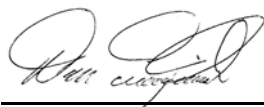
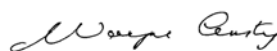


TO: Mayor Kelly and Members of Halifax Regional Council

SUBMITTED BY:



Dan English, Chief Administrative Officer



Wayne Anstey, Deputy Chief Administrative Officer - Operations

DATE: September 22, 2008

SUBJECT: Case 01114: Development Agreement - Duke, Hollis & Upper Water

SUPPLEMENTARY REPORT

ORIGIN

- Application by The Armour Group Limited to consider, by development agreement, the redevelopment of 1855-1873 Hollis Street, 1860-1870 Upper Water Street and 5143 Duke Street, Halifax, to allow for a 9 storey retail/office building with underground parking.
- Issues raised during public hearing held on September 9 and September 16, 2008.
- Issues raised during Council debate held on September 16, 2008.

RECOMMENDATIONS

It is recommended that Halifax Regional Council approve:

1. The draft development agreement, as contained in Attachment A of the June 16, 2008 staff report, to allow for the redevelopment of 1855-1873 Hollis Street, 1860-1870 Upper Water Street and 5143 Duke Street, Halifax.
2. The amendments to the June 16, 2008 draft development agreement as contained in Attachment "A" of the July 11, 2008 staff report.
3. The replacement of Schedule "D" of the June 16, 2008, draft development agreement with the schedule contained in Attachment "B" of the July 11, 2008 staff report.
4. The replacement of Schedule "E" of the June 16, 2008, draft development agreement with the schedule contained in Attachment "C" of the July 11, 2008, staff report.

5. Require that the development agreement be signed and returned within 120 days, or any extension thereof granted by Regional Council on request of the Developer, from the date of final approval by Regional Council or any other bodies as necessary, whichever is later; otherwise this approval will be void and obligations arising hereunder shall be at an end.
6. The demolition of the Imperial Oil building located at 1860 Upper Water Street.

BACKGROUND

At the close of the September 16th Regional Council meeting, Council instructed staff to prepare a supplementary report addressing questions raised by members of Council during the public hearing and in initial debate following the close of the hearing.

Additionally, it has come to the attention of staff that the motion to approve the proposal put forward by Councillor Streach was incomplete in that it did not include reference to the demolition of 1860 Upper Water Street. To correct this, it will be necessary for Council to amend the existing motion prior to voting on the matter.

DISCUSSION

Question 1: In considering the proposed development, what weight should be given to the heritage policies contained in the Regional Plan relative to other relevant policies in the Halifax MPS?

There are a number of competing policies in both documents that must be taken into consideration when evaluating any proposal. It is incumbent upon Council to strike a reasonable balance between these policies and the courts and the Utility and Review Board (the Board) have confirmed this approach. In its decision relative to the United Gulf proposal for the former Tex-Park site, the Board cited the following from the Court of Appeal:

"Planning policies address a multitude of planning considerations some of which are in conflict. Most striking are those that relate to economics versus heritage preservation. Planning decisions often involve compromises and choices between competing policies. Such decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions."

Important to the decision-making process is an understanding of certain operative terms contained in the various policies. Often, it has been suggested that in evaluating the proposal, staff has ignored the mandatory direction provided by the policies in use of the word "shall." Relative to the policies contained in the Regional Plan, the direction provided to Council is that they "shall consider" a variety of criteria in rendering a decision. This wording is intended to offer Council latitude and flexibility in weighing the various matters without being so specific as to force a narrow outcome. This matter was the subject of some discussion at the Board during the Midtown Tavern case and was referenced by them in the United Gulf (Tex-Park) decision where the following was stated:

"For purposes of the present proceeding, the Board adopts its analysis in Midtown of "should" and "shall." In doing so, it also notes, and agrees with, various of the comments made by Mr. Dunphy and Mr. Sampson in relation to this point. Mr. Dunphy, in the course of his evidence, said that "shall" can sometimes be used in the Halifax MPS in a way which is not as "predictive" as one might otherwise think the use of the term "shall" would be. For example, he said, a phrase such as "Council shall consider" requires Council to look at a certain set of information, or to consider certain alternatives, or to consider a set of policies, but does not bind Council to a particular outcome."

