Date: 19990104 Docket: C.A. 148472

NOVA SCOTIA COURT OF APPEAL
Cite as: Creelman v. Duke Street Area Residents, 1999 NSCA 174
Chipman, Hart and Cromwell, JJ.A.

BETWEEN:

CALDER CREELMAN Peter M. Rogers	)	for the Appellant
Appellant	)	
	)	Duke Street Area
- and -	)	Residents not appearing
	)	
	)	Utility & Review Board
DUKE STREET AREA RESIDENTS and NOVA SCOTIA UTILITY and REVIEW BOARD and TOWN OF TRURO	)	not appearing
	)	Gary A. Richard
	)	for the Town of Truro
Respondents	)	Appeal Heard:
	)	December 3, 1998
	)	Judgment Delivered:
	)	January 4, 1999

THE COURT: Appeal allowed per reasons for judgment of Hart, J.A.; Chipman and Cromwell, JJ.A. concurring.

HART, J.A.:

On March 21st, 1997, the appellant, Mr. Creelman, applied to the Town of Truro to enter into a development agreement which would allow the construction of a 3-storey, 12 unit apartment building.

The appellant owns several lots of property located at or near the corner of Duke and King Streets in the Town of Truro. The development agreement would apply to two of those lots, one known as 22 Duke Street and a large vacant lot of irregular shape which is located to the south of 22 Duke Street and adjoins 22 Duke Street. As part of the development agreement, the vacant lot and the lot known as 22 Duke Street would be consolidated to form one lot to which the development agreement would apply.

The Truro Town Council referred the matter to its Planning Advisory Committee for a report. They met with Mr. Creelman on May 21st, 1997, and again on May 26th, 1997, and then requested that the Town Council set a hearing date which was set for July 7th, 1997, at 2:30 p.m. and advertised in the usual way. The Town Planning Advisory Committee met prior to the hearing date and heard objections from David Parker on behalf of a group of residents who are respondents in this appeal. The Committee asked that the public hearing be adjourned and it was moved forward to October 6th, 1997, based on the recommendation from the Town Planning Advisory Committee. There were two more meetings of the Advisory Committee and on September 29th they passed

a motion to recommend that Council approve the proposed development agreement.

On October 6th, 1997, the Town Council held a public hearing concerning the proposed development agreement. After a lengthy discussion and debate, including discussion concerning the means of access to the site, a motion was put forward by Councillor Mills, which was seconded by Councillor Phipps that Council enter into a development agreement with the appellant. This motion was passed unanimously and all town councillors were in attendance.

The Duke Street Residents appealed to the Nova Scotia Utility and Review Board and their appeal was heard on March 27th and March 31st, 1998. The Board allowed the appeal and referred the matter back to Council for further consideration.

The Board hearing was conducted by Linda D. Garber who heard testimony from 14 residents of the Duke Street area who objected to the granting of the development agreement, from Mr. Creelman in support of the development agreement, and from Peter Nelson, the Town's development officer and planner. Mr. Nelson was the only expert qualified to testify before the hearing and his evidence was in support of the granting of the development agreement.

Before the hearings commenced, Ms. Garber made the following statement:

> ... because this hearing has - was rescheduled from yesterday I had originally understood that it would start at 10:30 today. I'm very concerned about the amount of time available and I thought it would be helpful if I made the following comments before we begin. First off the Board, the Clerk with me, Kirsten Greene, and I took the opportunity this morning to take a view of the subject property and the surrounding area. We drove into the centre of the parking lot and did drive around that block several times.
>
> There has been considerable amount of material filed, I have read all of the material filed, including the briefs that have been prepared by both the Appellant and the Town, but I have not viewed the video tape that was submitted. There are a number of arguments being presented concerning procedural irregularities about the way that the Council perhaps proceeded. I think it's important to note that the Board has held in the past, and the Court of Appeal has confirmed that the Board does not have jurisdiction to decide the merits of this appeal based on any failure by Council to comply with any procedural requirements. The Board's role on an appeal under s. 78 of the Planning Act is to determine whether the proposed development agreement is consistent with the intent of the M.P.S. and whether Council's decision to enter into a development agreement is reasonably consistent with the intent of the M.P.S., and what that means is that Council could have done all sorts of things improperly in the minds of various parties but the Board is restricted to looking at whether the Council's decision, how it relates to the Municipal Planning Strategy, that's the test that this Board is charged with. When there are issues about procedural irregularities the Courts have determined that it is the Courts that deal with that issue. So I just put that on the record now since that has been addressed in some of the briefs.
>
> I also wanted to note that in reviewing the relevant M.P.S. policies and the reports, I noted that there has been little discussion of Policy URC-22. It's my understanding that is the policy under which Council purported to find authority to consider the proposal. This policy appears to the Board to permit the conversion of existing dwellings. It is not clear to the Board how this policy operates with respect to vacant property. The Board anticipates that the parties will deal with this issue and indicate under what, it did not seem to have been as subject to as much discussion as the implementation policies were in the report and in some of the arguments that have been filed.

In her decision, Ms. Garber stated that most of the appellants owned heritage properties in the immediate area of the proposed apartment building and that they were concerned about the design and size of the building and

whether such a development is proper for the area. They were also concerned about losing the vacant lot as a play area for children and expressed concerns about traffic and potential run-off from the site from the paved parking area.

She further stated that the neighbourhood is zoned as residential/mixed use zone (R-7). Most of the homes in the area are older homes. Some have been converted to apartments and professional offices. Another apartment building had already been constructed at 77 Willow Street but was well set back from the street.

She stated that the vacant lot is to be consolidated with 22 Duke Street which will provide frontage on Duke Street of 50 feet. The existing home at 22 Duke Street is to be converted to a duplex. Access to the duplex and the apartment building was to be provided by a shared driveway with 18 and 22 Duke Street but she stated that this issue is not addressed in the proposed development agreement. The subject property also includes a 20 foot right-of-way to King Street which the applicant shares with others, including one of the respondents.

After stating that many of the complaints raised by the Duke Street residents were procedural in nature and that the Board had no jurisdiction to deal with them she went on to deal with the Municipal Planning Strategy as follows:

> The Town's Municipal Planning Strategy (M.P.S.), adopted in 1992, has a separate chapter dealing with the urban core. There are various areas within the urban core. Duke and King Streets are within Revitalization

Area I of the Urban Regional Core area of Truro. This area has a number of the "Town's most significant examples of early architecture which could potentially be jeopardized due to increased development pressures." The area is zoned Residential/Mixed Use Zone (R-7) which permits single detached dwellings and converted dwellings to four units. Sections 3.2 and 3.2.1 and Policy URC-22 of the M.P.S. deal specifically with residential development in Revitalization Area I and read as follows:

3.2 Urban Regional Core Revitalization Area Designations

The 1983 Municipal Planning Strategy identified and designated three areas within the downtown core as revitalization areas. The premise for their delineation was that such areas encompassed some of the Town's most significant examples of early architecture which could potentially be jeopardized due to increased development pressures. Concerns regarding the future integrity of these areas are still very evident today with particular emphasis on the compatibility of new construction in existing districts.

Outside of the urban core commercial areas, residential land uses are the most predominant. These areas of the Town have some of the highest concentrations of residential density due to the amount of conversion and infilling that has taken place over the years. While this strategy has expanded the areas of the urban core in which business and commercial uses may establish, the revitalization areas are intended to remain primarily residential with some limited commercial uses.

3.2.1. Revitalization Areas I and II

Within the areas defined as Revitalization Areas I & II on the Future Land Use Map two types of development are intended to occur. These areas will permit residential development up to a maximum of 80 units per hectare by development agreement. Conventional development permits within these areas will be subject to the requirements of the single dwelling zone as set out in the Residential Chapter of this strategy. Existing single dwellings may be converted to up to four separate dwelling units, given that certain lot and structure sizes are met. The intent here is to maintain the appearance and character of areas where the designations are applied by discouraging the demolition or massive alteration of existing structures. Conversion to more than four units will be considered only by the development agreement as outlined in Policy 22 of this Chapter.

