NOVA SCOTIA COURT OF APPEAL

Citation: ***Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board)***, 2008 NSCA 123

Date: 20081223
Docket: CA 289704
Registry: Halifax

Between:

Can-Euro Investments Limited

Appellant
Respondent on Cross-Appeal

v.

Nova Scotia Utility and Review Board, Halifax Regional Municipality and Dexel Developments Limited

Respondents
Appellants on Cross-Appeal

Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	October 8, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed and cross-appeals allowed per reasons for judgment of Oland, J.A.; Roscoe and Cromwell, JJ.A. concurring.
Counsel:	William L. Mahody, for the appellant/respondent on cross-appeal Robert G. Grant, for the respondent/appellant on cross-appeal, Dexel Developments Limited Karen Brown, for the respondent/appellant on cross-appeal, Halifax Regional Municipality

Reasons for judgment:

[1] On January 5, 2006, the Habour East Community Council of the Halifax Regional Municipality approved a development agreement ("Agreement") for property at 5 Horizon Court, Dartmouth (the "MT&T site"). The Agreement between Ollive Properties Limited, the owner of the property, and Halifax Regional Municipality ("HRM"), allows the construction of two buildings, each containing commercial space on its ground floor and residential units on its remaining six floors. Dexel Development Limited, a company related to Ollive Properties, is to develop the property.

[2] Can-Euro Investments Limited appealed Council's decision to the Nova Scotia Utility and Review Board. This is an appeal by Can-Euro of the Board's decisions dated July 23, 2007 and November 19, 2007, which are reported as 2007 NSUARB 100 and 2007 NSUARB 161 respectively, and of its order which issued November 19, 2007. Each of Dexel and HRM cross-appeals.

[3] For the reasons which follow, I would dismiss the appeal and would allow the cross-appeals.

Background

[4] The MT&T site consists of some 3.6 acres. On the northwest, the property is bounded by Woodland Avenue; however, there is no access from Woodland Avenue. On its southwest is Maybank Field Park, owned by HRM. To the southeast, between the MT&T site and the MicMac Mall, lie lands owned by Can-Euro. Finally, to its northeast, is a remnant of the Old Albro Lake Road, which is referred to as "the Stub." That strip is approximately 23 feet wide.

[5] As will be explained, the only access into the MT&T site is over Horizon Court, one end of which intersects MicMac Boulevard, a public street. Horizon Court itself is not a public street. It belongs to Can-Euro, which owns two high-rise apartment buildings and a low-rise apartment building on Horizon Court. Can-Euro also owns undeveloped land in that area.

[6] To understand the issues in the appeal and cross-appeals, it is necessary to review some planning history. The MT&T site had been zoned industrial, and not

been used since the late 1980's. In 2000, Dartmouth conducted the Woodland Avenue East Planning Process ("WAEP") to consider the future development of vacant lands in the MicMac Mall area. These included lands are owned by Can-Euro and the MT&T site. As part of the WAEP, an area-wide traffic and transportation planning study of the MicMac Boulevard area (the "Lea Study") was conducted. Its main objective was to consider the full build-out of residential and commercial lands in that area over a planning horizon to 2005.

[7] Following the WAEP, the Municipal Planning Strategy ("MPS") was amended in 2002 to adopt site-specific policies for each of the properties in the area. The preamble and Policy H-18 for the MT&T site read:

> MTT Lands - Woodland Avenue (PID No. 40173668)
>
> The Maritime Telephone and Telegraph Dartmouth Works Centre operated at this site for more than twenty years. The large graded site is strategically placed in relation to surrounding residential and commercial development. An opportunity for redevelopment of the site exists given its proximity to Woodland Avenue and Highway No. 111, and the regional shopping facilities at Mic Mac Mall. The community planning process carried out in 2000/01 supports redevelopment for multiple unit residential and/or office uses; however, a major retail facility(s) is not desired by the community. Access to the MTT site requires resolution prior to the consideration of any development proposal. No vehicular access will be allowed from Woodland Avenue.
>
> Policy H-18 Redevelopment of the former MTT works centre site (PID#40173668) for multiple unit residential use shall be subject to the requirements for Policy IP-5. Notwithstanding the Residential Designation and R-3 zoning, office development with [associated] retail [uses] including but not limited to small restaurants, pharmacy and/or convenience store may also be considered by development agreement pursuant to the provisions of Policy IP-1(c). (Emphasis added)

At the same time, the MT&T site was rezoned from Industrial I-1 to R-3 medium density residential.

[8] The matter of access to the MT&T site was the subject of considerable litigation. In a decision dated January 24, 2001, Justice Kelly of the Nova Scotia Supreme Court determined that that property enjoyed an easement over lands owned by Can-Euro and that the owner of the servient tenement had a duty to

maintain the easement. Before his order issued, Can-Euro appealed, unsuccessfully, to this court. It then applied for leave to appeal to the Supreme Court of Canada. Before the leave application was heard, HRM amended the MPS on January 29, 2002 and adopted Policy H-18, which is set out above, for the MT&T site, effective March, 2002. A few months later, the Supreme Court of Canada denied leave to appeal.

[9] Justice Kelly's order issued on August 30, 2002. It declared that the MT&T site has an easement and right-of-way "for the passage of persons and vehicles and for all purposes associated with the use and enjoyment of [the MT&T site]." The survey attached to the order shows an easement and right-of-way 60 feet wide running over Horizon Court from its intersection with MicMac Boulevard almost to the MT&T site. It then crosses over lands owned by Can-Euro to reach the boundary of the MT&T site. The owner of the servient tenement, Can-Euro, was ordered to maintain and repair the right-of-way at its cost. Justice Kelly's decision is reported as *Maritime Telegraph & Telephone Co. v. Chateau Lafleur Development Corp. et al.*, 2001 NSSC 14, (2001) 191 N.S.R. 302 (S.C.), appeal denied 2001 NSCA 167, (2001) 199 N.S.R. (2d) 250, leave to appeal denied [2002] S.C.C. No. 14, 209 N.S.R. (2d) 400.

[10] What Dexel proposed for the MT&T site were two, seven-storey buildings containing a maximum of 168 residential units and, on their ground floors, some 30,000 square feet of commercial space. In the spring of 2005, a public information session was held. That fall, planning staff recommended that Council approve the proposed development agreement which contemplated development on the MT&T site and the one-half of the Stub which abuts the MT&T site. Dexel had agreed to purchase that portion of the Stub from HRM. Without that land, approximately 4,000 square feet, the development would lose portions of five, or two entire, parking spaces. However, HRM subsequently discovered that it did not own the Stub, and that the Province did.

