

NOVA SCOTIA COURT OF APPEAL

**[Cite as: 3012543 Nova Scotia Ltd. v. Mahone Bay Heritage and Cultural Society,
2000 NSCA 93]**

Freeman, Hallett and Bateman, J.J.A.

BETWEEN:

MAHONE BAY HERITAGE AND CULTURAL SOCIETY

Appellant

- and -

3012543 NOVA SCOTIA LIMITED

Respondent

- and -

THE TOWN OF MAHONE BAY

Respondent

REASONS FOR JUDGMENT

Counsel: Peter J. MacKeigan, Q.C. and Matthew Williams for the
appellant
G.F. Philip Romney for the respondent 3012543 Nova Scotia
Ltd.
Derek M. Wells, Q.C. for the respondent Town

Appeal Heard: June 7, 2000

Judgment Delivered: August 8, 2000

THE COURT: The appeal is allowed as per reasons for judgment of Hallett,
J.A.; Freeman and Bateman, J.J.A. concurring.

HALLETT, J.A.:

[1] This is an appeal from a decision of the Nova Scotia Utility & Review Board dismissing an appeal from a decision of the Town Council of Mahone Bay to enter into a development agreement with the respondent 3012543 Nova Scotia Limited allowing the respondent to construct a 24 unit residential condominium development on South Water Street on land zoned Industrial Shoreline. The appellant asserts that the intent of the Municipal Planning Strategy (MPS) for the Town is that proposals for new multi-unit residential developments can only be considered by development agreement in residential zones.

[2] The issue before this Court is whether the Board erred in law in concluding that the appellant had not established that it was unreasonable to interpret the MPS as allowing this development in the Industrial Shoreline Zone.

SCOPE OF REVIEW:

[3] This is an appeal to this court from a decision of the Board pursuant to s. 30 of the **Utility and Review Board Act**, S.N.S. 1992, c. 11. The appeal is restricted to questions of law or jurisdiction.

[4] Section 78(1) and (4) of the **Planning Act**, R.S. 1989, c. 346 provide:

78 (1) Where a council has approved the entering into of an agreement pursuant to Section 55 or 56, or an amendment to such an agreement except respecting a matter that pursuant to Section 73 the parties have identified as not substantial, the decision of the council may be appealed by

- (a) an aggrieved person;
- (b) the Director;
- (c) the council of an adjoining municipality.

(4) The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy.

[5] The Legislature has seen fit to limit the jurisdiction of the Board when aggrieved persons appeal a municipal council's decision to enter into a development agreement. By reason of the provision of s. 78(6) of the **Planning Act** the Board cannot interfere with the Council's decision "unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy." The burden is on the aggrieved person to prove on a balance of probabilities that it is not.

[6] In **Markborough Properties Inc. v. Halifax Regional Municipality** (1996), 155 N.S.R. (2d) 294, Justice Freeman, for this Court, discussed the scope of review of such decisions pursuant to s. 30 of the **Utility and Review Board Act**. He stated at para. 6, 7 and 8 of his decision as follows:

Two recent cases of this court have considered the jurisdiction of this court to review Board decisions and the Board's role and jurisdiction in appeals under the **Planning Act: Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility and Review Board et al.** (1994), 128 N.S.R.(2d) 5; 359 A.P.R. 5 (C.A.), and **Kynock v. Bennett et al.** (1994), 131 N.S.R.(2d) 334; 371 A.P.R. 334 (C.A.). In both cases this court upheld the decisions of the municipal councils.

In *Heritage Trust*, Hallett, J.A., said at p. 35 :

There is an appeal to this court from the Board's decisions on questions of law or jurisdiction. There is no appeal to this court on findings of fact by the Board; findings of fact will stand. It is only if the Board has erred in law in the interpretation of the relevant statutory provisions of the **Planning Act** or other relevant legislation or erred in its interpretation of the intent of the municipal planning strategy

(the Plan) or the Bylaws or committed jurisdictional error that would give rise to a successful appeal to this court.

In **Kynock**, Hallett, J.A., said at p. 344:

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**).

[7] Where the Board confirms a decision of Council to enter a proposed development agreement, the Board will have erred in law within the meaning of s. 30 of the **Utility and Review Board Act** if, on a review of the record, the Board

- (i) misinterpreted, failed to consider or failed to correctly apply relevant legislation; or
- (ii) failed to ascribe to the MPS an intent which it can reasonably bear.

[8] Our task requires us to review:

- (i) the majority decision of the Board dismissing the appeal from Council's decision;
- (ii) the relevant legislation being the **Planning Act** and the **Utility and Review Board Act**;
- (iii) the MPS; and
- (iv) the Land Use By-laws which implement the MPS

for the purposing of ascertaining if the Board erred in law or jurisdiction in its majority

decision.

THE BOARD'S DECISION:

[9] In its decision the majority reviewed the law relevant to its task on an appeal from the decision of Council to enter into the development agreement in question. The Board made reference to this Court's opinions on the scope of the appellate function of the Board when reviewing such a decision. The Board recognized that this Court is of the opinion that planning decisions often involve compromises and choices between conflicting or competing policies and that in such circumstances the decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions. It is clear from a reading of the Board's decision that the majority were very conscious of the inherent difficulty in ascertaining the intent of the MPS. The Board also echoed this Court's comments that the policies ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation if to take a legalistic approach would lead to a result that would not be consistent with the overall objective of the MPS. The Board also recognized the view of this Court that the MPS may be capable of being interpreted reasonably in several ways; there is not necessarily one correct interpretation.

[10] The Board must look at the MPS as a whole in order to ascertain if the Town Council's decision is consistent with the intent of that MPS. The Board concluded that Policy 5.5 of the MPS did not restrict new multi unit residential development to the Residential area. The Board interpreted Policy 10.16 as allowing, in the Industrial

Shoreline Zone, the proposed residential development.

THE APPELLANT’S POSITION:

[11] The heart of the appellant’s submission is that Policy 5.5 does not allow a multi unit residential development in the Industrial Shoreline Zone. Policy 5.5 establishes a policy with respect to proposals for new multi-unit residential development in the Residential areas. It provides:

It shall be the policy of the Council to:

.....

5.5 consider only by development agreement, in the areas designated Residential, proposals for new multi-unit residential development, including but not limited to dwellings containing three (3) or more units, apartment buildings, row housing, nursing homes and homes for the aged, and clustered or grouped dwellings, in accordance with policies 19.8 and 19.9.

[12] The appellant asserts that it is only in residential areas that the multi unit residential development will be considered. The appellant asserts that it was never the intention to permit residential development in the Industrial Shoreline Zone. I will review the MPS for the Town as well as the Town’s Land Use By-law implementing the Strategy.

THE MUNICIPAL PLANNING STRATEGY (MPS) FOR THE TOWN:

[13] I have carefully reviewed the entire MPS for the Town but I will refer in a summary way only to those policies relevant to our review of the Board’s decision.

[14] In the Introduction to the MPS, it is stated:

INTRODUCTION

The Town of Mahone Bay was founded in 1754 and incorporated on March 31, 1919. Situated at the head of Mahone Harbour, it is one of two coastal towns in Lunenburg County. A picturesque seaside town, it is approximately 80 kilometres (50 miles) from Halifax.

Famous for the much photographed three churches and a dedication to excellence in the craft industry, Mahone Bay has maintained its small-town integrity and commitment to its heritage. A strong sense of history and a well maintained and interesting mixture of architectural designs are but two of its many assets.

The history of Mahone Bay is closely linked to the sea and in particular to its harbour. During the period when transport by water was predominant the Town prospered: however, in more recent times, with the shift toward land based transport, the Town has become less important in the regional context. This has resulted in a decline in the industrial and commercial sectors which has been followed by a population decline.

The Town of Mahone Bay is at a turning point in it's development history. It's position as a regional service centre has declined as improved transportation provides easy access to larger centres, and the Town has not been able to foster sufficient new industry to replace the marine industrial base to which it was accustomed.

Mahone Bay's challenge for the 1990's is to foster further new development related to the tourist industry and to move toward diversity and quality in the service sector to maintain its share of the regional market. The Town must maintain its present level of services and the quality of its living environment in order to prevent a further decline in population. This will be realized only through good planning and positive promotions of the Town as a business and residential community.

(Emphasis added)

[15] In Policy 2 entitled "Context" the first paragraph states:

The Town of Mahone Bay is a scenic community of modest size and population. In addition to serving as a small service centre, the Town has undergone an evolution in emphasis away from light industry that was focused on boat building, toward tourism, particularly fine arts and crafts for the tourist market.

.....

The Land Use By-law and the Subdivision By-law shall be regarded as the companion documents to this Planning Strategy and shall be the means by which Town Council shall "carry out the intent of the Municipal Planning Strategy" as set

out in section 51 of the Planning Act, for land use and development purposes.

(Emphasis added)

[16] Policy 3 deals with the interpretation of the MPS. It states, in part:

This Planning Strategy is a policy statement of Council. Council shall have regard to the policies contained within the Planning Strategy; no development can be permitted which is contrary to the policies of the Planning Strategy.

(Emphasis added)

[17] There are seven Goals and Objectives set out in Policy 4. The first three are generalized statements applicable to most municipal planning strategies. Goals IV to VII relate particularly to the situation of the Town of Mahone Bay. They provide as follows:

IV encourage preservation of the architectural and cultural heritage of the Town and to minimize any impact of change or new development that would negatively affect this heritage.

V encourage development and employment opportunities in an attempt to stabilize the Town's declining population in order to maintain and enhance its viability as a town and as a community.

VI encourage development that is compatible with the Town's role as a historic scenic community oriented toward tourist activity.

VII protect the aesthetics and environment of the harbour and waterfront
(emphasis added)

[18] As can be seen from Policies 1 to 4 of the MPS, the Council intended to clearly control development and to accommodate the evolution of the Town into a community oriented toward tourist activity and the protection of the environment of the harbour and waterfront.

[19] Policy 5, like each policy in the MPS, starts with a “Background” statement.

