NOVA SCOTIA COURT OF APPEAL

Citation: *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27

Date: 20100409
Docket: CA 319179
Registry: Halifax

Between:

Karen Archibald, William and Jean Thomas, David and Ronda Parker, Thomas and Carmel Chisholm, Glen and Leslie Fisher, Colin MacNeil, Ruby Duguay, Eleanor Carter, Deborah Elliott, Keith Finck, William and Lynn Gourley, Gregory Marshall, Heather MacLeod, Corinne Cameron, George and Bela Casson

Appellants

v.

Nova Scotia Utility and Review Board, Calder Hugh Creelman, Town of Truro, Attorney General of Nova Scotia

Respondents

Judges:	Hamilton, Fichaud, Farrar, JJ.A.
Appeal Heard:	March 24, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs per reasons for judgment of Fichaud, J.A.; Hamilton and Farrar, JJ.A. concurring
Counsel:	Karen Archibald, speaking for the appellants Peter M. Rogers, Q.C., for the respondent Calder Creelman Gary Richard, for the respondent Town of Truro

Reasons for judgment:

[1] Mr. Creelman, a developer, wants to build a multi unit residential building in Truro. Truro's Town Council declined his proposed development agreement. The Utility and Review Board allowed Mr. Creelman's appeal, and ordered the Council to approve the development agreement. Twenty-one residents of the Town appeal, and ask the Court of Appeal to reinstate the Council's refusal. The issue is whether the Board made a legal error in applying its standard of review to the Council's decision.

Background

[2] I will paraphrase the Board's findings about the project from the decision under appeal.

[3] The development would be two storeys, having ten residential units, and resemble a row of townhouses. The roof line, front and rear facades would be staggered, with projections and recesses giving the appearance of different, though connected, dwellings. The development would follow the site's topography by stepping down along the dropping grade. The development would include street access, parking for fifteen vehicles and landscaping.

[4] The project would be near the centre of a block bounded by Duke, Willow, Victoria and King Streets. The block has buildings fronting on all four streets. The neighbourhood has single family dwellings, dwellings converted to rental and professional uses and some apartment buildings.

[5] The proposal also would renovate an existing single family dwelling at 29 Victoria Street, now vacant and timeworn. This building lies within a heritage conservation district. The proposed ten unit building would lie just outside the heritage conservation district.

[6] Adjacent to the site of the proposed ten unit building lies an existing twelve unit apartment building that was built under a 2003 development agreement with the same developer. The proposed development agreement would replace this 2003 agreement, and would cover both the existing twelve unit and the new ten unit buildings.

[7] The property is zoned R-7 (residential mixed use) and is situated in the Town's Urban Regional Core (URC) within Revitalization Area I on the Future Land Use map. The Town's planning policy URC-33 says:

> It shall be a policy of Council to permit a maximum of four units in a converted dwelling within the Residential/Mixed Use Zone (R7) and consider applications for dwellings greater than four units that constitute a conversion or expansion and new multiple unit residential development only by development agreement.

[8] On November 5, 2008, Mr. Creelman applied to the Town of Truro for a development agreement. After a review by the Town's planning department, Mr. Creelman amended his application to address concerns raised by the department. The Town's Planning Advisory Committee and the Town's Heritage Advisory Committee both recommended that the Town Council approve the ten unit residential project and permit specified usage of the existing vacant building. An information package was sent to 197 property owners within 750 feet of the property, generating 48 replies, 21 favorable, 21 unfavorable, and 6 with no opinion. The Town's Director of Planning and Development, Mr. Jason Fox, prepared a staff report that concluded the project complied with the Town's Municipal Planning Strategy (MPS) and recommended that the Council approve the proposed development agreement.

[9] The Council held a public hearing on April 20, 2009, and then refused Mr. Creelman's application. The Town's Chief Administrative Officer wrote to Mr. Creelman on April 23, 2009, explaining the Council's reasons:

> In making its decision, Council identified several concerns about your proposal including compatibility of the proposal with adjacent land uses and compatibility of the proposed development with adjacent properties in terms of scale and density.

