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Item No. 3
Halifax Regional Council
July 30, 2019

TO: Mayor Savage and Members of Halifax Regional Council

SUBMITTED BY: Original Signed
Chief Ken Stuebing, Acting Chief Administrative Officer

DATE: July 19, 2019

SUBJECT: **Hotel Permit – Glenwood Avenue and Prince Albert Road, Dartmouth**

INFORMATION REPORT

ORIGIN

On April 16, 2019, the following motion of Regional Council was put and passed:

“THAT Halifax Regional Council request a staff report on what options the Halifax Regional Municipality might have that would ensure an as-of-right hotel development does not proceed at the corner of Prince Albert Road and Glenwood Avenue. Options to consider should include but not be limited to: 1. Current planning bylaws and requirements 2. Acquisition of the site through purchase or expropriation 3. Potential for negotiated land swap with the developer.”

LEGISLATIVE AUTHORITY

Halifax Regional Municipality Charter (HRM Charter), Part VIII, Planning & Development.

Halifax Regional Municipality Charter (HRM Charter), section 61(5)(a) regarding acquisition of real property.

Halifax Regional Municipality Charter (HRM Charter), section 65 regarding expropriation of real property.

Halifax Regional Municipality Charter (HRM Charter), section 79A regarding spending authority.

Expropriation Act, R.S.N.S., 1989, c. 156.

BACKGROUND

Subject Property:

The subject property consists of land generally located at the Southeast corner of Prince Albert Road and Glenwood Avenue in Dartmouth. The civic addresses are 307 Prince Albert Road and 5 Glenwood Avenue and the total area is approximately 2,388 square metres (25,705 square feet). The property has approximately 32 metres (105 feet) of frontage along Prince Albert Road and approximately 77 metres (253 feet) of frontage along Glenwood Avenue. The most recent uses on the site were a funeral home at 307 Prince Albert Road and a two unit dwelling at 5 Glenwood Avenue. The funeral home has been demolished and, at the time of the preparation of this report, the site was being excavated in advance of redevelopment.

Site Context:

The property is a relatively flat site at the northernmost terminus of Glenwood Avenue where it intersects with Prince Albert Road. The surrounding lands are generally flat to the west, north, northeast and northwest with moderate to steep slopes up to the southeast.

Subject Site	307 Prince Albert Road and 5 Glenwood Avenue (PID 00112110)
Location	Corner of Prince Albert Road and Glenwood Avenue, Dartmouth
Regional Plan Designation	Urban Settlement (US)
Community Plan Designation	Commercial (C) for the northern portion of 307 Prince Albert Road and Residential (R) for the balance of 307 Prince Albert Road and 5 Glenwood Avenue
Zoning	(General Commercial) at 307 Prince Albert Road and R-4 (Multiple Family Residential Zone High Density) at 5 Glenwood Avenue
Size of Site	25,713 Square Feet
Current Land Use(s)	Two-unit dwelling
Surrounding Use(s)	automotive repair auto parts sales supermarket; hotel; combination of a retail fuel outlet, convenience store, restaurant; low-density residential housing; multi-unit residential housing; and Kiwanis Grahams Grove Park and Lake Banook Regional Park.

Regulatory Regime:

Zoning on the property prior to recent amendments was C-2 (General Business) at 307 Prince Albert Road and R-2 (Two Family Residential) at 5 Glenwood Avenue. The zoning on the property after the recent amendments is GC (General Commercial) at 307 Prince Albert Road and R-4 (Multiple Family Residential Zone High Density) at 5 Glenwood Avenue. Attachment A provides a property location map and indicates the zoning before and after the recent zoning changes.

The current zoning outlines the “as-of-right” development capacity for the subject property. Property owners are legally entitled to proceed with any development that complies with the zoning provisions without further public input or approval by Council. HRM is obliged to issue permits for any application that complies with relevant regulations. Notwithstanding this “as-of-right” capacity, since December 4, 1991, new apartment buildings containing more than 3 units in the Dartmouth plan area can only be approved through the development agreement process.

Development Proposals:

The property in question has been the subject of multiple, concurrent applications since 2011. These applications represent fundamentally different development approaches based on two legislatively separate

but temporally concurrent approval streams. Following are chronologies outlining key milestones in each of these two processes.