Policy URC-22

Therefore, it shall be a policy of Council to:
Permit a maximum of four units in a converted dwelling within the mixed dwelling unit zone; and consider applications for greater than four units only by development agreement. In evaluating such agreements, in addition to the criteria outlined in Section 3.3 of the Implementation Chapter of this strategy, the Developer shall include for Council's consideration, the following:

a) detailed external architectural representations indicating architectural preservation and/or continuity to be maintained and shall include:
- building plan(s) and details;
- building elevations;
- landscaping plans;

b) pertinent information with regard to the architectural and/or any heritage significance and effect of the development on overall street scape:
- architectural representations which may consist of photographs, drawings, or similar graphic means; and
- Council may consult its own professional advice as circumstances warrant such consideration.

Ms. Garber then stated:

The Board was unable to find specific comments in the M.P.S. dealing with the development of vacant land for residential purposes in Revitalization Areas other than zoning it for residential mixed use. The M.P.S. does have provisions for future commercial uses in the Revitalization Areas I and II.

Both the preamble to and the wording of Policy URC-22 refer to conversions of existing dwellings. Clause (a) of the Policy URC-22 requires the Developer to include for Council's consideration "detailed external architectural representation indicating **architectural preservation and/or continuity to be maintained"** [emphasis added]. This wording coupled with the other references implies that a development agreement is for the conversion of an existing dwelling.

Peter Nelson, Town Planner, testified that the intention of Policy URC-22 was to cover both conversions of existing dwellings and vacant property within the Urban Regional Core. He implied that it was always open to tear down an existing dwelling and replace it with a new apartment building. If that is the intention of the M.P.S., the wording throughout suggests otherwise. The preamble specifically states that the intention is "to maintain the appearance and character of areas where the designations are applied by discouraging the demolition or massive alteration of existing structures."

Although this issue had not been raised by the respondents before the Board, Ms. Garber concluded:

In the Board's opinion the wording of the M.P.S. clearly suggests that the intent of Policy URC-22 was restricted to conversions of existing dwelling either as of right to four units or by development agreement to greater

> than four units. The issue of the intent of Policy URC-22 was never discussed in any of the material that was before Council, nor is there any reference to it in the Minutes. The Board does not know if Council considered this issue.

When referring the matter back to Council for further consideration the Board stated:

> In the Board's opinion Council's failure to consider lot frontage and access and provide a waiver from the L.U.B. requirements means that the proposed development agreement is not consistent with the intent of the M.P.S. Given that the required frontage is more than double what the property has, this is not a minor matter. Council's decision cannot be said to be reasonably consistent with the intent of the M.P.S. This is an appropriate case to refer the matter back to Council for further reconsideration. The driveway to the property needs to be addressed by Council as well.
>
> The Board is inclined to find that the intent of Policy URC-22 is restricted to the conversion of existing dwellings. The Planner states that the Board's interpretation is not what Council intended when it adopted the M.P.S. The Board does not believe that Council considered the issue of whether URC-22 applies to this proposed development agreement. The Board has for other reasons determined that this matter should be referred back to Council for further consideration. As part of its reconsideration, Council should address the intent of Policy URC-22.