Staff fully explored the issues raised by the Regional Plan in Appendix C of the June 16 staff report. The June 16 report states the several policy statements within Policy CH-1 be viewed within the context of the *Heritage Property Act* and the physical context of the land in question. The *Heritage Property Act* relates only to the external appearance of buildings and the physical context is such that the proposed building will be seen from very restricted vantage points creating the dominance of the heritage facades at the base of the structure. Furthermore, the situation involves merchant buildings from two time periods. The heritage value of these buildings is not their view from a distance, but a closeup pedestrian view of their facades within their respective streetscape.¹

Rooftop additions are appropriate under the policy provided they are stepped back from the base. This policy exists to permit restoration of heritage structures in a manner which also allows economically viable building space. The use of glass to maintain subordination to the heritage base is a common technique used across North America and around the world to highlight the heritage base.

It is also important to note in clause (f) of Policy CH-1, the word "subordinate" is followed by the word "by" and four criteria. These criteria provide guidance as to how an addition to a heritage building may be made to be subordinate. Staff's analysis of this policy is provided in Attachment C of the June 16, 2008 staff report.

The various policies must be interpreted as part of the whole plan and in the Midtown Tavern decision, the Board reiterated the following position of the Court of Appeal that a narrow, legalistic interpretation of policies would not be consistent with the overall objectives of plan policies:

"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. "

"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

¹A landmark building like Halifax City Hall, on the other hand, would have much less tolerance for a rooftop addition as it is meant to be formally viewed from a distance.

interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are to be made. The Plan must be made to work. A narrow legalistic approach to the meaning of policies would not be consistent with the overall objective of the municipal planning strategy."

It is important that Council strike a balance between the heritage conservation and economic development policies. Relative to this matter, the following 1994 Court of Appeal decision was also referenced in the United Gulf (Tex-Park) decision,

"Nevertheless, the case law under which the Board operates makes it clear that any municipal decision must be measured not just against such provisions as those just enumerated (relating, in essence, to heritage related matters), but against the MPS as a whole. With respect to the HRM MPS in particular, the Court of Appeal, in its 1994 decision in *Heritage Trust* (which likewise involved opposition by heritage groups, including one involved in the present proceeding, to a new development), specifically noted that provisions dealing with other matters, such as economic, are likewise of importance. The Court of Appeal stated that City-Wide Policy 6 (relating to heritage):

... is simply a policy that the City must consider along with all other planning policies as outlined in the Plan when considering application for development agreement.

As important as Policy 6 of Section II of the Plan is to the matters under review one cannot lose sight of other city-wide objectives of the Plan including those set out under Policy 1- Economic Development ... "

Policy 3.2.1 states:

"Major office projects, hotels, cultural facilities and government office activities, which would strengthen and enhance Halifax as the dominant centre of Atlantic Canada, should be induced to locate in the Central Business District. This policy shall remain in effect until the CBD is self sustaining."

It is critical to the long term success of the region that HRM strive to promote major office development in the CBD. This part of the region, as described by Nova Scotia Business Inc, is Atlantic Canada's showroom and the location of choice of the private companies expressing an interest in establishing in HRM. The Regional Plan explains that the cluster of activities in the Capital District is the key element of the strength and success of HRM as the leader in Atlantic Canada. The primary vehicle for accomplishing this goal is the inducement of major office projects, hotels and cultural facilities in the Central Business District.

In conclusion, when analysing this project and providing a recommendation to Council, staff considered a variety of competing policies. Staff also took into consideration decisions of the courts and Board with respect to policy interpretation and the balancing of competing policies interests that the Municipality has identified in its planning documents. As staff have indicated on many occasions, Council may reasonably reach a different conclusion with respect to balancing these competing policies. The fact that a different conclusion may be reached does not mean that staff has ignored policies or misinterpreted them.

Question 2: Members of the public commented that staff did not provide an evaluation of a number of policies in Attachment C of the June 16, 2008 staff report. Why did staff not take these policies into account when preparing Attachment C?