1. Discretionary planning application for a rezoning and development agreement to allow an apartment building. This process includes mandatory public engagement and the decision is made by Community Council based on whether the rezoning and subsequent development agreement are consistent with the intent of the municipal planning strategy:

- April 8, 2011 - Case 16898: Application to rezone 307 Prince Albert Road from C-2 (General Business) to R-4 (Multiple Family Residential – High Density), 5 Glenwood Avenue from R-2 (Two Family Residential) to R-4 (Multiple Family Residential – High Density) and to enter into a development agreement to permit a 15-storey residential building.
 - January 17, 2012 - Application refused by Harbour East Community Council
 - February 2, 2012 - Refusal appealed to Nova Scotia Utility and Review Board (NSUARB)
 - October 12, 2012 - Appeal Dismissed by NSUARB (refusal upheld)
- September 15, 2014 - Case 19501: Application to 1) rezone 307 Prince Albert Road from C-2 (General Business) to GC (General Commercial); 2) rezone 5 Glenwood Drive from R-2 (Two Family Dwelling) to R-4 (Multiple Family Residential – High Density); and 3) enter into a development agreement to allow a 15-storey residential building with 110 units and ground floor commercial uses.
 - September 11, 2015 - Application closed
- November 26, 2015 - Case 20269: Application to 1) rezone 307 Prince Albert Road from C-2 (General Business) to GC (General Commercial); 2) rezone 5 Glenwood Avenue from R-2 (Two Family Residential) to R-4 (Multiple Family Residential – High Density); and 3) enter into a development agreement to allow a 10-storey residential building containing approximately 90 units with ground floor commercial. The application was revised to reflect a 9-storey building and revised again to reflect an 8-storey building.
 - December 7, 2017 - Harbour East-Marine Drive Community Council (HEMDCC) deferred consideration of the proposed rezoning and development agreement for a 9-storey building pending a supplementary staff report discussing a six (6) storey proposal with an appropriate transition to the surrounding low-rise neighbourhood.
 - April 5, 2018 – HEMDCC received the supplementary report, approved the proposed rezoning, rejected the draft Development Agreement and directed staff to return to HEMDCC with a revised development agreement.
 - September 6, 2018 – HEMDCC approved a Development Agreement based on a proposal for an 8-storey building (including penthouse level) containing up to 90 units
 - September 19, 2019 - Approval appealed to the NSUARB
 - February 19, 2019 -- Appeal dismissed by NSUARB (approval upheld)

2. As-of-right permit application for the construction of a hotel. This process does not include public engagement or Council review and approval or refusal is based on compliance with approved regulations:

- September 30, 2011 - Development Permit (DP) issued for a 15 storey plus penthouse 200 room hotel
- September 24, 2012 - renewal of DP for a 15 storey plus penthouse 200 room hotel
- September 18, 2013 - renewal of DP for a 15 storey plus penthouse 200 room hotel

- September 22, 2014 - renewal of DP for a 15 storey plus penthouse 200 room hotel
- October 26, 2015 - renewal of DP for a 15 storey plus penthouse 200 room hotel
- November 17, 2016 - renewal of DP for a 15 storey plus penthouse 200 room hotel
- November 17, 2017 - renewal of DP for a 15 storey plus penthouse 200 room hotel
- May 23, 2018 DP for a 15 storey plus penthouse hotel incorporating changed landscaping configuration, changed parking configuration, reduced number of rooms (140) and the addition of a spa, multi-purpose room and swimming pool
- July 31, 2018 - permit issued to demolish commercial building
- September 28, 2018 - Construction Permits issued for “Prince Albert Hotel” based on the DP issued on May 23, 2018
- September 28, 2018 - permit issued for crane for construction of “Prince Albert Hotel”
- March 25, 2019 - approval granted for encroachment for tree removal
- April 24, 2019 – permit issued to demolish residential building

The above chronology contains references to both Development Permits and Construction Permits. Development Permits certify that plans comply with zoning requirements but they do not authorize construction. Construction Permits certify that plans comply with all relevant municipal regulations and they allow construction to take place. In this case, Development Permits certifying compliance with zoning regulations have been on record since September 2011, but full Construction Permits were not in place until September 2018.

Council Motion

Discretionary planning applications on these properties have been active for more than eight years and the various iterations of the project plans have been contentious in the local community. Relatively large amounts of time and resources have been expended by Community Council, staff, the developer and various groups and individuals in the community in an attempt to reach a consensus on an appropriate development form.

