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## **Item No. 4**

**Halifax Regional Council  
January 20, 2009**

**TO:** Mayor Kelly and Members of Halifax Regional Council

**SUBMITTED BY:**

A handwritten signature in dark ink, appearing to read "M.E. Donovan", written over a horizontal line.

M.E. Donovan, Director Legal Services and Risk Management

**DATE:** December 29, 2008

**SUBJECT:** 00728 - Development Agreement - Horizon Court, Dartmouth

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### **INFORMATION REPORT**

#### **ORIGIN**

Application by Dixel Developments Limited to enter into a Development Agreement to permit the construction of two multiple unit buildings containing a total of 168 dwelling units and approximately 30,000 square feet of commercial space on the former MT&T lands at 5 Horizon Court, Dartmouth.

## **BACKGROUND**

Harbour East Community Council (“HECC”) approved the entering into of the Development Agreement with Dixel Developments Ltd. (“Dixel”) on January 5, 2006. Can-Euro Investments Limited (“Can-Euro”) appealed Council’s decision to the Nova Scotia Utility and Review Board (the “Board”). The Board allowed Can-Euro’s appeal but approved the Development Agreement with amendments that both limited the accumulative square footage, restricted the hours of operation of the retail space and excluded certain types of businesses. Can-Euro appealed the Board’s order to the Nova Scotia Court of Appeal. Dixel and HRM cross-appealed. HRM’s position was that the Board exceeded its jurisdiction by ordering amendments to the Development Agreement that Council had approved.

This Report is being circulated to Regional Council because the decision of the Court of Appeal in relation to the cross-appeals is relevant to all Councillors. The decision of the Court of Appeal restates conclusions of previous Board and Court decisions and advice provided by staff with respect to:

- a single policy interpretation versus a range of choices
- what weight to give each policy;
- words such as “consider” or “have regard”; and
- the primary role of Council in making “reasonable” policy interpretations as opposed to the Board substituting its interpretation of what the meaning of the MPS policy “should” be.

## **DISCUSSION**

The Nova Scotia Court of Appeal heard the appeal and cross-appeals on October 8, 2008 and rendered its decision and Order on December 23, 2008. The Court of Appeal dismissed the appeal by Can-Euro and allowed the cross-appeals of HRM and the Developer. The result being that the November 19, 2007 order of the Board was reversed and the January 5, 2006 decision of council, which approved the Development Agreement was confirmed.

The grounds raised by Can-Euro were summarized by the Court of Appeal as follows:

- a. Did the Board err in law in denying Can-Euro’s request to present additional evidence and to adjourn the hearing;
- b. Did it err in law in reaching its findings relating to issues of access, and in failing to provide procedural fairness in relation to its determination of access issues; and
- c. Did it err in law by failing to appropriately consider the impact of the agreement on Horizon Court and on various other planning matters.

The Court of Appeal dismissed the first ground, stating that it was not persuaded that the Board erred in legal principle and its consideration of Can-Euro’s request to adjourn and reopen its case and the Board’s decision to refuse these requests did not result in a denial of procedural fairness.

With respect to the second ground of appeal, and issues regarding access, the Court found that the Board did not err in law in its approach to the weight, if any, to be given to the preamble to Policy H-18. In coming to this conclusion, the Court stated the following with respect to preambles to MPS Policy:

Moreover, the statement regarding access upon which Can-Euro relies is not found within Policy H-18 itself, but only in its preamble. A preamble to a policy may provide context for understanding the policy; however, it is the policy itself that guides council...

The Court found that the Board did not commit an error of law in disposing of the appellant's argument relating to whether policy H-18 was met. The Court stated:

In any event, even if the preamble to policy H-18 had required the resolution of all access issues, Can-Euro's submission regarding the necessity of determining access to the Stub is without merit.