When considering development agreement applications on Peninsula Halifax, Council must consider both the Halifax MPS and the Regional Plan in their entirety. Following common practice, staff outlined the **most relevant policies** related to this application in Attachment C of the June 16, 2008, staff report. Accordingly, staff highlighted policies contained in the City-Wide, Halifax Waterfront Development Area and the Implementation section of the Halifax MPS. The basis for identifying these as the most relevant policy sets is that the proposal is located within the Halifax Waterfront Development Plan Area (identified as Section IV of the MPS). The Halifax MPS states:

"Section IV of this Plan shall constitute the basis for decision-making by the City in the Waterfront Development Area. For clarity, Section IV may be interpreted by reference to Section III (the CBD) where appropriate."

Question 3: Can Council base its decision to either approve or reject the application on the Heritage Conservation Standards?

Council must base its decision on the applicable policies contained in both the Halifax MPS and the Regional Plan. The Heritage Conservation Standards do not form part of either the Halifax MPS or the Regional Plan. In fact, the Heritage Conservation Standards have never received official Council endorsement and are used by staff and members of the Heritage Advisory Committee as guidelines when dealing with heritage property matters.

Question 4: How much weight should Council assign to the 1973 Halifax City Council motion regarding Historic Properties?

The Council minutes of the time state,

"Moved by Alderman Moir, seconded by Alderman Stanbury that, as recommended by the City Planning Committee, City Council feels that the Granville Street area; Duke Street to Buckingham Street and both sides of Granville Street to the waterfront should be saved and Council work toward this end to see it developed without cost implications to the City being involved; that the Council go on record as desiring, if at all possible, that developers take into consideration, the wishes of Council that the area in question be preserved in its entirety and its original form as much as possible."

This motion was never incorporated into the MPS and therefore is not an official planning policy.

The motion therefore has no weight in the decision to either approve or refuse a development agreement application. Council must base its decision solely on the policies contained in the Halifax MPS as well as those of the Regional Plan.

Question 5: How much weight should be given to HRM by Design in the evaluation of

this proposal?

The HRM by Design process is anticipated to result in substantive changes to development regulations for the downtown. This process was initiated by Council, but has not received approval to date. Therefore, a decision by Council on the Waterside proposal cannot be based upon whether it meets HRM by Design, in its entirety or otherwise. Council must base its decision solely on the existing policies contained in the Halifax MPS and the Regional Plan.

The Board dealt with a similar issue with the United Gulf (Tex-Park) decision. In that case, the Board had to decide on the relevance of the draft "Barrington Street Revitalization Plan", which Council had adopted in principle, and the (then proposed) Regional Plan and whether Council should have taken these studies into account in making a decision on the development agreement proposal. The Board determined that these studies were irrelevant because they weren't duly approved policies of Council and assigned no weight to them in reaching its decision. An extract from the decision states,

"The Board does not accept this argument, and gives little weight to the Revitalization Plan. The fact that the Revitalization Plan has been adopted in principle does not mean that it will ever actually be adopted by Council and approved by the Minister. Moreover, even if it is, the Board has no way of knowing whether it might be adopted with significant changes, the nature of which the Board cannot anticipate. Further, even then, the Board cannot anticipate what changes, if any, might be made by HRM to its MPS in consequence.

In determining whether or not the Appellants have succeeded in establishing that Council's decision fails to reasonably carry out the intent of the MPS, the Board has given no weight whatever to any references to any matter which were taken into account in developing a new Regional Plan, or the provisions contained within such a Plan."

Question 6: Why is staff supporting the use of glass in the addition and not brick, stone, or other traditional materials?

There are two schools of thought on which exterior materials are appropriate in heritage contexts. A traditional response suggests that additions or exterior alterations to heritage buildings should be sympathetic to the existing structures by replicating the existing cladding materials. Conversely, the use of a non-traditional material such as glass, to clearly differentiate between the old and new work, is a more contemporary approach.