The "other reasons" for referring the matter back to Town Council refer to the failure of the development agreement to state that a waiver was granted to the requirement of a 100 foot lot frontage for an apartment building when only 50 feet was available on Duke Street. In discussing this matter, Ms. Garber stated:

> One of the issues that Council must consider under Policy IM-6 is whether the proposal is in conformance with the requirements of the Land Use By-law (L.U.B.) Implementation Policy IM-14 sets out the matters which shall be included in the development agreement. Clause (f) deals with any matter which may be addressed in the L.U.B. In clause 7 of the proposed development agreement the Town grants waivers of two L.U.B. requirements - one building per lot and reduction of the minimum rear yard setback.
>
> There are other aspects of the proposal which differ from requirements in the L.U.B. and which have not been addressed in the proposed

development agreement. One such requirement is lot frontage. A single dwelling in the R-7 Zone requires 20 metres or 65.5 feet of street frontage. Apartment buildings require a minimum of 30.5 metres or 100 feet. The proposal is to place an apartment building on a vacant lot which has no street frontage. The proposed development agreement calls for a lot consolidation with 22 Duke Street which has 50 foot frontage.

The issue of lot frontage was not addressed in Mr. Nelson's various reports. When questioned about this at the Board hearing, Mr. Nelson indicated that he considered this requirement satisfied by the existing frontage for 22 Duke Street as permitted by sections 4.6 and 4.8 of the L.U.B. which provide as follows:

> 4.6 Existing Undersized Lots
>
> Notwithstanding anything in this by-law, a vacant lot having less than minimum frontage or area required by this by-law, if such lot is separate from adjoining lots or parcels of land on the effective date of this by-law, may be used for a purpose permitted in the zone in which the lot is located and a building may be erected on the lot provided that the other applicable provisions of this by-law are complied with.
>
> 4.8 Existing Lots
>
> Notwithstanding anything else in this by-law, the use of a building, existing on a lot, on the effective date of this by-law, may be changed to a use permitted on the lot where the lot frontage or area required is less that the requirements of this by-law, provided that all other requirements of this by-law are satisfied.

In the Board's opinion, these two sections do not apply in this case. This is not a case of a vacant lot having less than the minimum frontage, this vacant lot has no frontage. While s. 4.8 would permit the conversion of the existing building on the existing lot at 22 Duke Street to two units, the proposal is to consolidate the two lots. The proposed building is to be built on the vacant lot, not on the existing Lot 22. This new consolidated lot cannot avoid the frontage requirements by relying on s. 4.6 and 2. 4.8 of the L.U.B.

If Council had considered this matter, it could have granted a waiver in the proposed development agreement as was done with respect to the minimum rear yard setback. Since the required frontage is double that which exists, this cannot be considered a minor matter.

The lack of frontage has contributed to one of the problems faced by the proposal: adequate vehicle access to the apartment building. Mr. Creelman considered various options. The proposal presented to Council calls for access through a shared driveway between 18 and 22 Duke Street. At present there is a narrow driveway for 18 Duke Street which is less than 16 feet wide. Mr. Creelman has entered into a written

document headed “Agreement” with the current owners of 18 Duke Street. The document calls for a 16 foot [wide] paved shared driveway. It is not stated to run with the land nor is there any evidence that the agreement has been registered at the Registry of Deeds. There are certain contingencies listed including the necessity to amend the development agreement in place with respect to 18 Duke Street.

The driveway to the parking lot for the apartment building must meet certain minimum requirements set out in the L.U.B. or Council must provide a waiver in the development agreement. The proposed development agreement for the subject property makes no reference to the document which Mr. Creelman has entered into with the owners of 18 Duke Street. The only reference to the shared driveway in the proposed development agreement is on the Site Plan which is attached as Schedule B-1. The only reference the Board could find in Mr. Nelson’s reports is a statement in the June 23rd report under policy IM-6 that “shared driveways are an acceptable means of site access”. There is no evidence before the Board that the necessary changes to the development agreement for 18 Duke Street have been made.

The proposed shared driveway is quite narrow for two way traffic. There are three other access routes, one through the main entrance to the medical centre from Duke Street which is a wide driveway, one to the rear of the medical centre building onto King Street, which is narrower, and a third via the 20 foot right of way onto King Street, which at present is only 12 feet wide. One of the problems is that the proposed location of the apartment building is not directly behind 22 Duke Street. It is behind 18 Duke Street. While the tenants will no doubt use whatever route they find convenient, the preferred access to and from the apartment building should be addressed in the text of the proposed development agreement. If the intention is to use the shared driveway with 18 Duke Street, then steps should be taken to ensure that proper documentation is prepared and registered and made a requirement of the development agreement.