[11] As approved by Council on January 5, 2006, the Agreement is a thirteen page document detailing matters such as permitted uses, architecture and siting, and environmental protection measures, together with 8 schedules which are plans for the development. The Agreement included an amendment dealing with the one-half of the Stub:

> 3.1 The following items are considered by both parties to be non-substantial matters and may be amended by resolution of Harbour East Community Council:
>
> > c) Non inclusion of PI#00445171, identified on Schedule B as "HRM lot to be purchased" as part of the Lands that are the subject of this agreement, provided that the developer submits a revised site plan showing how the lands will be developed without the additional parcel.

The Province subsequently offered to sell this portion of the Stub for the development. Its offer was open when the Board hearings were underway.

The Decisions and Order of the Board

[12] Within a week after Council's decision approving the Agreement as amended in regard to the Stub, Can-Euro filed its notice of appeal. It argued that the decision did not reasonably carry out the intent of Policy H-18 because Council entered into the Agreement before all access issues were resolved. Its grounds of appeal also related to the Stub and the interpretation of a 1981 right-of-way for the MT&T site. Moreover, it claimed that the commercial component of the proposed development negated the easement which runs over Horizon Court and Can-Euro lands to the MT&T site.

[13] After the parties had filed expert evidence and lists of witnesses, the Board's hearing of the appeal commenced on July 12, 2006. Can-Euro called Jenifer Tsang, a planner, and Roger Boychuk, a transportation engineer. They gave expert evidence and were cross-examined on that day and the next. Can-Euro then closed its case.

[14] When the hearing resumed on July 17th, Dexel called Kenneth O'Brien, an expert in traffic engineering and transportation planning. Cross-examination of Mr. O'Brien ended on the following day, and another witness for Dexel commenced his testimony. The hearing was then adjourned to Monday, October 23rd for continuation that week.

[15] On Thursday, October 19th, the Board received a letter from Can-Euro seeking an adjournment so that it could find replacement counsel, and asking that its President, Dr. Otto Gaspar, be permitted to provide evidence. After receiving

submissions from the parties, it refused both requests on October 20th. When the hearing resumed as originally scheduled on October 23rd, it was adjourned to November 14th. It resumed that day, continued on the 16th, and finished on November 29th.

[16] On July 23, 2007, the Board released its decision. Its concluding paragraphs read:

> [444] The Board finds that Council's decision of entering into the Agreement with Dexel has reasonably carried out the intent of the MPS, except for three minor aspects of the commercial content of the building, which were not intended by the Developer nor specifically contemplated by HRM. These require minor amendments to be made to the Agreement.
>
> [445] The Board will consider ordering these minor amendments pursuant to its jurisdiction under s. 251(1)(c) of the MGA and directs the parties to inform the Board within 10 days as to whether they wish to be heard through written submissions or oral arguments. The Board reserves jurisdiction to complete the amendment issue.

[17] The parties made submissions. In its November 19, 2007 decision, the Board determined that it has the authority to order amendments to a development agreement. Its order bearing that date allowed Can-Euro's appeal, but approved the Agreement with amendments that both limited the cumulative square footage and restricted the hours of operation of the retail space, and that also excluded certain types of businesses.

[18] Can-Euro appeals from the Board's order. Dexel and HRM cross-appeal.

Standard of Review

[19] In *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, the Supreme Court of Canada established that there should be only two standard of reviews for administrative decisions. Fichaud, J.A., for this Court, summarized the two-step approach to determining the standard of review in *Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74:

> [38] . . . Justices Bastarache and LeBel, for five justices, stated the following principles governing the administrative SOR.

[39] Correctness and reasonableness are now the only standards of review (¶ 34). The court engages in “standard of review analysis”, without the “pragmatic and functional” label (¶ 63).

[40] The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (¶ 49).

[41] The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (¶ 62, 54, 57).

[42] If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (¶ 55):

(a) Does a privative clause give statutory direction indicating deference?

(b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal’s purpose disclosed by the enabling legislation and the tribunal’s institutional expertise in the field (¶ 64).

(c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness (¶ 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal’s specialized expertise attract correctness. Correctness also governs “true questions of jurisdiction or vires”, ie. “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”. Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal’s statutory regime (¶ 55-56, 58-60).

[20] In *Midtown Tavern & Grill v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115, an appeal from the Board's review of a council's decision regarding a development agreement, this court held that where the issue under review is a question of law, then the standard of review is that of correctness: at ¶ 36. A question as to the Board's jurisdiction is a question of law which attracts the correctness standard: *Antigonish (County) v. Antigonish (Town)*, 2006 NSCA 29 at ¶ 20. That standard also applies to questions of procedural fairness: *Heritage Trust of Nova Scotia v. Halifax (Regional Municipality)*, 2007 N.S.J. No. 79 at ¶ 56.

[21] Legal questions of central importance to the legal system and outside an administrative tribunal's special expertise attract the correctness standard of review. However, if they are questions other than of general law and relate intimately to a tribunal's expertise, and if a legislative intent for deference is shown by a privative clause and an administrative regime in which the decision-maker has special expertise they may be subject to a reasonableness standard: *Dunsmuir*, at ¶ 55 and 56.

[22] In *Dunsmuir*, Justices Bastarache and LeBel explained the standard of review of correctness:

> 50 . . . When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[23] They defined reasonableness thus:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible,

> acceptable outcomes which are defensible in respect of the facts and law. (Emphasis added)

[24] There is no appeal from the Board's findings upon questions of fact within its jurisdiction. These are binding and conclusive: s. 26 of the *Utility and Review Board Act*, S.N.S. 1992, c. 11 (*URB Act*). Appeals from the Board to this court are limited to issues of law and jurisdiction: s. 30(1) of the *URB Act*.

[25] The appellant presents all of its grounds of appeal as alleged errors of law. The respondents on their cross-appeals allege errors of law or jurisdiction.

Analysis

[26] Municipalities have the primary authority for planning within their respective jurisdictions through the adoption of municipal planning strategies and land-use by-laws: s. 190 of the *Municipal Government Act*, S.N.S. 1998, c. 18, as am., (the "*MGA*"). The approval or refusal to approve, and the amendment or refusal to amend, a development agreement, may be appealed to the Board: *MGA*, s. 247(2). That legislation also stipulates when the Board may allow an appeal. The *MGA* sets out the test thus:

> Powers of Board on 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.

