

DECISION

**NSUARB-PL-10-10
2010 NSUARB 156**

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **MARSHLAND RESIDENTS GROUP** from the decision of Truro Town Council which approved a development agreement with **RON WALLACE REALTY LIMITED** to permit a 39 unit building and a 63 unit building off Marshland Drive at 16 Park Street, Truro, Nova Scotia

BEFORE: Murray E. Doehler, CA, P.Eng., Member

APPELLANTS: **MARSHLAND RESIDENTS GROUP**
Burnley Jones, LL.B. (Retired)

RESPONDENT: **TOWN OF TRURO**
Gary Richard, LL.B.

APPLICANT: **RON WALLACE REALTY LIMITED**
Ron Wallace

HEARING DATE: June 3, 2010

DECISION DATE: **July 27, 2010**

DECISION: **Appeal dismissed.**

I INTRODUCTION

[1] Thomas Acker, Michele Collins, Francis Collins, Paula Flanagan, Dorothy Harrity, Lynn Jones, Burnley Jones, Robert Jordan, Nancy Roby-Cassidy, and Ron Wallace¹, referred to as the Marshland Residents Group (the “Appellants”) appealed the decision of the Truro Town Council which approved a development agreement with Ron Wallace Realty Limited (the “Developer”). The development agreement is for the construction of two multiple unit buildings, for a total of 102 residential units, off Marshland Drive at 16 Park Street, Truro (the “Project”).

[2] The property at 16 Park Street is approximately 5.7 acres in area and has roughly 830 feet on Marshland Drive. This property is at the north end of a “neighbourhood” roughly defined by Marshland Drive on the north, Park Street on the east, Robie Street on the south and Rexdale Drive on the west. Ford Street runs north south, roughly in the middle. The north side of Marshland Drive is in the floodway, with no development. The south side of Robie Street has several multi-unit buildings including one which has 40 units. There are mainly single family dwellings or duplexes in the “neighbourhood” except for two 12-unit buildings off Park Street, to the East of the Project, on lands owned by the Developer, and two, 4-unit buildings on Ford Street.

[3] The property is presently vacant and undeveloped, and access is limited:

The subject property is zoned Multiple Unit Residential (R3) with a Flood Way Modification (E3) Overlay. A portion of the property along its western edge has a Flow Way Modification (E4) Overlay. The future land use designation of the subject property is Low Density Residential. The property is situated on the periphery of an established residential area in the vicinity of Ford Street, Nova Drive, and Cross Street.

[Exhibit M-2, Planner’s Report, p. 4-5]

¹ An appellant with the same name as the Developer.

Driveway access to Marshland Drive is not permitted at this location as it is considered a controlled access road. Access to the subject property is currently via a right-of-way over the applicant's lands at 18 and 20 Park Street. The property has frontage on Ford Street and on a Town owned right-of-way which connects to Ford Street.

[Exhibit M-2, Planner's Report, p. 4-2]

[4] The Appellants' notice of planning appeal dated March 19, 2010, and received by the Nova Scotia Utility and Review Board (the "Board") on the same day, stated:

Town council voted for the development based on proposed changes that failed to adequately answer concerns that area residents had expressed with respect to the developer's original proposal..

MPS policy R-1:

No provision has been made by either the developer or the Town of Truro to extend the sidewalks on Park Street to the subject property.

Proposed five story buildings are incompatible with R-3 zoning and are significantly inconsistent with existing housing types within the area. (Contrary to Staff Final Report, there is no twelve unit building on Ford Street.)

MPS policy R- 24:

b), d), and j): A variance in the height of the proposed building should not have been granted because of the impact it will have on the view plane and its incompatibility with the surrounding neighbourhood.

MPS policy 1M-1:

d): The Staff Final Report is indecisive about ground level parking, suggesting "potentially" up to 50 spaces that, together with the 88 planned surface parking spaces, could meet the requisite number of spaces required, which it does not.

MPS policy IM-2:

a): Town staff states the development will be without cost to the municipality, but overlooks the costs of extending the sidewalks and curbing to the project and the possible need for additional traffic controls at the intersection of Park Street and Marshland Drive.

e): Traffic patterns to and from the proposed development are especially poorly designed given the density of "rush hour" traffic on these roads and the entrance and exit to development occur within metres of the busy intersection at Marshland Drive and Park Street, an intersection further encumbered by trains that block Park Street further to the north.

l): Proposed buildings are not compatible with the low density dwellings, which mostly predominate in the area.

m): These high density buildings, in size, density, scale and bulk are inconsistent with adjacent properties and low density designation.

MPS policy IM-20:

Proposal not compliant with policies IM-2 and IM-21.

MPS policy IM-21:

e) and g): A proposed "cut and fill" strategy was not required of this development agreement that would have been mandatory under an application for a development permit. We also have concerns over the developer's ability to implement the cut and fill in the manner required.

MPS policy IM-29

The property owners were unaware of these variances until the hearing.

