetched scarecrow concern. She submitted that cabarets have “historically been a concern for the Dartmouth area.” Ms. MacLaurin pointed to Chapter 8 of the MPS, which indicates that “[a]dult entertainment uses such as Massage Parlours and Adult Cabarets have received considerable attention in the Dartmouth Area.” She also referenced MPS Policy M-10, which indicates Adult Cabarets and Massage Parlours are only permitted in areas designated Industrial on the Generalized Future Land Use Map (GFLUM) pursuant to a development agreement.

[73] Under MPS Policy IP-13, used to implement development agreements for such facilities, Adult Cabarets cannot be located near schools, residential uses, and many types of public places. Ms. MacLaurin submitted that if the property is rezoned to I-2, without a change to the underlying commercial GFLUM designation, the very specific restrictions on these types of cabarets will be lost. While Ms. MacLaurin recognized there were protections afforded by the licensing process under the *Liquor Control Act* related to schools and residential neighbourhoods, there is no absolute prohibition as set out in MPS

Policy IP-13. If this rezoning is approved, HRM Council would lose the degree of control it had conferred upon itself in addition to the protections in the *Liquor Control Act*.

[74] Mr. Grant cited *Armco* in discussing rezoning and intended uses. He said:

In the **Armco** case as well, the rezoning was sought without specifying the intended use for which the rezoning was being sought, other than it was to allow for an I-1 light industrial use. And the Board was satisfied that there was no requirement to specify what the use was. And then considered whether any of the permitted uses might cause any difficulty and concluded there was not.

[Transcript, pp. 23-24]

[75] The Board agrees with Ms. MacLaurin that where a rezoning is proposed, Community Council can legitimately look at other permitted uses in the new zone to see if the rezoning "is in conformance with the policies and intent" of the MPS. That said, when one looks at the wording of MPS Policy IP-1(c), the primary focus in evaluating the various factors which Community Council must address relates to the proposed use anticipated by the rezoning. It would be very difficult to specifically address, for example, compatibility, the adequacy of sewer and water services, the adequacy of transportation networks, whether a use is obnoxious, and whether there are sufficient legal controls related to emissions and traffic issues, in the abstract.

[76] As well, denying an application on abstract considerations of permitted uses which are not grounded in realistic uses of the Property, the facts presented in the appeal, or specific direction in the MPS, would, in the Board's view, be a form of *ad hoc* decision making unguided by principle. There is no current intent to construct a pawn shop or a cannabis production facility. The future use of such facilities at this location, on the evidence, appears speculative at best. There is no indication current LUB provisions are inadequate to address compatibility issues with these types of uses. Therefore, the Board

does not consider denying OSCO's application on the grounds these potential uses are a risk to the community is reasonably consistent with the intent of the MPS.

[77] The issue of cabarets raises different considerations. Ms. MacLaurin, in oral final submissions, raised a specific issue with cabarets. In fact, the parts she cited in the MPS relate to a specific form of cabaret: namely, Adult Cabarets, or what are often colloquially called strip clubs. The genesis of the 2006 MPS amendments related to Adult Cabarets can probably be traced to the former Sensations Cabaret. The history of that establishment, and issues which arose when it attempted to renew its liquor license in December 2005 are discussed in detail in *Roberts, Re*, 2006 NSUARB 46 (CanLII). In any event, Adult Cabarets are defined in the Dartmouth LUB and are a sub-genre of Adult Entertainment under the LUB.

[78] This argument was raised for the first time during oral argument at the end of the hearing. This rationale in support of Community Council's decision was not contained in any planning reports before Community Council or filed with the Board. That said, while planning experts can provide valuable insight into the interpretation of the intent of the MPS, discovering its meaning is essentially an exercise in statutory interpretation. All counsel who appear regularly before the Board in planning matters are well versed in this form of exercise.