Following the December 2018 NSUARB appeal process, Community Council and the community at large were anticipating development of an 8-storey mixed-use building. However, the developer has chosen to abandon the mixed-use option in favour of exercising the lawful right to construct a 15-storey (plus penthouse) hotel under the existing zoning provisions. This choice has been negatively received in the community and on April 16, 2019, Regional Council adopted the following motion:

“THAT Halifax Regional Council request a staff report on what options the Halifax Regional Municipality might have that would ensure an as-of-right hotel development does not proceed at the corner of Prince Albert Road and Glenwood Avenue. Options to consider should include but not be limited to:

- 1. Current planning bylaws and requirements*
- 2. Acquisition of the site through purchase or expropriation*
- 3. Potential for negotiated land swap with the developer”*

This report has been prepared in response to that motion.

DISCUSSION

In response to community concerns, Regional Council asked staff to clarify what capacity (if any) HRM has to prevent the construction of the proposed hotel. Council’s request specified that options should include but not be limited to applying current planning bylaws and requirements, acquiring the site through purchase or expropriation or negotiating a land swap with the developer.

1) Current Planning Bylaws and Requirements

This part of Council's motion is a request for staff to clarify if any existing municipal regulations would allow HRM to alter or revoke the existing permits in a manner that would prohibit the construction of the hotel as proposed.

All relevant municipal regulations have been assessed with respect to the proposed hotel construction. The current application meets all applicable requirements for the issuance of Construction Permits. Therefore, HRM is obliged to issue the permits and allow the proposed construction. In turn, the developer is obliged to proceed with construction in compliance with the approved plans. Provided the developer acts in conformance with the terms of the approved permits, HRM has no lawful authority to revoke or otherwise alter those permits.

In addition to the as-of-right capacity established under the current zoning, staff have noted two consistent questions identified by the community through engagement with staff and the local Councillor since the developer's intent to construct a hotel has become broadly known.

a) *Did the Rezoning Approved in April of 2018 Create Capacity for Construction of the Hotel?*

The rezoning process approved in April of 2018 was required to accommodate the development agreement for an apartment building. However, the capacity to construct a hotel on the portion of the site previously zoned C-2 (General Business) was not altered by that rezoning. Requirements relative to as-of-right hotel construction are identical in the previous C-2 zone and the new GC zone. The capacity to construct the hotel existed equally before and after the rezoning.

b) *Does the Upcoming Adoption of the Centre Plan Impact the Proposed Hotel and will the Centre Plan Create Capacity to Convert the Hotel to an Apartment Building?*

Centre Plan Adoption

It must be acknowledged that the Centre Plan is not currently in effect. The plan and bylaw are in draft form and are still subject to amendments through the adoption process, the extent of which are currently unknown. Under these conditions, it is not possible to draw definitive conclusions in response to the question noted above. However, a general understanding can be achieved based on the presumption that the Centre Plan, if adopted as currently drafted, would result in zoning changes that will take place in advance of the conclusion of the construction of the hotel at this location.

The subject property is within the geographic area that is presently subject to change under the draft Centre Plan. The current version of the draft plan and bylaw allows both apartment and hotel uses on the subject property in a building envelope limited to 20 meters in height. Typical construction practice under these conditions would yield a 6-storey structure. At 16-storeys plus a penthouse, the proposed hotel structure does not comply with the current version of the draft Centre Plan. However, it does comply with the existing regulation and valid permits are in place for its construction. The *HRM Charter* contains specific provisions to deal with circumstances where regulatory changes occur during the development process as follows:

Section 252(2)(b) of the Charter states:

“(2) A non-conforming structure is deemed to exist at the date of the first publication of the notice of intention to adopt or amend a land-use by-law if ...

... (b) the permit for its construction was in force and effect, the construction was commenced within twelve months after the date of the issuance of the permit and the construction was completed in conformity with the permit within a reasonable time.”

A permit for the construction of the hotel has been in force and effect since September 28, 2018 and notice of the intention to adopt the changes contained in the Centre Plan has not yet been published. If hotel construction begins prior to September 28, 2019 and is completed in a reasonable time frame, then the adoption of the Center Plan will have no impact on the developer's ability to construct the hotel.

