

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **JOHN AND THERESA MACNEIL** of a decision of Council for Cape Breton Regional Municipality to refuse an amendment to the Land Use By-Law respecting property identified as PID 15225733 (Upper Prince Street Area, Grand Lake Road, District 6, Cape Breton Regional Municipality)

BEFORE: David J. Amon, LL.B., Member

APPLICANT: **JOHN AND THERESA MACNEIL**
On their own behalf

RESPONDENT: **CAPE BRETON REGIONAL MUNICIPALITY**
Demetri Kachafanas, Q.C.

HEARING DATE: April 8, 2021

DECISION DATE: **June 11, 2021**

SITE VISIT: April 16, 2021

DECISION: **The appeal is allowed**

I INTRODUCTION

[1] John and Theresa MacNeil own land identified as PID 15515414 and PID 15165285, which fronts on Upper Prince Street, Sydney. These two parcels are zoned Arterial Business Corridor (ABC). Mr. and Mrs. MacNeil wish to purchase the adjacent rear property identified as PID 15225733 (the subject site) to allow for a self-storage facility. The subject site is zoned Residential Urban A Mobile Home (RUAM). The ABC Zone permits self-storage facilities, while the RUAM Zone does not.

[2] The existing 24' x 24' building located on the subject site would be converted for storage, security, maintenance, and restroom facilities.

[3] In its November 30, 2020, Staff Report, Cape Breton Regional Municipality planning staff recommended Council give first reading to the *By-law of the CBRM amending the Land Use By-Law (LUB)* and directed staff to schedule a public hearing at an upcoming meeting of Council.

[4] In its January 19, 2021, report, the Planner made the following recommendation:

Given that the area is mixed use in nature, the screening provisions of the ABC Zone, and the request is in keeping with the MPS Part 10, Policy 17:

I recommend that Council rezone the subject site as identified as Schedule "A" of the attached amending by-law (Attachment D) to Arterial Business Corridor (ABC).

[5] The LUB amendment request was considered by CBRM Council on January 26, 2021. Following a public hearing to consider the matter, CBRM Council passed a motion to decline the request.

[6] Mr. and Mrs. MacNeil appealed the decision of CBRM Council to the Nova Scotia Utility and Review Board by notice filed on February 4, 2021. The grounds of appeal, among other things, stated that the decision of Council failed to reasonably carry

out the intent of the Municipal Planning Strategy (MPS), and the intent of MPS Policy 17 Part 10 as recommended in the Staff report.

[7] Under s. 250(1)(a) of the *Municipal Government Act (MGA)* the grounds for appealing such a decision are limited:

- s. 250 (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;

[8] The Board's remedial powers, and the restrictions on the exercise of these powers, are prescribed by s. 251 of the *MGA* which provides:

- 251 (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 shall not allow an appeal unless it determines that the decision of 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]

[9] The Board heard evidence from the Appellants and Kristin Knudskov, MSc, BA, CBRM planner, who was called by the Appellants to give evidence. Council for CBRM called no witnesses. There were no speakers registered for the evening session, which, as a result, was cancelled. The Board also had the benefit of the Appeal Record and relevant planning documents of CBRM.

[10] The Board finds that, on the balance of probabilities, the Appellants have met the burden of proof. The Board allows the appeal and reverses the decision of Council.

II ISSUE

[11] The issue to be determined in this Decision is whether the decision of CBRM Council declining the request to amend the LUB failed to reasonably carry out the intent of the MPS.