MPS policy T-28

Development at this site compromises policy objectives, which calls for the extension of Willow Street to Marshland Drive via Ford and Nova Drive.

[Exhibit M-1]

[5] The hearing was held at the Truro Town Council Chambers, 695 Prince Street, Truro, Nova Scotia on June 3, 2010. The Appellants' case was coordinated by Burnley Jones (at the start of the hearing Mr. Jones noted that he has retired practicing as a lawyer and was merely assisting the residents to present the case). Witnesses for the Appellants were Lynn Jones, Lenore Zahn, Elizabeth Archibald, Francis Collins, and Robert Jordan. The Town of Truro was represented by Gary Richard, who called as his witness Jason Fox, the Director of Planning Development for the Town. The Developer, Ron Wallace Real Estate Limited, was represented by its President, Ron Wallace, who only wished to appear and make a presentation at the end of the hearing and did not want to be an intervenor.

[6] An evening session was originally planned but no one had applied to speak; hence it was cancelled.

[7] A letter of comment was received from Christene Anderson who is a resident within 500 feet of the property under appeal and generally supports the arguments of the Marshland Residents Group. Her main concern was that the

development was on a major flood plain and that “the proposed development creates a dangerous situation during flooding for the landowners who live on the flood plain”. She went on to further say “I have lived through four floods and each subsequent one causes more and more damage and limits my insurance coverage”. Enclosed with her letter were three pictures of the March, 2003 flood.

II ISSUE

[8] The issue before the Board is whether council’s decision to approve a development agreement with the Developer for the Project fails to reasonably carry out the intent of the Municipal Planning Strategy (“MPS”) for the Town of Truro.

[9] The Board finds the answer to this question to be “no”.

III EVIDENCE

1. Lynn Jones

[10] Ms. Jones grew up in the area, and owns property near the Project and slightly upstream.

[11] Her concerns about the Project revolve around flooding, the height of the buildings, the view planes, increased traffic, and how access to the buildings could impact the neighbourhood.

[12] Ms. Jones stated that she had been through many of the past floods in the area and that this new development may make the flooding worse. She is aware that the Town has spent a considerable amount of time to develop zoning by-laws to

address this issue and some of the other concerns she had raised. She does not believe that the Project is compatible with the area as there are mainly single family dwellings in the neighbourhood.

2. Lenore Zahn

[13] Ms. Zahn lives in the area and her house is located in the flood fringe area upstream from the Project. She also had concerns about flooding and what the large structures proposed by the Developer would do to the surrounding properties. She expressed her views about the change in traffic and whether it would become worse with this new development.

[14] Ms. Zahn was also concerned whether the community's needs and ideas were properly taken into consideration when council approved this development. She reiterated the comments of Ms. Jones about the degree of public consultation and opined that if it had happened it would have reduced, or eliminated, the opposition to the Project.

3. Elizabeth Archibald

[15] Ms. Archibald lives at Hayward Court, which is downstream from the Project.

[16] Ms. Archibald provided a series of pictures of the floods of January, 1998 and March, 2003 where the floodwaters had come from the Marshland Drive direction. The flooding came up to the back of the house and into her basement causing extensive damage to her home. This has created a problem in getting insurance for her

home. As she is downstream from the proposed development she is concerned that she may experience worse flooding.

[17] She also expressed concerns about flooding affecting the traffic patterns.

4. Francis Collins

[18] Mr. Collins has lived for over 65 years on Ford Street, a short distance from the Project. He commented that the flooding has become worse over the last 20 or 30 years which he attributes, in part, to the riverbed not being dug out in over 60 years. He is concerned that if the Project raises the level of the land, then the flooding would go around it and towards him, causing greater damage to his property.

[19] He observed that there is an apparent inconsistency in the application of flood plain building restrictions by the Town. At times it seemed that you could not build because the property was in the flood plain. Then, five or 10 years later, it was no longer a problem and the Town allowed you to build.

[20] He commented upon the single family dwellings in the area and how this Project would be out of context with its mass and height. He does not agree that the buildings should be higher than the other residential properties and is concerned that once this happens there could be others, surrounding this area of single family homes with high-rise buildings. He believes that comparing the mass (or “bulk”, the term used in the MPS) of this building to the one on Robie Street, which is quite a distance away, is inappropriate.

[21] He also commented upon the heavy traffic on Ford Street, especially from 8:00 a.m. to 9:00 a.m. He further mentioned the sidewalk requirements and how the town would be paying for this and not the developer.

5. Robert Jordan

[22] Mr. Jordan lives near the upstream side of the development and has lived there since 1971. Mr. Jordan became involved in planning issues in the area in 1997, when the first apartment building had been suggested for the Project site. He was on the Town Planning Advisory Committee for approximately 11 years and he was the principal author of the Appellants' "Presentation of Evidence".