[27] As the appellant, Can-Euro has the burden of establishing that the Board erred in law by failing to conclude that the Agreement approved by Council did not reasonably carry out the intent of the MPS. Dexel and HRM have the corresponding onus on their cross-appeals.

[28] In *Midtown Tavern*, this Court spoke of the deference that the Board is to give to planning decisions made by a council. It emphasized that:

> **[47]** ... it must be remembered that the 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.... 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:
>
> > ¶ 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.
> >
> > . . .
> >
> > **[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:
> >
> > > ¶ 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**.

Can-Euro's Appeal

[29] Can-Euro's grounds of appeal focus on issues pertaining to procedural fairness and to access to the lands to be developed, which the appellant submits amount to errors in law which warrant appellate intervention. These grounds can be broadly stated as follows: (a) did the Board err in law in denying Can-Euro's requests to present additional evidence and to adjourn the hearing; (b) did it err in law in reaching its findings relating to issues of access, and in failing to provide

procedural fairness in relation to its determination of access issues; and (c) did it err in law by failing to appropriately consider the impact of the Agreement on Horizon Court and on various other planning matters. Some of these broad grounds encompass several issues. These I will set out and consider in the course of my decision.

Adjournment and Reopening the Case

[30] Dr. Gaspar, the President of Can-Euro, sent a letter dated October 18, 2006 to the Board. He advised that Can-Euro's counsel had withdrawn and asked the Board to exercise its jurisdiction under s. 20 of the *URB Act* to adjourn to allow the retention of new counsel and also to permit him to testify. The Board heard the parties by conference call on October 20th. Dr. Gaspar advised that he had been seriously ill for several months and had undergone three heart operations, from which he was still recovering. He requested a three-week adjournment. During a second conference call that day, the Board refused to grant a re-opening of Can-Euro's case to allow Dr. Gaspar to present evidence and refused to grant an adjournment.

[31] In its July 23, 2007 decision, the Board recounted its rejection of Dr. Gaspar's requests. It observed that Can-Euro's appeal commenced in January 2006, its counsel had been involved in all preliminary and procedural steps, its representatives had been present at the hearing, and Can-Euro had completed its case and the respondents had begun theirs. It continued:

> [78] The Board finds that Can-Euro chose not to present evidence, had ample opportunity to do so, and had people knowledgeable and capable of providing that evidence to the Board. Having chosen to close its case, the Board will not reopen it. The Board noted at the hearing that Can-Euro, of course, maintains its right to present rebuttal evidence.
>
> [79] The Board also refused to grant an adjournment for a change in counsel. The matter had been adjourned since July and a request for the adjournment had come just two business days before the hearing was to recommence in October of 2006. The Board was not prepared to provide an adjournment to permit Mr. Gaspar to represent Can-Euro as his health was poor. He could not take over the representation immediately considering his health problems and that he would be taking a personal risk to do so. It was uncertain when he would be healthy enough to continue the case. To adjourn the hearing until Mr. Gaspar's health improved

> would be adjourning it without day indefinitely. Even though he had a disagreement with counsel, the Board was concerned that no efforts had been made to actually locate counsel to date.

[32] The Board having refused to adjourn, the hearing resumed on October 23, 2006. That session was brief. The Board accepted a joint recommendation from counsel and adjourned the hearing until November 14, 2006.

[33] Can-Euro submits that by refusing to adjourn, the Board forced it into a position where it had to either proceed unrepresented, accept counsel the Board forced upon it, or abandon its appeal. In my view, this submission is without merit.

[34] According to s. 4(3) of the *MGA Rules*, the Board may make directions on procedure and procedural orders. Section 15(7) of those *Rules* states that a hearing may be adjourned by the Board at the request of any party. In regard to adjournments, Sara Blake in *Administrative Law in Canada*, 4th ed. (Toronto: Butterworths, 2006) states at pages 44 to 45:

> A tribunal's choice of date for a hearing prevails unless a party can demonstrate that to proceed on that date would result in a denial of procedural fairness. Unless prohibited by statute, every tribunal has an inherent power to adjourn a proceeding to ensure that all parties are dealt with fairly. A requirement to make a decision within a specified time limit does not prevent a tribunal from adjourning to be fair. Some statutes expressly grant authority to adjourn a proceeding. No one has a right to an adjournment. Adjournments are within the discretion of the tribunal. Even if the parties agree to adjourn, the tribunal may refuse to do so. Conversely, a tribunal should not use its power to adjourn as a tactic to avoid or delay making a decision.
>
> Various factors may be considered when deciding whether to adjourn. The most important is the requirement of a fair hearing. This requirement must be balanced against the tribunal's statutory duty and the need to resolve disputes expeditiously and to avoid delay.

[35] Quite simply, the record does not support Can-Euro's claim that its right to a fair hearing was prejudiced by the Board's refusal to adjourn because it was without legal representation. The Board's October 20th decision meant that the hearing resumed on October 23rd. That day, counsel for the parties quickly advised the Board of their joint recommendation for an adjournment to mid-November.

The Board readily agreed, and rescheduled the hearing to November 14th. As a result, although the Board had denied his request, Dr. Gaspar received the very three-week adjournment that he had sought. Can-Euro's argument that it did not have sufficient time to retain replacement counsel of its choice cannot succeed where it obtained the adjournment it had requested.

[36] Nor can I accept Can-Euro's submission that the Board erred in law in refusing to allow Dr. Gaspar to testify. A judge's decision whether or not to allow the reopening of a case is a discretionary one which is entitled to considerable deference. In *Griffin v. Corcoran*, [2001] N.S.J. No. 29 (C.A.), 2001 NSCA 73, this court observed that:

> **[65]** The decision must be informed by a balancing of the risk of both procedural and substantial injustice to both parties. These fundamental concerns were well-expressed by Macdonald, J.A. in the **Clayton** case, supra at page 440:
>
> > If the power [to reopen a trial] is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment but before entry showing that the judgment was wrong and the trial Judge was convinced of its authenticity no lack of diligence by solicitor in producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.
>
> **[66]** An application by one party to reopen a trial presents obvious risks of procedural injustice to the other party and, more generally, of undermining the orderly conduct of litigation. Civil litigation is not a judicial inquiry; a trial judge has no roving commission to examine every aspect of the relationship between the parties. The parties themselves must advance the issues they wish determined by the Court and put forward the evidence they consider necessary to advance their positions. They must disclose the relevant documentation to each other and be subject to extensive discovery. A trial proceeds by each side having the opportunity, in turn, to present its case. A party must bring forward the whole of the evidence on which it intends to rely. This is particularly true of the plaintiff who is not permitted to seek tactical advantage by "splitting" the case; that is, by holding back evidence known to be relevant from the outset until after the defendant has started calling its evidence.
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> (Emphasis added)