Hotel to Apartment Conversion

One of the fundamental principles inherent in the draft Centre Plan Package A is a reduced reliance on segregating land uses in favour of a primary focus on land use compatibility through building form. Based on this approach, the draft plan allows a wide range of uses within the Package A area. The current version of the draft plan and bylaw, if adopted without further amendments, would allow conversion from a hotel to any permitted use (including residential). This capacity would exist for all existing building stock throughout the Package A plan area. Any such conversions would be conditional on compliance with any additional use-specific requirements in the by-law and the conversion could only be approved if it did not increase the level of structural non-conformity. Council should note that the developer has indicated their intention is to develop the hotel as planned and they have no intent to convert the structure for residential purposes.

2) Acquisition of the Site Through Purchase or Expropriation

This part of Council's motion is a request for staff to clarify any alternatives that may exist for HRM to acquire the subject property and, as the new owner, prevent the development of the hotel. The motion refers to purchase or expropriation. These are two fundamentally different alternatives in that a purchase requires two willing parties while expropriation essentially requires only one willing party (HRM). These two approaches are also subject to different statutory restrictions and each alternative is discussed separately below:

a) Purchase

Municipal authority for acquisition of property and expenditures of public funds are governed by the *HRM Charter*. Section 61 of the Charter sets out the municipality's authority to acquire property as follows:

"61 (5) *The Municipality may*

(a) acquire property, including property outside the Municipality, that the Municipality requires for its purposes or for the use of the public;"

Section 79A of the Charter sets out Council's specific authority to expend public funds as follows:

"79A (1) *Subject to subsections (2) to (4), the Municipality may only spend money for municipal purposes if*

(a) the expenditure is included in the Municipality's operating budget or capital budget or is otherwise authorized by the Municipality;

(b) the expenditure is in respect of an emergency under the Emergency Management Act; or the expenditure is legally required to be paid"

Generally, Council has relatively broad powers to expend funds. However, those powers are limited to a "municipal purpose". In this case, the purpose being suggested is the prevention of a development that is compliant with municipal regulations. Under these circumstances, staff advise that they are not aware of any valid municipal purpose to justify expenditure of public funds to acquire this property.

With respect to the willingness of the parties involved, staff had very preliminary discussions with the developer to determine their overall interest to consider municipal acquisition either through purchase or property exchange. The developer has indicated that, as a business-driven entity, they are generally

prepared to entertain any alternatives that are financially advantageous. However, the developer noted that the process for construction of the hotel is very advanced and includes commitments with contractors, financial institutions and hoteliers. To be considered favorable, compensation associated with any purchase would have to offset costs associated with disposal of existing commitments, include a value for lost profits associated with abandoning the development and accommodating the basic property value inherent in the land based on the principle of highest and best use. The developer also indicated any interest would be contingent on a very short timeline that would likely be less than what is typically required for HRM to conduct due diligence on an expenditure of this nature.

Given the absence of clear authority for any purchase, the likelihood of high costs and the requirements for a very short timeframe, staff advise that this is not a viable option.

b) Expropriation

Expropriation is defined in the *Expropriation Act* as ... “the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers ...”. Municipal authority for expropriation is set out in the *HRM Charter* and the *Expropriation Act*.

Section 65 of the Charter contains the following authority:

“65 (1) *Where the Council considers it necessary to acquire real property, including real property outside the Municipality, for a purpose for which it may spend money, the Council may expropriate the real property, but this power to expropriate does not authorize the Municipality to expropriate property of another municipality ...*

... (3) The Expropriation Act applies to expropriation proceedings by the Municipality.”

Section 6 of the *Expropriation Act* includes the following authority:

“6 *Where a statutory authority desires to expropriate land, it shall be expropriated in accordance with the provisions of this Part but only for the purposes authorized by its statute and to the extent set forth therein.” and;*

Section 11(1)(d) of the *Expropriation Act* includes the following obligation:

“11 (1) *Where a statutory authority has authority to expropriate land and it is desired to expropriate the same, the expropriating authority shall deposit at the office of the registrar of deeds for the registration district in which the land is located a document or documents setting forth ...*

... (d) the statutory purpose for which the land is expropriated;”

HRM is a statutory authority and has the general authority to expropriate land. However, as with the property purchase alternative described in a) above, authority for expropriation is limited to acquiring land for municipal purposes. To initiate the expropriation process, the Municipality is required to file documents that include, among other things, a description of the statutory purpose that is to be achieved through expropriation. In this case, the purpose as suggested in Council’s motion is the prevention of a development that is compliant with approved municipal regulations. This is not a valid municipal purpose.