Non-reflective glass is a material that staff feels is complementary and distinguishable to the materials used on the heritage facades. Glass has been used in numerous projects around the world where modern additions were added to heritage buildings/districts. The lightness and transparency of non-reflective glass has the result of focussing the viewer's attention towards heavier materials like brick and stone. Glass in that sense does not compete with more traditional materials.

The Armour Group has been on record that if it is the wish of Council, they are prepared to build

Waterside Centre with a brick exterior cladding. Staff is not in support of this alternative for the reasons stated above. The approval of such an alteration to the project would require the submission of revised drawings and a new public hearing would be necessary because the change in material and design would represent a substantial amendment. Council and the public would need to see and be able to comment on the redesign with respect key design issues such as window and roof treatments.

Question 7: Is facadism an acceptable practice under current HRM planning policies?

While the adaptive reuse of heritage buildings is ideal, it is not practical in all situations. Facadism can therefore be seen as an appropriate alternative in those cases. The Halifax MPS and the Regional Plan are silent on the issue. There have been a number of redevelopment projects undertaken in the past two decades that have used the technique of facadism. These include portions of Founders Square, the Granville Mall, Historic Properties and the Garden Crest Apartments. In addition, HRM has provided a grant through its Heritage Property Program to shore up the facade of the former National Film Board (NFB) Building on Barrington Street after a fire destroyed most of the building. The plan is to include the NFB facade in a future redevelopment project.

Question 8: Is the proposed development located within the boundaries of Historic Properties?

“Historic Properties” is a term that is often used loosely and appears to mean different things to different people. Sometimes it is used to describe the group of historic waterfront buildings between Upper Water and the harbour. Sometimes it is used to describe the entire area between Granville Street and the waterfront, between Duke Street and the former Buckingham Street.

Although popularly perceived as a “heritage area” the Historic Properties area between Granville and the harbour is not officially designated as a heritage conservation area/district nor is there a “Historic Properties” area designated or mentioned in the Municipal Planning Strategy. However, all of the properties within the area (except for 1870 Upper Water) are individually registered heritage properties.

To formally recognize this area in planning policy, the draft HRM by Design document identifies Historic Properties as a potential future heritage conservation district. As noted earlier, this proposed designation is not relevant. Council’s decision must be based upon existing policy.

Question 9: Who owns Historic Properties?

The waterfront property east of Upper Water is owned by HRM and leased to The Armour Group Limited (formerly Historic Properties Ltd.) under a 75-year lease. All other properties west of Upper Water Street are privately owned.

Question 10: What kind of financial assistance is available to support a different type of

development on the site? Would a land swap be possible?

Council has requested staff to report on possible financial incentives and alternate development scenarios for this group of registered heritage buildings, should the current application be refused.

Municipal Funding

The *Heritage Property Act* provides opportunities for HRM to offer financial incentives to a private property owner. Council would have some latitude in deciding whether a tax holiday or direct grant would be most appropriate as the Act states HRM may determine the type and extent of financial contribution “as it sees fit”.

There are several potential sources of financial assistance, all of which would require that the existing buildings be retained, without demolition.

The existing Heritage Incentives Program offers a 50% cost sharing for exterior restoration to a maximum of \$10,000 per building, and a maximum of two grants in each four year period. There are four buildings, so grants could total \$80,000 over two years.

The financial incentives program being contemplated for the Barrington Street Historic District consists of grants and property tax credits and the waiver of permit application fees for building permits. The Municipality has no experience in implementing this type of program and as such, staff are unable to advise whether it would be appropriate on a site-by-site basis versus a larger and more cohesive area.

Federal Funding

The Cultural Spaces Canada Program provides 33% funding for renovation/ expansion/ construction of arts and heritage facilities. It could potentially support a feasibility study and conversion of these buildings into such facilities. Applicants must be non-profit organizations or municipal/regional governments. Program literature indicates that grants are normally in the realm of \$50,000. Currently, all funding is committed until 2010 but a new funding cycle is expected.

If the buildings were designated as a National Historic Site, like the neighbouring historic waterfront buildings and the Granville block, then significant federal funding might also be available under the National Cost Sharing Program. However, the process for national designation takes at least two years and this would then have to be followed by a funding application. The outcome of both of these processes would be time consuming and uncertain.