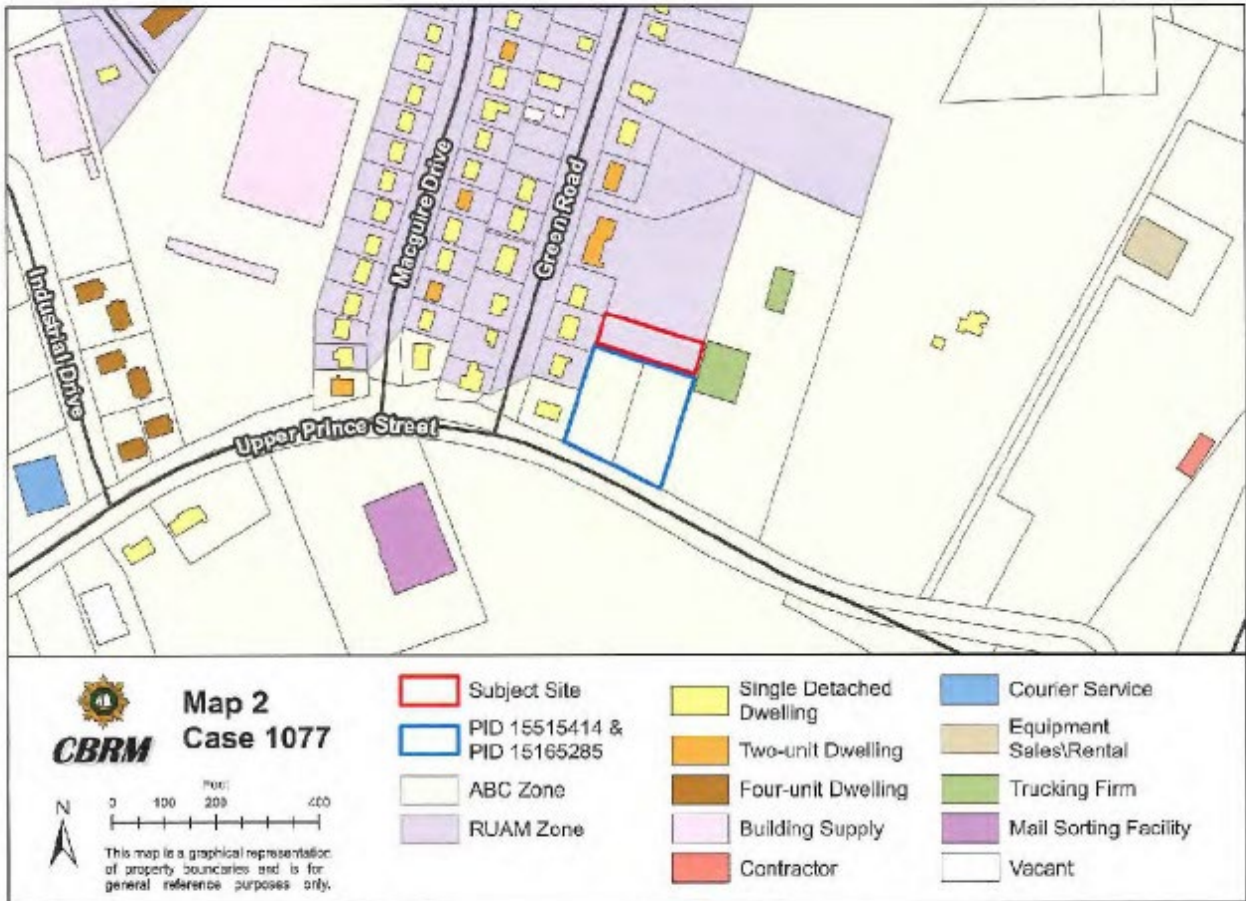
[12] For the reasons described below, the Board concludes that Council's decision did not reasonably carry out the intent of the MPS. Thus, the appeal is allowed.

III BACKGROUND

[13] On November 2, 2020, the Planning & Development Department, CBRM, received a zone amendment request from John and Theresa MacNeil for a portion of PID 15225733 (the subject site) to allow a self-storage facility. If Council approved the amendment, the subject site would be purchased and consolidated with PID 15515414 and PID 15165285.

[14] The existing 24' by 24' accessory building located on the subject site would be converted for storage, security, maintenance, and restroom facilities. The Appellants indicated that their intent was to install one 3,600 ft² self-storage building with a second building to follow.

[15] PID 15515414 and PID 15165285, outlined in blue on the Map, are zoned ABC, but the subject site, outlined in red on the Map, approximately 12,000 ft² in size, is zoned RUAM. While the ABC Zone permits self-storage facilities, as of right, the RUAM Zone does not. Part 10, Policy 17 of the MPS allows Council to consider a zone amendment to the zone immediately adjacent, provided the intent of all other policies are satisfied. Therefore, Council may consider rezoning the subject site to ABC zoning.



[Exhibit M-1, p.21, Map 2]

[16] According to the staff report, the surrounding area is mixed-use in nature. Properties along Green Road and Macguire Drive are zoned RUAM and are developed with low-density residential dwellings. Properties along Upper Prince Street are zoned ABC and include a mix of light-industrial, commercial, and low- to mid-density residential uses.

[17] If Council approved the rezoning, any development on the property would need to comply with the provisions of the ABC zone as well as all other applicable provisions of the CBRM LUB. The ABC Zone contains a provision which requires that

non-residential developments be screened from adjacent non-residential zones. Compliance with the screening provisions would be evaluated when an application for a Building Development Permit was received.