[23] Mr. Jordan reiterated the concerns of others about flooding and how, if this development is flood proofed, it does not mean the community will be flood proofed. He made observations on the methods used to flood proof buildings and whether or not a cut and fill method should have been insisted upon for the flood fringe area, so as to minimize harm to the surrounding neighbourhood.

[24] Comments were made in the "Presentation of Evidence" about how the Project fails to meet the MPS. Particular comments related to compatibility were as follows:

About Policy R-24(b), (d), and (j):

A variance in the height of the proposed building should not have been granted because of the impact it will have on the view plane and its incompatibility in size and density with the surrounding neighbourhood.

About Policy IM-2(l):

Proposed buildings are not compatible with the single-family dwellings, which mostly predominate in the area.

About Policy IM-2(m):

These high density buildings, in size, density, scale and bulk are inconsistent with adjacent properties and low density designation.

[Exhibit M-4, pp. 3-4]

[25] Mr. Jordon elaborated upon these comments by stating how the appearance of the community would change as it is now primarily single family dwellings, whereas the development is five storeys with a large bulk. He said the zoning for the Project site had been changed a number of years ago to R-3, which permits multi-unit buildings with a height of up to 12 metres. He acknowledged that council does have the ability under the MPS to change the zoning specifications a bit, to allow, for example, an increase in height when it is counterbalanced by surpassing other minimum conditions.

[26] Mr. Jordan commented on the compatibility of the development with the neighbourhood. He stated that the Project is compatible with the existing buildings that the Developer already has on the lot, but not to the two storey dwellings that are predominant in the area, and which are older.

[27] Mr. Jordan stated he does not believe the people in the area would be adverse to the Developer constructing buildings that did fit within the height condition of the R-3 zone. He is concerned that the Project's scale and height, when considered together, do not fit the rest of the neighbourhood.

[28] Upon being asked about view planes, Mr. Jordan replied that there is not one for this area.

[29] Under cross-examination Mr. Jordan acknowledged that the Developer could put more than the proposed 102 units on the property (may be up to 200 units);

however, the ultimate number would be dependent upon what could be properly flood proofed.

[30] Mr. Jordan also commented that even though the entrance to the new development will be on Park Street it abuts the top of Ford Street. Unless the property is properly fenced there is a possibility that the residents of the Project will use Ford Street for access. It is likely children will use Ford Street to catch the bus. This will exacerbate the traffic problems on a narrow street that does not have proper sidewalks.

[31] In summary, Mr. Jordan made the following statement:

... We don't feel that the town has contravened anything large. There was no big thing. It's just a bunch of little things that didn't all fit together. ...

[Transcript, June 3, 2010, p. 115]

6. Jason Fox

[32] Mr. Fox was qualified as an expert in land-use planning as outlined in the Town of Truro's MPS and Land-Use By-Law ("LUB"). He was the principal author of the Planner's Report that was submitted to the Town Planning Advisory Committee and to Town Council, and that is a part of the Appeal Record. He agreed he had not heard anything during this hearing that would cause him to change his opinion in the report.

[33] Mr. Fox stated how Truro has had a long history of development in the flood plain and that it had been the subject of many studies to determine how best to allow, or not allow, development in that area. He stated that the Truro flood plain is one of the most complex flood environments anywhere as it has a combination of tides, ice dams, and the confluence of the North and Salmon Rivers.

[34] According to evidence filed by the Appellants there are two areas in a flood plain, the floodway and the floodway fringe. These are defined as follows:

The floodway is the part of the flood risk area over which flood waters flow most often. Here, water flows deep and fast and can cause severe damage. The floodway is expected to flood completely on average once in 20 years. That is, there is a 5% chance of being flooded in any given year.

The floodway fringe is the part of the flood risk area that is higher and generally outside the floodway. In contrast to the floodway, the water flow is generally shallow and slow. The floodway fringe can be expected to flood completely once in 100 years. That is, there is a 1% chance of being flooded in any given year.

[Exhibit M-8]

[35] The Board notes that the Truro Flood Management Study, completed in 1998, recommended ways to accommodate development within the flood plain. MPS section 8.2 is focused entirely on policies for the flood plain. The LUB identifies the specific flood way zones, in particular E-3, Flood Way Modification Overlay and E-4, Flood Way Fringe Overlay. The majority of the lands for the Project are within the E-4 Overlay, with a small downstream portion under the E-3 Overlay. (The property description in the Planner's Report had them incorrectly reversed).

[36] The two buildings that are part of this Project are to be constructed within the E-4 Overlay (flood way fringe). In response to Mr. Jordan's view that any construction in the flood way fringe should require cut and fill floodproofing, Mr. Fox said that is not the case. For any construction in a flood way fringe, offsite fill, as is proposed for the Project, may be used for flood proofing purposes.

[37] Mr. Jones, in his cross-examination of Mr. Fox, explored the provincial interests as it concerns flood risk areas as defined in the *Municipal Government Act*, S.N.S. 1998, c. 18, as amended (the "MGA"). The Province has identified the Salmon

and North Rivers as a flood risk area which has been mapped and to which the following provisions shall apply:

. . .