[79] Ms. MacLaurin pointed to what she said was a clear direction in the MPS that cabarets be prohibited except by development agreement controls in areas designated Industrial on Maps 8a and 9 under the GFLUM. Ms. MacLaurin says this protection for Dartmouth residents will be lost if this rezoning is approved. It does not appear to the Board that these consequences would flow from a successful appeal.

[80] Under the Dartmouth LUB, a Cabaret is defined as “any establishment holding a Cabaret License issued by the Province of Nova Scotia.” Adult Cabarets are defined as a form of Adult Entertainment under the Dartmouth LUB. Section 18P of the LUB only allows Adult Entertainment uses by development agreement, in accordance, *inter alia*, with MPS Policy IP-13, and only where the Property is in an area designated as Industrial or Commercial on Map 10 of the GFLUM.

[81] While not brought to the Board’s attention during argument, the Board notes that MPS Policy C-10 has almost identical wording with respect to Adult Cabarets under the Commercial designation, referencing Map 10 of the GFLUM. The rezoning amendment does not amend the GFLUM. As well, while cabarets are a permitted use in the Industrial Zone, Adult Cabarets are not, pursuant to s.42(a)(i) of the LUB. There is, therefore, nothing in the MPS or LUB providing the type of protection related to Adult Cabarets, which is lost if the rezoning occurs. In the Board’s opinion, the absolute prohibition related to Adult Cabarets, absent a development agreement, in both the commercial and industrial GFLUM designations are preserved by the LUB definitions and provisions.

[82] As with pawn shops and cannabis production facilities, the evidence indicates the location of a cabaret style licensed premises on the Property is unlikely. There is also nothing in the evidence which indicates the protections under the *Liquor Control Act* are inadequate to protect the community from societal risks and compatibility issues with respect to licensed premises generally. A denial of the application on this basis is not reasonably consistent with the intent of the MPS.

[83] Having considered all the reasons provided by Community Council, the Board will now address Mr. Ouellet’s opinion that the Property cannot be rezoned pursuant to

MPS Policy IP-1(b) because it is not within the boundaries of the Industrial Designation on MAP 3 in the Industrial Chapter of the MPS. The parties agree the property is not located within the boundaries on Map 3. They disagree as to what this means.

[84] It is Mr. Ouellet's opinion that the language of MPS Policy M-1 and Section (4) in this chapter limits what lands can be used for industrial purposes. Policy M-1 says:

It shall be the intention of City Council to permit new industrial development only in the North Dartmouth/South Dartmouth industrial areas and to a limited extent on the waterfront between Macdonald Bridge and Tufts Cove.

[85] Section (4) of the Industrial Chapter says, in part:

Because of the unpredictability of industrial land requirements, it is important that the City's interest should extend beyond immediate and short term considerations.

In the South Dartmouth area, expansion possibilities exist to the east of the land currently owned by Imperial Oil Limited. This area is bounded on the south by CFB Shearwater and on the north by lands currently held by the Nova Scotia Housing Commission (See Map 3).

[86] Mr. Ouellet says MPS policy M-1 limits industrial expansion where the Property is located to South Dartmouth. He is of the opinion Map 3 establishes what constitutes South Dartmouth and the limit for new industrial development under MPS Policy M-1. Mr. Ouellet says the general enabling policy set out in MPS Policy IP-1(b) is subject to the express limitation in MPS Policy M-1. Mr. Ouellet is also of the opinion that MPS Policy M-2, which expresses an intent "to locate new industry and relocate existing industry within planned and serviced areas zoned for industrial purposes", provides policy direction limiting industrial expansion to industrial parks and lands already zoned industrial.

[87] Ms. MacLaurin submits Mr. Ouellet's interpretation of the interplay between MPS Policies IP-1(b), M-2 and M-1, and the limitations he says this places on industrial expansion, is one the wording of the policies can reasonably bear. She says there is a clear inter-relationship between a map labelled Dartmouth Industrial Areas which includes a boundary labelled Industrial Designation, and wording in the MPS. She submits the

Board is not limited to a consideration of Community Council's decision but must also consider if there are other policy rationales which support Community Council's ultimate decision as reasonably carrying out the intent of the MPS.