[18] Given that the area is mixed-use in nature, the screening provisions of the ABC Zone, and that the request was in keeping with the MPS Part 10 Policy 17, the Planner, in her staff report recommended the CBRM Council rezone the subject site. Following a public hearing to consider the matter on January 26, 2021, CBRM Council passed a motion to decline the request. The January 27, 2021 letter advising the MacNeil's of the refusal stated, simply:

The above-noted Land Use Bylaw amendment request was considered by the Council of the Cape Breton Regional Municipality (CBRM) on January 26, 2021. Following a public hearing to consider the matter, CBRM Council passed a motion to decline the request.

The refusal to amend the Land Use Bylaw may be appealed to the Nova Scotia Utility and Review Board (see below) within fourteen (14) days of this notice of decision.

[Appeal Record, p. 51]

No reasons were given.

[19] The Appellants' Notice of Appeal, filed with the Board on February 4, 2021, stated the grounds of appeal as:

PID 15225733, Cape Breton Regional Municipality Council's refusal to amend the Land Use Bylaw for rezoning of portion of PID 15225733 from RUAM to ACB Zone fails to reasonably carry out the intent of the Municipal Planning Strategy for Cape Breton Regional Municipality and the intent of MPS Policy 17 Part 10 as recommended in the Staff report provided to Council by CBRM Planner, Kristen Knudskov.

ZONING BOUNDARY AMENDMENT POLICY

Policy 17 Part 10: Areas immediately adjacent to a given land use designation on the Municipal Planning Strategy Map may be considered for rezoning to a use permitted in the given designations without requiring an amendment to this Strategy, provided that the intent of all other policies of the Strategy are satisfied.

Of note, Planning did note screening in the report provided to Council as well as advising access portion of PID 15225733 would be by way of Upper Prince Street.

Council failed to recognize the subject property (Portion of PID 15225733) and the proposed commercial use thereon was compatible with surrounding uses and the commercial designation applied to the subject property (portion of PID 15225733).

The recommendation of the Cape Breton Regional Municipal Planning Division was that given the area is mixed use in nature, the screening provisions of the ABC Zone and that the request is in keeping with the MPS Part 10, Policy 17, rezoning of the portion of PID 15225733 to Arterial Business Corridor (ABC) should be approved.

See also
Attached letter of Appeal.

[Exhibit M-1, pp. 1-2]

[20] As well, the Appellants' filed a letter of appeal to the NSUARB dated February 4, 2021, which stated:

...

**RE: FORM A - DECISION OF COUNCIL NOTICE OF APPEAL
JOHN & THERESA MACNEIL
CASE 1077 LAND USE-BYLAW MAP AMENDMENT**

To Whom It May Concern:

We would like to offer additional information in our Formal Appeal regarding the Decision made by Cape Breton Municipality Council. Council did not reasonable carry out the intent of MPS Policy 17 Part 10 as recommended by Planner, Kristen Knudskov. The intention of Theresa and John MacNeil was to have a portion of PID 15225733 added to the rear of PID 15515414 and PID 15165285.

The given history to explain our situation would be that PID 15515414 and PID 15165285 Upper Prince Street had been acquired back in 1985 from Eugene MacNeil (father) when all land at that time owned by Eugene MacNeil located within PID 15225733 101 Green Road was considered commercial land.

A portion of PID 15225733 (the subject site) was later acquired and in April 2020, we proceeded to have the land (the subject site) surveyed and added to PID 15515414 and PID 15165285. We were of the understanding PID 15225733 was still considered commercial land.

A subdivision application was filed to consolidate PID 15515414 and PID 15165285 as well as a portion of PID 15225733 (the subject site). When the subdivision application and drawings were presented to CBRM Planning Division, we were advised the portion of PID 15225733 (the subject site) was no longer considered commercial. The explanation provided was that in 2004, the municipalities amalgamated and the zoning was changed.

All land associated with PID 15225733 101 Green Road was no longer considered commercial land and changed back to residential including the portion of PID 15225733 (the subject site) we had acquired. We were advised we would have to make application (\$1000) to have a Public Hearing before Council in regard to approval to have a portion of PID 15225733 (the subject site) rezoned to ABC Zone for commercial use prior to having it added to PID 15515414 and PID 15165285.

Of note, in regard to PID 15225733, it had been used by Eugene MacNeil since the 1970's as a commercial site for his business. At no time did any neighbouring properties offer any

offense. In the vicinity of the commercial land on Upper Prince Street is Hillman's Transfer (Howie MacNeil Trucking). This land was at one time owned by Eugene MacNeil as well as the residential properties adjacent to PID 15515414 and PID 15165285. We are well aware of the history of the properties in the vicinity of Upper Prince Street, Green Road as well as McGuire Drive. This area has always been mixed use in nature for over 40 years. Properties in this area include a mix of light-industrial, commercial and low to mid-density residential uses. (We have included a list of the various businesses in the vicinity of Upper Prince Street).