[37] The same principles apply where an administrative board is exercising its discretion in deciding whether or not to reopen a hearing. Can-Euro had not included Dr. Gaspar in its list of witnesses that was filed in advance of the hearings. Nor, before it closed its case, did the appellant suggest that it wanted him to testify. In his letter request to the Board, Dr. Gaspar gave no indication of what evidence he wanted to present. Nor was this offered in his submissions during the conference call the Board held with the parties. In the result, there is no evidence that the Board's refusal to allow Can-Euro to reopen its case caused Can-Euro any injustice.

[38] I am not persuaded that the Board erred in legal principle in its consideration of Can-Euro's requests to adjourn and to reopen its case. Moreover, the result of its decision to refuse these requests did not result in a denial of procedural fairness.

MPS Planning Policies

[39] Can-Euro argues that the Board erred in its determinations with regard to access to the MT&T site and by failing to appropriately consider the impact of the Agreement on Horizon Court and other planning matters. Before considering the issues which arose from these broad grounds of appeal, it would be helpful to set out the MPS planning policies on which submissions by the parties are based.

[40] Site-specific Policy H-18 authorizes development agreements for multiple unit residential use and office development with associated retail use. It is prefaced by a summary of the past use of the MT&T site, its location, and the community's views regarding its development as ascertained during the WAEP in 2000. That preamble includes a sentence which reads: "Access to the MTT site requires resolution prior to the consideration of any development proposal."

[41] Policy H-18 itself states that the development of the MT&T site is subject to two implementation policies, Policies IP-5 and IP-1(c). Policy IP-5 provides that when considering the approval of a development agreement for apartment building development, Council "shall consider" certain criteria. Those criteria include:

> (d) adequacy of transportation networks in, adjacent to, and leading to the development;

...

(i) the Land Use By-law amendment criteria as set out in Policy IP-1(c).

[42] Policy IP-1(c) provides that when considering zoning amendments and contract zoning, Council "shall have regard to" various matters. Those include:

(2) that the proposal is compatible and consistent with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal

. . .

(4) that the proposal is not premature or inappropriate by reason of:

...

(iv) the adequacy of transportation networks in adjacent to or leading to the development

. . .

(6) that controls by way of agreements or other legal devices are placed on proposed developments to ensure compliance with approved plans and coordination between adjacent or near by land uses and public facilities. Such controls may relate to, but are not limited to, the following:

. . .

(iii) traffic generation, access to and egress from the site, and parking

...

(v) provisions for pedestrian movement and safety . . .

The Access Issues

[43] In order to understand Can-Euro's grounds of appeal which relate to access, a recounting in summary fashion of the factual basis upon which they are founded

would be useful. Can-Euro and Ollive Properties Limited own adjacent lands. Pursuant to Justice Kelly's order, the MT&T site enjoys an easement and right-of-way "for all purposes" over Horizon Court, a private thoroughfare owned by Can-Euro, and over property owned by Can-Euro. Can-Euro was ordered to maintain that easement. Any development on the MT&T site is subject to Policy H-18 and implementation Policies IP-5 and IP-1(c). The preamble to Policy H-18 states that "Access to the MTT site requires resolution prior to consideration of any development proposal." The Agreement which Council approved proposed a development on the MT&T site and on one-half of the Stub. An amendment to the Agreement described the Stub portion as "non-substantial," and provided that the developer could submit a revised site plan showing how the MT&T site would be developed without it.

[44] Can-Euro's appeal raises several issues which relate to access:

(a) whether access to the MT&T site was resolved as required;

(b) whether the Board exceeded its jurisdiction in considering matters relating to private property rights;

(c) whether it erred in law in failing to provide procedural fairness in relation to its determination of access issues; and

(d) whether it erred in law in reaching its findings relating to issues of access.

[45] According to Can-Euro, the issue of access to the MT&T site had not been resolved as stipulated in the preamble to Policy H-18 and, therefore, the Board erred in determining that the decision of Council to enter into the Agreement reasonably carries out the intent of the MPS. In its July 23, 2007 decision, the Board disposed of this argument thus:

> [168] The preamble to Policy H-18 states: "Access to the MT&T site requires resolution prior to the consideration of any development proposal". The Board finds that the intent of this sentence within this policy of the MPS is to ensure that the MT&T site has access to it from a public street and is not land locked before there is any development on this site. The Board finds that pursuant to the Court Order, there is access to the MT&T site from a public street for this development

> and that the Court Order is not negated by the agreement containing a commercial component. The lands had been zoned Industrial at the time the easement was granted and the Court has clearly stated that the easement "shall be for passage of persons and vehicles for all purposes associated with the use and enjoyment of [the MT&T site]." This sentence in the preamble to Policy H-18 does not require other access issues to be resolved, including whether there is access to the Stub or access to the north end of Horizon Court pursuant to the 1981 right-of-way. These latter two legal questions were not necessary for the Board's decision in this case and therefore were not answered. Furthermore, the MPS does not require permission from the Province before Council adopted its Development Agreement with Dexel.

[46] The history of the litigation concerning the easement to the MT&T site supports the Board's finding as to the intent of the sentence in the preamble to Policy H-18. When Policy H-18 was approved, the matter of access to the MT&T site was still before the courts. Justice Kelly's order declaring that that property had an easement "for the passage of persons and vehicles and for all purposes associated with the use and enjoyment of [it]" issued after the MPS amendment which created Policy H-18. That time-line provides an explanation for the reference in the preamble to the need to resolve access to the MT&T site.

[47] Moreover, the statement regarding access upon which Can-Euro relies is not found within Policy H-18 itself, but only in its preamble. A preamble to a policy may provide context for understanding the policy; however, it is the policy itself that guides council. In *Kynock v. Bennett*, [1994] N.S.J. No. 238 (Q.L.), 131 N.S.R. (2d) 334 (C.A.), the respondent referred to the preamble to a policy in arguing that the Board failed to consider a factor. This Court stated:

> **[43]** With respect, the council was required to have regard to those matters set out in Policy P-24 in determining whether or not to approve a quarry operation in a mixed use area. The preamble merely identified what problems have given rise to the need for controls but it is Policy P-24 which spells out the matters that Council is to consider. ...