[88] Ms. MacLaurin argues Mr. Ouellet's interpretation is such a policy rationale. In the absence of clear boundaries defining South Dartmouth, Community Council would be left with no clear direction on where Policy M-1 is applicable, and Councillors would be left to their own devices to map out their view of such boundaries.

[89] It is Ms. Young's opinion that the rezoning of a small parcel surrounded by industrial uses is not properly characterized as an industrial expansion. Even if it could be so characterized, she says that the link between Map 3 and MPS Policy M-1 suggested by Mr. Ouellet does not exist. This is because the lands described in the preamble to the policies in the Industrial Chapter of the MPS are more expansive than the lands labelled with the Industrial Designation on Map 3. She provided a detailed analysis involving a labelled sketch which establishes this to be the case. It is her opinion that the policy guidance in the Industrial Chapter "...is not about steering industry only to business parks or pre-authorized zones." In Ms. Young's opinion, it is about encouraging growth in specified areas, including South Dartmouth generally, instead of throughout the city, and limiting the disturbance industrial activities can cause.

[90] Mr. Grant submits that, based on Ms. Young's analysis, the area of South Dartmouth discussed in the Industrial Chapter and MPS Policy M-1 cannot be limited to the area labelled as Industrial Designation on Map 3. Rather, South Dartmouth is not "a rigid area...defined by a bold line on a map." It means the "general area of industry in South Dartmouth."

[91] Mr. Grant's position can be summarized by the following passage from his oral submission:

So, if you take M-1 to mean what Mr. Ouellet says it means, which is the keystone to his opinion that Council's decision can be defended as being reasonably consistent with [the intent] of the Municipal Planning Strategy, you have to read into M-1, Map 3 where it's not explicitly included, even though Map 3 is referred to in M-6 where the discussion is protecting industrial use. So, you have to read in Map 3 and then you have to read the policy in an illogical fashion that says: "New industrial uses can only occur in the areas where industrial use is already occurring which wipes out the discussion in the future industrial expansion portion of the plan identifying areas for immediate expansion and future expansion."

[Transcript, pp. 61-62]

[92] The Board notes that Community Council did not address this issue at all and exercised no discretion and made no choices between competing options related to the Industrial Chapter provisions. Therefore, there is no interpretation or discretionary policy choices towards which the Board can show deference. There is also no precedent supporting Mr. Ouellet's interpretation. Nevertheless, the Board must assess whether the interpretation proposed by Mr. Ouellet is one the language of the MPS provisions can reasonably bear in deciding whether they provide a rationale grounded in policy showing Community Council's decision reasonably carries out the intent of the MPS.

[93] The Board acknowledges that the Property is surrounded by industrial uses. The Board does not agree with Ms. Young's opinion that rezoning a small property from C-2 to I-2 is not an industrial expansion. The rezoning expands the area within which industrial uses are permitted, albeit by a relatively small area. That said, the Board is in general agreement with Mr. Grant's submission that it is unreasonable to interpret the interplay between the wording in the preamble of the Industrial Chapter and MPS Policies M-1 and 2 in the manner suggested by Mr. Ouellet.

[94] The Industrial Chapter preamble discusses two distinct types of industrial expansion. Section (1) addresses "future" industrial expansion. In this discussion, the MPS

even provides the acreage of industrial lands presently in use, those available for immediate expansion, and those available for future expansion. While the relationship between this available industrial land and the lands labelled Industrial Designation on Map 3 is not before the Board, a relationship can be inferred because a finite defined land area is described. Section (2) has been repealed. Section (3) addresses the lands owned by Imperial Oil and the provincially owned industrial park. Again, these sections appear to address finite and defined land areas.