In regard to the steps involved in a Hearing with Cape Breton Regional Municipality, we were not aware that we could have access to both the Staff report and copies of the Public Hearing Submissions. If we had reviewed the Public Hearing Submissions prior to the Hearing, we would have submitted a rebuttal on our behalf.

After we received a copy of the letter of refusal from Council to amend the Land Use Bylaw, Planning was contacted to ask for specific reasoning behind the Council's decision. The Planner could not offer any specifics and advised she would be back in contact. The follow up explanation provided was in keeping with the concerns presented during the Council Hearing.

The concerns and arguments presented at the Hearing came from one family (three submissions) focused on complaints received of increase in traffic on Green Road, attracting rodents to the area, possible storage of contaminants and property value. There are numerous routes to access Upper Prince Street since trucks over 3000 kg are not permitted on the Green Road. (Signage posted both ends). This area has been mixed in use for over 40 years and anyone who moved into this area since then, would be well aware of the various businesses and their uses in the area. The complaints submitted to Council are foundless for the rezoning intent.

Public support or opposition to a proposed development is not a provision in the MPS Policies.

Respectfully,
John & Theresa MacNeil

[Exhibit M-1, pp 27-28]

[21] The Board's hearing was held by *GoToWebinar* on April 8, 2021. The Appellants represented themselves and Demetri Kachafanas, Q.C., acted as counsel for CBRM.

IV LETTERS OF COMMENT

[22] The Board received copies of letters of comment, which were similar to those contained in the Appeal Record. The Appeal Record indicates that several residents from the area expressed concerns opposing the development, which were

circulated to Council. The Board has summarized the concerns – real or perceived – expressed in those letters as:

- traffic issues;
- storage units will decrease homes' resale value;
- excess noise from people accessing the units at all hours;
- potential for contaminants to seep into the ground;
- no jobs created except for the landowners ; and,
- possible rodents.

[23] One letter of support was received from Jason and Jan MacNeil, John MacNeil's brother and sister-in-law, who reside on Green Road. They disputed the issues and concerns, raised by the objectors, arguing that they were groundless. They also suggested that there was no genuine concern for the neighbourhood and area, by the objectors, "but rather a disgruntled family member and resident of Green Road who coveted this piece of property for themselves without entitlement."

V SITE VISIT

[24] The Board conducted a site visit on Friday, April 16, 2021 accompanied by Mr. & Mrs. MacNeil and Mr. Kachafanas. It consisted of a drive along Upper Prince Street into the driveway leading to the subject property and walking a portion of the property, the part outlined in blue, on the map, and zoned ABC, which is owned by the Appellants and where a self-storage facility can be built "as of right," and the subject site which is outlined in red, on the map and zoned RUAM. The Board observed some residences bordering the Appellants' property and the subject property, which front on Green Street and some

accessory buildings on the subject property, noting their scale and bulk. The location and size of the whole lot was also noted.

VI SCOPE OF BOARD'S REVIEW

[25] The burden of proof is on the Appellants in this appeal to show, on the balance of probabilities, that CBRM Council's decision to refuse an amendment to the Land Use By-Law does not reasonably carry out the intent of the MPS.

[26] The appeal involves the decision of Council denying the LUB amendment to rezone the subject lands from RUAM Zone to ABC Zone.

[27] The Board's jurisdiction in an appeal of a Council's decision to refuse to amend the LUB is set out in s. 250(1)(a) of the *MGA*:

s. 250 (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]

[28] The powers of the Board are similarly limited on such an appeal:

s. 251 (2) The Board shall not allow an appeal unless it determines that the decision of 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.

[29] Thus, the Board must not interfere with the decision of Council unless it determines that Council's denial does not reasonably carry out the intent of the MPS.

[30] The Court of Appeal has set out the standards by which the Board should review a council's decision. These standards or principles are condensed and set out succinctly in the decision of Fichaud, J.A. in *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, a comprehensive statement of the Court of Appeal. The Board notes that the Court of Appeal, as *per* Fichaud, J.A., implicitly endorsed these principles

most recently in *Heritage Trust of Nova Scotia v. AMC Barrett Investments Inc*, 2021 NSCA 42, which affirmed the Board's decision in *Heritage Trust of Nova Scotia (Re)*, 2020 NSUARB 73.