The Board then concluded:

The Board determines that the proposed development agreement is not consistent with the intent of the M.P.S. and that Council’s decision is not reasonably consistent with the intent of the M.P.S. The Board refers the matter back to Council for further consideration.

Calder Creelman now appeals from the decision of the Utility and Review Board on the following grounds:

(1) that the Board erred in law and exceeded its jurisdiction in interfering with a decision of Council when such decision was reasonably consistent with the intent of the Municipal Planning Strategy;

> (2) that the Board erred in law in finding that the absence of a waiver from the L.U.B. requirements meant that the proposed development agreement was not consistent with the intent of the Municipal Planning Strategy;
>
> (3) Such other grounds as may appear.

The Town of Truro supported Mr. Creelman's appeal and no one appeared on behalf of the Duke Street Residents.

If the Board was correct in its determination that Policy URC-22 did not permit the building of an apartment unit on vacant land by a development agreement, it is difficult to understand why the matter was referred back to Town Council for further consideration. The agreement should have simply been quashed as not being in conformity with the Municipal Planning Strategy.

In my opinion, the Board was incorrect in holding that Policy URC-22 was restricted to conversions of existing dwellings and did not apply to vacant property in the area. The Town Planner, who was the only expert witness called at the hearing, gave a very reasonable and logical interpretation of the provisions of the Municipal Planning Strategy. The Planner was clearly of the view that Policy URC-22 enabled the development of vacant property or the conversion of existing units to more than four by use of a development agreement. His testimony was as follows:

> Q. Now, the Chair raised a point at the outset of this hearing with respect to some concern that she had about the application of Policy URC-22 to the present situation. Your planner's report indicates that this application proceeds by way of development agreement under URC-22.

> And we've heard the Board's reference to that policy and the concern. Can you address that now?
> A. Yes, I believe so. If the policy -- while - if I could have a copy of the policy in front of me I might make a better reference.
> Q. This is the Town of Truro Municipal Planning Strategy.
> A. Okay. There is reference to -- in under Policy URC-22, it sets up framework whereby, as of right, you can develop or convert dwellings up to four units. And I mean develop new or convert up to four units. Beyond four units you must do business with respect to residential development by development agreement only. And that's the primary intent of that policy. Its clearly put as I can say it.
>
> Now, with respect to some references, the fact that it confines itself to conversions only, was never the intent. Conversions perhaps creeps in there as a poor -- as one aspect of it. But the fact of the matter is if you wanted to develop a three-unit or a two-unit or a four-unit as a brand new structure and demolish and take out a structure, that's entirely within the possibilities under that policy. And if you wanted to do anything over four units then you would have to do that by way of development agreement.
>
> There is an overall intent in all the revitalization areas to pay attention to streetscape and to give, if there's nothing more, lip service, to the architectural character of the area. But it would need a much stronger policy definition in order to come up with a rather restricted policy. If we're going to limit it to conversions only, and indeed limit vacant lots to no development, I think we'd have to be far clearer with respect to our policy definitions and the regulations that would ensue.
>
> That's not the case here. I don't believe it was ever the intent of any of the Council [who worked?] and adopted this to do that at all.

Mr. Nelson went on to state that there had been no revitalization areas in the 1983 planning policy of the Town but they had been introduced in 1992 when the new Municipal Planning Strategy was developed. The idea of the revitalization areas was to prevent the older parts of town from collapsing and to encourage the development of residential units to support local commercial areas in that part of the Town. He stated that it was more of an economic development approach to the development of the core areas and the need was to preserve and increase the number of residents in the downtown core. His testimony continued:

> Q. Well, what I'm wondering specifically is was there an objective in the creation of revitalization area 1? And I'll focus on that because that's the

subject of this appeal. Was there an objective in the creation of revitalization area 1 with respect to the downtown core?
A. Yeah. The concept of revitalization is to enhance, make grow, and revi -- not necessarily to protect or preserve. And in this particular case, a lot of the way properties were evolving in that area, prior to that, they were in fact starting to come apart and fall apart quite severely at one point, with buildings being cut up and made into higher density uses, but without a whole lot of -- how should I put it -- consideration.