[95] Section (4) addresses “long term” industrial expansion, which appears to the Board to have a longer time horizon than “future” land uses which were designated as industrial when the provisions were drafted. In the Board’s view, this is why the areas discussed go beyond the boundaries of the Industrial Designation lands in Map 3. Map 3 is used as a reference point, but the lands labelled under the Industrial Designation do not precisely delineate what lands in the South Dartmouth could be rezoned for industrial uses. Industrial uses beyond that boundary were necessarily contemplated by the wording of Section (4).

[96] The interpretation proposed by Mr. Ouellet would seriously curtail Community Council’s ability to attract new industry and permit new development in the South Dartmouth area pursuant to MPS policy M-1 and provide for “readily available industrial sites” under MPS Policy M-3, using enabling MPS Policy IP-1(2)(b). Where much of the land discussed in the Industrial Chapter has already been taken up, an interpretation which incorporates limitations from Map 3, where it is not required by the policy wording, is not reasonably consistent with the intent of the MPS. This is especially the case where there is no

indication the factors in MPS policy IP-1(3) are not sufficient to protect any existing uses, including residential uses.

[97] The final issue the Board must address relates to general compatibility issues raised by concerned citizens before Community Council and the Board related to noise, fumes, dust, health and safety issues, proximity to the South Woodside Elementary School and issue related to bulk and scale. While Community Council was made aware of these concerns, they were ultimately not incorporated in the reasons provided by Community Council. It could be inferred that Community Council was satisfied by the materials before it that, with respect to these additional compatibility concerns, the proposed concrete ready-mix facility was reasonably consistent with the MPS when assessed against the compatibility provisions therein.

[98] Mr. Ouellet postulated hypothetical rationales as to how Community Council could have come to the decision it did, which could be reasonably consistent with the MPS, based on compatibility issues not expressed in its decision. The Board acknowledges that its determination is not confined to the reasons expressed by Community Council. The Board acknowledges that, for the purposes of this exercise, the words “adjacent uses and the existing development form in the area” used in MPS Policy IP-1(c)(2) and “adjacent land uses” in MPS Policy IP-1(c) (3) could include the residential neighbourhood which was ultimately included in Community Council’s notice area.

[99] The Board is not convinced the concerns expressed by the residents are supported by the evidence before it or the wording of the relevant policies. In the first place, it does not appear that it is Mr. Ouellet’s opinion that the proposal is incompatible with adjacent uses or the form and scale of development. He simply theorizes that Community

Council could theoretically have come to a different conclusion when weighing discretionary considerations and making value judgments with respect to potentially competing or conflicting policies. The Board notes as it did before that Community Council did not make value judgments in support of the hypothetical rationales raised by Mr. Ouellet. Therefore, the Board is not in a position to show deference to such value judgments and discretionary choices, where they are not apparent from the record.

[100] The Board is satisfied that the unchallenged evidence of Dr. Langley, along with the evidence of Mr. Bancroft about how dust issues will be mitigated, establishes that the surrounding neighbourhood, including the elementary school, will not be exposed to hazardous or dangerous materials at a threshold beyond a balance of probabilities. In addition, there is no evidence the conditions imposed by any industrial approval required from the Province will not be sufficient to address health and safety issues. There is therefore no evidentiary basis for finding that the proposal is not reasonably consistent with the MPS based on health and safety issues or dust.

[101] Given the Board's discussion in this decision about noise, dust and fumes, the Board is also satisfied that a ready-mix concrete plant is not an obnoxious use pursuant to the definition in the MPS. As well, it is unlikely it will generate materially more diesel fumes than the current heavy truck traffic on Pleasant Street.

[102] With respect to noise, Ms. MacLaurin submitted Mr. Villeneuve's report was deficient. While it may well be that further noise studies would have produced more data, in the absence of any contrary evidence, the Board is satisfied, on a balance of probabilities, that Mr. Villeneuve's report establishes that the proposed facility, and the cement trucks associated with it, will not create materially more noise than surrounding

properties are exposed to by the loud highway noise levels discussed in that report. This is consistent with what the Board observed on Pleasant Street in the vicinity of the elementary school during its site visit. This evidence is supplemented by Mr. Bancroft's evidence as to the placement of the trucks while being loaded which will direct much of the noise towards the industrial uses. There is also a proposed sound barrier wall as a mitigation measure.