Provincial Funding

The Provincial Heritage Property Program offers a 50% cost sharing to a maximum of \$2000 for professional Building Conservation Advice.

Alternative Development

The developer has indicated to staff that he is prepared to agree to a mutual “best efforts” clause that, if the contract development is approved by Regional Council at nine stories, the developer will work with HRM Staff to explore a mutually acceptable means of financial support that would, subject to the approval of Council, allow the developer to reduce the overall height of the development by 1 or perhaps even 2 stories.

The developer has indicated his full financial analysis on the building would be made available for review by HRM’s financial analysts so a reasonable amount of assistance could be determined. It should be pointed out that the Armour Group has stipulated that the analysis be complete within a short time frame so that the results can be reported back to the sitting Council for its final decision. If Council instructs staff to pursue this option, then a further report will be required. Given the complexity of the issues at hand, staff advises that the developer’s requested time frame may not be able to be met. In staff’s opinion, it is reasonable to expect that appropriate analysis for Council’s consideration could take months to complete.

A land swap with HRM may be possible provided the parties are able to agree on value and location. This matter has not been explored and can be expected to take quite some time to determine whether or not a deal is possible. As with the option discussed above, it is staff’s opinion that it is unlikely that this decision could be reached within the developer’s desired time frame.

Question 11: Have HRM Building Officials inspected the buildings?

HRM Building Officials do not inspect buildings for structural integrity. Should questions of structural integrity arise during the course of a permit application or as a result of a Dangerous or Unightly premises investigation, HRM orders the owner to obtain a report from a qualified engineer. The report must include solutions to remedy the matter. Quite often, a range of solutions is possible which involve more or less retention of the existing building fabric. HRM does not prescribe the specific course of action to be taken; only that the building is returned to a safe condition. The Developer has provided engineering statements as to structural issues.

Cursory observations by HRM Building Officials confirm that should a change in occupancy be requested, numerous elements of the Building Code would come into play requiring renovations to the building. Once again, there are numerous ways in which this could be done, with varying implications for retention of the existing building fabric. HRM would not prescribe a specific solution, only that the buildings meet requirements for any change in occupancy.

Once again, Council’s ultimate decision in this case is to be based on regional and municipal plan policies.

Question 12: What will happen to the exterior walkway that connects Upper Water Street to Hollis Street?

The exterior walkway operates to enhance the commercial viability for operators in Granville Mall and Historic Properties (below Upper Water Street). An internal walkway connecting both Upper Water and Hollis Streets will stay open during retail business hours to facilitate pedestrian movement and contribute to the commercial viability of the area.

Question 13: What is the assessed value of the subject properties?

The site is made up of four separate parcels of land. The following is a listing of the individual properties with their respective 2008 assessed values:

- 1870 Upper Water Street (PID # 00002311), assessed at \$169,000;
- 1860 Upper Water Street/5143 Duke Street (PID # 00002303), assessed at \$605,800;
- 1855-1865 Hollis Street/1866 Upper Water Street (PID # 00002279), assessed at \$365,300; and
- 1873 Hollis Street (PID # 00002287), assessed at \$350,000.

Total 2008 assessed value = \$1,490,100

BUDGET IMPLICATIONS

None.

FINANCIAL MANAGEMENT POLICIES / BUSINESS PLAN

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Capital and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Capital and Operating reserves, as well as any relevant legislation.


ALTERNATIVES

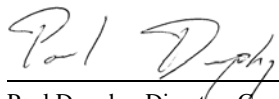
1. Regional Council may choose to approve the entire development agreement, as contained in Attachment A of the June 16 staff report and as subsequently amended. This is the recommended course of action.
2. Regional Council may choose to alter the terms of the development agreement. This may necessitate further negotiations with the Developer, and may require an additional public hearing.
3. Regional Council may choose to refuse the entire development agreement. Pursuant to Section 230(6) of the Municipal Government Act, Council must provide reasons for this refusal, based on the policies of the MPS.

A copy of this report can be obtained online at <http://www.halifax.ca/council/agendasc/cagenda.html> then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

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