Further, the Court had the following to say with respect to access issues:

If Olive Properties should acquire that half portion of the Stub and if access over Horizon Court or other land owned by Can-Euro to it should become an issue, either Olive Properties or Can-Euro can bring proceedings in the Nova Scotia Supreme Court to resolve the matter. Can-Euro's arguments that increased traffic from commercial uses would mean excessive use of the easement to the MT&T site and that the Agreement creates unanticipated burdens on the servient tenement pertain to the scope and nature of the Nova Scotia Supreme Court declaration of an easement and right-of-way "for the passage of persons and vehicles and for all purposes associated with the use and enjoyment" over Can-Euro's land to the MT&T site. Any such questions or disagreements concerning that easement should be determined by the same body that issues the order, namely the Nova Scotia Supreme Court. Its jurisdiction to do so was not disputed by the respondents before the Board, or by the appellant before the court.

With respect to the third issue of whether the Board failed to appropriately consider the impact of the agreement on Horizon Court and on various other planning matters, the Court concluded the following:

Can-Euro had the burden of persuading the Board that the traffic consequences of the proposal for the MT&T side did not reasonably carry out the intent of the MPS. Both it and Dexel presented extensive written reports and testimony in regard to the traffic issues, including the transportation or road networks, traffic counts and service ratings, and vehicle to capacity ratios. It is evident from its decision that the Board carefully analysed the evidence relating to the commercial uses and the traffic issues which the parties placed before it. I can find no error of law in the Board's

assessment of the traffic impact of the proposed development of the MT&T site on Horizon Court.

Nor could the Court find any merit in Can-Euro's argument that the Board erred in law by failing to consider the impact of the development agreement on bicycle traffic and pedestrian movement in the area of the MT&T site. The Court found that the decision of the Board was explained clearly and was amply supported by the evidence and was not persuaded that the Board committed any error of law.

With respect to whether the Board failed to consider the impact of the proposed development on the adjacent land use, namely the future build-out of Can-Euro's remaining land, the Court once again found that Can-Euro failed to meet the burden of establishing that the Board erred in law in this regard.

### **Cross-Appeal**

In reviewing the Cross-Appeals, the Court stated the following:

The changes the Board made to the Agreement might be reasonably consistent with the intent of the MPS. However, even assuming they were, how could the addition of the Board's "minor amendments" to "minor aspects" of only the commercial component of the proposed residential and commercial development transform the Agreement from one which is not reasonably consistent with the MPS to one which is? The answer lies in the approach the Board took in reviewing Council's decision with approved the Agreement. In my respectful view, it strayed from the test mandated in s. 251(2) of the *MGA*, and so erred in law.

The Court found that although the Board set out the test in s. 251 of the *MGA* and referred to the *Midtown Tavern* case in its decision, it failed to follow the clear direction set out by the court in that case. The Board instead, imposed its own interpretation of the MPS in regard to the commercial component of the development.

The Board erred when it first sought to ascertain the intent of the MPS and then compared what it determined was the intent against what council had decided. In doing so, it concluded how in its view, the MPS should be interpreted.

The Court concluded that:

By ordering what the Board itself described as "minor amendments" to "minor aspects" of the commercial element of the development, the Board substituted its own opinion as to the appropriate types of commercial uses and the hours of operation.

In taking the approach it did, the Board failed to ask itself the critical question: can it be said that the decision of Council does not reasonably carry out the intent of the MPS?

It is interesting to note that the Court of Appeal when reviewing the implementation policies, IP-5 and IP-1(c) which state that Council is to “consider” and to “have regard” to certain criteria, the Court said:

They do not stipulate how these are to be weighed, nor do they demand a single outcome. Council had a range of choices which could reasonably carry out the intent of the MPS.

The Court found that

The Board’s intrusive approach of determining what it considered the single intent of the MPS, comparing it to what Council had decided, and then through its Order finessing the Agreement to perfectly comply with its own view could complicate and confuse negotiations between parties to development agreements, add uncertainty to the planning process, and lengthen hearings.

## **CONCLUSION**

The Court of Appeal dismissed the appeal by Can-Euro and allowed the Cross-Appeals by HRM and Dixel. The Court restores the decision of Council made January 5, 2006, which approved the original Development Agreement.

## **BUDGET IMPLICATIONS**

N/A

## **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.

## **ATTACHMENTS**

N/A

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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