2. For Flood Risk Areas that have been mapped under the Canada-Nova Scotia Flood Damage Reduction Program planning documents must be reasonably consistent with the following:

(a) within the Floodway,

(i) development must be restricted to uses such as roads, open space uses, utility and service corridors, parking lots and temporary uses, and

(ii) the placement of off-site fill must be prohibited;

(b) within the Floodway Fringe,

(i) development, provided it is floodproofed, may be permitted, except for

(1) residential institutions such as hospitals, senior citizen homes, homes for special care and similar facilities where flooding could pose a significant threat to the safety of residents if evacuation became necessary, and

(2) any use associated with the warehousing or the production of hazardous materials,

(ii) the placement of off-site fill must be limited to that required for floodproofing or flood risk management.

. . .

5. Development contrary to this statement may be permitted provided a hydrotechnical study, carried out by a qualified person, shows that the proposed development will not contribute to upstream or downstream flooding or result in a change to flood water [floodwater] flow patterns.

[38] Mr. Jones questioned Mr. Fox about whether Provision 5, as stated above, has been followed by the Town. While the response was that no specific study had been commissioned or completed since the Project had been proposed, Mr. Fox did state that he was unsure as to whether or not this development would be considered contrary to the Statements of Provision 5. He believes that the Town has been consistent with the Statement of Provincial Interest regarding this Project and the flood risk area.

[39] Upon questioning from the Board Mr. Fox confirmed that anyone who has property within the floodway fringe area can, if they meet all other LUB requirements, construct a building. The uncertainty that has been identified by Mr. Collins from prior years does not exist anymore. Mr. Fox also confirmed that within the floodway fringe offsite fill and paved areas can be used, both of which could reduce the capacity of the flood plain to store water and, hence, cause flooding elsewhere. This is in accordance, and consistent, with the LUB for the Town and the Provincial Interest Statement.

[40] When Mr. Fox was asked about the compatibility of the proposed development with the immediate neighbourhood he had some additional comments. He observed the development only covers 15% of the site, which is similar to the lot coverage of all the houses in the neighbourhood. He also stated that the immediate neighbourhood may be two storey dwellings, however, only a couple of blocks away there are some multi-unit buildings (such as to the east of the site and on the south side of Robie Street). Mr. Fox also commented on how the apartment building design is consistent with the residential designs in the area, including such characteristics as the pitch of the roof, the materials being proposed, and the addition of bays, dormers, and balconies with gable ends.

[41] He acknowledged that the building will be five storeys rather than the predominately two storey construction nearby, however it will comply with all the other R-3 zoning requirements except for height. The height guideline, which is going to be exceeded by 2.5 meters (approximately one storey), is offset by the setbacks being more than double the requirements (e.g., the side yard requirement is 4.5 metres, whereas the Project proposes 18 metres).

[42] When the Board asked Mr. Fox about the height of the building and from where it is measured, he replied that if the land was built up, then the height of the building would be measured from that newer height, and not from the original elevation. Mr. Fox later corrected this, upon redirect by Mr. Richard, stating that the height of the Project, as now planned, is measured from the established grade and not from the new finished grade. He also responded that if one more storey was added to the building it would require further consideration and a revisit of the whole issue of scale and compatibility.

[43] When questioned as to whether the site could support up to 200 units, Mr. Fox said he wasn't sure if that was a correct number. He did state, however, that you could meet all the R-3 requirements, such as height, setback and flood proofing, and still have more units on the site than what is being proposed in this Project.

[44] He also elaborated on the view plane concept that is part of the MPS. This presently consists of some vista points on the high ground on the south of the Town overlooking the flood plains. These view planes are identified on the Recreation Map attached to the MPS. Mr. Fox stated that they are not relevant for the location of the Project.

[45] Mr. Fox was also questioned about the future plans for the Town for roads and sidewalks. He said, at this time, there is no current policy on any road extension that would go through the Project site. As such, the proposed Project does not interfere with the potential road network, as it now is planned, for the Town of Truro. He also stated that the sidewalk extension on Park Street is in the Town's capital budget for this year.

7. Ron Wallace

[46] Mr. Wallace, in describing his Project, stated that the 14.5 metre height of the building is measured from the original elevation. To flood proof the building he will be placing a berm around the outside. Cars will park within the berm. The height of the berm will give the illusion, from the ground, of reducing the height of the building.

[47] He also commented how he had contacted the councillor for the Ward, Mr. Tynes (who lives in the neighbourhood), to discuss the Project. He believed that was the only process available to him to enter into a consultation with the neighborhood about the Project.

IV SITE VISIT

[48] Following the hearing on the merits on Thursday, June 3, 2010, the Board, with the consent of the parties, attended the site of the Project at 16 Park Street. The Board observed that the parcel of land is right next to Marshland Drive and that access will be through the Developer's present property on Park Street. The Board also noted the proximity of the property line to the end of Ford Street and how it is near the residence of Francis Collins. The Board observed the buildings, lot sizes, and sidewalks in the area, and traffic lights at the corner of Park and Marshland Drive.