The Background statement is relevant with respect to Residential Development and Land use. The most significant paragraphs are the first five:

Background

The predominant housing type in the Town is the owner-occupied single unit dwelling. The dominant thrust of Planning Strategy policy for residential land use is to protect the integrity of residential areas. The housing stock of the Town includes a number of large older single unit dwellings which are difficult to maintain as single unit residencies and which have been, or have the potential to be, converted into apartments. In the interest of maintaining the economic viability of these large older buildings, conversion to multi-unit dwellings will be allowed provided it does not overly intrude upon or alter the prevailing character of the single-unit residential areas. Two (2) unit dwellings, guest houses, and boarding houses are also recognized as compatible uses in residential neighbourhoods. Mobile homes are regarded as incompatible with the dominant architectural character of the Town, and will be allowed only in mobile home parks. Mobile home parks will be allowed only by development agreement subject to criteria intended to reduce the visual impact of such a modern development on the Town. Campers will be allowed as human habitation only for a temporary period in order to accommodate seasonal residents but will not be allowed to create a new main use.

There are a number of existing multi-unit buildings in the Town. Proposals for new multi-unit developments or for increasing existing multi-unit developments to more than four (4) units will be considered on their merits by development agreement in order to ensure that the character of the residential area is not negatively affected.

While business and commercial uses in residential areas are generally regarded as intrusive, it is recognized that certain small businesses which operate incidentally or secondarily to a main residential use can be quite compatible. Such business uses shall be permitted as-of-right. They will only be allowed within or as accessory uses to single unit dwellings, with restrictions on the variety of uses allowed, residency of the owner of the business, and limitations on size, signs, outdoor storage, and parking in order to lessen the potential impact on residential neighbourhoods.

It is recognized that residential properties with frontage on Main Street and Edgewater Drive offer attractions to business uses. These properties will be specifically designated so that proposals for compatible business uses, primarily related to tourism, may be considered on their merits by development agreement.

In addition, there are a number of properties within the residential designation which front on Main Street or Edgewater Drive and have traditionally been used for tourist-related commercial uses. Such uses will continue to be allowed on these properties as-of-right.

(Emphasis added)

[20] It is clear that the draftsmen were anxious to protect the integrity of residential areas and that multi unit residential developments would be considered on their merits by development agreement in order to ensure that the character of the residential area was not negatively affected. It is also to be noted that the draftsmen were conscious of the distinction between uses that would be permitted as of right and developments that would be considered by development agreement. The background also recognizes that the properties within the residential designation on Main Street or Edgewater Drive which have been traditionally used for tourist-related commercial uses shall continue to be allowed on these properties as of right.

[21] Policy 5, like each policy in the MPS, opens with the following words: "It shall be the policy of Council to:" Then the policies are listed. By the manner in which it is drafted, Policy 5 recognizes the distinction between uses permitted as of right and those that will be considered only by development agreement. Policy 5, relating to residential development in the Residential Zones, similar to policies that deal with Commercial, Industrial, Industrial Shoreline and other Zones, designate an area or areas of land in the Town for the respective uses permitted in that Zone (5.1). Policy 5 establishes a Residential zone (5.2) and permits in the area designated "residential" single and two-unit dwellings, etc. (5.3). Policy 5.5 provides that the Council will consider, only by development agreement in the areas designated residential, proposals for new multi unit residential development in accordance with Policies 19.8 and 19.9. The latter policies relate to the general conditions that apply where a development agreement is being considered. Policies 5.6 and 5.7 have some relevancy to the issue before us in

that they provide for designation of Industrial Shoreline property also as Commercial Development Agreement Areas in addition to its designation as Industrial Shoreline Zone. They provide:

It shall be the policy of Council to:

- 5.6 further designate those properties fronting on Main Street and Edgewater Drive which are designated Residential or Residential Shoreline, or Industrial or Industrial Shoreline, as Commercial Development Agreement Areas on Map 2, the Future Land Use Map, in accordance with Policies 7.7 and 7.8.
- 5.7 consider only by development agreement in areas designated both Commercial Development Agreement and Residential or Residential Shoreline, or Industrial or Industrial Shoreline, proposals for new tourist establishments, new tourist-related retail activities and new office buildings and craft workshops, in accordance with policies 19.8, 19.9 and 7.8.

[22] We have been advised by counsel that the Industrial Shoreline Zone in question in these proceedings has been designated as a Commercial Agreement Development Area in accordance with Policies 7.7 and 7.8. Those policies provide as follows:

It shall be the policy of Council to:

- 7.7 further designate the areas shown as Commercial Development Agreement Areas on Map 2, the Future Land Use Map for commercial uses by development agreement. These areas are intended to include residential areas having frontage or access to Main Street or Edgewater Drive, with the exception of those areas designated Open Shoreline.
- 7.8 consider only by development agreement in areas designated both Commercial Development Agreement and Residential or Residential Shoreline, or Industrial or Industrial Shoreline, proposals for new tourist establishments, new tourist-related retail activities and new office buildings and craft workshops, provided adequate off-street parking is provided and that development is in accordance with policies 5.7, 8.11, 10.18 and 19.8 and 19.9.

(emphasis added)

[23] Policy 7 deals with commercial development and land use. Policy 7.8 clearly indicates that Council will consider, by development agreement only, proposals for new tourist establishments and tourist-related retail activities, etc. in the Industrial Shoreline Zone.

[24] Policy 6 is entitled “Rural Development and Land Use”. It is not really relevant to the issue before us despite the appellant’s assertion that it is.

[25] The Background to Policy 7, Commercial Development and Land Use, is of relevance in seeking the intent of the MPS with respect to the issue before us. Relevant portions of the Background statement in Policy 7 are as follows:

Background

Traditionally, Mahone Bay has functioned as a commercial and service centre for the surrounding local area. In recent years, however, new commercial development has been increasingly directed to the growing tourist trade. Further growth in tourism is anticipated and welcomed as a way of improving the Town’s economic base while reinforcing its historic character. While most commercial activity is located in the central commercial district and the secondary commercial area on West Main Street, it is recognized that Main Street and Edgewater Drive throughout their entire lengths offer some attraction to new business. An “overlay” designation will be added in these areas in order to allow commercial uses by development agreement.

New tourist-related activities, offices and craft workshops are perceived to be compatible with the existing commercial and residential development on these streets. A number of structures on both Main Street and Edgewater Drive have traditionally been used for commerce; these structures will be allowed to be used for a variety of tourist-related commercial uses in the future whether or not the commercial use has been continuous.

Commercial uses are also seen to be compatible with the industrial area fronting on South Main Street, and will broaden the opportunities for potential development in these industrial areas.

Parking is limited on Main Street; the width of the street and volume of traffic prohibit parking on both sides of the street in many areas. New buildings including replacement buildings will be required to provide customers parking in order to ease the parking problem, as will any new business that locates in an existing structure and is considered to belong in a different parking category as

established in the Land Use By-law.

A number of retail uses which attract tourists are based on the local production of the wares sold. In order to focus commercial development, these retail uses, and their production facilities, to be known as industrial workshops, will be permitted as-of-right in the Commercial area. Similar uses which are larger in scale will come under the category of light industrial uses and because of their size and potential impact, will be controlled by development agreement.

(emphasis added)

[26] As can be seen from a reading of this Background, the draftsman concentrated on the commercial development of Main Street, Edgewater Drive and South Main Street with a particular focus on tourist-related activities. I would note in particular the statement that Commercial uses would be compatible with the industrial areas fronting on South Main Street and that in the opinion of the draftsman such uses would broaden the opportunities for potential development in these industrial areas. There is no reference to potential residential development in the industrial areas of South Main Street.

[27] Policies 7.1 to 7.4 are relevant to a consideration of the issue before us. The policies provide:

It shall be the policy of Council to:

- 7.1 designate the areas shown as Commercial, on Map 2, the Future Land Use Map for commercial uses. It is intended to include the developed commercial areas in this designation.
- 7.2 establish a Commercial (C) zone in the Land Use By-law to correspond to the areas designated Commercial on the Future Land Use Map;
- 7.3 permit in the areas designated Commercial:
 - (a) a broad range of retail and service activities
 - (b) residential uses
 - (c) institutional uses subject to specific requirements for lot area, frontage, setbacks and the height of buildings
 - (d) lounges and beverage rooms of less than 111 sq. metres (1,200 sq. ft.) in area

(e) industrial workshops

7.4 consider only by development agreement, in areas designated Commercial, light industrial uses in accordance with policy 8.8.

(emphasis added)

[28] Policy 7.3 indicates what is permitted in the areas designated Commercial as of right and Policy 7.4 indicates what will be considered only by development agreement. Clearly the Policy contemplated some permitted residential uses in the Commercial zone as of right. I will not again set out policies 7.7 and 7.8. Policy 7.13 is relevant and it provides:

7.13 permit, in areas designated Residential, tourist related retail activities limited to antique shops, art and craft shops and restaurants on properties formerly used for commercial purposes, which have frontage on Main Street or Edgewater Drive and which are identified in the appropriate zone of the Land Use By-law.

This policy shows a clear intent to permit as of right in the areas designated “Residential”, tourist-related retail activities limited to certain types of uses and locations which will be identified in the appropriate zone of the Land Use By-law.

[29] Policy 7.15 provides:

7.15 permit, in areas designated Industrial, commercial uses.

This is a general policy that would permit commercial uses in industrial designated areas.

[30] Policy 8 is entitled “Industrial Development and Land Use”. The Background

statement is as follows:

Background

Only one (1) large industrial use, the Reinforced Plastic Systems plant, is now in operation in Mahone Bay. Other industrial uses have closed, leaving empty industrial buildings and sites. However, small industries related to tourism have grown and flourished. Jobs in these smaller industries now provide much of the employment base of the Town.

Provision must be made for both large and small industries in Mahone Bay. The revival of industrial buildings and sites and industrial use of the waterfront will be accommodated where there is identifiable potential. Little serviced land is available for industrial use. New industries may locate within the areas designated Industrial or Rural-Industrial in order to provide a range of locations for industrial use. In both areas, uses which are likely to create land-use conflicts or may be hazardous will be allowed only by development agreement.

The areas designated Commercial provide opportunity for small industries, particularly since parts of this area were industrial until recently.

(emphasis added)

[31] The Reinforced Plastics Systems plant is located on the inland side of South Main Street to the south of the land in question in these proceedings. It is noted in the Background that small industries related to tourism have grown and flourished and provide much of the employment base in the Town.

[32] While certain industrial uses are permitted as of right in the Industrial Zone, a review of Policy 8 shows a general intention to exercise control by development agreement in the Industrial area of the Town if the use will create land use conflicts. The Reinforced Plastic Systems Plant is the only industrial plant in the Town. The MPS for the Town does not stress industrial development as is evident from the policies.