[31] In *Archibald*, Fichaud, J.A. summarized the applicable principles for the Board's review in appeals from council decisions in planning matters:

[24] The Board then (¶ 51-62) recounted the provisions of the *MGA* and passages from decisions of this court that state the principles to govern the Board's treatment of an appealed planning decision. I will summarize my view of the applicable principles:

- (1) The Board usually is the first tribunal to hear sworn testimony with cross-examination respecting the proposal. 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 the 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*, 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. Later (¶ 30) I will elaborate on the treatment of the Council's reasons.
- (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. By this, I do not suggest that the Board should apply a different standard of review for such matters. The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. But the intent of the MPS may be that the Council, and nobody else, choose between conflicting policies that appear in the MPS. This deference to Council's difficult

choices between conflicting policies is not a license for Council to make *ad hoc* decisions unguided by principle. As Justice Cromwell said, the “purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council’s authority should be exercised” (*Lewis v. North West Community Council of HRM*, 2001 NSCA 98, ¶ 19). So, if the MPS’ intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council’s decision reasonably bears that intent.

(8) The intent of the MPS is ascertained primarily from the wording of the written strategy. The search for intent also may be assisted by the enabling legislation that defines the municipality’s mandate in the formulation of planning strategy. For instance, ss. 219(1) and (3) of the *MGA* direct the municipality to adopt a land use by-law “to carry out the intent of the municipal planning strategy” at “the same time” as the municipality adopts the MPS. The reflexivity between the MPS and a concurrently adopted land use by-law means the contemporaneous land use by-law may assist the Board to deduce the intent of the MPS. A land use by-law enacted after the MPS may offer little to the interpretation of the MPS.

[25] These principles are extracted from the decisions of this court in: *Heritage Trust*, ¶ 77-79, 94-103,164; *Lewis v. North West* ¶ 19-21; *Midtown Tavern*, ¶ 46-58, 81,85; *Can-Euro Investments*, ¶ 26-28, 88-95; *Kynock v. Bennett* (1994), 1994 NSCA 114 (CanLII), 131 N.S.R. (2d) 334, ¶ 37-61; *Tsimiklis v. Halifax (Regional Municipality)*, 2003 NSCA 30 ¶ 24-27, 54-59, 63-64; *3012543 Nova Scotia Limited v. Mahone Bay Heritage and Cultural Society*, 2000 NSCA 93, ¶ 9-10, 61-64, 66, 84, 86, 89, 91-97; *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality)*, 2004 NSCA 59, ¶ 26.

[32] 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.

[33] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

9(1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;

- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

VII ANALYSIS AND FINDINGS

[34] The Board's task in an appeal of the refusal to amend a Land Use By-Law is to determine whether the Council's decision reasonably carries out the intent of the MPS. The Board's task is not to substitute its own decision for that of Council. In the words of the Court of Appeal in *Archibald*, the Board is not to "launch its own detailed planning analysis that disregards Council's view."

[35] In her submission, Mrs. MacNeil stated that, had they known, she and her husband would have taken part in the process and provided their input at the public hearing and Council Meeting, missing their opportunity to have a voice.

[36] The thrust of the Appellants' argument centered on the January 26, 2021 Council meeting, and the video file of the meeting (Exhibit M-6) to which the Board was directed to view.

[37] The brief draft Minutes of the January 26th Council meeting reflect the following:

Motion:

Moved by Councillor Paruch, seconded by Councillor Cyril MacDonald, to deny the request to amend the Land Use Bylaw to allow a Self-Storage Facility on a Portion of PID 15225733 (Upper Prince Street Area, Grand Lake Road, District 6).

Public Hearing

Planner Knudskov reported that they received 4 written submissions opposed to the amendment. After a lengthy discussion regarding access to the property and concerns of area residents, it was pointed out that the self-storage facility would be permitted on the property outlined in blue in the staff report. Furthermore, if this motion passes the applicants have a right to appeal Council's decision to the URB.

Motion Carried.

[Exhibit M-2, p.12]

[38] Mrs. MacNeil submitted that councillors focused on the request of one councillor, Glen Paruch, who asked other councillors to lend him their support in denying the rezoning, without any specific reasoning, centering on the negative feedback, comments, letters, and e-mails, and ignoring the MPS. Mrs. MacNeil also testified that there does not appear to be any good planning reasons for Council to reject the Staff recommendation.

[39] In her evidence Ms. Knudskov testified that she worked with the Appellants in obtaining all the necessary information for her review. She reviewed the proposal against the relevant MPS policies.