[10] On May 6, 2009, Mr. Creelman appealed the Council's refusal to the Utility and Review Board (Board). His Notice of Appeal alleged that the Council's decision did not reasonably carry out the intent of the MPS, the Board's appellate standard prescribed in ss. 250(1)(b) and 251(2) of the *Municipal Government Act*, S.N.S. 1998, c. 18 (*MGA*).

[11] Following the Council's refusal, Mr. Creelman became concerned about the deteriorated condition of the existing building at 29 Victoria Street. Mr. Creelman's insurer had advised that the property would not be insured if it remained vacant. So Mr. Creelman applied to the Council for a demolition certificate. On May 28, 2009, the Council declined to issue the certificate. Rather, the Council deferred consideration of that application until the decision of the Board on Mr. Creelman's planning appeal respecting the development agreement.

[12] On May 29, 2009, Mr. Creelman, under the *Heritage Property Act*, R.S.N.S. 1989, c. 199, appealed to the Board from Council's refusal to issue a certificate approving the demolition of the building at 29 Victoria Street.

[13] The Board heard both Mr. Creelman's appeals together on July 8, 2009. Mr. Creelman and the Town were represented by lawyers. The Board gave intervenor status to The Downtown Truro Residents' Association, an unincorporated group who were represented by one of its members. At the hearing, Mr. Creelman testified and called as witnesses Mr. Jason Fox, the Town's Director of Planning and Development, and Ms. Jennifer Tsang, a planner. The Town filed an appeal record and the Downtown Truro Residents' Association filed excerpts of a book concerning Truro's historic buildings, but neither of those parties called witnesses. After the hearing on July 8, the Board visited the site, accompanied by the parties' representatives. Three residents from the surrounding neighbourhood spoke to oppose the development, citing concerns about scale, infilling, parking, and the development's impact on the neighbourhood's traditional character.

[14] The Board issued a decision on September 30, 2009 (2009 NSUARB 143). The Board allowed Mr. Creelman's appeal under the *MGA* and held that the Town Council's refusal to approve the development agreement, as submitted in Mr. Creelman's amended application, did not reasonably carry out the intent of the MPS. The Board ordered the Council to approve that development agreement. Later I will discuss the Board's reasons. The Board declined to rule on Mr. Creelman's other appeal respecting the demolition certificate, but reserved its jurisdiction to do so if later required.

[15] The Downtown Truro Residents' Association appealed to the Court of Appeal. After direction from the Court of Appeal’s chambers justice, the notice of

appeal was amended to identify the individual appellants instead of the unincorporated association.

Issues

[16] The appellants' submissions may be grouped under the umbrella issue - Did the Board make an appealable error by ruling that the Council's refusal to approve the development agreement, submitted by Mr. Creelman, did not reasonably carry out the intent of the MPS under ss. 250(1)(b) and 251(2) of the *MGA*?

[17] There is no appeal to this court respecting the Board's treatment of Mr. Creelman's request for a demolition certificate under the *Heritage Property Act*. I will not discuss that issue further.

Standard of Review

[18] Before considering the standard of review, the reviewing court isolates the threshold grounds of appeal that are permitted by the statute. *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, ¶ 36; *Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 35, ¶ 15-20. Sections 26 and 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c. 11 state that the Board's findings of fact made within its jurisdiction are binding and conclusive, and that an appeal lies to the Court of Appeal only on questions of jurisdiction or law. See *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board*) (N.S.C.A.) (1994), 128 N.S.R. (2d) 5, at ¶ 101, and *Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board)*, 2008 NSCA 123, ¶ 24. There is no jurisdictional issue in this appeal. So the question, to which the standard of review analysis applies, is whether the Board erred in law.

[19] The Court of Appeal applies correctness respecting the Board's selection of the Board's standard of review to the decision that is appealed to the Board. *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78, ¶ 41; *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115, ¶ 27, 32, 36.