[33] Policy 9 is entitled “Heritage Preservation” . The Background statement with

respect to Policy emphasizes the importance attributed to the ambience which the Town clearly has and again focuses on the importance of tourism. The first two paragraphs of the Background statement are as follows:

Background

There are a number of areas within Mahone Bay which contribute to the overall ambience of the Town. Notable among these are Edgewater Drive, with its churches and residential development on the one side and the harbour on the other, and Main Street, with its relatively compact residential development on either end and a compact commercial core. Although an architectural analysis of these areas has not been completed, it is apparent even to the casual observer that the appearance of the majority of structures within these areas contributes significantly to the overall attraction of the Town.

Within these areas there are many architecturally and historically significant buildings. Council recognizes the importance of these structures to the Town's identity and to its continuing prosperity as a tourism destination. Incremental changes to sites and structures in these areas in the future could result in the loss of the present atmosphere.

[34] Policy 9.5 provides as follows:

9.5 designate the areas shown as Architectural Control Areas on Map 2, the Future Land Use Map, for the architectural control of the public facade of heritage buildings. It is intended to reflect the front portion of the properties fronting on Edgewater Drive between the Town boundary and Main Street and fronting on Main Street from 255 Main Street east to the Town boundary as the heritage area.

[35] The land in question in the proceedings before us is within the Architectural Control Area.

[36] Policy 10 is entitled "Shoreline Development and Land Use". It is the most relevant Policy respecting the issue before us as the proposed residential development is in the area zoned Industrial Shoreline. The first two paragraphs of the Background reflect the importance attached by the Town to the shoreline and its potential for future commercial and industrial development:

The harbour shoreline was important to the establishment and development of the Town, serving as the focus for the milling and shipment of lumber as well as for shipbuilding, ship chandlery and general shipping. Although these activities are no longer carried out, the harbour and its shoreline are still important for their major determination of the character and scenic qualities of the Town as well as for the potential for future commercial and industrial development.

The interface between the Town and the water is complex enough in land use and development potential to require specific policies.

(emphasis added)

[37] There is no mention of developing the shoreline for potential future multi-unit residential development. I also note that, in the opinion of the Town as expressed in the Policy, the interface between the Town and the water requires specific policies; Policy 10 is the expression of that policy

[38] The Background statement in Policy 10 contains the following:

Council perceives the shoreline as having a number of areas distinguished by their existing land use and potential impact on the overall development of the Town.

[39] The Council then identifies seven areas of shoreline in the Town and expressly sets out its planning intention with respect to each of these areas. The proposed development in these proceedings is in Area 4. The Background statement has the following to say with respect to Area 4:

Area 4 - From the boatshed, civic #659 South Main Street, south to and including the Government Wharf (Assessment Property Code 78-020198-000).

On the inland side of Main Street, this area has a mix of residential and commercial uses; the shoreline side has a mix of commercial and industrial uses.

It is Council's intention to maintain an Industrial designation in this area to permit maximum flexibility in the future use of this key resource.

(emphasis added)

[40] Civic #659 South Main Street is the shorefront land in question in these proceedings. There are only two properties in Area 4, that is, the property on which the proposed development is to be located and the so-called Government Wharf (now owned by the Town) immediately to its southeast.

[41] Council's intent, with respect to Area 1 (the Edgewater Drive side of the harbour), is to preserve its open character in order to increase its value as a tourism focus. With respect to Area 2 (the Edgewater Drive side), Council resolved to allow continued commercial use of the existing buildings but to restrict as of right development to low impact uses such as water access, parking and band stands. With respect to Area 3 (Main Street, South Main Street), Council's intention was to encourage the continuation of the commercial uses in this established commercial area. With respect to Area 5, extending from the Government Wharf south to the north boundary of the Boat Storage Yard near Feubeaux Road, Council's intent is to allow reasonable and customary use of the shoreline, recognizing that some commercial development may be appropriate in some circumstances and to provide for such development with special conditions. Council recognized that there is an opportunity in this area for tourist-related commercial development and to provide for the same only by development agreement. In Area 6, extending from the Boat Storage Yard south to the north boundary of Civil #781 South Main Street, an area which on both sides of the street is developed in a variety of commercial and industrial uses, the Council's intention

is to encourage this diversity of use by maintaining the industrial designation and allowing for commercial development. Area 7, extends from Civic 781 South Main Street south to the Town boundary. The inland side of the street is entirely residential and the shoreline side of the street largely undeveloped. Council's intention is to restrict new development to low impact uses such as water access, etc. which would be compatible with neighbouring residential uses.

[42] The Council then went on to establish the policies for the shoreline which it recognized as so important to the Town's economic future. What it did was create four shoreline zones and establish a policy for each zone. The zones created are: Open Shoreline, Commercial Shoreline, Residential Shoreline and Industrial Shoreline with permitted uses designated in the respective areas and a provision as to what would be considered only by development agreement in those respective zones.

[43] Policies 10.14 to 10.18 are the policies that relate to the Industrial Shoreline Zone where the proposed development will be located. They provide as follows:

- 10.14** designate the areas shown as Industrial Shoreline on Map 2, the Future Land Use Map, for restricted industrial activities.
- 10.15** establish an Industrial Shoreline (IS) zone in the Land Use By-law to correspond to the areas designated Industrial Shoreline on the Future Land Use Map.
- 10.16** permit in the areas designated Industrial Shoreline:
 - (a) activities and structures which preserve the open character of the area, but not limited to private and public parks, gazebos, parking areas, wharves, slipways, boathouses and other recreational and water access uses;
 - (b) all uses allowed in the Commercial (C) zone in accordance with the Commercial (C) Zone Standards.

(c) all uses allowed in the Industrial (I) zone in accordance with the Industrial (I) Zone Standards.

(emphasis added)

[44] Policies 11 to 18 are not relevant to the issues we have under consideration.

Policy 19 is entitled “Implementation”. It provides as follows:

The Land Use By-law shall be the principal means for implementing the land use policies of the Planning Strategy pursuant to Sections 51-54 of the Planning Act.

[45] Policy 19.8 authorizes the municipality to enter into development agreements on the terms and conditions set forth in the planning strategy. Policy 19.9 sets out the criteria for development agreements and land use by-law amendments. It states:

- 19.9** consider the following in addition to all other criteria set out in the various policies of this Planning Strategy, when considering amendments to the Land Use By-law, or development agreements:
- (a) that the proposal conforms to the intent of the Planning Strategy and to all other applicable Town By-laws and regulations, except where the application is for a development agreement and the requirements of the Land Use By-law need not be met;
 - (b) that the proposal is not in conflict with Municipal or Provincial programs in effect in the Town.

Policy 19.9(a) requires that development agreement proposals conform to the intent of the MPS but the requirements of the Land Use By-law need not be met. This is simply a reflection of the concept that the intent of the MPS must be adhered to but if the development proposed is by development agreement the requirements of the by-laws may be varied. It also illustrates the significance of the distinction between uses permitted as of right and those that can be considered by development agreement as the latter need not comply with the requirements of the By-laws but are governed by the terms of the agreement approved by Council.

[46] Policy 19.9(c) states that in considering a development agreement Council shall take into account whether the proposal is premature or inappropriate for a number of reasons enumerated in Policy 19.9(c). It would appear that the proposed multi unit residential development in the proceedings before us either meets the requirements of Policy 19.9(c) or conditions are provided for in the development agreement that address all relevant development concerns with respect to the proposal. The Development Agreement was approved by a majority vote of four to three; the mayor having cast the tie breaking vote

[47] I will turn now to a brief review of the By-laws adopted to implement the MPS.

THE LAND USE BY-LAW:

[48] Section 45 of the **Planning Act** prevents a municipality from undertaking any development within the scope of the planning strategy in any manner inconsistent with or at variance with the strategy. Section 51 of the **Planning Act** requires a municipality to adopt a land use by-law where the planning strategy contains statements of policy with respect to the control of land use and development as is the situation in the Town.

[49] The land use by-law of the Town was approved by the Minister on November 30th, 1994, being the same day the Minister approved the planning strategy. The By-law is divided into twenty-two (22) parts.

[50] Pursuant to By-law 3.1, there are ten (10) different zones provided for:

Zone
Residential
Rural-Residential
Commercial
Industrial
Industrial Shoreline
Rural-Industrial
Recreation
Open Shoreline
Commercial Shoreline
Residential Shoreline

[51] By-law 4.1.2 states:

4.1.2 For the purposes of this By-law, if a use is not listed as a permitted use in any zone, or if it is not accessory to a permitted use within the zone, it shall be deemed to be a prohibited use in such zone and subject to the non-conforming use provisions of the Planning Act.

(emphasis added)

By-Law 4.1.2 is significant; if a use is not permitted in a zone it is deemed to be prohibited subject, however, to the non-conforming use provisions of the **Act**. However, by reason of the provisions of Policy 19.9(a) the requirements of the By-laws need not be met when Council is considering a development agreement. To interpret By-law 4.1.2 as meaning that a use, if not permitted, is prohibited as preventing a proposed development by agreement would totally negate the provisions of the **Planning Act** and the MPS that implicitly (s. 76(4) and s. 83(2) of the **Planning Act**) or expressly (Policy 19.9 of the MPS) authorize the Municipality to consider by agreement developments that do not comply with the by-laws.

[52] By-law 5 is the general provision for Residential (R) and Rural Residential (RR) Zones. It provides that certain business uses as listed are permitted in the zones

provided they are located in a detached single unit dwelling subject to a number of conditions as spelled out in the By-law. By-law 7 is the by-law for the Residential (R) Zone. It, of course, permits single unit dwellings in the areas zoned Residential. It provides for a number of existing uses in specifically designated existing multi-unit residential buildings. By-law 6.1(b) permits developments subject to other requirements of the By-law, none of which are relevant to the issues before the Court.

[53] By-law 6.1(c) is of extreme relevance as it would appear to be the By-law under which the Board concluded it had the authority to allow the proposed development to proceed pursuant to development agreement in the Industrial Shoreline Zone. It provides:

6.1 Permitted Developments

(c) Developments Permitted by Development Agreement

- (i) residential conversions in accordance with Municipal Planning Strategy Policy 5.4
- (ii) residential developments which do not conform to Subsection 6.1.(a) or (b) in accordance with Municipal Planning Strategy Policy 5.5
- (iii) tourist establishments, tourist-related retail activity, office buildings and craft workshops in accordance with Municipal Planning Strategy Policies 5.7 and 7.8.