[103] The Board does not agree with Mr. Ouellet's opinion that the policy consideration related to the "adequacy and proximity of schools" expressed in MPS Policy IP-I(c)(4)(iii) relates in any way to the proximity of an industrial facility to a school. It clearly relates to the proximity and adequacy of schools for residential developments. The Board further notes that examples were provided of concrete ready-mix facilities in residential neighbourhoods and near a school where no compatibility issues were reported to have arisen.

[104] With respect to bulk and scale, the residential and commercial component of the neighbourhood, while it can be described as mixed and varied, is currently surrounded by industrial uses such as the Imperial Oil site, and the Irving Energy site. The Board notes the Irving Energy tank farm at the end of Irving Street is considerably closer to the residential neighbourhood than the Property. The placement of a relatively small existing office building is consistent with the bulk and scale of the buildings on Pleasant Street. The storage containers, mixing equipment and trucks will all be located behind the office building. This will be similar in bulk and form to the existing industrial uses to the rear of the Property. As well, it must be kept in mind that most of the residential neighbourhood is located a considerable distance from the Property and at a much higher elevation.

[105] The Board therefore finds that the evidence establishes that the bulk and scale of the proposed development is reasonably consistent with the intent of the MPS, and that a contrary finding would not be based on fact or planning principles.

V. CONCLUSION

[106] The Board has determined that the reasons provided by Community Council for denying OSCO's proposed rezoning from C-2 to I-2, for the purposes of constructing a concrete ready-mix facility, are not supported by the evidence or the planning principles set out in the relevant RMPS and MPS provisions. The Board finds that other potential rationales advanced by HRM in support of Community Council's decision suffer from the same defect. Accordingly, Community Council's decision does not reasonably carry out the intent of the MPS. The appeal is, therefore, allowed and the Board directs that OSCO's rezoning application be approved.

[107] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 12th day of December, 2022.


Original Signed

Richard J. Melanson

APPENDIX “A”

Attachment B: Review of Relevant MPS Policies

Dartmouth Municipal Planning Strategy	
Policy	Provided
<p>Policy IP-1(b)</p> <p><i>Zoning amendments may be considered for any permitted use within each generalized land use category without a plan amendment provided that they do not conflict with the policies of this plan.</i></p> <p><i>An area immediately adjacent a given generalized land use designation may be considered for a zoning amendment to a use permitted within the adjacent designation without requiring a plan amendment, provided that the policies of this plan are not violated.</i></p>	<p>The property immediately adjacent to the site is designated Industrial under the Dartmouth MPS. The industrial zones within the generalized Industrial land use category include the I-2 (General Industrial) Zone.</p>
<p>Policy IP-1(c)</p> <p><i>In considering zoning amendments and contract zoning, Council shall have regard to the following:</i></p> <p><i>(1) that the proposal is in conformance with the policies and intent of the Municipal Development Plan</i></p>	<p>See below.</p>
<p><i>(2) that the proposal is compatible and consistent with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal</i></p>	<p>The site was previously a commercial propane storage and truck distribution facility and now contains a vacant commercial/office building. It is directly adjacent to a large swath of Industrial I-3 Zoned lands, zoned for harbour related industrial uses to the East (previously an oil refinery), and C-2 zoned lands to the West. Opposite Pleasant Street from the site are C-2 zoned lands, and South Woodside Elementary School. Opposite Station Road from the site are C-2 zoned lands, however two properties are used as low density residential. The rear of the proposed site abuts Canadian Railway tracks. Located on the opposite side of the tracks are more I-3 zoned lands with Halifax Harbour access, used for an Industrial oil facility.</p> <p>The existing development form in the general area is mixed. Uses in the area include commercial retail/service (laundry, dry cleaners), takeout restaurant,</p>