[20] Here s. 250(1)(b) of the *MGA* says that the refusal of a development agreement may be appealed only "on the grounds that the decision of the council

does not reasonably carry out the municipal planning strategy". The Board's decision expressly purports to apply that standard to the Town Council's refusal of Mr. Creelman's proposed development agreement. There is no issue respecting the Board's selection of its standard.

[21] The issue on this appeal is whether the Board committed an error of law in its application of ss. 250(1)(b) and 251(2). In *United Gulf*, ¶ 45-56, this court considered the factors prescribed by Justices Bastarache and LeBel in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and concluded that reasonableness is the appropriate standard to the Board's decision respecting Council's refusal to amend a development agreement under s. 250(1) of the *MGA*. I adopt Justice Hamilton's standard of review analysis from *United Gulf*, and will apply reasonableness to assess whether the Board erred in law in its application of ss. 250(1)(b) and 251(2).

[22] I will add a few words on the meaning of "reasonableness" for a reviewing court. In *Dunsmuir*, Justices Bastarache and LeBel said "reasonableness" has components of process and outcome.

> (a) For process, the reviewing court considers whether the decision under review expresses a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion. This is not a correctness analysis in disguise. Rather, the reviewing court determines whether it can understand how the tribunal reached its outcome, and whether the tribunal's reasons afford to the reviewing court the raw material for the reviewing court to perform its next task of assessing whether the tribunal's conclusion inhabits the range of acceptable outcomes.
>
> (b) The court then assesses the outcome's acceptability through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime". This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. The reviewing court does not ask whether the tribunal's conclusion is right or preferred. Rather the court tracks the tribunal's reasoning path, and asks whether the tribunal's conclusion is one of what may be several acceptable outcomes.

Dunsmuir, ¶ 47-49; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at ¶ 47-55; *Canada v. Khosa*, ¶ 59. *Lake v. Canada*, [2008] 1 S.C.R. 761, at ¶ 41; *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Limited*, 2009 NSCA 60, ¶ 22-24, 34-35; *Casino Nova Scotia v. NSLRB*, 2009 NSCA 4, ¶ 29-31; *Midtown Tavern*, ¶ 42.

Analysis

[23] The Board began by citing ss. 250(1)(b) and 251(2) of the *MGA*. These provisions permit an appeal to the Board only on the ground that the Council's refusal of the development agreement "does not reasonably carry out the intent of the municipal planning strategy" and authorize the Board to allow an appeal only when the Board "determines that the decision of council ... does not carry out the intent of the municipal planning strategy or conflicts with the provisions of the land use by-law or the subdivision by-law". As I noted earlier, the Board (¶ 49) correctly defined its task as to determine whether Council's refusal "does not reasonably carry out the intent of the MPS".

[24] The Board then (¶ 51-62) recounted the provisions of the *MGA* and passages from decisions of this court that state the principles to govern the Board's treatment of an appealed planning decision. I will summarize my view of the applicable principles:

> **(1)** The Board usually is the first tribunal to hear sworn testimony with cross-examination respecting the proposal. The Board should undertake a thorough factual analysis to determine the nature of the proposal in the context of the MPS and any applicable land use by-law.
>
> **(2)** The appellant to the Board bears the onus to prove the facts that establish, on a balance of probabilities, that the Council's decision does not reasonably carry out the intent of the MPS.
>
> **(3)** The premise, stated in s. 190(b) of the *MGA*, for the formulation and application of planning policies is that the municipality be the primary steward of planning, through municipal planning strategies and land use by-laws.

(4) The Board's role is to decide an appeal from the Council's decision. So the Board should not just launch its own detached planning analysis that disregards the Council's view. Rather, the Board should address the Council's conclusion and reasons and ask whether the Council's decision does or does not reasonably carry out the intent of the MPS. Later (¶ 30) I will elaborate on the treatment of the Council's reasons.

(5) There may be more than one conclusion that reasonably carries out the intent of the MPS. If so, the consistency of the proposed development with the MPS does not automatically establish the converse proposition, that the Council's refusal is inconsistent with the MPS.