[54] By-law 9 relates to the Commercial (C) Zone. By-law 9.1(a) permits all uses permitted in the Residential (R) Zone along with a number of other uses which include most commercial businesses. By-law 9.1(b) provides for developments permitted subject to other requirements of the By-law. This section (b) is directed towards development by agreement of beverage rooms and certain institutional developments. By-law 9.1(c) permits developments by agreement in the Commercial Zone with

respect to light industries, retail developments, beverage rooms and lounges.

[55] By-law 12 relates to the Industrial (I) Zone (not to be confused with the Industrial Shoreline Zone). It permits manufacturing and processing, production developments, building supply and equipment depots, commercial uses, repair shops, etc. By-law 12.1(b) permits all uses permitted in Commercial (C) Zone in accordance with By-law 9.

[56] By-law 12.1(c) deals with developments permitted by development agreement. It provides:

12.1 (c) Developments Permitted by Development Agreement

- (i) industrial developments which are likely to create land-use conflicts in accordance with Municipal Planning Strategy 8.7.
- (ii) tourist establishments, tourist-related activity, office buildings and craft workshops in accordance with Municipal Planning Strategy Policy 8.11.

There is no express reference in any part of By-law 12 to residential development in the Industrial Zone.

[57] By-law 17 deals with the Industrial Shoreline (IS) Zone. By-law 17.1 states:

17.1 Permitted Developments

- (a) Developments Permitted Subject to Industrial Shoreline (IS) Zone Standards, Section 17.3
wharves, piers and slipways, launching ramps and similar water access uses
parks, playgrounds, open spaces and sports fields
parking lots
gazebos and bandstands to a maximum of 39 sq. metres (409 sq. ft.)
boat houses
all uses permitted in Subsection 12.1(a)
all uses permitted in Subsection 9.1(a)
- (b) Developments Permitted Subject to Other Requirements of this By-law
None

- (c) Developments Permitted by Development Agreement
 - (i) tourist establishments, tourist-related retail activity, office buildings and craft workshops in accordance with Municipal Planning Strategy Policies 10.18 and 7.8.

(emphasis added)

[58] This By-law is, of course, relevant to the issues before the Court as the proposed development is in this Industrial Shoreline Zone.

[59] It is helpful to understand what information was placed before Council that led to its decision to approve the entry into the development agreement which would allow the proposed development to proceed. Geoffrey MacDonald, the planning Director for Lunenburg County District Planning Commission presented a report to Council in which he offered the opinion that the Council had the authority to allow the development to proceed pursuant to development agreement. He stated that the proposed development was possible within the terms of the MPS and the By-laws. I will not reproduce his full report but his reasoning with respect to Council's authority to allow the development to proceed by way of development agreement is contained in the following excerpts:

4.0 LAND USE BY-LAW

As shown on Figure 2, this property is in the Industrial Shoreline Zone, which is described in Part 17 of the Land Use By-law (LUB), quoted in Appendix 2. Part 17 lists the land uses permitted in the Industrial Shoreline Zone. These uses include all uses permitted in the Commercial Zone, which in turn include all uses permitted in the Residential Zone. The list of land uses permitted in the Residential Zone includes developments containing more than two dwelling units, but these are permitted only by development agreement. These developments must conform to the requirements of Municipal Planning Strategy Policy 5.5. The Municipal Planning Strategy provisions are discussed below in Part 5 of this report.

5.0 MUNICIPAL PLANNING STRATEGY

5.1 MPS Policy 5.5

Policy 5.5 of the Municipal Planning Strategy (MPS) is quoted in Appendix 1. It allows Council to consider, by development agreement, proposals for new multi-unit residential development in areas designated Residential. There is no other policy in the MPS dealing with this kind of multi-unit residential development. As shown on Figure 1, the proposed development is not in an area designated Residential. From this perspective, the Municipal Planning Strategy (MPS) does not appear to allow the proposed development. However, this simple reading of the policy conflicts both with the provisions of the Land Use By-law and with other provisions in the MPS.

As discussed above in part 4.0, the Land Use By-law plainly allows in the Industrial Shoreline Zone all uses permitted in the Residential Zone, including the uses permitted by development agreement. If there had been an intention to allow in the Commercial or the Industrial Zones only the range of uses permitted by right in the Residential Zones, the list of uses in the Commercial Zone could easily have said that, in the same way that the Industrial Zone permits only the uses allowed by right in the Commercial Zone, and does not include the uses permitted by Development Agreement. From this perspective, the Land Use By-law clearly includes the possibility of multi-unit residential buildings both in the Industrial Zone and in the Commercial Zone.

In Part 10.0 of the MPS, Council's intention for the Industrial Shoreline Designation is clearly "to permit maximum flexibility in the future use of this key resource" (preamble to Area 4) and in keeping with that intent, to allow "all uses allowed in the Commercial (C) Zone" (Policy 10.16). In Part 7.0 of the MPS, Policy 7.3 allows the general category of "residential uses" in the area designated Commercial. This cannot be construed to exclude multi-unit residential structures. From this perspective, neither the Industrial Shoreline policies nor the Commercial policies in the MPS back up the exclusionary wording of Policy 5.5.

Where there is direct conflict among the provisions of the MPS the conflict should be resolved in favour of the applicant. When the wording of both the LUB and the MPS are considered as a whole, Council is in a position to consider this application for a development agreement under the relevant policies of the MPS.

(emphasis added)

THE BOARD'S DECISION:

[60] I will now turn to the decision of the Board. The Board dismissed the appeal by the persons opposed to the development. The most relevant passages from the Board's majority decision are as follows:

General Compliance of Development Agreement with M.P.S.

In the present case, Mr. MacDonald's Report exhaustively explores the criteria

contained within the M.P.S. with respect to such matters as the waterfront, heritage properties, etc. and evaluates the proposed development agreement in the light of those provisions. While there was a range of differing testimony offered by the Appellants and other residents with respect to such detailed matters as the adequacy of water pressure, or the scale of the development, Mr. MacKeigan, on behalf of the Appellants, did not suggest this was the principal thrust of the appeal. Indeed, the Board concluded that it was the position of the Appellants that, no matter how well the development might meet each of the detailed criteria in the M.P.S., the development would still not be legally possible on the site because, in their view, no multi-unit residential development, however well-designed, could legally occur upon the property, given its designation as “industrial shoreline”.

The Board has evaluated all of the evidence in this matter, including the M.P.S., the L.U.B., Mr. MacDonald’s Report respecting the draft development agreement, and the development agreement itself. Reserving for the moment the sole (but, for purposes of this proceeding, key) question of the legality of a multi-unit residential development on the property in question, the Board finds that the draft agreement is reasonably consistent with the intent of the M.P.S. (as is required by s. 78(4) of the **Planning Act**). More particularly, the Board finds the provisions of the agreement are reasonably consistent with the detailed criteria appearing in the various policies of the M.P.S.

Permissibility of a Multi-Unit Residential Development in the Industrial Shoreline Zone

As noted, the Appellant took the view that, properly interpreted, the M.P.S. and the L.U.B. mean a development of this type is, without question, illegal on the site. In contrast, the Developer asserted, with equal vigour, that such a development, provided a development agreement is signed, is, without question, legal on the site. Lastly, the Town suggested that the M.P.S. is ambiguous on the point, can be interpreted either way, but that the ambiguity should be resolved in favour of the Developer.

The property is designated Industrial Shoreline. It, along with the adjacent wharf, is the only property in the Town so designated. With respect to shoreline development in general, Policy 10 of the M.P.S., entitled “Shoreline Development and Land Use” (p. 18 of the M.P.S.), says the following with respect to Area 4, which includes the subject property:

“On the inland side of Main Street, this area has a mix of residential and commercial uses; the shoreline side has a mix of commercial and industrial uses.

It is Council’s intention to maintain an Industrial designation in this area to permit *maximum flexibility* in the future use of this key resource.” [emphasis added]

Policy 10.16 of the M.P.S. permits

“in the areas designated Industrial Shoreline:

- (a) activities and structures which preserve the *open character of the area*, including but not limited to private and public parks, gazebos, parking areas, wharves, slipways, boathouses and other recreational and water access uses;

- (b) *all uses allowed in the Commercial (c) zone* in accordance with the Commercial (C) Zone Standards
- (c) *all uses allowed in the Industrial (I) zone* in accordance with the Industrial (I) Zone Standards.” (emphasis added)

Policy 10.16 of the M.P.S., then, permits in Policy 10.16(a), the various “open uses” favoured by the Appellants and many of the residents who spoke at the hearing. It also permits, in Policy 10.16(b) and (c), “all uses allowed” in either the Commercial or the Industrial zone.

Policies 7.2 and 8.2 of the M.P.S. provide for the establishment of Commercial and Industrial zones in the L.U.B.:

It shall be the policy of Council to:

- 7.2** establish a Commercial (C) zone in the Land Use By-law to correspond to the areas designated Commercial on the Future Land Use Map;
- 8.2** establish an Industrial (I) zone in the Land Use By-law to correspond to the areas designated Industrial on the Future Land Use Map.”

One finds, in By-law 17.1(a) of the L.U.B., that “permitted developments” in the Industrial Shoreline Zone include “all uses permitted in By-law 12.1(a) of the L.U.B.” (the Industrial Zone), and “all uses permitted in By-law 9.1(a) of the L.U.B.” (the Commercial Zone). This is consistent with Policy 10.16(b) and (c) of the M.P.S. (quoted above), which permits in the area designated Industrial Shoreline all uses allowed in the Industrial and Commercial Zones.

In By-law 12.1(a) of the L.U.B., the “permitted developments” in the Industrial (I) Zone include “commercial uses”. By-law 12.1(b) permits “all uses permitted in the Commercial (C) Zone in accordance with Part 9, Commercial (C) Zone”.

Turning to the Commercial (C) Zone provision By-law 9.1(a), one finds under the list of “permitted developments” in the Commercial Zone the following:

“all the uses permitted in the Residential (R) Zone”

This is consistent with Policy 7 of the M.P.S., entitled “Commercial Development and Land Use”. Policy 7.3 states that it is council’s policy to

“permit in the areas designated Commercial:
(b) residential uses”

Thus, relying on the M.P.S. or the L.U.B., one can have in the Industrial Shoreline area or zone, “residential uses” (in the language of Policy 7.3 of the M.P.S.) or “all uses permitted in the Residential (R) Zone” (in the language of By-law 9.1(a) of the L.U.B.). What are these uses?