See also *King's (County) v. Lutz*, 2003 NSCA 26 at ¶ 50.

[48] In my view, in determining whether Council's approval of the Agreement reasonably carries out the intent of the MPS, the Board did not commit any error of law in its approach to the weight, if any, to be given to the preamble to Policy H-18.

[49] I turn then to Can-Euro's submissions that the Board exceeded its jurisdiction by considering matters relating to private property rights as between two adjacent land owners, and that it erred in law by failing to provide procedural fairness in relation to its determination of access issues.

[50] According to Can-Euro, the terms of the Agreement raised numerous questions relating to access to the MT&T site, including whether the Stub benefits from the easement to the MT&T site on consolidation, whether increased traffic resulting from the commercial uses results in an excessive usage of the easement, and whether the Agreement results in increased burdens upon Can-Euro's servient tenement beyond those contemplated by Justice Kelly's order. The Board decided that it had jurisdiction by the doctrine of necessary implication and pursuant to s. 22 of the *URB Act* to determine these questions. It found that it was unnecessary to deal with the issue of access to the Stub because it was so small in comparison to the overall size of the property proposed for development, Council had declared it non-substantive and the Agreement may proceed without its acquisition, with the further approval of Council: July Reasons, ¶ 147. As to the effect of a development with a commercial component, the Board found that there was no enlargement of the original easement and that a commercial usage of the easement did not negate access to the MT&T site from a public street: July Reasons, ¶ 163.

[51] All of the issues Can-Euro raises regarding the Board's jurisdiction and private property rights relate to the issue of access and are founded on the appellant's submission that the statement in the preamble to Policy H-18 amounts to a condition precedent which is met only if all questions which might pertain to access are resolved. I have already determined that the Board did not commit any error of law in disposing of the appellant's argument in this regard. In these circumstances, I need not address the Board's conclusions as to jurisdiction or its answers to these questions on access. I expressly make no comment in regard to any of them.

[52] I do find it curious, and inconsistent with its position before the Board, that Can-Euro submits that the Board exceeded its jurisdiction. It had raised these issues pertaining to access to the Stub, excessive usage and increased burden at the Board hearing. However, there it was not Can-Euro, but rather HRM and Dexel,

which had challenged the Board's jurisdiction to consider them. This is evident from the Board's July 23, 2007 decision:

> [133] Both Respondents [HRM & Dexel] argued that the Board lacks jurisdiction and is not permitted to answer the legal questions. Specifically, Dexel states that neither the Board nor Council are the arbiters of the legality of access, stating at paras. 69 and 74 as follows:
>
> > 69 With respect, any arguments about "legal" access and the change in use is beyond the jurisdiction of the Board in the planning appeal. Neither the Board nor Community Council is the arbiter of the "legality" of access and if Can-Euro disputes the burden imposed upon Horizon Court whether by the addition of half of five parking spots or by a mixed use residential/commercial development, the forum is the Supreme Court.
> >
> > 74, ... The issue of legal access and a change of use of the easement is beyond the jurisdiction of the Board.
>
> The Board disagrees.

[53] In any event, even if the preamble to Policy H-18 had required the resolution of all access issues, Can-Euro's submission regarding the necessity of determining access to the Stub is without merit. When Council approved the Agreement, and when the Board heard Can-Euro's appeal, Ollive Properties did not own the half-portion of the Stub adjacent to the MT&T site. Nor had that land been consolidated with the MT&T site. Site-specific Policy H-18 applies only to the MT&T site. Can-Euro did not establish that the Stub is subject to Policy H-18, or to its preamble. The description that counsel for Dexel gave this argument is apt: the Stub is "a red herring."

[54] If Ollive Properties should acquire that half portion of the Stub and if access over Horizon Court or other land owned by Can-Euro to it should become an issue, either Ollive Properties or Can-Euro can bring proceedings in the Nova Scotia Supreme Court to resolve the matter. Can-Euro's arguments that increased traffic from commercial uses would mean excessive use of the easement to the MT&T site and that the Agreement creates unanticipated burdens on the servient tenement pertain to the scope and nature of the Nova Scotia Supreme Court declaration of an easement and right-of-way "for the passage of persons and vehicles and for all

purposes associated with the use and enjoyment" over Can-Euro's land to the MT&T site. Any such questions or disagreements concerning that easement should be determined by the same body that issued the order, namely the Nova Scotia Supreme Court. Its jurisdiction to do so was not disputed by the respondents before the Board, or by the appellant before the court.

[55] Finally, I reject Can-Euro's argument that the Board erred in law by failing to invite the parties to call evidence and make submissions on the questions relating to access and that the appellant was denied the right to be heard on them. Can-Euro knew that issues regarding access were before the Board — after all, it was Can-Euro which raised them. Moreover, the considerable evidence which the parties led on these questions is reflected in the Board's decision: July Reasons, ¶ 152-163.

The Impact of the Agreement

[56] I then move to Can-Euro's ground of appeal relating to the impact of the Agreement on Horizon Court. It raises several questions:

(a) whether the Board erred by failing to assess the traffic impact of the proposed development of the MT&T site on Horizon Court, regardless of its status as a private street;

(b) whether it considered bicycle and pedestrian movement in the area; and

(c) whether it considered the impact on an adjacent land use, namely, the future build-out of Can-Euro's lands in the area.

According to Can-Euro, had the Board given these matters proper consideration, it would have had to conclude that the Agreement did not reasonably carry out the intent of the MPS.

[57] Much of the hearing before the Board was devoted to matters relating to traffic, including projections as to the volume likely to result from the proposed development, its peaks and ebbs, intersection capacities, etc. The Board clearly understood that traffic was a critical consideration in determining whether

Council's approval of the Agreement reasonably carried out the intent of the MPS. It described the traffic issues as "central to this appeal": July Reasons, ¶ 303. It received in evidence traffic impact studies prepared by Kenneth O'Brien on behalf of Dexel, a traffic and transportation review prepared by Roger Boychuk on behalf of Can-Euro, and an expert opinion prepared by Alan Taylor, an expert in transportation engineering and transportation planning, which provided some further analysis of the reports of Mr. O'Brien and Mr. Boychuk, on behalf of HRM. It heard oral evidence on the traffic issues from all six experts who testified on behalf of the parties.