	<p>automotive repair, vehicle sales, industrial oil company lands, a school, and low-density residential development. Industrial and commercial zones line Pleasant Street, however there are existing low density residences within the C-2 zone. A transition into low density residential development is prevalent on side streets on the opposite side of Pleasant Street. The South Woodside Elementary School is across Pleasant Street. The school building is set back from the street, however outdoor fenced-in play areas are closer to the street.</p> <p>The bulk and scale of the I-2 zone in comparison with the existing C-2 zone is similar in terms of minimum lot sizes (5,000 sqft), lot coverage (100% max) and building setbacks (building code). The proposal re-uses the existing commercial office building on the site, and proposes additional industrial uses and structures that are well under 100% lot coverage.</p> <p>A variety of general and harbour industrial uses are located adjacent to residential and commercial uses in the area. A concrete ready-mix facility provides an opportunity for a buffer to higher intensity industrial uses, like those found in the adjacent I-3 zone. Having lower intensity industrial uses provides the opportunity for transition between the residential and commercial uses nearby.</p> <p>The site is across from two commercially zoned but residentially used properties on Station Road. These properties are owned by a sister company of the property owner of this site. A 10 foot landscaped buffer is proposed along Station Road to reduce incompatibilities between land uses.</p>
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<p><i>(3) provisions for buffering, landscaping, screening, and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries</i></p>	<p>Provisions for landscaping exist in the I-2 Zone that include:</p> <ul style="list-style-type: none"> - 42(5) A landscaped area of at least ten (10) feet in depth measured at right angles from the property boundary abutting any street(s) shall be provided, except where driveway or sidewalk access is required. <p>There are no provisions in the Land Use By-law required for screening or buffering beyond section 42(5) unless the property abuts residential or institutional uses, which this site does not directly abut.</p>
<p><i>(4) that the proposal is not premature or inappropriate by reason of:</i></p> <p><i>(i) the financial capability of the City is to absorb any costs relating to the development</i></p> <p><i>(ii) the adequacy of sewer and water services and public utilities</i></p> <p><i>(iii) the adequacy and proximity of schools, recreation and other public facilities</i></p> <p><i>(iv) the adequacy of transportation networks in adjacent to or leading to the development</i></p> <p><i>(v) existing or potential dangers for the contamination of water bodies or courses or the creation of erosion or sedimentation of such areas</i></p> <p><i>(vi) preventing public access to the shorelines or the waterfront</i></p>	<p>(i) There are no costs associated with this rezoning applicable to HRM.</p> <p>(ii) Site is within the serviced boundary. Halifax water has not flagged any issues, however has provided comment that developments may be required to prove capacity exists in the local wastewater/combined system at the building/development permit stage.</p> <p>(iii) The site is proposed Industrial with no residential that would rely on school/recreation facilities.</p> <p>(iv) Engineering has reviewed the provided Traffic Study and commented that no operational issues are expected to result. The existing access proposed on Pleasant Street will only be approved for non-industrial vehicles during the permitting process. There are two other site accesses proposed off Station Road which are to be used by large industrial vehicles. Station Road is a private road, owned by Canadian National Railway.</p>