The whole question from that point was purely economics. We tried to marry the paying attention to streetscape and the quality of development with land use in order to encourage development in the area, encourage investment in the area. And that was done by allowing for higher density residential uses of the property infilling.

When dealing specifically with Policy URC-22 the Planner testified:

A. Okay. First of all, within the areas defined as revitalization areas 1 and 2 on the future land use map, two types of development are intended to occur.

> These areas will permit residential development up to a maximum of 80 units per hectare by development agreement, and conventional development permits within these areas will be subject to the requirements of the single dwelling zone, as set out in the residential chapter on 'Strategy'.

The first part of that just sets up that there's going to be two types of development which [you tend to build?] which is the business and residential. And residential is anything over four, falls into an R-3 or medium-density residential zone, which the 80 units an acre alludes to. That's sort of the -- or hectare, I'm sorry -- that's sort of the standard that you can develop to in a medium density zone.
Q. Anything beyond that would be what, high density?
A. High density, yes. And the -- so it's just indicating that these areas permit residential development up to a maximum of 80 units per hectare.
Q. So its' envisioned that revitalization area 1 would develop up to medium density but not into the high density?
A. Well, depending on the size of the lots you can get into the high density range. Medium to high-density development could occur in this area by development agreement. I don't think it's meant to limit it. Because when you start talking density it doesn't necessarily mean high rise. It can mean just the density of property.

So it's obvious that the revitalization areas 1 and 2 can develop to a pretty dense standard, yeah. And that would be medium to high-density standards by choice. That's the way it's always been interpreted from -- and I believe that the Councils are well aware that we've done them before in apartments.

And I guess we've eluded to 77 Willow Street on a couple of occasions in this hearing. And that was developed into a 12-unit apartment. And in that case they removed an existing house off the lot to do that. That was considered by Council and approved by Council and certainly well within the possibilities of things that could happen.
Q. Now, Policy URC-22, is the actual enabling policy for this

development, in your opinion, is that correct?
A. That's right, for revitalization area 1, certainly.
Q. And specifically, isn't it really the first sentence of that policy that sets out the premise that you're operating under?
A. Yes. It allows, as of right, a maximum of four units in a converted dwelling. Dwellings within a mixed residential zone. So basically it sets out the zone and says that in this zone, as of right, can have anything from a single-family home up to four units within that and can convert an existing structure certainly up to that.
Q. But there's two independent clauses separated by a semicolon that make up that first sentence, right?
A. That's right.
Q. So what -- you described what the first clause means. The second says, "And consider applications for greater than four units only by development agreement."
A. Yes. And that's where you depart on anything that says of a substantial -- or anything over four units can -- has to be developed by agreement. I agree that it would probably have been better if that was left to two sentences. That probably is, I don't know, the [form work?] that might have been drafted. It was certainly interpreted to be that anything over four units would be by development agreement and [inaudible] for those apartments [inaudible].
Q. Now, just to close that off, I'd like to direct you to the bottom of that page, that's page 60. And I wonder if you could read the last two sentences on that page? It starts with "In order to ..."
A. Yes.

> In order to ensure that any development does not conflict with the residential professional use is proposable only -- proposals will only be by development agreement. This will enable the Town a means of rationalizing relevant development concerns.

Q. Now, do you take the reference to new development to be limited to the development of dwellings into converted dwelling units?
A. No. That would be placing a very high restriction on the properties in the area and I would think it was not something contemplated at any time. It could be a whole range of applications of this kind of thing.