[58] The Board also had the Lea Study, the traffic study for the area that had been prepared in 2000, which it described as "very robust in its analysis": July Reasons, ¶ 317. The Lea Study made certain assumptions in examining the adequacy of the streets to accommodate future development in the MicMac Mall area. For example, it assumed 300,000 square feet of Mall expansion, 300 additional units on the lands owned by Can-Euro and 80 condominium units on the MT&T site. At the time Council considered the traffic information pertaining to the Agreement, only 22,000 square feet of retail space had been added to the Mall, Can-Euro was in the process of constructing 144 units, and the Agreement contemplated 168 on the MT&T site.

[59] In its July 23, 2007 decision, the Board stated:

> [363] . . . The Board received extensive evidence on the studies, the traffic count volume and their comparisons between the various studies before the Board. The Board found that the most relevant studies for it to consider these issues were those studies that were before Council at the time it made its decision, being Mr. O'Brien's June 2005 study, which incorporated the traffic volume counts from the Lea Study and Mr. Boychuk's study which provided a traffic analysis prepared for the Appellant and is the foundation for its arguments in this appeal.

[60] The June 24, 2005 traffic impact analysis prepared by Mr. O'Brien ("O'Brien TIA") included Table 1 showing peak hour trip generation estimates for 88 condominium units, 25,670 square feet of office space, and 5,000 square feet of retail space. The use of 88 units for the estimates is not disputed. Although Dexel proposes 168 units, the Lea Study had already incorporated the effect of 80, so only the 88 additional units needed to have their traffic impact studied.

[61] Can-Euro's argument that the Board failed to assess the traffic impact on Horizon Court focusses on the commercial component of the proposed development. The Agreement as approved allows for a maximum of 30,000 square feet of commercial space. The permitted uses described in the Agreement were professional business offices, retail or service uses no greater than 5,000 square feet, medical clinics and uses accessory to the foregoing. The restrictions on the types of permitted uses and the limitation on the square footage for retail or service uses were methods by which HRM sought to control the commercial development on the MT&T site. As noted earlier, the community had indicated during the WAEP that it supported multiple unit residential and/or office uses, but not a major retail facility.

[62] The Agreement does not specify the division of the commercial space between office space and retail space as set out in that O'Brien TIA table. Can-Euro submits that if the breakdown between office and retail space in the development as constructed on the MT&T site should be substantially different than that in the O'Brien TIA, and if the type of businesses should be or include those which generate considerable traffic, the peak hour trip generation estimates which the Board considered could be significantly higher. It also argues that should that be the case, Can-Euro's future development on its remaining lands in the MicMac Mall area could be negatively affected or precluded.

[63] In its submission that the Board erred by relying on the O'Brien TIA, Can-Euro alleges that the Board identified the O'Brien TIA as the most relevant study. This was not the case. The Board found that the O'Brien TIA and the review which Mr. Boychuk prepared and upon which Can-Euro's arguments pertaining to the traffic issues were based, were the most relevant reports: July Reasons, ¶ 363.

[64] The Board recounted the appellant's main concern with the O'Brien TIA, namely, that its assumptions as to the types of commercial retail space are inaccurate and arbitrary and high volume traffic could result. It conducted a detailed analysis and comparison of the O'Brien TIA which used the Lea Report as its baseline and Mr. Boychuk's traffic review. In regard to the latter, the Board stated:

> [369] Only scenarios 2 or 3 of Mr. Boychuk's report are to be considered by the Board in this appeal, the difference between the two are their commercial assumptions. Scenario 2 uses the assumptions of Mr. O'Brien generating 94 trips

> above those estimated in the Lea Study. Scenario 3 adds the additional trips generated by retail space consisting of a coffee shop, sit-down restaurant, convenience store and a specialty retail shop ("Boychuk's commercial assumptions"). He notes on page 7 of his report these commercial assumptions will result in an increase of 304 trips.

[65] It concluded:

> [370] At the end of the extensive facts and the analysis, the difference in their commercial assumptions has very little impact on the adequacy of the transportation networks because the O'Brien traffic study considered in Council's decision has a different and more robust traffic volume baseline than the existing traffic counts plus Can-Euro's building under construction used in Mr. Boychuk's report.

According to the Board then, even taking into consideration the full expanse of Mr. Boychuk's commercial assumptions which were higher than in the O'Brien TIA, the transportation networks would perform at a satisfactory level. It also determined that using the commercial assumptions of either Mr. O'Brien or Mr. Boychuk, the traffic volumes for peak hours determined by Mr. Boychuk, except one, are less than those projected in the O'Brien TIA.

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

[67] I also see no merit in Can-Euro's argument that the Board erred in law by failing to consider the impact of the Agreement on bicycle traffic and pedestrian movement in the area of the MT&T site. Policy IP-1(6) calls on Council to have regard to controls by way of agreements on developments with commercial uses, and lists a number of matters. Its (v) refers to "provisions for pedestrian movement and safety". Can-Euro submits that Council should have required the building of sidewalks and cross-walks from the MT&T site to MicMac Boulevard.

[68] It is apparent from the Board's review of the evidence and its analysis contained in [391] to [417] of its July 23, 2007 decision that the Board fully understood the concerns raised by Can-Euro and others regarding the lack of a sidewalk along Horizon Court to MicMac Boulevard and the complications in this regard flowing from the private ownership of Horizon Court. It observed that although that route is the shortest path from the MT&T site to that public street, the Agreement which Council approved provides for sidewalks around the proposed development and required a path to be built to the HRM lands of Maybank Field Park which borders MicMac Boulevard. That path provides pedestrian access from the MT&T site to MicMac Boulevard over lands owned by the parties to the Agreement. According to the Board, in all the circumstances before it, Council had reasonably carried out the intent of the MPS in consideration to pedestrian movement: July Reasons, ¶ 417. It also noted that experts had given evidence that pedestrian traffic in the area is light and that sidewalks along Horizon Court were not required for the reasonable safety of pedestrians.

[69] The decision of the Board was explained clearly and was amply supported by the evidence. Again, I am not persuaded that the Board committed any error of law and I would dismiss this ground of appeal.

[70] I next consider Can-Euro's submission that the Board erred by failing to consider the impact of the proposed development on an adjacent land use, namely the future build-out of Can-Euro's remaining land. The appellant challenges the Board's characterization of its future development and relies on one of the implementation Policies.