(6) The Board should not interpret the MPS formalistically, but pragmatically and purposively, to make the MPS work as a whole. From this vantage, the Board should gather the MPS' intent on the relevant issue, then determine whether the Council's decision reasonably carries out that intent.

(7) When planning perspectives in the MPS intersect, the elected and democratically accountable Council may be expected to make a value judgment. Accordingly, barring an error of fact or principle, the Board should defer to the Council's compromises of conflicting intentions in the MPS and to the Council's choices on question begging terms such as "appropriate" development or "undue" impact. By this, I do not suggest that the Board should apply a different standard of review for such matters. The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. But the intent of the MPS may be that the Council, and nobody else, choose between conflicting policies that appear in the MPS. This deference to Council's difficult choices between conflicting policies is not a license for Council to make *ad hoc* decisions unguided by principle. As Justice Cromwell said, the "purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council's authority should be exercised" (*Lewis v. North West Community Council of HRM*, 2001 NSCA 98, ¶ 19). So, if the MPS' intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council's decision reasonably bears that intent.

> **(8)** The intent of the MPS is ascertained primarily from the wording of the written strategy. The search for intent also may be assisted by the enabling legislation that defines the municipality's mandate in the formulation of planning strategy. For instance ss. 219(1) and (3) of the *MGA* direct the municipality to adopt a land use by-law "to carry out the intent of the municipal planning strategy" at "the same time" as the municipality adopts the MPS. The reflexivity between the MPS and a concurrently adopted land use by-law means the contemporaneous land use by-law may assist the Board to deduce the intent of the MPS. A land use by-law enacted after the MPS may offer little to the interpretation of the MPS.

[25] These principles are extracted from the decisions of this court in: *Heritage Trust*, ¶ 77-79, 94-103, 164; *Lewis v. North West* ¶ 19-21; *Midtown Tavern*, ¶ 46-58, 81, 85; *Can-Euro Investments*, ¶ 26-28, 88-95; *Kynock v. Bennett* (1994), 131 N.S.R. (2d) 334, ¶ 37-61; *Tsimiklis v. Halifax (Regional Municipality)*, 2003 NSCA 30 ¶ 24-27, 54-59, 63-64; *3012543 Nova Scotia Limited v. Mahone Bay Heritage and Cultural Society*, 2000 NSCA 93, ¶ 9-10, 61-64, 66, 84, 86, 89, 91-97; *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality)*, 2004 NSCA 59, ¶ 26.

[26] The Board's decision cited these principles, then moved to apply them to the Council's refusal of Mr. Creelman's development agreement. The Board's application of the principles is the real issue on this appeal.

[27] The appellants say Mr. Creelman's development would install an obtrusive apartment building next to their backyards, changing the neighbourhood's population density, scale and traditional character. They contend the Council's role was to assess whether this passed the tipping point of compatibility between revitalization and incumbent tranquillity. The Council's decision, they submit, was a value balance of intersecting planning perspectives to which the Board should have deferred.

[28] Had the Board embarked on a *de novo* planning exercise, balancing conflicting principles afresh while circumventing the Council, and then substituted its own conclusion, I would agree that the Board overstepped its appellate role. But this was not the Board's approach.

[29] Section 230(6) of the *MGA* requires the municipality to give the applicant written reasons for the refusal to approve a development agreement:

> Within seven days after a decision refusing to approve a development agreement or an amendment to a development agreement, the clerk shall notify the applicant in writing, giving reasons for the refusal and setting out the right of appeal.

[30] These reasons are to appear in the notice setting out the right of appeal. So the *MGA* intends that the municipality's stated reasons be pivotal to the appeal. Section 230(6) invites the appellant to address the Municipality's stated reasons in his grounds of appeal and beckons the Board to address them in the Board's analysis. I do not suggest the Board is confined to those stated reasons. The ultimate question – whether the Council's decision reasonably carried out the intent of the MPS – may propel the Board to other issues. See *Lewis*, ¶ 9, 22; *United Gulf*, ¶ 15, 72-74; *Midtown Tavern*, ¶ 52-53, 79. But the focus on the municipality's written reasons prompts the Board to respect its appellate role that I discussed earlier.