[40] She authored the two Reports found in the Appeal Record, the first presented on December 8, 2020, to CBRM Council, whereby Council passed a motion to proceed to a public hearing; the second, dated January 19, 2021 and presented at the January 26, 2021 Council meeting. From there, she advertised for the public hearing in accordance with the MGA and proceeded to present her evaluation and recommendation to Council on January 26, 2021. Her January 19, 2021, evaluation and recommendation to CBRM Council included the following:

Background

The Planning & Development Department has received a zone amendment request from John and Theresa MacNeil for a portion of PID 15225733 (the subject site) to allow the development of a self storage facility [Map 1]. If Council approves the amendment, the subject site would be purchased and consolidated with PID 15515414 and PID 15165285. The existing 24' by 24' accessory building located on the subject site would be converted for storage, security, maintenance, and restroom facilities. The applicants have indicated that their intent is to install one 3,600 sq. ft self-storage building with a second building to follow [Attachment C].

Discussion

As shown on Map 2, PID 15515414 and PID 15165285 are zoned Arterial Business Corridor (ABC) but the subject site is zoned Residential Urban A Mobile Home (RUAM). While the ABC Zone permits self-storage facilities, the RUAM Zone does not. Part 10, Policy 17 of the Municipal Planning Strategy (MPS) [Attachment B] allows Council to consider a zone amendment to the zone immediately adjacent provided the intent of all

other policies are satisfied. Therefore, Council may consider rezoning the subject site to ABC zoning.

The surrounding area is mixed-use in nature [Map 2]. Properties along Green Road and MacGuire Drive are zoned RUAM and are developed with low-density residential dwellings. Properties along Upper Prince Street are zoned ABC and include a mix of light-industrial, commercial, and low-to mid-density residential uses.

If Council approves the rezoning, any development on the property would need to comply with the provisions of the ABC zone as well as all other applicable provisions of the CBRM Land Use By-law. The ABC Zone contains a provision which requires that non-residential developments be screened from adjacent non-residential zones [Attachment B]. Compliance with the screening provisions will be evaluated when an application for a Building Development Permit is received.

During the December 8, 2020 meeting of Council, Council asked where the proposed driveway would be located. In keeping with the General Provisions of the CBRM Land Use Bylaw, the proposed development would require driveway access from Upper Prince Street. Access from Green Road would not be permitted pursuant to Part 2, Section 29.c.15 of the Land Use Bylaw:

15. excepting the TCH Zone only, any driveway accessing parking spaces from a public street/road shall be in the same zone as the land use serviced by the parking area or, if not, the driveway must be in a zone that permits the land use.

Notice of Public Hearing

In accordance with the *Municipal Government Act*, notice of this application was placed in the January 11th and January 18th editions of the Cape Breton Post. Notice was also mailed to assessed property owners in the vicinity of the properties in question and posted to the CBRM Facebook Page. At the time this report was prepared no written comments were received by the Planning and Development Department.

Recommendation

Given that the area is mixed-use in nature, the screening provisions of the ABC Zone, and that the request is in keeping with MPS Part 10 Policy 17:

I recommend that Council rezone the subject site as identified in Schedule A of the attached Amending Bylaw [Attachment D] to Arterial Business Corridor (ABC).

[Exhibit M-2, pp. 25-26]

[41] The reasoning for her recommendation was that the area is mixed use in nature. There are screening provisions in place within the ABC zone to protect adjacent residential properties, and that the request is in keeping with Part 10, Policy 17 of the MPS.

[42] The MPS establishes criteria regarding Sales/Service Development, which includes self-storage facilities. The MPS preamble to policies regarding Sales/Service Development states in part:

Land use policy based on a formula using the above noted factors implemented consistently throughout the CBRM should create a coherent pro-development approach facilitating the rejuvenation of the region's business economy that can also be defended logically.

[43] Part 10, Policy 17 of the MPS provides for the following:

**ZONING BOUNDARY AMENDMENTS
POLICY**

17. Areas immediately adjacent to a given land use designation on the Municipal Planning Strategy Map may be considered for rezoning to a use permitted in the given designations without requiring an amendment to this Strategy, provided that the intent of all other policies of the Strategy are satisfied.

[44] Under cross-examination by Mr. Kachafanas, Ms. Knudskov testified that her recommendation to approve the rezoning would be in keeping with the policy. She also agreed that the use of the word "may," as opposed to "shall," "would insinuate some discretion or option" on the part of Council. However, the Board does not agree with this interpretation of the words of Policy 17. Applying the provisions of s. 9(5) of the *Interpretation Act*, the Board concludes that this provision is to be read in the context that Council is able to rezone without having to amend the MPS if it chooses; not that it affords Council any discretion about rezoning if the other criteria are met.