[49] The Board was on the site at approximately 5:00 p.m. and viewed the traffic on Ford Street and Park Street. The Board did not notice any line up of cars at the Cross Street and Park Street intersection, or any string of cars going along Ford Street.

V SCOPE OF REVIEW

[50] The *MGA* states that municipalities are to have “the primary authority” for planning. Section 190(b) of the *Act* states:

s.190 The purpose of this Part is to

...

(b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character, through the adoption of municipal planning strategies and land-use by-laws consistent with interests and regulations of the Province;

[51] Despite this role as a primary authority, if a municipal council approves or refuses to approve a development agreement, s. 247(2)(b) gives an aggrieved person a right to appeal to the Board, the grounds for such an appeal being found in s. 250(1)(b):

250 (1) An aggrieved person or an applicant may only appeal

...

(b) the approval or refusal of a development agreement or the approval of an amendment to a development agreement, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy;

[52] Section 251(2) of the *Act*, however, places a strict limit on the authority of the Board to allow such an appeal:

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.

[53] Thus, the Board must not interfere with the decision of Council unless it determines that Council’s decision to grant the development agreement fails to reasonably carry out the intent of the MPS, which includes the various policies within the Strategy. The burden of proof is on the Appellants to establish, on a balance of probabilities, that in the words of s. 251(2): “...the decision of council... does not reasonably carry out the intent of the municipal planning strategy.”

[54] The Nova Scotia Court of Appeal has, in a number of cases, considered the standard by which this Board must review a council's decision. Clearly, the Board is not permitted to substitute its own decision for that of Council. The Board's mandate is restricted to the jurisdiction conferred upon it by the *Municipal Government Act* (formerly the *Planning Act*), as noted by Hallett, J.A., in *Kynock v. Bennett et al.* (1994), 131 N.S.R. (2d) 334 (CA), and *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50 (CA). The extent of the Board's jurisdiction in planning appeals generally, and in appeals respecting development agreements specifically (and other forms of planning appeals, including rezoning), is described in *Heritage Trust* at pp. 34-35:

[99] In reviewing a decision of the municipal council to enter into a development agreement the Board, by reason of s. 78(6) of the Planning Act, cannot interfere with the decision if it is reasonably consistent with the intent of the municipal planning strategy. A plan is the framework within which municipal councils make decisions. The Board is reviewing a particular decision; it does not interpret the relevant policies or bylaws in a vacuum. In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. This court, on an appeal from a decision of the Board for alleged errors of interpretation, should apply the same test. This is implicit in the scheme of the Planning Act and the review process established for appeals from decisions of municipal councils respecting development agreements. 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.* ... [Emphasis added]

This approach to interpretation is consistent with the intent of the Planning Act to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions ...

[100] Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review of enacting s. 78(6) of the *Planning Act*. The various policies set out in the Plan must be interpreted as part of the whole Plan. 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 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. The *Planning Act* and the policies which permit developments by agreement that do not comply with all the policies and by-laws of a municipality are recognition that municipal councils must have the scope for decision-making so long as the decisions are reasonably consistent with the intent of the plan. Very often ascertaining the intent of a policy can be achieved by considering the problem that policy was intended to resolve.

[55] The Court of Appeal in *Heritage Trust* further held:

[164] The *Planning Act* imposes on municipalities the primary responsibility in planning matters. The *Act* gives the municipal council the authority to enter into development by contract which permits developments that do not comply with all the municipal bylaws (s. 55 of the *Act*). In keeping with the intent that municipalities have primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (s. 78 of the *Act*). 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 decision... Neither the Board nor this court should embark on their review duties in a narrow legalistic manner as that would be contrary to the intent of the planning legislation. Policies are to be interpreted reasonably so as to give effect to their intent; there is not necessarily one correct interpretation. This is implicit in the scheme of the *Planning Act* and in particular in the limitation on the Board's power to interfere with a decision of a municipal council to enter into development agreements ...

[22] The approach to be followed by the Board was also described by the Court of Appeal in *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115 ("Midtown"). MacDonald, C.J.N.S., stated:

[47] Despite the Board's detailed hearing, it must be remembered that members of Council are elected and accountable to the citizens of HRM. As such they exercise discretion and are accordingly entitled to deference. As earlier noted, one purpose of the MGA is to provide municipalities with autonomy when it comes to planning strategies and development. This decision fell within Council's discretion, provided it reasonably reflected the intent of the MPS. As elected officials, their decisions must be respected. This court has said as much on several occasions. For example in *Tsimiklis v. Halifax (Regional Municipality)*, [2003] N.S.J. No. 64, 2003 NSCA 30, Chipman, J.A. observed:

para 24 A review of the MPS confirms, as one would surmise, that many of the policies are, to use the words of Hallett, J.A. in *Heritage Trust*. supra, at para. 100 "inherently in conflict". The Board recognized this in its decision. The MPS recognises a number of competing interests necessarily involved in the creation of a workable planning regime and, of necessity, Council must have considerable latitude in striking a balance among those interests in making a planning decision.