3) Potential for Negotiated Land Exchange with the Developer

This part of Council’s motion is a request to clarify an alternative that may exist for HRM to acquire the property to prevent the development of the hotel through a land exchange as opposed to a cash payment.

Notwithstanding the difference in the form of the value being exchanged, this option is a form of property acquisition that requires HRM to have authority to both acquire real property for a municipal purpose and dispose of a public asset. The test of municipal authority to acquire the lands in question is identical to that

described in part 2a) above.

In addition to the lack of clear authority for the acquisition, the exchange process would also require identification of any candidate properties, completion of due diligence to confirm accurate property value and completion of the property surplus process required by Administrative Order 50. These steps could not be accommodated with the time frame identified by the developer.

Given the absence of clear authority for any purchase, the likelihood of high costs and the requirements for a very short timeframe, staff advise that this approach also is not a viable option.

FINANCIAL IMPLICATIONS

Should Council choose to pursue alternatives to acquire the property via purchase, land exchange or expropriation, material costs to HRM will be incurred to carry out that intent. Confirmation of municipal cost is not possible in advance of determination of the value of the property(s) in question and the conclusion of negotiations on additional compensation related to lost profits and disposal of the developer's existing obligations related to the construction of the hotel.

RISK CONSIDERATION

There are several material risks associated with municipal action to alter/revoke the existing permit for the hotel or to acquire the subject property with the intent to prevent the construction of the hotel.

Alteration or Revocation of Permit

As noted earlier in this report, staff advise there are no grounds for alteration or revocation of the Construction Permits. Any actions to carry out this intent would create a material risk of legal challenge. The likelihood and impact of this risk is high.

In addition to the risk of legal action noted above, there would also be a material risk to the integrity and reliability of the permit process which could lead to more widespread negative or unanticipated outcomes related to property development. The presence and reliability of municipal Construction Permits are a critical component of property development that drives owner decision-making, financing, construction timing and fundamental economic elements such as material purchases and contract execution. This situation exists for all permitted activities ranging from minor projects like backyard decks/sheds to larger scale building construction. HRM taking action to alter or revoke a lawfully issued permit would create uncertainty in the overall development approval process. The likelihood and impact of this risk is low to moderate.

Property Acquisition

Should Council choose to pursue acquisition of the property through cash purchase or property exchange, there is a material risk of a legal challenge. The likelihood of this type of risk materializing is moderate while the impact is moderate to high.

Should Council choose to pursue expropriation to acquire the property, it could create a material risk of legal challenge. The likelihood of this risk materializing is moderate to high and the impact is low to moderate with respect to the expropriation process alone.

If the acquisition or expropriation processes were initiated by HRM but were unsuccessful as a result of challenges with respect to authority, HRM could incur additional risk of subsequent legal action by the owner. The likelihood and impact of this risk are both high.

If the acquisition or expropriation processes were initiated by HRM under these circumstances, there is a material risk that requests for similar accommodation would be received for other permitted projects that

are not broadly supported in the community. The likelihood of this risk is very high while the impact is moderate to high.

COMMUNITY ENGAGEMENT

There was no community engagement associated with the development of this report.

Community engagement took place as part of the discretionary planning application processes in the form of public information meetings, website publications, property signage and public hearings in the period between 2011 and 2018.

The two NSUARB hearings associated with the discretionary planning applications were advertised and held in the public forum. Public input was accommodated in accordance with standard procedures for NSUARB hearings.

No public engagement was required or took place with respect to the permit application process for the hotel development

ENVIRONMENTAL IMPLICATIONS

There are no environmental implications associated with this report.