I think the best that these policies do towards setting up a preservation situation, streetscape or anything, is to allow Council the opportunity, through an agreement, to judge the merits of that application and how it fits within the confines of the existing community.

So it's a value judgment thing on part of Council. It opens a door where Council can make those value judgments, but it does not close the door and say that you can only develop in a specific way, a very restrictive way. I don't think any Council -- Council intended that at all.

In arriving at his interpretation of the Municipal Planning Strategy, the Planner considered the whole purpose of the scheme. In my opinion, his opinion which was the one that would have been presented to Council before the

development agreement was approved, is one which the Council could have readily accepted as being reasonable.

The Board, on the other hand, simply looks at the plain meaning of the Policy and claims that no reference was made to the intention of the Municipal Planning Strategy during the various meetings before Town Council and, therefore, its meaning had not really been considered.

I cannot accept this view, however, because there were lengthy meetings of the Town Planning Advisory Committee and of Council itself at which this argument could have been raised if anyone thought there was any merit to it. The Town Planner's interpretation throughout was to the effect that the Town had a right to develop vacant land in the region by development agreement and, in fact, his and the Committee's final recommendation to support the agreement would have allowed Town Council to interpret the M.P.S in the same manner. Council knew that part of the strategy was to increase the residential density of the area to be revitalized and that they could approve development up to a maximum of 80 units per hectare by development agreement. The area was not zoned as a heritage area and Council knew that the purpose was revitalization rather than stabilization.

As I mentioned earlier, it is my opinion that Ms. Garber incorrectly interpreted URC-22 to restrict Council's authority to conversion units when

entering into a development agreement for more than four such units and that she, therefore, was in error in finding that the decision of the Town Council to approve this development was contrary to its Municipal Planning Strategy.

The second reason given by the Board for referring the matter back to Town Council for reconsideration was that the agreement failed to include an express waiver of some of the provisions of the Land-Use By-Law, namely, the requirement of 100 foot of frontage for an apartment development and clearly documented evidence over the rights of access, ingress and egress to the property.

The appellant and the Town have argued that there is no requirement for an express waiver, either in the **Town Planning Act** or in the Municipal Planning Strategy. They say further that the Board is wrong when it finds that the lot upon which the apartment is to be built has no street frontage being an isolated lot to the rear of Lot 22 Duke Street. Because of the lot consolidation the 50 foot frontage of lot 22 becomes the frontage of the consolidated lot. Furthermore, the area is zoned R-7 and does not contain a frontage requirement for apartment buildings which can only be built by development agreement.

I accept both of these arguments. Neither the **Town Planning Act** nor the Municipal Planning Strategy require specific waivers of the L.U.B. and this

development agreement is premised on the consolidation of Lot 22 Duke Street with the area upon which the apartment units will be built.

Section 55 of the **Planning Act** contemplates the use of development agreements as an alternative to conventional zoning restrictions as a means of land use control. Truro's Land-Use By-Law contains a typical provision subordinating the usual zoning and other L.U.B. restrictions to the contents of development agreements. Section 4.23 of the L.U.B. states:

> **4.23 Uses Permitted by Agreement**
> Notwithstanding anything else in this by-law:
> (a) Council may by resolution under the authority of section 55 of the **Planning Act** and policies --- approve any so specified development which would not otherwise be permitted by this by-law.

This provision is mirrored by the Municipal Planning Strategy and Policy IM-13 which states:

> It shall be the policy of Council to consider certain developments which would not otherwise be permitted by the Land-Use By-Law by development agreement as provided for by policy of the Strategy.

Section 3.3.1 of Chapter XIII of the Municipal Planning Strategy states:

> A development agreement is a binding legal agreement entered into between a Town and a property owner. In such agreement a wide range of factors may be addressed that go beyond what may be considered under Standard Zoning Practices. All of the factors that may be addressed under zoning may be included as well as sites, specific information, hours of operation and maintenance requirements. The use of these agreements more properly addresses the concern of adjacent land owners and provides a greater degree of flexibility to the developer in fitting the neighbourhood. These agreements provide for termination by either party at which time the prevailing zoning in that property will come into effect. The property must then conform to

> those requirements.