...

para 64 As I have already pointed out, planning decisions often involve compromises and choices between competing policies which are best made by the elected representatives, so long as they are reasonably

consistent with the intent of the MPS. To my mind, read against these policies Council's decision here is reasonably consistent with that intent.

[48] So it is not for the Board to impose its interpretation of the MPS. Instead the Board must defer to Council. Thus, this court in *Kynock v. Bennett et al.*, (1994), 131 N.S.R. (2d) 334 (C.A.) observed:

para 27 ... Clearly the legislature did not intend to confer a de novo jurisdiction on the board when hearing an appeal from a municipal council decision to enter into a development agreement. The board is functioning in a review capacity and is limited by the jurisdiction conferred on it under the Planning Act.

[49] Also this court in *Mahone Bay Heritage & Cultural Society v. 3012543 Nova Scotia Ltd.*, [2000] N.S.J. No. 245, 2000 NSCA 93 concluded:

para 9 ... The Board also recognized ... that the MPS may be capable of being interpreted reasonably in several ways; there is not necessarily one correct interpretation.

para 10 The Board must look at the MPS as a whole in order to ascertain if the [Council's] decision is consistent with the intent of that MPS.

[50] Thus, in the end, resort inevitably must be had to specific directions contained in the statute. By doing so, the fundamental question therefore becomes: Can it be said that Council's decision does "not reasonably carry out the intent of the MPS"?

[51] To answer this question, the Board must embark upon a thorough fact-finding mission to determine the exact nature of the proposal in the context of the applicable MPS and corresponding by-laws. As in this case, this may include the reception of evidence as to the intent of the MPS.

[52] However the Board should not then take its body of decided facts and use this work product to conclude how it feels the MPS should be interpreted. In this regard, I agree with the developer. Instead, after completing its factual analysis, the Board should go immediately to Council's conclusion. The Board should then ask itself, based on the facts as determined, have the opponents established that Council's decision did not reasonably carry out the intent of the MPS?

[53] This would be consistent with the approach taken by this court over the years and as first enunciated by Hallett, J.A. in *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)*, [1994] N.S.J. No. 50, Hallett, JA noted...[para. 99 of *Heritage Trust*].

[56] Accordingly, if the Appellants can show, on the balance of probabilities, that Council's decision, which involves compromises and choices between competing policies, does not reasonably carry out the intent of the MPS, the Board must reverse Council's decision to approve the development agreement. If the Appellants fail to meet the standard of proof it is the Board's duty to defer to Council's decision.

VI ANALYSIS AND FINDINGS

[57] The reasons as identified in the Notice of Appeal, and the evidence presented at the hearing, indicate that the objections fall into one of three major categories: flood plain, compatibility, and traffic. The compatibility concerns are mainly concentrated on the height of the Project and its bulk and scale. Traffic issues centre on the potential increase in traffic, both vehicular and pedestrian, and a proposed roadway extension to Marshland Drive.

1. Flood Plain

[58] The Board finds that the flood plain has been subjected to intense scientific analysis and community discussion as to how development should or should not be allowed. The criteria of what can and cannot be constructed in various parts of the flood plain and what specifications such development must meet have been defined in both the MPS and LUB and are applicable to this Project. The question as to whether some of the policies are appropriate (i.e., cut and fill versus the allowance of infill) is not a question that the Board need determine, and is more appropriately left to Council.

[59] The Appellants have questioned whether Town Council has appropriately followed the requirements for flood plain development, in particular Provincial Interest Provision 5 for flood risk areas. As has been stated in the evidence, the two buildings are to be constructed on land which is subject to the Flood Way Fringe Overlay (E-4). In accordance with the Statement of Provincial Interest, most development is permitted within the flood way fringe as long as it is flood proofed. Provision 5 of the Provincial Interest is only applicable if a development is to be permitted contrary to the

Statements. As development within the flood way fringe is already permitted, the Statement of Provincial Interest, Provision 5 is not applicable. Accordingly, the Board finds that a hydrotechnical study is not required for the Project.

[60] It is conceivable that the Project may worsen the flooding in the area immediately surrounding it. Whether it does or does not, is not the main issue facing the Board in this matter. The issue facing the Board is whether this Project fails to reasonably meet the requirements of the MPS (as “illuminated” by the LUB) as they relate to the flood plain. The Board accepts the evidence of Mr. Fox that the MPS policies on the flood plain have been addressed by Council. The Board finds that the Appellants have failed to prove that the decision of Council does not reasonably meet the flood plain policies of the MPS.