[31] The Town's letter of April 23, 2009 to Mr. Creelman, said the Council "identified several concerns about your proposal including compatibility of the proposal with adjacent land uses and compatibility of the proposed development with adjacent properties in terms of scale and density". After undertaking a factual analysis of the proposal and noting (¶ 52) that Mr. Creelman, as appellant, bore the onus, the Board squarely addressed the Town's two stated reasons for rejecting the development agreement.

[32] Respecting compatibility with adjacent land uses, Ms. Tsang, a planning expert, gave evidence to the Board in a report:

> The proposal is compatible with adjacent land uses which consist of a mix of residential housing forms including a twelve unit building, converted dwellings of up to three units, and large single unit dwellings. The proposed ten unit building fits into the land use mix as does the preservation and conversion of the house at 29 Victoria Street into either a three unit building or a two unit with a professional office.

[33] The Board 's decision accepted her view:

> [71] The Board accepts the evidence of Ms. Tsang that the use proposed for the subject development is compatible with adjacent land uses.
>
> . . .
>
> [73] Based on the evidence of Ms. Tsang, any suggestion that the use of the proposed development (i.e., a multi-unit residential building) is not compatible with the uses enjoyed on adjacent lands (i.e., single family residential homes and multi-unit residential buildings) is clearly incorrect. The use proposed for the subject development and adjacent land uses are identical: i.e., both uses are residential uses within similar types of buildings.

[34] There was evidence that was reasonably capable of supporting the Board's finding of compatibility. The Board's finding of compatibility bore no error of law that is appealable to this court under s. 30(1) of the *Utility and Review Board Act.*

[35] Based on its finding, the Board determined:

> [73] . . . Thus, a refusal by Council based on the assertion that the proposed use is inconsistent with adjacent land uses does not reasonably comply with the intent of the MPS.

Given the finding of compatibility, there is nothing unreasonable in the Board's conclusion. The Board's reasoning is understandable and the outcome is an acceptable deduction.

[36] The Board next discussed the Council's second stated reason, the concern about scale and density.

[37] The Board referred to the evidence of Ms. Tsang:

> [78] Ms. Tsang testified that the application meets the intent of the MPS in terms of both scale and density:
>
> The traditional neighbouring residential properties are large older homes with many architectural details. The size and footprint of a multiple unit building would naturally be larger than that of a single unit home. Because the MPS encourages intensification through the consideration of higher density development in this area, the analysis here is about how to make the size and scale of a multiple unit building compatible with the traditional neighbouring

residential properties, rather than to limit the size and scale to the same absolute values.

In this case, compatibility is achieved, in part, by proposing a lower density multiple unit building than the MPS would allow. The overall density of the site is approximately 60% of what the MPS would allow, and further, this density is spread across four buildings. The new multiple unit building itself, is just ten units, fewer than the existing twelve unit building on the site. The new ten unit building is not ten times larger than the neighbouring traditional residential properties because each unit is smaller. The footprint of the proposed ten unit building is larger than the footprints of the neighbouring traditional residential properties, but not ten times larger. The larger footprint is a reasonable trade off for achieving a two storey building rather than three story building, which could be considered for this property.

Compatibility is also achieved through the architectural style and housing type which is that of five townhouses which are more in size and scale to the traditional neighbouring residential properties than what a typical multiple unit building would be. The significant architectural details, staggered facades, staggered roof lines, and individual entrances for the units also make the scale more in keeping and compatible with low density housing forms. The new building is designed to follow the natural grade as closely as possible which results in the building being lower in height than all the surrounding residential dwellings. The size and scale of the proposed ten unit building is compatible with the traditional neighbouring residential properties.

[79] At pages 16-17 of her report, she also addressed the same issues:

The height, scale, lot coverage, density and bulk of the proposal are compatible with adjacent properties. In contemplating the intensification of this area through the development of medium and high density residential housing it would be expected that new buildings would be larger than adjacent single unit dwellings. This type of intensification is what the MPS supports. Therefore, understanding that intensification would likely be greater in terms of these matters than adjacent properties, the effort is to be put into ways to improve upon the compatibility of multiple unit buildings with adjacent properties.