The term “residential uses” is not defined in Policy 7.3. The ordinary meaning of the word “residential” is, in the Board’s judgement, very broad: see, for example, the Compact Edition of the Oxford Dictionary (1981), which contains a definition of “residential” as “connected with, pertaining or relating to, residence or residences”; it defines “residence” as simply “the place where one resides; one’s dwelling place; the abode of a person”. In the Board’s view, the word “residential” would certainly include a multi-unit residential development.

However, the meaning of “residential uses” and “all uses permitted in the Residential Zone” should also be explored in the context of, primarily, the M.P.S., and, secondarily, the L.U.B. (which, again, is subordinate to the M.P.S.). The Board will briefly review the L.U.B. provisions, before turning to the M.P.S.

Turning to By-law 6 of the L.U.B., entitled “Residential (R) Zone”, one finds there are three categories of “permitted developments” which appear in By-law 6.1; 6.1(a) [“Developments Permitted Subject to Residential (R) Zone Standards” (By-law 6.2)]; 6.1(b) [“Developments Permitted Subject to Other Requirements of this By-law”], and 6.1(c) [“Developments Permitted by Development Agreement”].

“Permitted Developments” under By-law 6.1(a) of the L.U.B.

These include single unit dwellings, two unit dwellings, and other buildings, such as day care centres, cemeteries, schools, parks, playgrounds and open spaces, tourist related retail uses, and restaurants. Various of these are similar or identical to the matters referred to in Policy 5.3 of the M.P.S., although By-law 6.1 of the L.U.B. does not specifically refer to Policy 5.3 of the M.P.S.

“Permitted developments” under s. 6.1(b) of the L.U.B.

These include certain commercial uses, institutional developments, conversion of established structures to a maximum of four dwelling units, and certain developments on lots not abutting a public street. While By-laws 6.1(a) and (c) were discussed extensively at the hearing, By-law 6.1(b) was not.

“Permitted developments” under s. 6.1(c) of the L.U.B.

By-law 6.1(c)(i) of the L.U.B. includes residential conversion specifically in accordance with the M.P.S. Policy 5.4.

Under By-law 6.1(c)(ii) permitted developments include “... residential developments ... in accordance with municipal planning strategy policy 5.5”, which relates specifically to multi-unit residential developments of the type in issue in this case.

Policy 5.5 is one part of Policy 5 of the M.P.S., which deals with residential development and land use. Policy 5 contains no definition of the term “residential use” which appears in Policy 7.3, but a number of sub-sections of Policy 5 discuss specific residential activities or developments. Three of these, Policies 5.3, 5.4 and 5.5, were discussed at length at the hearing.

- 5.3** permit in *the areas designated Residential*, on all lots which abut a public street:
- (a) single and two (2) unit dwellings
 - (b) conversion of existing structures to multi-unit residences to a maximum of four (4) dwelling units, and control, through the Land Use By-law, the area required for each unit and parking requirements
 - (c) business uses in conjunction with residential uses, subject to Policy 7.14
 - (d) tourist-related commercial uses and restaurants on properties formerly used for commercial purposes
 - (e) veterinary clinics established prior to 1991
 - (f) cemeteries

- (g) day care centres and schools
- (h) parks, playgrounds and open spaces
- (i) boarding houses and guest houses
- (j) institutional uses subject to specific requirements for lot area, frontage, setbacks and the height of buildings
- (k) multi-unit residences existing on the date this Planning Strategy comes into force and listed in the Land Use By-law

5.4 consider only by development agreement, in the *areas designated Residential*, proposals for the conversion of established structures to multi-unit residences containing more than four (4) dwelling units, in accordance with policies 19.8 and 19.9.

5.5 consider only by development agreement, *in the areas designated Residential*, proposals for new multi-unit residential development, including but not limited to dwellings containing three (3) or more units, apartment buildings, row housing, nursing homes and homes for the aged, and clustered or grouped dwellings, in accordance with policies 19.8 and 19.9. [emphasis added]

As noted, Policy 5.5 deals with new multi-unit residential development, saying that such developments can be considered “only by development agreement”. Policy 5.5 was of particular significance to the Appellants’ case. They placed heavy emphasis on the phrase “in the areas designated residential”, which appears in Policy 5.5. In their view, the phrase means that multi-unit residential development can occur only in the areas designated residential. Accordingly, they argue, the multi-unit residential developments provided for in Policy 5.5 cannot be considered to be a “residential use” within the meaning of Policy 7.3(b) of the M.P.S.

To interpret

“consider only by development agreement *in the areas designated residential* proposals for new multi unit residential development ...” [emphasis added]

as meaning that such developments can occur only in an area designated residential is not, in the Board’s view, an unreasonable interpretation of that phrase - indeed, it is an obvious, and literal, interpretation. However, the case law makes it clear that one must consider whether this obvious and literal interpretation really is (as the Appellants clearly believe) the only reasonable interpretation which can be made, in the overall context of the M.P.S.

As noted, Policy 5.3 also contains the same phrase “in the areas designated residential” that Policy 5.5 does. Policy 5.4, dealing with conversions of existing structures to multi unit residences, likewise contains the phrase “in the areas designated residential”.

The activities or uses permitted in Policy 5.3 of the M.P.S., such as single and two unit dwellings, etc., were, however, seen by the Appellants as included within the meaning of the phrase “residential uses” which would be possible on the site, and permitted under By-law 6.1(a) of the L.U.B. In short, they consider that “residential uses” permissible on this site include all of the uses listed in Policy 5.3 of the M.P.S. (by virtue, it seems, in part, at least, of their having been listed in By-law 6.1(a) of the L.U.B.), but do not include the multi-unit residential use

appearing in Policy 5.5.

If the Board applied the same reasoning to Policy 5.3 of the M.P.S. as the Appellants argue is appropriate for Policy 5.5, the Board could conclude that none of the uses listed in 5.3 would be allowable in a commercial zone. This is because the uses listed in Policy 5.3 are, according to the introductory words, permitted “in the areas designated residential” - exactly the same phrase to which the Appellants attach such significance in Policy 5.5. Viewed from this perspective, the provision of Policy 7.3 of the M.P.S., permitting “residential uses” in commercial areas, would become, to a large extent, meaningless: if (because of the phrase “in the areas designated residential”), the “residential uses” referred to in Policy 7.3 cannot include any item appearing in Policies 5.3 and 5.5, most possible residential uses would become prohibited. Viewed from the same perspective, most (if not all) of By-law 6.1(a) of the L.U.B., being inconsistent with Policy 5.3 of the M.P.S., would have to fall (because of the subordination of any L.U.B. to its M.P.S.), with the consequence that the uses listed therein - all accepted by the Appellants as permissible on the site - would no longer be permitted.

The Appellants reinforce their position by pointing to, among other things, Policy 6 of the M.P.S., “Rural Development and Land Use”. Policy 6.3, 6.7 and 6.8 say, in part

- 6.3 permit in the areas designated Rural-Residential a variety of residential, resource related and other activities characteristic of rural areas, on all lots which abut a public street. These shall include but not be limited to:
- (d) residential uses.
- 6.7 consider only by development agreement, in the areas designated Rural-Residential, proposals for new multi-unit residential development ...
- 6.8 consider only by development agreement mobile home parks in the areas designated Rural-Residential ...”

The property in question is not subject to Policy 6. However, the Appellants note that, while Policy 6.3(d) of the Rural Development section refers to “residential uses” being permitted in a rural area, Policies 6.7 and 6.8 deal specifically with multi-unit residential developments and mobile home parks. They argue that it follows that the term “residential uses” used in Policy 6.3(d) does not include multi-unit residential developments or mobile home parks. Therefore, it is said, references elsewhere in the M.P.S. (or L.U.B.) to “residential uses” being available in a commercial zone or area do not include multi-unit residential developments.

Heritage Trust, and the other related case law, encourages a liberal, purposive and pragmatic approach to interpreting the M.P.S., rather than one which is restrictive, literal or legalistic. In the Board’s view, an argument can be made that the Appellants’ approach to the meaning of “residential uses” in Policy 6 places an unnecessarily restrictive interpretation on the M.P.S., for two principal reasons.

First, the Board is not sure that the reference to “residential uses” in Policy 6.3(d) of the M.P.S., followed by references to multi-unit residential developments and

mobile home parks in Policies 6.7 and 6.8, leads necessarily to the conclusion that the term “residential uses” in Policy 6.3(d) does not include multi-unit residential developments and mobiles. For example, one can argue that Policies 6.7 and 6.8 simply provide explicit reassurance to persons in rural residential areas that no such developments can occur except through a development agreement.

Second, let us assume, for purposes of this discussion only, that the reference to multi-unit residential developments in Policy 6.7 really does lead necessarily to the conclusion that the term “residential uses” in Policy 6.3 does not include multi-unit residential developments. The Appellants’ next, and essential, argument, is that the restricted meaning of the term “residential uses” thus deduced for Policy 6.3 must be the meaning the term takes everywhere else it appears in the M.P.S. - and, in particular, in Policy 7.3. This seems to the Board to conflict with the case law reviewed above. For example, Justice Hallett observes in **Heritage Trust** that the provisions of the M.P.S. “... should be recognized for what they are - simply policies. In many instances policies conflict.” [para. 116]

This observation was unconsciously echoed by Mr. Feeney in his testimony about the Mahone Bay M.P.S. He said that, in his view, wording used in one part of the M.P.S. would “not necessarily” have the same meaning in another part, and went on to say:

“there were inconsistencies in the wording in the plan and interpretation ... I don’t think it was an intention to have that happen. I just think it’s part of life, part of the process.”

A further argument referred to briefly by Mr. Douglas is that, in essence, the broad language of M.P.S. Policy 7.3 (which simply says that “residential uses” are permitted “in the areas designated Commercial”) should be limited by virtue of Policy 7.8 of the M.P.S. and By-law 12.1(c) of the L.U.B. These latter two provisions refer to the possibility of tourist establishments, tourist related retail activity, office buildings and craft workshops occurring in the Industrial Zone by development agreement. Policy 7.8 reads as follows

“7.8 consider only by development agreement in areas designated both Commercial Development Agreement and Residential or Residential Shoreline, or Industrial or Industrial Shoreline, proposals for new tourist establishments, new tourist-related retail activities and new office buildings and craft workshops, provided adequate off-street parking is provided and that development is in accordance with policies 5.7, 8.11, 10.18 and 19.8 and 19.8.”