[45] Any development on the property would need to comply with the provisions of the ABC zone as well as other applicable provisions of the LUB.

[46] Part 5 of the LUB provides for the following:

PART 5 ARTERIAL BUSINESS CORRIDOR (ABC) ZONE

Section 1 ABC Uses Permitted

Development Permits shall only be issued in the ABC Zone for one or more of the following uses in compliance with any relevant section of the General Provisions Part, and any specific section of this Part devoted to the use.

...

- service all except
 - animal shelters are not permitted in areas serviced with both Municipal water and sewer
 - recycling facility using outdoor storage

The proposed development falls within the permitted use of “service.”

[47] Section 8 of the LUB provides for the following:

Section 8 Screening Provision adjacent Residential Zones

Any:

- new construction of a business development or its accessory parking area; or
- expansion of existing business development including buildings and/or parking area on a parcel of land:
 - a) abutting a parcel of land occupied by a residential development; or
 - b) on the directly opposite side of a Level S public street/road from a lot parcel with a residential development;

where scenario "a" or "b" is within a zone with the word "Residential" in it, shall be screened (as defined in the Definitions Part of this By-law) from the residential property unless all aspects of the business development are more than 100 feet from the boundary of either the abutting residential lot parcel, or the residential lot parcel directly across the public street/road.

Non-residential developments such as this must be screened along the rear and side of the property.

[48] In response to Board questions, the Planner stated that compliance with the provisions of the ABC Zone would be determined upon the application for a building and development permit; access and egress to the subject property would be from Upper Prince Street; and, that traffic would predominantly increase on Upper Prince Street – as opposed to on Macquire Drive and Green Road.

[49] The Board has viewed the January 26 video of the CBRM Council deliberations [Exhibit M-6]. The nine councillors who were opposed, supported Councillor Paruch’s motion to deny the request to amend the LUB to allow the self storage facility, it seems, based on the opposing comments of the four neighbouring property owners and

their speculative perception of a potential loss in property values, noise, possible contamination, and increased traffic.

[50] Councillor Darren Bruckschwaiger seemed to be speaking for the three councillors and Mayor McDougall, who opposed the motion, when he stated that Council's decision must be made based on "planning principles." As mentioned previously, Mrs. MacNeil echoed those sentiments when she submitted that there did not appear to be good planning reasons for rejecting the Planner's recommendation.

[51] Section 210(5) of the MGA states:

Amendment of land-use by-law

(5) Within seven days after a decision to refuse to amend a land use by-law referred to in subsection (1), the clerk shall notify the applicant in writing, giving reasons for the refusal and setting out the right of appeal.

[52] In discussing a Council's reasons, in the context of s. 230(6) of the MGA, in *Archibald*, pertaining to the refusal to approve a development agreement, Justice Fichaud said:

[29] Section 230(6) of the MGA requires the municipality to give the applicant written reasons for the refusal to approve a development agreement:

Within seven days after a decision refusing to approve a development agreement or an amendment to a development agreement, the clerk shall notify the applicant in writing, giving reasons for the refusal and setting out the right of appeal.

[30] These reasons are to appear in the notice setting out the right of appeal. So the MGA intends that the municipality's stated reasons be pivotal to the appeal. Section 230(6) invites the appellant to address the Municipality's stated reasons in his grounds of appeal and beckons the Board to address them in the Board's analysis. I do not suggest the Board is confined to those stated reasons. The ultimate question – whether the Council's decision reasonably carried out the intent of the MPS – may propel the Board to other issues. See *Lewis*, ¶ 9, 22; *United Gulf*, ¶ 15, 72-74; *Midtown Tavern*, ¶ 52-53, 79. But the focus on the municipality's written reasons prompts the Board to respect its appellate role that I discussed earlier. [Emphasis added]

[53] The Board has accepted in other decisions that it need not confine itself to the stated reasons of Council (see for example, *Re FH Construction Limited*, 2017

NSUARB 153). The Board finds that, having heard the video recording, which is linked in the Appeal Record, Mrs. MacNeil accurately reported comments made by Council members at the January 16 meeting. However, the Board's role is to determine whether Council's decision reasonably complies with the intent of the MPS. The decision-making process of Council is not a matter for the Board. This was recently discussed in *Cresco Holdings Limited (Re)*, 2021 NSUARB 34:

[58] In *Hatchet Lake*, a planning expert included references to several comments made by Council members in her report to illustrate the rationale behind Council's decision. She used these comments to support her contention that members of Council were influenced by irrelevant factors. The Board made the following comments, at para. [57], in relation to the use which could be made of this type of evidence:

[57] The Board has accepted in other decisions that it need not confine itself to the stated reasons of Council. (See for example, *Re FH Construction Limited*, 2017 NSUARB 153.) The Board finds that, having viewed and heard the video recording, which is linked in the Appeal Record, Ms. Tsang accurately reported comments made by members of Council at the September 24, 2020 meeting. However, the Board's role is to determine whether Council's decision reasonably complies with the intent of the MPS. The decision-making process of Council is not a matter for the Board. Any issues regarding the process are for the courts. Individual councillors may make comments during public hearings, but ultimately Council speaks with one voice, i.e., its vote. The Board affords no weight to the comments which were recorded on the video and reported in the minutes. In any event, in this appeal, public support or opposition to a proposed development is not a provision in the MPS policies.

[59] The Board continues to be of the view that, as a general proposition, the comments of individual members of a council are of limited assistance in the task of applying the statutory test to the written reasons provided by a municipal council. Council meetings are not courtrooms, and while councils perform a type of adjudicative role when determining applications, they are not courts. As *Archibald* stresses, the written reasons are important in framing the issues before the Board so that it respects its appellate role. That said, council members do not sit as a panel to formulate written reasons. They may disagree with one another and may have different reasons for approving or rejecting a particular application. Therefore, as discussed in *Hatchet Lake*, the Board considers that a council speaks with one voice and generally does not parse the comments of individual members of council.

[54] The Board affords no weight to the comments which were recorded on the video. As mentioned previously, the December 8, 2020, and January 26, 2021, Minutes reflect discussion on the proposed by-law amendment. In any event, in this appeal, public

support or opposition to a proposed amendment to the Land Use By-Law is not a provision in the MPS policies.

[55] Importantly, in this case, CBRM failed to provide any reasons in its refusal letter to the Appellants, as required under s. 230(6) of the *MGA*. Accordingly, the Board has no context provided by CBRM surrounding Council's reasons for its refusal.

[56] The Board must still determine whether Council's refusal decision reasonably carries out the intent of the MPS. The Board agrees with the Appellants; this analysis must be based on the MPS, in accordance with planning principles. The issue remains what interpretation Council placed on the relevant MPS policy, and whether this interpretation is one the language can reasonably bear.

[57] In this case no alternative policy was presented as a basis for Council's decision.

[58] As stated previously, it is not the role of the Board to substitute its own decision for that of Council; rather it is to see if Council's decision reasonably carries out the intent of the MPS. The various memos from Ms. Knudskov, CBRM Council minutes and Ms. Knudskov's December 8, 2020, presentation to Council indicate that the appropriate MPS Policy and LUB were brought to the attention of Council and also raised at the January 26, 2021, public hearing before Council.

[59] The Planner recommended approval of the Land Use By-Law amendment. There is nothing which requires Council to accept the recommendation of planning staff, but as noted in other decisions of the Board (for example, *Re Bona Investments Limited*, 2009 NSUARB 58, and *Re Griff Construction Limited*, 2011 NSUARB 51), there must be good planning reasons to do so. The Board considers that such reasons must be rooted

in the MPS. In this matter, the only expert evidence presented to the Board at the hearing was from the Appellants. CBRM did not call any witnesses, including any expert witnesses, challenging the evidence of its own planner, who was called as a witness by the Appellants in support of their position.

[60] The Board finds that there do not appear to be any good reasons for Council to have rejected the staff recommendation. CBRM did not identify any policy direction in the MPS for denying the proposed LUB amendment. The fact-finding mission discussed in *Archibald* did not uncover facts or opinion evidence, much less supporting reasons provided in the denial letter, or the rationales expressed during the deliberations which could be tied to the relevant MPS policy, as a basis for the denial.

[61] The MPS allows Council to consider a zone amendment to a zone immediately adjacent to a given land designation, in this case the ABC zone. It is a mixed-use area, and the development would be subject to ABC Zone provisions in that non-residential developments must be screened from adjacent residential zones. The decision of CBRM Council declining the request to amend the Land Use By-Law failed to reasonably carry out the intent of the MPS.

[62] The Board allows the appeal and reverses the decision of Council.

VI CONCLUSION

[63] The Board is satisfied that the Appellants have met the burden of proof, on a balance of probabilities, based on the evidence filed and the testimony at the hearing, to persuade the Board that Council's decision to refuse an amendment to the Land Use By-Law does not reasonably comply with the MPS.

[64] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 11th day of June, 2021.

Original Signed by:

David J. Almon