[71] When the Board heard its appeal, Can-Euro had not applied to develop its remaining lands in the MicMac Mall area. The appellant objects to the Board's description of its future developments as "speculative", and argues that its use of the land was "probable". In this regard, Can-Euro points to Policy H-17, the Lea Study and letters in May 2005 from Can-Euro, or its counsel of the time, to HRM. Site-specific Policy H-17 applies to Can-Euro's remaining lands. It contemplates development for multiple unit residential use. The Lea Study included assumptions that those lands would be developed for that use. However, the existence of this material does not mean that development will necessarily follow. That is a decision for the owner who will weigh multiple factors in deciding the type and

size of development and when, if ever, to proceed. The May 2005 letters, to which our attention was drawn at the hearing of the appeal, do not establish that Can-Euro had any firm intention to develop its remaining lands.

[72] Can-Euro points to *Elderkin, Re*, 2004 NSUARB 94 in which the Board considered future development plans. However, that case is distinguishable on its facts. Here, there was no planned development by Can-Euro for Council to consider.

[73] The appellant also directs our attention to Policy IP-1(c)(2) which applies to Can-Euro's undeveloped lands, as well as to the MT&T site. Among other things, that implementation Policy states that Council shall have regard to the proposal's compatibility and consistency "with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal."

[74] In my view, Can-Euro's reliance on this Policy is misplaced. It deals with the compatibility of the proposal before Council, which here is that for the MT&T site, with adjacent uses and existing development forms. That it does not require a proposal to comply with a possible future development on adjacent lands is supported by another of its provisions, Policy IP-1(c)(6), which refers to controls on proposed developments to "ensure compliance with approved plans and coordination between adjacent or near by land uses and public facilities." (Emphasis added)

[75] It is also noteworthy that Can-Euro's own traffic engineering expert, Roger Boychuk, took into account only existing developments or developments that are approved or have a level of certainty about them, plus the Lea Study which suggested future development, in preparing his transportation review. Can-Euro's expert planner, Jenifer Tsang, was of the view that the future plans for its lands was not an appropriate factor to consider and did not do so in providing her opinion. Similarly, Dexel's witness, Kenneth O'Brien, testified that the HRM Traffic Impact Study Guidelines requires consideration of those developments that are either under construction or approved for construction.

[76] In my view, Can-Euro failed to meet the burden of establishing that, by not considering the future build-out of its remaining property, the Board erred in law,

when deciding if Council's approval of the Agreement was reasonably consistent with the MPS.

Disposition of Can-Euro's Appeal

[77] I would dismiss the appeal.

Dexel and HRM's Cross-Appeals

[78] As indicated earlier, the MT&T site is zoned R-3 medium density residential. Policy H-18 provided that

> . . . Notwithstanding the Residential Designation and R-3 zoning, office development with [associated] retail [uses] including but not limited to small restaurants, pharmacy and/or convenience store may also be considered by development agreement pursuant to the provisions of Policy IP-1(c).

The Agreement that Council approved allowed for two multiple unit residential buildings, with ground floor commercial space of no more than 30,000 square feet.

[79] Clause 2.2 of the Agreement, which is headed "Permitted Uses," includes a subclause 2.2.2 which sets out particulars regarding the commercial component. The Board's order dated November 19, 2007 amended the Agreement by adding restrictions to that subclause. The Board's amendments are shown underlined in the following extract from its order:

> Consequently, subclause 2.2.2 shall read as follows:
>
> > 2.2.2 In addition to 2.2.1, no more than 30,000 square feet of ground floor commercial space is permitted. Such commercial space should be intended to serve the local community and shall be limited to:
> >
> > a) professional/business offices (e.g. legal, insurance, real estate);
> >
> > b) individual retail or service uses no greater than 5,000 square feet each such as convenience stores (e.g. food, video); specialty retail (e.g. bakery, deli, gifts); personal service shops (e.g. tailor, hair salon); sit down restaurants,

> cafes, coffee shops; banks; and pharmacies; provided the cumulative square footage of the retail space shall be less than 50% of the 3,000 square feet of permitted commercial space;
>
> c) medical clinics;
>
> d) uses accessory to any of the foregoing uses.;
>
> e) retail space may not operate more than 16 hours per day; and
>
> f) the above shall not include any drive-through operations or services, adult entertainment, drinking establishments, amusement centres, and/or fast food restaurants.

[80] In its cross-appeal, HRM maintains that the decision of Council to enter into the Agreement reasonably carries out the intent of the MPS, and that the Board erred in ordering these amendments. For its part, Dexel says that because the Agreement as ordered amended by the Board does not affect its development as planned, it could accept the amendments. However, in its cross-appeal, it takes the same position as HRM, namely, that the original Agreement as approved by Council was reasonably consistent with the intent of the MPS and, accordingly, should stand.

[81] HRM and Dexel's cross-appeals raise numerous and similar grounds. I need address only these two:

> 1. Did the Board err in law in the exercise of its jurisdiction under s.251(1)(c) and s.251(2) by rendering an incongruous and perverse decision, finding that Council's decision did not "reasonably" carry out the intention of the MPS in relation to the commercial component of the development thereby allowing the appeal but then, ordering only "very minor changes" to the Development Agreement to render it "reasonably" consistent.
>
> 2. Did the Board err in law in its articulation and application of the Board's reviewing authority granted under s.251(2) of the ***Municipal Government Act***, S.N.S. 1998, c.18, as amended, i.e. not to allow an appeal unless the decision of Council does not reasonably carry out the intention of the MPS

> (a) in attempting to identify one correct interpretation of the Municipal Planning Strategy ("MPS") and failing to recognize reasonable interpretations of the MPS.

[82] My analysis begins with s. 251(1) of the *MGA*. It sets out the powers of the Board after hearing an appeal from Council:

> 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;
>
> (d) allow the appeal and order that the development permit be granted;
>
> (e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan. (Emphasis added)

[83] As discussed earlier, s. 251(2) of the *MGA* specifies just when the Board can allow an appeal. I reproduce it for convenience here:

> 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.