Mr. Douglas seems to say that Policy 7.8 means that the only kind of development agreements permitted on this site are ones which are non-residential. He reinforces this assertion by turning to By-law 12.1(c), which, he says, reflects Policy 7.8. It, again, refers to tourist establishments, etc., and is entitled “Developments Permitted by Development Agreement”. The argument, it seems, is that the list of developments appearing in By-law 12.1(c) and Policy 7.8 is exhaustive, i.e., is a list of all the developments which can occur in such an area by development agreement.

The Board sees this approach as similar to the Appellants’ argument on Policy 6.7 (which the Board discussed at p. 38 above). It is, in the Board’s view, too

restrictive an interpretation of what is intended by the words in Policy 7.8 (as well as the words in By-law 12.1(c)). Moreover, the essence of the argument is that the restricted meaning which the Appellants deduce for Policy 7.8 must also restrict the meaning of the broad language appearing in another policy, Policy 7.3 (which, again, simply says that “residential uses” are permitted in “areas designated commercial”). Further, attempting to use the title of By-law 12.1(c) (“Developments Permitted by Development Agreement”), which relates to Policy 7.8, not Policy 7.3, to infer a restricted meaning for Policy 7.3, seems to the Board to be an attempt to turn the subordinate relationship of an L.U.B. to an M.P.S. on its head.

In **Heritage Trust**, Justice Hallett warns (as already noted) against “legalistic” interpretations of the M.P.S. [paras. 100 & 163]. We have two fundamental, and opposing, interpretations in the present case - the first, that of the appellants, which is that a multi unit residential development cannot, by definition, be built on the site; the second, that it can. Among other things, the appellants’ interpretation:

requires arguing that the phrase “in the areas designated residential,” in Policy 5.5 is restrictive, and can only mean that multi-unit residential developments can occur solely in a residential zone;

requires arguing that the same phrase “in the areas designated residential” does not have the same restrictive meaning in Policy 5.3 or, indeed, any restrictive meaning at all;

requires looking in the Rural Residential section, which has no direct relevance to the proposal being evaluated, to deduce a narrower definition of “residential uses”, which does not include multi-unit residential developments, and then using that narrower definition to:

- narrow the meaning of the broad term “residential uses” in Policy 7.3 of the M.P.S. which permits “residential uses” in an area designated Commercial, and to
- narrow the scope of the residential uses referred to in Policy 5.0 of the M.P.S. and By-law 6.1 of the L.U.B., to exclude multi-unit residential developments;

similarly requires looking at Policy 7.8 of the M.P.S. to deduce a narrower definition of the term “residential uses” in Policy 7.3, and to narrow the meaning of the residential provisions of Policy 5.0.

The contrary interpretation, that multi-unit residential developments are indeed possible on the site, is, in the Board’s respectful view, less “legalistic” and more direct - it simply follows the sequence of references provided in the M.P.S. (with corresponding references in the L.U.B.) beginning with the designation of the property as Industrial Shoreline in Policy 10 of the M.P.S.

In sequence, the M.P.S. tells us: the designation of the area which includes the property as Industrial Shoreline was made with the explicit intention of permitting “maximum flexibility in the future use of this key resource” (Policy 10.0 of the M.P.S., p. 18); that one can have in the area designated Industrial Shoreline all uses that are permitted in the Commercial Zone (Policy 10.16(b)); that in an area designated Commercial, permitted developments include “residential uses” (Policy 7.3); and, finally, that, in an area designated residential, multi-unit residential developments are one of the types of developments permitted (Policy 5.5). Following this fairly clearly marked trail through the M.P.S. the only direct difficulty that arises is the phrase “in the areas designated Residential” in Policy 5.5. The Board has already discussed this phrase at pp. 35-38 above.

In weighing the question of whether allowing a multi-unit residential development on the property is a reasonable interpretation of the M.P.S., the concept of “maximum flexibility” becomes, in the Board’s view, of great importance. As noted above, the M.P.S. explicitly says it is Council’s intent to “permit maximum flexibility” for uses in the Industrial Shoreline Zone, which includes the property in question. To conclude that the interpretation allowing a multi-unit residential development in the Industrial Shoreline Zone is unreasonable requires accepting that the “maximum flexibility” specified by Council nonetheless does not include the possibility of a multi-unit residential development in that Zone.

Section 9(5)(f) of the Interpretation Act says:

“(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
(f) *the consequences of a particular interpretation;*” [emphasis added]

The Board thinks it useful here to examine one of the consequences of the Appellant’s interpretation by contrasting the Industrial Shoreline Zone with the Residential Zone.

The M.P.S. recognizes that a principal fear associated with multi-unit residential developments is that they might be placed in the midst of an existing residential area in an inappropriate fashion. To take account of this, Policy 5.0 of the M.P.S. provides assurance that such developments can only occur by development agreement, after being “considered on their merits” so “that the character of the residential area is not negatively affected”. Thus, even though owners of single family detached houses have a fear that multi-unit residential developments may appear in their neighbourhood, such developments can still occur, if council, after holding a public hearing, chooses to enter into a development agreement.

In the Industrial Shoreline Zone, in contrast, the appellants assert that a multi-unit residential development can never occur, under any circumstances, even after a public hearing and a decision by council to enter into a carefully prepared development agreement. Thus, the Industrial Shoreline Zone, which has few people working in it (just those sometimes using the wharf), and not living in it, is (according to the appellants’ interpretation) accorded much greater protection (to the extent of absolute protection) against multi-unit residential development than is accorded a residential zone with existing dwellers.

In the Board’s view, an argument can be made that such a restrictive interpretation is inconsistent with the statement of Council’s intention in the M.P.S. to permit “maximum flexibility” for the area including the site. The corollary of this argument is that the contrary interpretation of the M.P.S., which does allow the proposed development, is more consistent with the M.P.S. directive for “maximum flexibility”.

The Board makes this point not to suggest that the Appellants’ interpretation is fatally flawed, but rather simply to point out that each of the interpretations under consideration (including that of the Appellants) is marked by inconsistencies, which occur, the Board believes, because this M.P.S. (and its associated L.U.B.), not unlike others, is ambiguous, and contains policies which are in apparent conflict.

Finding

The **Planning Act** and the case law recognize that municipal councils have the primary authority in planning matters, including making decisions to enter into a development agreement of the type proposed here, and make it clear that a council should be accorded the necessary latitude in exercising its authority.

The **Act** carefully limits appeals to the Board, saying that the Board can only intrude on a council's authority if the council's decision is not reasonably consistent with the intent of the M.P.S.

The case law interpreting the **Act** on this point makes it clear that it is possible to have more than one reasonable interpretation of an M.P.S. Thus, the fact that an appellant may put forward an interpretation which is "reasonably consistent".

While the Board does not find that the Appellants' interpretation of the M.P.S. is "unreasonable", the burden which rests on the Appellants is not to show the "reasonableness" of their interpretation, but rather to establish that the Municipality's decision to enter into the development agreement is not reasonably consistent with the M.P.S.

In support of their position, the Appellants have advanced arguments that allowing a multi-unit residential development on the property is not reasonably consistent with the M.P.S.

However, the Board finds the contrary view is at least equally compelling - that another interpretation of the M.P.S. is that such a development is reasonably consistent with the M.P.S. In brief, this view simply says the M.P.S.: explicitly states it is Council's intent to "permit maximum flexibility" for uses in the area designated Industrial Shoreline, which includes the property in question; permits all uses allowed in the Commercial Zone in the area designated Industrial Shoreline; allows residential uses in the areas designated Commercial; and allows multi-unit residential development (i.e., the type of development proposed here) in areas designated Residential. Thus, according to this view, a multi-unit residential development is possible in the area designated Industrial Shoreline.

Taking into account all of the provisions in the M.P.S. (and in the L.U.B.), the Board finds that, on balance of probabilities, the Appellants have not established it is unreasonable to interpret the M.P.S. as allowing a multi-unit residential development on the property in question, as approved by the Town Council of Mahone Bay.

Accordingly, the Board dismisses the appeal, and confirms Council's decision.

THE ISSUE: Did the Board err in law in confirming Council's decision?

ANALYSIS:

[61] In my opinion, the Board did err in law in that it failed to consider sections 51, 53 and 55 of the **Planning Act** as a result of which it ascribed to the MPS and intent which it cannot reasonably bear. I would also note that there was no reference to the

import of these sections of the **Act** in the submissions made to this Court. Maybe counsel felt that these sections were well enough understood that there was no need to make reference to them.

[62] Section 51 of the **Planning Act** provides that the Council of a municipality is required to concurrently adopt a land use by-law if the planning strategy being adopted contains statements of policy with respect to the control of land use and development. Section 53 of the **Act** requires that the council establish zones and prescribe by-laws for each zone stating what are permitted or prohibited uses of the land or structures in the respective zones.

[63] Section 55 of the **Planning Act** deals with development agreements and is, therefore, most relevant. Section 55(1) and (2) state:

55 (1) Policies adopted by a council pursuant to clause (p) of subsection (2) of section 38 to provide for development by agreement shall identify matters that the council shall consider prior to the approval of an agreement and the developments that are subject to agreement.

55 (2) Where a municipal planning strategy contains policies pursuant to subsection (1), the land-use by-law shall identify the developments to be considered by agreement.

(emphasis added)

[64] The Board, by failing to consider ss. 53 and 55 in particular, failed to recognize the import and clear distinction between uses permitted as of a right and developments considered only by agreement in seeking out the intent of the MPS. Under s. 53 the Town was required to adopt by-laws prescribing the permitted uses in

the respective zones. Pursuant to s. 55(2) of the **Act**, the by-law, adopted at the same time by the Town, was required to identify the developments to be considered by agreement. As a result of failing to consider these mandatory requirements of the **Planning Act** the Board misinterpreted the MPS. In drafting By-law 17 (the By-law which identifies the uses that are permitted in the Industrial Shoreline Zone and those developments that will be considered by development agreement), it is reasonable to assume that the draftsman were addressing these mandatory requirements of the **Act**. In fact, when one reads the various policies of the MPS and by-laws of the Town it is quite clear that the draftsman did distinguish between those uses permitted as of right and those developments which would be permitted only by agreement. A search for the intent of the MPS ought to start with the presumption that the draftsman would comply with the provisions of ss. 53 and 55 of the **Planning Act**.