2. Compatibility

[61] The Appellants have stated that MPS Policy R-24, in particular, sections (b), (d), and (j), have not been met. Policy R-24, in its entirety, is as follows:

It shall be a policy of Council to consider multiple unit residential developments in the Low Density Residential designation by development agreement provided that:

- a) the proposal satisfies the evaluative criteria for development agreements and amendment applications as outlined in Part 12: Implementation of this Strategy;
- b) the height, bulk, scale, lot coverage of any building is compatible with adjacent land uses;
- c) the architectural design, including roof pitch, roof type, materials, fenestration, of any new building are compatible with nearby residential uses;
- d) the proposal does not detract from an established or developing streetscape by significantly varying from the typical building height, setbacks, of other neighbouring structures;
- e) parking is provided on site and is located in either a side yard or rear yard and is adequately landscaped or fenced to minimize its visibility from neighbouring properties and the public right of way;

f) the impact of the proposed development on abutting low density residential uses is effectively mitigated through landscaping elements and appropriate setbacks;

g) there is on-site recreational open space suitable in extent and design to the nature of the development; and

h) the proposal either consists of a mixture of dwelling types such as townhouse units, semi-detached units, and apartment units or the proposal will, together with neighbouring properties, result in an mixture of dwelling types in the neighbourhood as a whole;

i) the proposed development is located on a property that:

i) was zoned Two Unit Dwelling (R-2), Local Commercial (C-3), or Institutional (P- 3) on or before August 20th, 2005; or

ii) abuts an arterial or collector street as shown on the Transportation Map;

j) the Multiple Unit Residential (R-3) Zone requirements are used as a guide when considering lot requirements, amenity space requirements, and building height except where these requirements are contrary to this Policy.

[Exhibit M-2, MPS, p. 2-9]

[62] They have also stated that policy IM-2, sections (l) & (m), have not been met. These specific policies are:

Therefore it shall be a policy of Council to consider all appropriate policies set out in this strategy when examining any request to amend the Town's planning document or enter into a development agreement with the Town, and Council shall have due regard for the following matters:

...

l) compatibility of the proposed land use with adjacent land uses;

m) compatibility of the development in terms of height, scale, lot coverage, density, and bulk with adjacent properties; and

...

[Exhibit M-2, MPS, p. 12-2]

[63] Compatibility is both an objective and subjective matter for consideration.

[64] The LUB, through its various zoning provisions, can be used to define objective numerical criteria for some parts of compatibility. The R-3 zone requirements outlined in LUB 7.4, include numerical specifications about lot area, frontage, yard set backs, height, and amenity space. There are no numerical specifications for "bulk" or

“scale” in the LUB. The only numerical specification that is in dispute is the building height, which according to the R-3 zone requirements, should be a maximum of 12.0 metres.

[65] The Appellants have highlighted elements (b), (d) and (j) of Policy R-24 and (l) and (m) of Policy IM-2, where they believe the Project is contrary to the MPS and disagree with the conclusions of the Planner’s Report, and the decision of Council.

[66] The Planner’s Report addressed the compatibility issues of bulk, scale, streetscapes, and land use as follows:

Policy R-24

b) the height, bulk, scale, lot coverage of any building is compatible with adjacent land uses;

The height, bulk, and scale of the proposed development is not consistent with the residential area to the south of the subject property, however, it is consistent with existing multiple unit developments to the east. The proposal does feature a substantial amount of open space and this has resulted in a lot coverage which is consistent with other residential development in the area. Because of the large setbacks and large areas of landscaped open space, any negative impacts associated with the height, bulk, and scale of the proposal have been effectively mitigated and the proposal is therefore compatible with surrounding land uses.

The buildings feature well articulated facades that include accent gables, bays, and variations in cladding materials. This effectively reduces the appearance of scale.

d) the proposal does not detract from an established or developing streetscape by significantly varying from the typical building height, setbacks, of other neighbouring structures;

This proposal fronts on Marshland Drive, which is a controlled access collector road, and there is no established or developing streetscape or neighbouring structures on the street.

[Exhibit M-2, Appeal Record, p. 4-13]

Policy IM-2

l) compatibility of the proposed land use with adjacent land uses;

The proposed development will consist of residential dwelling units and the use, therefore, is compatible with adjacent residential land uses. The intensity of the residential land use is not consistent with the residential area to the south of the development, but this area will not be directly affected by vehicle traffic -- which is one the most obvious affects of land use intensity -- because the proposed development is to be accessed from Park Street.

m) compatibility of the development in terms of height, scale, lot coverage, density, and bulk with adjacent properties; and

The five storey buildings are significantly higher than adjacent residential development to the south, however, the developer has addressed this issue through increased setbacks.

The proposed development's lot coverage is consistent with neighbouring residential development.

Because of the increased setbacks and large areas of landscaped open space, any negative impacts associated with the height, bulk, and scale of the proposal have been effectively mitigated and the proposal is therefore compatible with surrounding land uses.

[Exhibit M-2, Appeal Record, p. 4-17]

[67] The Planner's Report found that there is, essentially, no established streetscape near the Project; hence Policy R-24(d) is not an issue. The Appellants did not present any evidence to refute this statement.