Before the Town can consider a development agreement a great deal of information must be filed showing the proposal in graphic terms including street frontage and driveways.

It is obvious that the Planning Advisory Committee and subsequently, the Town Council, considered the matter of street frontage and the accesses to and from the property. These were set out on the plans for the development filed with the Municipality and eventually approved by the Town Planner in his recommendation to approve the development agreement. The requirement for sufficiency of documentation for the establishment of the common driveways is really a matter of procedure and should not have been taken into consideration when deciding whether the agreement conformed to the Municipal Planning Strategy.

The Board appears to have failed to follow the directions of this Court in **Heritage Trust v. Nova Scotia Utility and Review Board** (1994), 128 N.S.R. (2d) 5 where Hallett, J.A. stated for the Court at p. 35:

> 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 by 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 bylaws 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.

In a later decision, this Court dealt with the jurisdiction of the Board and of the Court of Appeal in planning matters of this type. In **Knyock v. Bennett et al** (1994), 131 N.S.R. (2d) 334 the Court stated:

> In summary, the board on an appeal taken under the **Planning Act** from a decision of a municipal council to enter into a development agreement has jurisdiction to deal with planning matters. It cannot interfere with a municipal council decision to enter into a development agreement unless it determines that "the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy" for the district as spelled out in the planning policies. The jurisdiction of this court is limited by the **Utility and Review Board Act** to questions of law and jurisdiction. This court has a duty to intervene if the board misinterprets the legislation which confers jurisdiction on the board and, as a result, exceeds its jurisdiction or if the board misinterprets the law which it is required to apply in its decision-making process. On these issues the policy of judicial deference does not come into play given the scope of appeal to this court from a board decision. The board's findings of fact within jurisdiction are final and conclusive (s. 26 **Utility and Review Board Act**).

Hallett, J.A., speaking for the Court, then went on to explain why the decision of the Board was being set aside:

> [37] The issue on this appeal is whether the board exceeded its jurisdiction. It is necessary to give consideration to what was relevant for the board to consider in determining whether the decision of the council to enter into the development agreement was reasonably consistent with the intent of the planning policies for District 18. In this case it was an exercise that, in my opinion, required little evidence. The board ought to have been primarily concerned with the relevant policies that were in place in the municipal planning strategy, the staff report recommending that council enter into the development agreement and the development agreement itself. It was essentially a matter of reviewing the proposed quarry operation and the terms of the development agreement to see if the proposed quarry operation meets the requirements of the policies and in particular to determine whether the controls were in place to reduce conflicts between the quarry and other uses in this mixed use area. The board does not appear to have approached its task in this manner; rather the board heard evidence for 18 days of every real or imagined problem that might be associated with the

> proposed quarry operation. On the basis of the evidence the board stated that it had concerns and doubts about the merits of the proposal going ahead. With respect, that was not the board's role. The **Planning Act** prescribes that a municipal council make the decision whether or not to enter into a development agreement; the board is to carry out a limited review of that decision. The board should have confined itself to hearing evidence that was relevant to the issue it is directed to decide by s. 78 of the **Planning Act**. The board approached its task as if it had the primary responsibility to determine if, in its opinion, there should be a quarry on this site. In proceeding to set aside the decision of council the board misinterpreted s. 78(6) of the **Planning Act** and thereby exceeded its jurisdiction.

I would allow the appeal, set aside the decision of the Utility and Review Board and restore the decision of the Town Council of Truro.

Hart, J.A.

Concurred in:

Chipman, J.A.

Cromwell, J.A.

C.A. No.148472

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CALDER CREELMAN	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
DUKE STREET AREA RESIDENTS and NOVA SCOTIA UTILITY AND REVIEW BOARD and TOWN OF TRURO	)	HART, J.A.
Respondents	)	