[65] The focus of Policy 10 is the shoreline of the Town. As stated in Policy 10, “the interface between the Town and the water is complex enough in land use and development potential to require specific policies”. The area of the shoreline that is the focus of this appeal is the Industrial Shoreline Zone. It is covered by Policies 10.14 to 10.18, previously set out in this decision.

[66] Policy 10.16, in effect, directs one to consider the by-laws related to the uses allowed in the Commercial (C) Zone and the Industrial (I) Zone as it is in the By-law that the specific uses permitted are set out. Therefore, it is appropriate to consider the relevant by-laws in seeking the intent of the Town’s MPS.

[67] For convenience, I will reproduce By-law 17.1:

17.1 Permitted Developments

(a) Development Permitted Subject to Industrial Shoreline (IS) Zone Standards, Section 17.3

wharves, piers and slipways, launching ramps and similar water uses
 parks, playgrounds, open spaces and sports fields
 parking lots
 gazebos and bandstands to a maximum of 39 sq. metres (409 sq. ft.)
 boat houses
all uses permitted in Subsection 12.1(a)
all uses permitted in Subsection 9.1(a)

Developments Permitted Subject to Other Requirements of this By-law

none

(b) Developments Permitted Subject to Other Requirements of this By-law
 None

(c) Developments Permitted by Development Agreement

(i) tourist establishments, tourist-related retail activity, office buildings and craft workshops in accordance with Municipal Planning Strategy Policies 10.18 and 7.8.

[68] I would infer from a review of By-law 17.1 that under subparagraph (a) the Town has set out the uses permitted as of a right and under (c) developments that will be permitted by agreement. Such an inference recognizes the dictates of ss. 53 and 55 of the **Act**. Under (a), the uses permitted in the Industrial Shoreline Zone are those permitted in By-law 12.1(a). That By-law sets out the uses permitted in the Industrial (i) Zone. The uses permitted in By-law 12.1(a) do not include residential uses. The uses permitted by By-law 9.1(a) (the Commercial (C) Zone), include all uses permitted in the Residential (R) Zone. However, the uses permitted as of a right in the Residential (R) Zone do not include new multi-unit residential developments. Such developments can only be considered by agreement.

[69] The only developments expressly permitted by agreement in the Industrial Shoreline Zone (By-law 17) are “tourist establishments, tourist-related retail activity, office buildings and craft workshops in accordance with the MPS Policies 10.18 and 7.8.” There is no mention of new multi-unit residential development.

[70] Policy 10.18 provides for the designation of the Industrial Shoreline property as a Commercial Development Agreement Area in accordance with Policies 7.7 and 7.8. Policy 7 deals with commercial development and land use. Policy 7.8 provides that the Council shall consider only by development agreement in areas designated both Commercial Development Agreement and Industrial Shoreline proposals for new tourist establishments, new tourist-related retail activities and new office buildings and craft workshops provided the development is in accordance with Policies 5.7, 8.1, 10.18 and 19.8 and 19.9. Policy 5.7 is substantially the same as Policy 7.8. Policy 8.11 deals with the designation of certain zones as Commercial Development Agreement Areas in accordance with Policies 7.7 and 7.8. Policy 8 deals with the industrial development and land use. Policy 10.18, to which I have already made reference, is essentially the same as Policy 8.11 and Policies 19.8 and 19.9 deal with the general requirements for developments considered by agreement.

[71] By-law 17 is consistent with Policy 10.16 which permits, in the areas designated Industrial Shoreline Zone: activities and structures which preserve the open character of the area, public parks, etc. (10.16(a)); all the uses that are allowed in the Commercial (C) Zone (10.16(b)); and all the uses allowed in the Industrial (I) Zone

(10.16(c)). There is a notable absence in Policy 10.16 of any reference to allowing in the Industrial Shoreline (IS) Zone uses allowed in the Residential (R) Zone. This is consistent with the clear intent in the policies, when read as a whole, to use land on the shoreline of the Town that is zoned Industrial Shoreline, either for restricted industrial uses or to accommodate specific commercial development on South Main Street. In Policy 10.16, not only is there not any reference to residential development of any sort as being a permitted use but, in particular, there is no mention of permitting new multi-unit residential development by agreement in the Industrial Shoreline (IS) Zone.

Considering the requirements of the **Planning Act** as set forth in ss. 53 and 55, I would interpret the word “allowed” as it appears in Policy 10.16 as referring to those uses permitted as of a right and not as referring to developments that might be “considered by agreement”.

[72] Even if one interprets the word “allowed” where it appears in Policy 10.16(b) as including developments by agreement in the Commercial Zone, it does not include new multi-unit residential buildings (see By-Law 9.1(c)). Nor does By-Law 9.1(a) assist the development in this instance. By-law 9.1(a) permits “all uses permitted in the Residential (R) Zone”. The uses permitted in the Residential (R) Zone do not include new multi-unit residential developments as such developments can only proceed by development agreement even in the Residential (R) Zone.

[73] Similarly, if you interpret the word “allowed” in Policy 10.16(c) as including developments that can proceed by development agreement in the Industrial Zone, it

does not include new multi-unit residential developments as such developments are not mentioned in 12.1(c). Nor is such a development mentioned under By-law 12.1(a) as a development that is permitted as of right.

[74] By-law 12.1(b) permits development of “all uses permitted in the Commercial (C) Zone in accordance with Part 9 Commercial (C) Zone.” As mentioned above, the uses permitted in Commercial (C) Zone do not include new multi-unit residential developments.

[75] What is the policy with respect to new multi-unit residential developments in the Town? It is significant to note that even in the Residential (R) Zone such developments are not a permitted use but can only proceed by agreement. This is evident from Policy 5.5 previously quoted.

[76] Returning to By-law 17 and the reference in it to permitting, by agreement, tourist establishments, etc. in accordance with MPS Policies 10.18 and 7.8, and the policies which are cross referenced by those particular policies, I would note that under Policy 5.7 there is no reference to considering, by development agreement, proposals for anything other than new tourist-related activities, etc. The land in question has been designated pursuant to Policy 5.6 as a Commercial Development Agreement Area in addition to the designation of Industrial Shoreline Zone. There is a clear intent in the Policies to control the Industrial Shoreline (IS) Zone for industrial and commercial enterprises to offset the decline in the industrial and commercial sectors and encourage

development oriented towards tourist activities (see Policies 1, 2, 4, 7, 8, and 10, the relevant parts of which have been previously set out in this decision).

[77] There is nothing in Policy 10, which Policy specifically deals with shoreline development and land use, which even suggests that Council intended any part of the shoreline to be host to new multi-unit residential development. Even the residential development permitted in the area zoned Residential Shoreline restricts the residential development. For example, with respect to Area 5, the Background portion of Policy 10 states:

It is Council's intention to:

- (a) allow a reasonable and customary use of this shoreline without allowing buildings to dominate;
- (b) recognize that some residential development may be appropriate in some circumstances and provide for such development with special conditions regarding the amount of lot frontage covered by structures and the maximum height of structures;
- (c) recognize that there is an opportunity in this area for tourist-related commercial development and to provide for such development only by development agreement, thereby controlling the scale, architectural design and location;
- (d) restrict as-of-right development to low-impact uses such as water access uses which are compatible with neighbouring residential uses.

[78] And with respect to Area 7, the Background states:

It is Council's intention to:

- (a) allow a reasonable and customary use of this shoreline without allowing buildings to dominate;
- (b) restrict new development to low-impact uses such as water access uses which are compatible with neighbouring residential uses.
- (c) allow marine-related commercial uses within the existing boat house located at 995 South Main Street.
- (d) allow residential uses on the property located at 781 South Main Street.

[79] The Background statement is reflected in the Policies with respect to the

Residential Shoreline Zone which shows an intent to restrict residential development.

These policies are 10.9 to 10.12 which provide as follows:

- 10.9** designate the area shown as Residential Shoreline on Map 2, the Future Land Use Map, for restricted activities which will preserve the open character of the area. This area extends from the Government Wharf south to the northern boundary of the boat storage yard near Feaubeaux Street.
- 10.10** establish a Residential Shoreline (RS) zone in the Land Use By-law to correspond to the areas designated Residential Shoreline on the Future Land Use Map.
- 10.11** permit in the area designated Residential Shoreline activities and structures which preserve the open character of the area, including but not limited to private and public parks, gazebos, parking areas, wharves, slipways, boathouses and other water access uses which will be compatible with the nearby residential area and single unit dwellings will be permitted with special conditions regarding the amount of lot frontage covered by structures and the maximum height of the structures.
- 10.12** consider only by development agreement in the areas designated Residential Shoreline, proposals for tourist-related commercial development, such as but not limited to accommodations, antique shops, art shops, restaurants and marinas provided:
 - (a) the total frontage of all buildings on the lot does not exceed fifty per cent (50%) of the lot frontage;
 - (b) the structure does not exceed 7.5 metres (25') in height;
 - (c) development is in accordance with policies 19.8 and 19.9.

[80] This Policy shows an intent not to permit as of right even in the Residential Shoreline Zone, new multi-unit residential development. There is an obvious thrust to maintain as much of the open character of the harbour front as possible.

[81] Obviously the areas designated Open Shoreline in Policy 10 provide for very restricted use. Policy 10.4 states:

- 10.4** permit in the areas designated Open Shoreline activities which preserve the open character of the area, including but not limited to private and public parks, parking areas, wharves, slipways and other

water access uses. In addition, marine related commercial uses shall be permitted within the existing boat house located at 995 South Main Street and residential uses shall be permitted on the property located at 781 South Main Street.

[82] If one looks at all the shoreline zones intended to be established pursuant to Policy 10, it is quite clear that the draftsman distinguished between uses that were permitted and those that would be considered only by development agreement. Re: Commercial Shoreline Zone see Policies 10.7 and 10.8. With respect to the zone Residential Shoreline permitted uses are dealt with in Policy 10.11. Policy 10.12 provides for those developments that would be considered only by development agreement; the primary focus of which is on proposals for tourist-related commercial development. There is no mention of new multi-unit residential development. With respect to the Industrial Shoreline there is no indication that the draftsman intended there to be residential uses as of a right or by development agreement. It is only by going through the exercise undertaken by the planning director and the Board that one can reach the conclusion that by inference there could be a new multi-unit residential building in the Industrial Shoreline Zone. In effect, the approach taken by both the Planning Director and the majority of the Board was legalistic in that it resembled a search for some way to allow the development to proceed rather than a proper focus on the intent of the MPS.