[84] Among other things, the Board considered the residential and limited commercial uses proposed for the MT&T site. Its July 23, 2007 decision concluded:

> [444] The Board finds that Council's decision of entering into the Agreement with Dexel has reasonably carried out the intent of the MPS, except for three minor aspects of the commercial content of the building, which were not intended by the Developer nor specifically contemplated by HRM. These require minor amendments to be made to the Agreement. (Emphasis added)

[85] Its November 19, 2007 order allowed Can-Euro's appeal. It follows that the Board determined that the decision of Council did not reasonably carry out the intent of the MPS. That is the only circumstance under which the Board can allow an appeal according to s. 251(2) of the *MGA.*

[86] The Board's order also approved the Agreement with its subclause 2.2.2 amended to add limitations to the square footage and hours of operation of the retail space, and to exclude certain types of businesses. HRM had already imposed controls over the commercial uses by setting out in the Agreement restrictions on the types of permitted uses and the size of the retail and services uses. As the Board noted in its reasons, the evidence did not suggest that Dexel intended any of the types of businesses prohibited by the Board's amendments, nor retail spaces or hours beyond those imposed by those amendments.

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

[88] In *Midtown Tavern,* supra, this Court set out the correct approach to be taken by the Board in answering the fundamental question set out in s. 251 of the *MGA*, namely: can it be said that the decision of Council 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, J.A. noted:
>
> > ¶ 99 ... 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. In this case that would be the **Planning Act**, the **Heritage Property Act**, the objects and purposes of the planning policies of the City and the application of the policies by Council. 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.. I agree with Côté's observations that if the goal of interpretation is to reveal the intention of the law maker there is also an implicit objective of interpretation "to find a reasonable solution to a genuine and concrete problem". *The Legislature recognized this when it enacted s. 78(6) of the **Planning Act**. In short, the Board must determine if a municipality's interpretation and application of a planning policies with respect to the development agreement decision in issue was one that the language of the policies would reasonably bear*. [Emphasis added.]

[89] Although the Board set out the test in s. 251 of the *MGA* and referred to this case in its decision, it failed to follow the clear direction set out in *Midtown Tavern*. Instead, the Board imposed its own interpretation of the MPS in regard to the commercial component.

[90] That this is the process the Board followed is evident from these passages from its July 23, 2007 decision:

> [107] Section 251(2) requires the Board to conduct a comparative analysis between the decision of Council and the intent of its MPS. The standard of analytical comparison between the two is "whether the former reasonably carries out the latter". Before a comparison can occur between these two, the Board must determine what each is.
>
> ...
>
> [109] As the test requires a comparative analysis, the Board must determine and disclose in its reasons what the intent of the MPS is in order to make a determination of whether Council's decision reasonably carries out that intent.
>
> ...
>
> [116] To do the comparative analysis of whether Council's decision reasonably carries out the intent of the MPS, the Board must first determine the intent of Policy H-18.

[91] These passages show that Board sought first to ascertain the intent of the MPS, and then compared what it determined was the intent against what Council had decided. In order to ascertain the single intent of the MPS, the Board dove into a detailed analysis of the proposed development against the criteria in Policy H-18 and its implementation policies. It concluded how, in its view, the MPS should be interpreted.

[92] Clause 2.2.2 of the Agreement already specified that the commercial space should be intended to serve the local community and limited the types of uses. The floor plans contained in its schedules specified the layout of the ground floors, including the size of the commercial spaces, whether office or retail. Dexel would have to apply for approval of any changes. Yet the Board imposed an additional restriction limiting the cumulative area of the retail space to less than 50% of the commercial space. Although nothing in Policy H-18 and its implementation policies require Council to consider hours of operation, the Board did so and restricted them. Although Dexel did not propose, and neither the Agreement or its plans referred to any drive through operations or services, adult entertainment, drinking establishments, amusement centres or fast food restaurants, the Board

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

[93] As indicated earlier, municipalities are primarily responsible for planning decisions: *MGA*, s. 190. In making such decisions, council must be accorded considerable latitude in striking a balance among the competing interests recognized by the *MGA: Tsimiklis* at ¶ 24. The discretionary decisions of the elected members of council are entitled to deference from the Board: *Midtown Tavern* at ¶ 28.

[94] In taking the approach it did, the Board failed to ask itself the critical question: can it be said that the decision of Council does not reasonably carry out the intent of the MPS? It did not focus on the overall appropriateness of the development in view of the applicable planning requirements. Here site-specific Policy H-18 authorizes development agreements for multiple unit residential use and office development with associated retail uses on the MT&T site. The development the Agreement proposed consists of 12 stories of residential uses and two of commercial uses, with numerous restrictions on the permitted uses within the development. Its uses were those contemplated by Policy H-18. Implementation Policies IP-5 and IP-1(c) state that Council is to “consider” and to “have regard” to certain criteria. They do not stipulate how these are to be weighed, nor do they demand a single outcome. Council had a range of choices which could reasonably carry out the intent of the MPS.

[95] The Board’s intrusive approach of determining what it considered the single intent of the MPS, comparing it to what Council had decided, and then through its Order finessing the Agreement to make it perfectly comply with its own view could complicate and confuse negotiations between parties to development agreements, add uncertainty to the planning process, and lengthen hearings. The Board erred in law by failing to follow the approach set out in *Midtown Tavern, supra* in determining whether the decision of Council does not reasonably carry out the intention of the MPS. I observe, however, that although the Board’s analysis did not comply with the *MGA* and jurisprudence, it was less rather than more deferential to Council’s approval than is appropriate. Accordingly, it was not prejudicial to Can-Euro.

Disposition of the Cross-Appeals

[96] I would allow the cross-appeals.

Summary

[97] I would dismiss the appeal and allow the cross-appeals. The November 19, 2007 order of the Board is reversed and the January 5, 2006 decision of Council which approved the Agreement is confirmed.

[98] *Rule* 62.27 provides that no costs are awarded on a tribunal appeal unless ordered by this court in its discretion. Cases where the court exercised its discretion and awarded costs on appeals from the Board's decisions include *Creelman v. Truro (Town)*, 2003 NSCA 96, *Lewis v. Halifax (Regional Municipality)*, 2001 NSCA 98, *Certain Ratepayers of Chester (District) v. Chester (District)*, 2000 NSCA 19, and *Heritage Trust*. Can-Euro failed to establish that the Board made any error of law. Site-specific Policy H-18 contemplates the very type of development, and the permitted uses, proposed in the Agreement. Dexel and HRM succeeded in their cross-appeals. Dexel sought costs of $2,500 to $3,000; counsel for Can-Euro indicated that were the court to award costs, he could not take issue with that range. In all the circumstances, I would award costs of $3,000 to Dexel, together with disbursements as agreed or taxed. HRM not having sought costs, none are awarded.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.