<p><i>(vii) the presence of natural, historical features, buildings or sites</i></p> <p><i>(viii) create a scattered development pattern requiring extensions to truck facilities and public services while other such facilities remain under utilized</i></p> <p><i>(ix) the detrimental economic or social effect that it may have on other areas of the City.</i></p>	<p>(v) Operation of the proposed concrete ready-mix facility would be regulated by Nova Scotia Environment under the Industrial Approval Process. The Industrial Approval process sets site-specific requirements including noise, dust control, stormwater management and controls for groundwater/surface water protection from facility operations. Additionally, there are no watercourses on the site.</p> <p>(vi) The site does not prevent public access to the waterfront as it does not have waterfront/shoreline access.</p> <p>(vii) N/A</p> <p>(viii) The site is located along an existing truck route and on existing services.</p> <p>(ix) Presently no known economic or social effects that the proposal may have on other areas of the City.</p>
<p><i>(5) that the proposal is not an obnoxious use</i></p>	<p>The I-2 Zone does not permit obnoxious uses or uses creating a hazard to the public.</p> <p>Truck traffic leading to and from the site will be along Pleasant Street, an existing truck route. Other site operations will be regulated by Nova Scotia Environment, and the site will continue to be subject to standard HRM by-laws including for noise. A wash station is proposed on the site to reduce dust from vehicles entering/ exiting the site.</p>
<p><i>(6) that controls by way of agreements or other legal devices are placed on proposed developments to ensure compliance with approved plans and coordination between adjacent or nearby land uses and public facilities. Such controls may relate to, but are not limited to the following:</i></p>	<p>(i) The I-2 Zone of the Dartmouth Land Use By-law controls the types of use permitted on the site.</p>

<p><i>(i) type of use, density, and phasing</i></p> <p><i>(ii) emissions including air, water, noise</i></p> <p><i>(iii) traffic generation, access to and egress from the site, and parking</i></p> <p><i>(iv) open storage and landscaping</i></p> <p><i>(v) provisions for pedestrian movement and safety</i></p> <p><i>(vi) management of open space, parks, walkways</i></p> <p><i>(vii) drainage both natural and sub-surface and soil-stability</i></p> <p><i>(viii) performance bonds.</i></p>	<p>(ii) Municipal By-law N-200 Respecting Noise will regulate noise on site.</p> <p>Operation of the proposed concrete ready-mix facility would be regulated by Nova Scotia Environment under the Industrial Approval Process. The Industrial Approval process sets site-specific requirements including noise, dust control, stormwater management and controls for groundwater/surface water protection from facility operations.</p> <p>The proposal includes a purpose built wash out location, and a washing station for trucks, to prevent dust particles from entering air and water streams.</p> <p>(iii) The Dartmouth Land Use By-law regulates parking for industrial warehousing and manufacturing at a rate of one parking space for 2,000 square feet of floor area. Parking for office space area shall be provided at the rate of one parking space per 200 square feet of floor area.</p> <p>Engineering has reviewed the provided Traffic Study and commented that no operational issues are expected to result. The existing access proposed on Pleasant Street will only be approved for non-industrial vehicles during the permitting process. There are two other site accesses proposed off Station Road which are to be used by large industrial vehicles. Station Road is a private road, owned by Canadian National Railway.</p> <p>(iv) Provisions for landscaping exist in the I-2 Zone that include:</p> <ul style="list-style-type: none"> - 42(5) A landscaped area of at least ten (10) feet in depth measured at right angles from the property boundary abutting any street(s) shall be provided, except where driveway or sidewalk access is required.
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	<p>There are no provisions in the Land Use By-law required for open storage on this site.</p> <p>(v) HRM Engineering has provided comments that at this time pedestrian needs have been met. Existing pedestrian walkways along Pleasant Street connect by way of an intersection crossing provide a connection from the sidewalk that ends at the edge of this property, to the continuing sidewalk on the opposite side of Pleasant Street. This application requires no change to the existing pedestrian infrastructure.</p> <p>(vi) There is no open space as part of this application, nor would the use require open space under the Land Use By-law.</p> <p>(vii) A stormwater management plan and grading plan is required during permitting that will be reviewed by the HRM Engineering Department.</p> <p>Operation of the proposed concrete ready-mix facility would be regulated by Nova Scotia Environment under the Industrial Approval Process. The Industrial Approval sets site-specific controls for groundwater/surface water protection.</p> <p>The facility would be required to meet all HRM/HRWC requirements pertaining to drainage both natural and sub-surface, as well as soil-stability. The industrial approval may contain requirements in excess of HRWC requirements. If required by HRWC or NSE during detailed design/permitting or identified through the Industrial Approval process, the applicant has included a location for a potential stormwater management pond on the site plan.</p> <p>(viii) N/A</p>
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<p><i>(7) suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors.</i></p>	<p>There are no watercourses or flood prone areas present on the site.</p> <p>The Industrial Approval Process addresses environmental features such as slope, soil conditions, and watercourses. The proposed site is an existing commercial property that has been fully cleared and developed.</p> <p>There are no concerns regarding steepness of slope, soil conditions, or rock outcroppings on the site.</p> <p>The proposal was submitted to CN Rail for their information as the site is adjacent to rail, and no comments/concerns were received regarding the proposal.</p>
<p>Regional Municipal Planning Strategy</p>	
<p>Policy E-C5</p> <p><i>Where HRM has identified lands that may be suitable for industrial uses, amendments to secondary planning strategies and land use by-laws shall be initiated to allow for the intended uses and to ensure that these lands remain available while minimizing conflicts with existing or future incompatible uses in the vicinity.</i></p>	<p>The site is adjacent to Industrial Harbour properties.</p>
<p>Policy EC-12</p> <p><i>HRM shall establish a Halifax Harbour Designation which extends from Hartlen Point in Eastern Passage to Chebucto Head, including Northwest Arm and Bedford Basin, and extends inland generally to the first major roadway paralleling the Harbour, as shown on the Generalized Future Land Use Map (Map 2). The Designation shall support a range of development opportunities including marine-dependent industrial and commercial uses, transportation uses and facilities including ferries, recreational uses, residential uses, institutional uses and matters related to environmental improvement and protection.</i></p>	<p>A rezoning of the site to I-2 does not appear to impact the Harbour Designation intent.</p>