[83] The importance of the Town shoreline and the focus in this area on open space and developments related to tourism is a dominant consideration throughout the MPS.

[84] When the policies are read as a whole and in tandem with the requirements of sections 53 and 55(2) of the **Planning Act**, the intent is clear - the only developments that will be considered by development agreement in the Industrial Shoreline Zone are those described in By-law 17.1(c) (tourist-related businesses, craft workshops and office buildings). This does not include the proposal for a new multi-unit residential building. As I have previously indicated, the failure of the Board to consider the import of sections 53 and 55 of the **Planning Act** has led the majority of the Board in to error in searching for the intent of the Town's MPS. Had the majority directed their minds to these requirements of the **Act**, they would have recognized (i) that the MPS was drafted so as to clearly distinguish between uses permitted as of right and those that would be considered/permitted by development agreement; (ii) that the by-laws shall prescribe the uses permitted in each Zone (s. 53(2)); and (iii) that the developments to be considered by agreement were required to be identified in the Land Use By-law (s. 55(2)). Had the majority recognized these requirement of the **Act**, they would not likely have erred in their interpretation of the MPS.

[85] The land in question had been zoned Industrial prior to the development of the MPS. The Council obviously wanted to maintain at least this one section of shoreline to allow an industrial use notwithstanding that they were fearful that they might get an industrial development that might not be attractive. While industrial uses are permitted as of right under Policy 10.16 and By-law 17, the Council did impose certain restrictions on industrial development even in the Industrial Zone. When one considers

the MPS as a whole, with particular attention to Policy 10.16 and By-law 17 implementing the policy for the Industrial Shoreline Zone, there is a clear intent to restrict development of this area of the shoreline. The land in question is the only area of the Town shoreline, along with the Town wharf, that is zoned Industrial Shoreline. The Background to Policy 10 which I have previously quoted clearly emphasizes the Council's desire to zone the shoreline very specifically with the primary intent for the shoreline as open space or as a potential for "future commercial and industrial development". There is nothing in the policies that indicates an intent to utilize the shoreline for new multi-unit residential development.

[86] In my opinion, the statement in the Background to Policy 10 that Area 4 where the land is located was to be maintained as an industrial designation so as "to permit maximum flexibility in the future use of this key resource" must be interpreted with reference to what the Town actually provided for in Policies 10.14 to 10.18 and in By-law 17. In my opinion, the Board over-emphasized the Background statement that Council would maintain the site Industrial for maximum flexibility. A reading of the MPS, as a whole, shows a clear intent to utilize this area of shoreline to revitalize the Town's economy, either through an acceptable industrial or commercial use. There was absolutely no intention to use the only shoreline parcel of land zoned Industrial Shoreline for a residential development that could go elsewhere. The proposed multi-unit residential development is not at all consistent with the intent of the MPS for the Industrial Shoreline Zone.

THE BOARD'S FINDING OF FACT:

[87] In the course of its decision, the Board, after reviewing evidence of various witnesses involved in the planning process, made the following finding of fact:

Taking into account what evidence we have on this question (which the Board recognizes is far from comprehensive), the Board finds, on balance of probabilities, that excluding multi-unit residential development from areas outside those already designated residential, and in particular excluding such a development from the Industrial Shoreline Zone (which includes the property in question) was neither a subject on the minds of, nor an intent of, the majority of Councillors in adopting the M.P.S. With respect to the site in question, the Board finds that their concern was that it might, unavoidably, be developed in an industrial way that could lead to noises or smells which would be unattractive for the developing waterfront.

In reaching this conclusion, the Board does not doubt the passion, or the sincerity, of Mr. Douglas with respect to his differing personal recollections of what was key to the M.P.S. and L.U.B.

The Board has reviewed the evidence respecting legislative history, in part because a significant portion of the hearing was occupied with evidence related to it. However, the Board does not consider that ascertaining the intent of the persons who developed or adopted an M.P.S. is determinative of (or, even, in general, a necessary step in deciding) a matter such as this. To the contrary, the Board considers that the case law emphasizes instead a focus upon the M.P.S. itself - not upon its legislative history. It is, therefore, to the words of the M.P.S., in the context of the **Planning Act**, the case law, and the development agreement, that the Board now turns, and upon which its decision is based.

[88] We are bound by findings of fact by the Board as s. 26 of the **Utility and**

Review Board Act provides:

The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.

[89] The intent of the MPS is to be primarily ascertained from the written document as recognized by the Board. Whatever those councillors who testified before the Board may have thought or did not think at the time the strategy was adopted is really irrelevant if the intent of the document is clear as it is in this instance. The finding of fact by the Board is, therefore, irrelevant.

SUMMARY:

(i) Council's Decision:

[90] It is reasonable to infer that the Town Councillors who voted to approve the entry into the development agreement were influenced by the opinion of the planning director that Council had the authority to allow the proposal to proceed by development agreement pursuant to Policy 10.16. The planning director erred in his interpretation of the MPS in that he failed to properly review the strategy to ascertain its intent but rather, sought out a legal route to accommodate the proposed development.

(ii) The Board's Decision:

[91] The majority of the Board erred in their search for the intent of the MPS by failing to consider sections 51 to 55 of the **Planning Act**. Had they done so, they would have realized that the draftsman of the Town MPS had these sections in mind when the MPS and the By-law were developed.

[92] The Board quoted from **Heritage Trust** at page 28 of its decision as follows:

In **Heritage Trust**, as in the present case, there were certain provisions upon which an Appellant could urge a more restrictive interpretation of the M.P.S. than the one taken by the Municipality. In examining one of these arguments, Justice Hallett observed,

To impose a narrow construction on the words would likely defeat the purpose of the Policy [para.107].

Justice Hallett also noted the "weak position" of the city in **Heritage Trust** [para. 107], in attempting to achieve what it saw as a reasonable solution. In the present case, the Town of Mahone Bay, according to the evidence of its former and present mayors, did not wish to have noisy or smelly uses on the site in question, but would have little power to prevent such uses if an owner chose to

use the lot in that fashion, i.e., no development agreement or re-zoning would be necessary for such a use to occur (while M.P.S. Policy 8.7 provides some authority to restrict developments such as incinerators and asphalt plants, the list of uses permitted under L.U.B. By-laws 12.1(a) and 9.1(a) is an extensive one, including manufacturing, motor vehicle repair shops, construction equipment storage, marine trades, and industrial workshops). Apart from noise and smell, such uses could also be up to 45 feet in height (see p. 16 above). However, the Developer wishes to build a low-rise (39 foot high) multi-unit residential condominium development, which avoids the industrial noise and smell concerns, and also allows the Town to use a development agreement to closely control size and appearance.

The Court in **Heritage Trust** notes that the provisions of an M.P.S. are simply policies, which may often conflict:

In interpreting a municipal planning strategy which is set out in policy statements intended as a guide to decision-making by a municipality with respect to development by agreement in the municipality a liberal, purposive and pragmatic interpretation should be the rule as planning is not an exact science; the policies are very often phrased in general terms that require a degree of latitude in interpretation and application ... *The provisions of the Plan should be recognized for what they are - simply policies. In many instances policies conflict ... It is obvious that there is need for latitude in interpreting and applying the various policies.* City Council is required to make value judgments in the best interest of the City and within the framework of the intent of all of the policies of the Plan ... [paras. 115 & 116; emphasis added]

Justice Hallett repeatedly emphasizes that there can be more than one reasonable interpretation of an M.P.S. Quoting again from Côté, on the subject of legislative interpretation generally, he notes

A judge may on occasion recognize that there is no single 'correct' or 'true' meaning, and that sometimes *the law may lead to more than one 'reasonable' interpretation.* [para. 83; emphasis added]

With respect to Nova Scotia's **Planning Act**, Justice Hallett states:

... the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear ... This is implicit in the scheme of the Planning Act ... *There may be more than one meaning that a policy is reasonably capable of bearing.* This is such a case. [para. 99; emphasis added]

He elsewhere observes

Neither the Board nor this court should embark on their review duties in a narrow legalistic manner as that would be

contrary to the planning legislation. Policies are to be interpreted reasonably so as to give effect to their intent; *there is not necessarily one correct interpretation...* [para. 163; emphasis added]

These latter words were quoted with approval by the Court of Appeal in **Markborough** [para. 44].

[93] The passages from **Heritage Trust** formed the justificatory base for the majority's eventual interpretation of the MPS that would allow the proposed residential development to proceed.

[94] The statements quoted from **Heritage Trust** were made in the context of the issues raised by the facts of that appeal. In **Heritage Trust** there was a marked conflict between the policy encouraging development and the policy to preserve heritage buildings. A municipal planning strategy often contains competing or even conflicting policies that necessitate a degree of latitude in considering whether a council's decision to approve a development by agreement was consistent with the strategy. That is, presumably, why the Legislature directed the Board not to interfere with such a decision unless the decision could not reasonably be said to be consistent with the strategy. However, when the intent of the strategy is clear and, when applied to the proposed development, it is clear that the proposal is not the type of development contemplated by the strategy, the Board ought to set aside the decision of Council approving the entry into such an agreement. It ought not try and ferret out an intent that flies in the face of the intent expressed in an MPS which is not clouded by conflicting or competing policies.

[95] A search for the intent of a municipal planning strategy requires a careful review of the strategy represented by the policies of the municipality and, very often, a review of the By-laws implementing the strategy as the by-laws adopted concurrently with the MPS may assist in throwing light on the intent of the strategy. In this instance By-law 17 assists in the interpretation of Policy 10.16. In my opinion, the intent of the MPS for the Town was abundantly clear with respect to the uses that would be permitted or considered by development agreement in the Industrial Shoreline Zone.

(iii) Disposition of the Appeal:

[96] The Board, in failing to consider the import of sections 53 and 55 of the **Planning Act** in seeking the intent of the MPS, erred in law in that it ascribed to the MPS an intent which it could not reasonably bear. Had it properly identified the intent, it could not have found that Council's decision to enter into the development agreement was "reasonably consistent with the intent of the MPS."

[97] Reviewing the MPS as a whole the intent is clear; the Town did not intend to permit or consider by development agreement new multi-unit residential development in the Industrial Shoreline Zone. The decision of Council to enter the development agreement cannot reasonably be said to be consistent with the intent of the MPS. I would allow the appeal and set aside the Board's Order confirming the decision of Council. I would set aside the decision of Council to enter into the proposed development agreement. I would not make an order for costs.

Hallett, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.