In this case, the proposed ten unit building is two stories in height and sited at a lower elevation than the adjacent properties. The MPS allows for up to three stories, and in fact the roof line of the proposed building will be 7 - 10 feet lower than the peak of the roof lines on adjacent properties. The lot coverage of the proposal, including existing and proposed buildings, is just 20% of the lot. This is consistent with the lot coverage in the neighbourhood. The density of the proposal

> is 60% of what the MPS could allow and the density is broken out across four buildings. The density is just slightly higher than adjacent properties. The new building is designed in a townhouse form so that its scale is more reflective of low density housing. It has significant architectural detailing to recognize and be compatible with the architectural detailing of some of the adjacent land uses. The footprint of the building is staggered so that it fits more parallel with the lot lines to maximize setbacks. The new ten unit building's design, grade, setbacks, buffers and height reduce its bulk and make it compatible with adjacent properties. The preservation and conversion of the existing house at 29 Victoria Street is fewer units than what the MPS would allow and compatible with other converted dwellings in the area.

[38] Later in its reasons, the Board stated:

> [87] As noted by Ms. Tsang in her testimony, in applying the MPS in its entirety, it is not possible to develop higher density multiple unit buildings (up to 80 units per hectare) into buildings that are the same absolute size of a family home. The Board accepts her testimony that issues such as height, scale and density must be considered in the context of the policies of the MPS as a whole, including the policies that, according to Ms. Tsang, “encourage intensification and new multiple unit buildings”.
>
> [88] For the above reasons, the Board concludes that a refusal of the application, on the basis of scale and density, does not reasonably comply with the intent of the MPS.

[39] The Board had noted earlier (¶ 63) that:

> The Future Land Use Map, which designates future uses for lands covered by the MPS, identifies the subject property as being in a Revitalization Area.

The Board elaborated on the MPS' policy of "intensification of uses":

> [102] In addition to Policy URC-33, which allows development agreements for residential buildings having more than four units, Policy R-1 provides that Council is to encourage “a variety of housing types” and Policy R-3 provides that Council is to encourage “new residential development forms.”
>
> [103] Moreover, the subject property is located in a Revitalization Area, which contemplates new housing developments of different types in the Urban Regional Core. As noted in Section 4.4.1 of the MPS, an intensification of uses is contemplated for Revitalization Areas.

> [104] The Board accepts the evidence of Ms. Tsang that Council's refusal of the development agreement actually defeats the intent of the MPS by ignoring the above policies: see paragraph 34 above in this Decision.

[40] The Board also referred to the testimony of Mr. Fox, the Town's Director of Planning and Development:

> [80] Mr. Fox also testified that the proposed development is consistent with the MPS in terms of scale:
>
> Q. (Rogers) Now, what was your view with respect to the scale of this project in relation to the neighbourhood?
>
> A. (Fox) Taken as a whole, I guess if you looked at the size of the building footprint, if you looked at it -- if you determined scale in that way, I'd say it would be larger than the average building footprint in the neighbourhood. However, if you look at scale in terms of the perception of scale, if you look at the structure and you say, what does it actually look like in relation to the surrounding, how does it compare, I would say that the way the building's been designed, given the broken roof line and the way it stepped down on the site, the way it uses -- employs a staggered facade, projections at the rear and accent gables, all those things add to the visual interest and reduce any appearance of something that's out of scale. It makes it appear more in keeping with the surroundings.
>
> Q. And ultimately, did you feel the scale and compatibility was appropriate or inappropriate?
>
> A. I felt it was appropriate.

[41] The Board quoted Mr. Fox's testimony that the Council had not given due consideration to the MPS' policies on scale and density:

> [86] Mr. Fox acknowledged on cross-examination by Mr. Richard that the MPS provisions relating to scale and density are qualitative in nature and can be taken into account by Council. However, while he was hesitant to be critical of Council, which he described on a few occasions as his employer, he stated that it was not evident to him how Council would have relied on these provisions to refuse the development agreement in this particular case. In relation to Council's refusal, Mr. Fox testified:

MR. FOX: I just don't think due consideration was given to the policies when they reached their decision.