<p>Policy EC-13</p> <p><i>Within the Halifax Harbour Designation, HRM shall establish zoning under applicable land use by-laws and apply the zone on lands where existing harbour related industrial uses are located and lands or water lots determined by HRM to be suitable for these uses in the future. Corresponding land use regulations will be established under the applicable land use bylaws.</i></p> <p><i>Amendments to applicable land use by-laws may be made to:</i></p> <p><i>(a) allow for additional lands or water lots for harbour related industrial uses that have not previously been identified where such lands are considered appropriately situated for these uses;</i></p> <p><i>(b) implement regulations that mitigate potential negative impacts of existing and potential marine-dependent industrial and commercial areas on adjacent uses, while maintaining the economic viability of marine-dependent uses; and</i></p> <p><i>(c) discourage new residential development from locating in areas that abut lands designated for intensive marine dependent industrial and commercial uses.</i></p>	<p>Zoning of 538 Pleasant Street as I-2 would continue to mitigate potential negative interactions from Harbour Industrial uses to adjacent properties while maintaining the economic viability of marine-dependent uses.</p>
<p>Policy EC-14</p> <p><i>When considering an amendment to secondary planning strategies, land use by-laws or development agreements to permit new residential development in proximity to harbour related industrial uses, consideration shall be given to the potential for nuisances and compatibility issues and the importance to HRM in protecting the viability of the marine related industrial uses.</i></p>	<p>The proposal is for rezoning from commercial to industrial. There is no new residential development proposed.</p>

<p>Policy E-22</p> <p><i>HRM shall, through the applicable land use by-law, prohibit all residential development on the coast within a 3.8 metre elevation above Canadian Geodetic Vertical Datum (CGVD 28). Provisions shall be made within the by-law to permit residential accessory structures, marine dependant uses, open space uses, parking lots and temporary uses within the 3.8 metre elevation. Consideration may be given to amending the bylaw requirements where an updated system of measurement has been adopted or studies have been undertaken which recommend that such amendments are deemed prudent to provide a reasonable level of safety or to conform with guidelines or statements of interest adopted by the Province.</i></p>	<p>The site is not able to be developed residentially. The 3.8 metre elevation requirement does not apply to industrial proposals.</p>
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