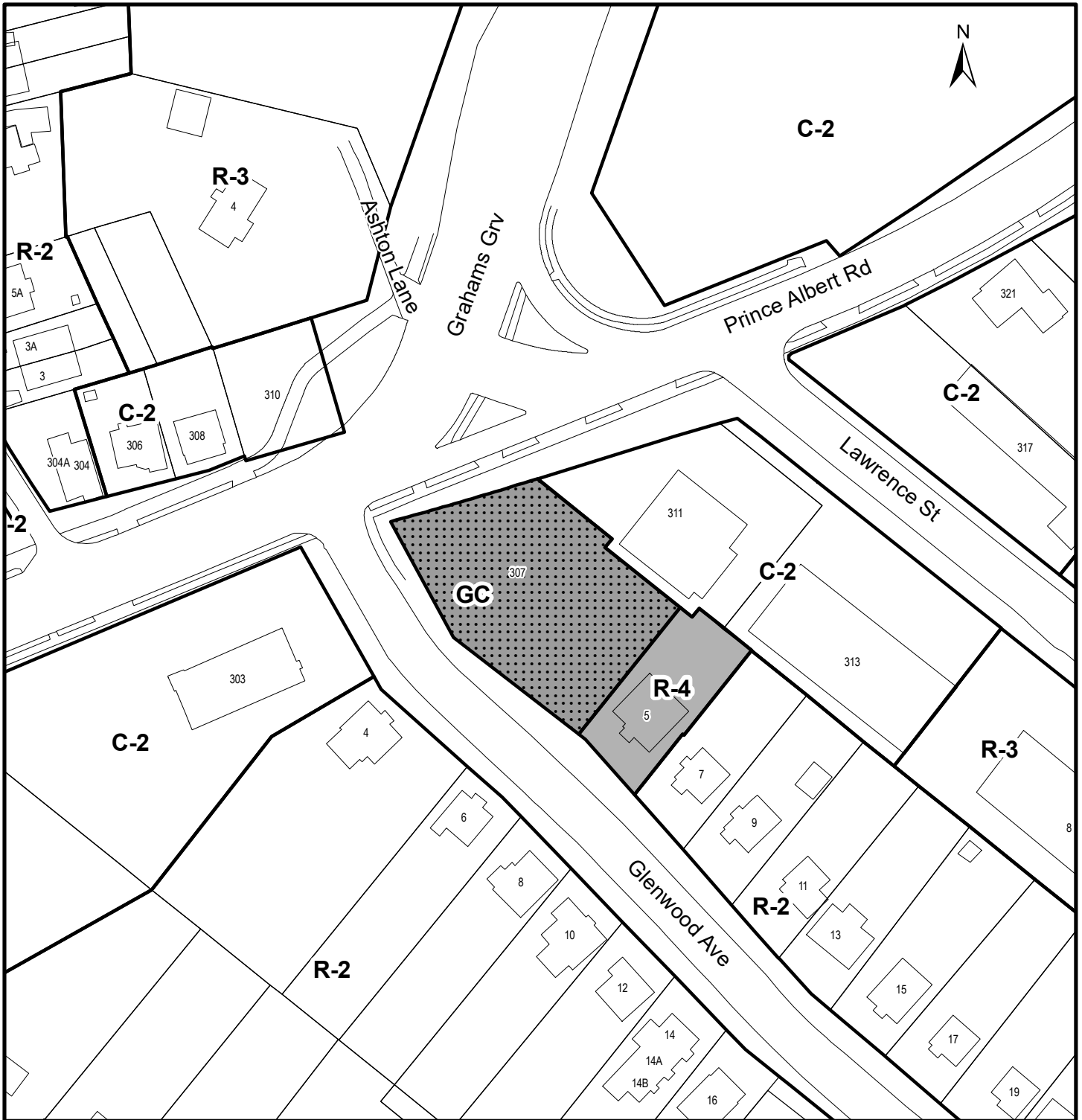
ATTACHMENTS

Attachment A – Location / Zoning Map

A copy of this report can be obtained online at halifax.ca or by contacting the Office of the Municipal Clerk at 902.490.4210.

Report Prepared by: Steven Higgins, Manager of Current Planning, 902.490.4382



Report Approved by: Kelly Denty, Director, Planning and Development, 902.490.4800



Attachment A

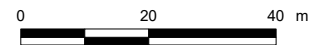
307 Prince Albert Road & 5 Glenwood Avenue,
Dartmouth

HALIFAX

-  Area rezoned from C-2 (General Business) to GC (General Commercial)
-  Area rezoned from R-2 (Two Family Dwelling) to R-4 (Multiple Family Residential -High Density)

Zone

- R-2 Two Family Residential
- R-3 Multiple Family Residential (Medium Density)
- C-2 General Business



This map is an unofficial reproduction of a portion of the Zoning Map for the plan area indicated.

The accuracy of any representation on this plan is not guaranteed.