THE CHAIR: Policies collectively, you mean?

MR. FOX: Yes. The policies that were discussed in the body of the report.

THE CHAIR: So in your view, did they isolate on one policy or two policies to the exclusion of all the other ones, or exactly what do you mean by that?

MR. FOX: I -- I mean, I don't think -- I don't think they gave due consideration to the policies when they made their decision. So I don't think they went -- the -- things like compat -- the policies relating to compatibility and that sort of thing, I didn't see any evidence that they gave due consideration to those in reaching their conclusion...

[42] The Board said:

> [82] First, the Board accepts the evidence of both Ms. Tsang and Mr. Fox that the scale of the proposed building is compatible with other buildings in the neighbourhood.

[43] The Board concluded, respecting scale and density:

> [88] For the above reasons, the Board concludes that a refusal of the application, on the basis of scale and density, does not reasonably comply with the intent of the MPS.
>
> [89] In this respect, Council's decision does not reasonably comply with the intent of the MPS.

[44] The Board dealt with the Council's stated reason for rejecting the development agreement – the Council's concern over compatibility of scale and density. The Board found that the development was compatible with the neighbourhood in terms of scale and density, and that the Council had erred in its contrary view. The Board had evidence, from Ms. Tsang and Mr. Fox, from which

the finding of compatibility could reasonably be made. The finding of compatibility involves no issue of law which this court may consider on appeal.

[45] The Board stated that the Council's decision also was inconsistent with the MPS' policy of heritage and streetscape preservation. Paragraph 2.12.2 of the Town's MPS says:

> The intent of the Heritage Conservation Districts is to preserve an entire streetscape that would be representative of Truro's unique heritage styles.

The existing building at 29 Victoria Street, located in a heritage conservation district, was "seriously deteriorated" according to the Board, and uninsurable, with infelicitous prospects. The proposed development would refurbish the building. The Board said:

> [107] The Board is satisfied, on the basis of the evidence before it, that Council's refusal of the development agreement may threaten the preservation of the streetscape along Victoria Street. Such a result is not consistent with the intent of the MPS.

[46] Given the Board's undisturbable factual findings respecting compatibility of use, scale and density and heritage preservation, the question is whether the Board's decision offended the reasonableness standard of review that governs the Court in this appeal. The Board's reasoning is transparent and intelligible. I understand how and why the Board reached its conclusion, and I am able to assess the acceptability of the Board's outcome. The Board considered both the Council's stated reasons and the Council's ultimate conclusion, and did not just engage in a *de novo* planning exercise. The Board explained how both the Council's reasons and conclusion did not carry out the intent of identified passages in the MPS. The Board's interpretation of the MPS was supported by evidence of the planning witnesses and the terms of the MPS. The Board's decision does not offend the principles I have set out earlier (¶ 24), extracted from the authorities.

[47] This is not a case of intersecting planning policies where the Board should defer to the Council's compromise of values. I appreciate Ms. Archibald's able submission that, in the appellants' view, the scale of non-traditional uses in this neighbourhood has brimmed over and revitalization should be curtailed. But I agree with the reply of Mr. Creelman's counsel that the "fix", if one is needed, is an

amendment of the MPS. The intent of the current MPS governs this development, the Council's consideration of it, the Board's review of the Council's decision, and the appeal to this court.

[48] In my view, the Board's decision, including its interpretation of the MPS, satisfies the reasonableness standard of review.

Conclusion

[49] I would dismiss the appeal without costs. I disagree with Mr. Creelman's request for costs. Under Rule 90.51, this court does not normally award costs in a tribunal appeal. I would not want to introduce a costs chill into a planning issue of public interest such as this.

Fichaud, J.A.

Concurred in:

Hamilton, J.A.

Farrar, J.A.