[68] The Planner's Report has identified that the Project is not "consistent" in height, bulk, scale, and intensity of use with the neighbourhood to its south. It is compatible with land use (residential) and lot coverage. The lack of consistency, according to the Planner's Report, is mitigated by large setbacks, landscaped open space, and well articulated facades.

[69] Compatible means "mutually tolerant: capable of being admitted together, or of existing together in the same subject; accordant, consistent, congruous,

agreeable” (*Compact Oxford English Dictionary*, June 1981). It does not mean “the same as”, or “similar”.

[70] The determination of compatibility, for this development agreement, is primarily a subjective judgment, which requires consideration of all ten elements of MPS Policy R-24. This exercise of judgment involves compromises and choices and weighing the relative merits of each element. As the Appellants have only cited three of these elements as being of concern, the Board can only assume they have agreed that the Project has met the other seven.

[71] It is agreed, by Mr. Fox and the Appellants, that the Project, with respect to height, bulk, and scale, is not consistent with the neighbourhood to the south. The Appellants did not make any comment about intensity of use, other than its application to traffic.

[72] The Appellants’ opinion, or judgment, is that the Project is not compatible with the neighbourhood. The only differences between Mr. Fox’s finding of compatibility and that of the Appellants are the mitigating factors. The Appellants did not present any evidence as to why they thought the mitigating factors were insufficient, or whether there were others. The Board accepts Mr. Fox’s evidence in this respect.

[73] It is inherent in the MPS, for a determination under Policy R-24, that a subjective judgment be made as to compatibility. No new evidence was entered that would indicate that when Council reviewed the compromises and choices, it did not have full information. There is, obviously, a disagreement between the Appellants and Council on the choices made. Regardless, the Board has no grounds to find that the decision of Council was not consistent with the MPS.

[74] The Board finds, on the balance of probabilities, that the Appellants have failed to prove that the decision of Council does not reasonably meet the policies of the MPS as they relate to compatibility.

3. Traffic

[75] The Appellants have expressed concern about the increase in traffic and the reduction of pedestrian safety around the Project site. As was noted by Mr. Fox, the opinion of the Town's Traffic Authority had been requested as to the effect this Project would have on traffic, to which the response was there would be minimal impact. Only anecdotal evidence about the traffic and/or pedestrian safety issues on Ford Street was given by the Appellants. The Board notes the Council motion approving the development agreement stated it was "...subject to a favourable traffic impact study".

[76] The Board finds that some of the Appellants' concerns about pedestrian safety on Park Street will be partially addressed by the extension of the sidewalk, which is an approved item in this year's capital budget. The Board also finds that any other traffic concerns are to be met upon the receipt of a favourable traffic impact study.

[77] The Appellants stated that the Town Council decision does not meet MPS Policy T-28 which states as follows:

It shall be a policy of Council to extend Willow Street to Marshland Drive via Court and Elm Streets.

[Exhibit M-2, p. 9-8]

[78] In the MPS, as an introduction to the above Policy, the following statement is made:

However, a link with Marshland Drive in the north is required if Willow is to function properly as an arterial. Accordingly, it is to be extended to join with Marshland Drive via Court Street and Elm Street at the existing Park Street intersection.

[Exhibit M-2, p. 9-8]

[79] As was stated by Mr. Fox, there is no policy, at this time, that has been adopted by Town Council to actually say which route this extension will take, and that no indication has been made that it would go through the site of the Project.

[80] The Board observes that Court Street and Elm Street are parallel, and to the west of Park Street. The Project is also to the west of Park Street. The Board notes that Schedule C of the MPS (Transportation) shows Ford Street extending through the Project site and connecting to Marshland Drive.

[81] The Appellants provided evidence that the Town of Truro had sold a parcel of land, which could be considered a "roadway", between the present top of Ford Street which is on the south boundary of the Project site, and Marshland Drive, to the Developer, on February 12, 1997. The Appellants disputed the validity of this sale.

[82] With the evidence before it the Board finds that Schedule C of the MPS (as approved by Town Council on July 5, 2004) was in error by showing a continuation of Ford Street to Marshland Drive. Secondly, the Board, in these circumstances, finds it does not have the jurisdiction to make a finding on the validity of the land sale.

[83] The Board does not have any evidence before it to indicate the intent of Council to have a future roadway going through the Project site. In fact the past actions of Council would indicate the converse.

[84] The Board finds that the Appellants have failed to prove that the decision of Council does not reasonably carry out Policy T-28.

VII CONCLUSION

[85] In summary, the Board, on the three categories of flood plain, compatibility, and traffic, (and considering its totality) finds that the Appellants have failed to prove, on the balance of probabilities, that the decision of Council did not reasonably carry out the intent of the Town of Truro's MPS for this development agreement.

[86] The appeal is dismissed.

[87] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 27th day of July, 2010.

Murray E. Doehler