

Our File: HL-314
October 4, 2012

Karen Brown
Halifax Regional Municipality
5251 Duke Street, 3rd Floor
Halifax NS B3J 3A5

Dear Ms. Brown:

**Re: Northwest Community Council
Case No. 17424: Land Use By-Law Amendments to the
Bedford West Business Zone, Service Stations in the "B" Area**

I am the solicitor for West Bedford Holdings Limited ("WBHL") in connection with the above captioned matter. I understand you will be providing legal advice to the Community Council at or before its next meeting. I would be grateful if you would provide a copy of this letter to the Council, together with any comments you may have upon its contents.

There are several points relating to this matter that we believe are worthy of being brought to Council's attention.

- 1. Where there are competing respectable planning opinions on whether a LUB Amendment is within the intent of the SPS, the decision is for Council and it is not bound to following staff planners advice**

For reasons discussed at the September 27 Council meeting as well as those set out below, WBHL submits that the requested clarification of the LUB regarding service stations is within the intent of the MPS. Planning staff, in its July 17, 2012 report at page 6, disagree. It is very important that Northwest Community Council understand that the interpretation of the intent of the Secondary Planning Strategy in such circumstances is entirely within its own proper role and jurisdiction. Staff's advice is not an impediment to Community Council supporting the proposed amendment if Council genuinely believes it to be within the intent of the Plan.

The reason that the interpretation of the Municipal Planning Strategy is ultimately for Community Council and not for professional planners is well described in the following passages from

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paragraph 153 of *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* [1994] N.S.J. No. 50 (NSCA):

"Planning policies address a multitude of planning considerations some of which are in conflict. ... **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 upon such decisions. So long as a decision to enter into a development contract [or amend a Land Use By-Law] is reasonably consistent with the intent of a Municipal Planning Strategy, the Nova Scotia Utility and Review Board has no jurisdiction to interfere with the decision ... **Policies are to be interpreted reasonably so as to give effect to their intent; there is not necessarily one correct interpretation.**" [emphasis added]

There are countless cases where Councils in the HRM and throughout the Province have not followed staff advice but have been upheld on appeal to the UARB. To be sure, Council should have a planning rationale for doing so. In this case that has been provided by WBHL planners at the September 27 meeting, and further explained in this letter.

In short, it is for the Community Councillors to decide which of two plausible planning opinions more accurately reflects Community Council's view of the intent of the Planning Strategy.

2. Interpreting a Planning Strategy is not a technical exercise but calls for pragmatism and finding reasonable solutions

The Planning Staff opinion in this matter is largely based on the premise that because service stations are permitted in the highway commercial zone under the pre-existing Bedford Land Use By-Law to which the Bedford West LUB provisions were added, one should infer that service stations were not intended elsewhere, even in a zone in Bedford West which permits an "automobile service and supply centre/outlet". This conclusion relies upon a technical interpretation doctrine concerning a use being deemed to be excluded because of its expressed inclusion elsewhere.

This is not the approach which Courts have mandated to be applicable in planning matters involving Council decisions. As stated in paragraph 99 of the same *Heritage Trust* case:

"The ... Act dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. ... If the goal of interpretation is to reveal the intention of the lawmaker there is also an implicit objective of interpretation 'to find a reasonable solution to a genuine and concrete problem'."

The exercise for the Community Council in this case is to interpret the secondary planning strategy policy BW-36:

"The Mixed Use Business Campus designation, illustrated on Schedule BW-7, shall support a wide range of businesses which produce goods and services, recreational uses, hotels, institutional facilities and park-and-ride facilities. Limited provision shall be made for retail uses, personal and household services and restaurants ..." [emphases added]

The Utility and Review Board, in commenting on the importance of giving a planning strategy a broad and liberal interpretation, said in paragraph 14 of its decision in *Re Dow*, 2008 NSUARB 48, that:

"Policies are not to be given a strict, narrow, or legalistic interpretation. If words are not defined in the Policy, they are to be given their ordinary meaning, generally, that is as defined in a dictionary." [emphasis added]

The words "automotive service and supplies centre/outlet" are not defined in the By-Law and accordingly should be given their plain and ordinary meaning. These words clearly would include gas stations because gasoline is a frequently needed "automotive supply", and a gas station is a retail "centre" or "outlet".

3. **The use of a concurrent implementing amendment to a Land Use By-Law is a proper interpretative aid, but a pre-existing By-Law provision should not be used to interpret the Planning Strategy**

While it has long been established that an implementing LUB may be used for guidance in interpreting a municipal planning strategy, the Board, at paragraph 80 of the *Dow* case has noted that **"using the previously enacted LUB to interpret the MPS is fraught with difficulties"**. In paragraphs 75 and 76 of *Dow* the Board notes that:

"At most, a concurrently enacted LUB may shed some light but cannot tie Council's hands." ... [emphasis added]

It is important to appreciate in the current case that the purely permissive provisions of the pre-existing Land Use By-Law allowing service stations in the highway commercial zone were not enacted concurrently with the Bedford West Secondary Planning Strategy. They form a part of background zoning provisions to which the West Bedford amendments became attached within a single document as a result of the adoption of the West Bedford Planning Strategy and implementing Land Use By-Law Amendments many years later. It strains the imagination to suggest that Community Council when approving the West Bedford planning documents had in their thoughts the definition of service stations and the permitted uses in the highway commercial zone from the old By-Law. The relevant provisions in the Land Use By-Law are not those pertaining to pre-existing permissive uses in the highway commercial zone, but the provisions found in the implementing by-law which permit an "automobile service and supply centre/outlet". An "automotive service and supply centre/outlet" implies a broader range of uses than gas service or stations, and the text contains no words of exception, which could have easily been inserted if that was the intent, to remove gas stations from the broad variety of automotive retail stores or service centres falling within the larger category. Nor is there any pragmatic logic to allowing things like muffler shops and auto parts supply centres but not gas stations. The intent of the Planning Strategy is expressly for a "wide range" of businesses, and WBHL respectfully requests that this intent be honoured.

CONCLUSION

If Council were to approve WBHL's request, even if there were an aggrieved person to oppose a decision of Council approving the requested amendment (which there does not seem to be), the chances of a successful appeal would be negligible. At the very least, the planning opinion articulated by West Bedford Holdings Limited representatives at the public hearing is

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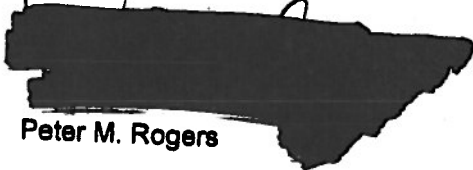
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respectable, sensible, pragmatic and consistent with ordinary language. If Council believes that the intent of the planning strategy in Policy BW-36 was indeed to allow automobile service stations as one of a "wide range" of permitted uses, that alone is a sufficient basis to justify Council in not following the staff recommendation.

Furthermore, and with the greatest of respect for HRM planning staff with whom WBHL is loathe to disagree, staff's use of a pre-existing Land Use By-Law provision which is purely permissive and not restrictive is a technical exercise which the Board and Courts have identified as inappropriate from two different perspectives.

As can be seen from the legal authorities which we have referenced, this is a case in which there is a strong planning rationale not to follow the staff recommendation. The right thing for Council to do is to grant the requested By-Law amendment.

Respectfully submitted,



Peter M. Rogers

PMR/dp
c: Client