C.A. No. 02839

NOVA SCOTIA COURT OF APPEAL
Cite as: Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board), 1994 NSCA 11

Jones, Hallett and Matthews

BETWEEN:

HERITAGE TRUST OF NOVA SCOTIA and FRIENDS OF THE PUBLIC GARDENS Appellants	Ronald A Pink, Q.C. and Leanne W. MacMillan for the Appellants
- and -	
NOVA SCOTIA UTILITY AND REVIEW BOARD, BRENHOLD LIMITED and THE CITY OF HALIFAX Respondents	John P. Merrick, Q.C. for the Respondent, Brenhold Limited Barry S. Allen for the Respondent The City of Halifax
	Appeal Heard: November 16, 1993 Judgment Delivered: February 2nd, 1994

THE COURT: Appeal dismissed per reasons for judgment of Hallett J.A.; Matthews J.A. concurring; Jones J.A. dissenting.

HALLETT, J.A.

Introduction

This is an appeal from a decision of the Nova Scotia Utility and Review Board dismissing an appeal by the appellants from a decision of the Council for the City of Halifax permitting a development by contract agreement on a large parcel of land owned by the respondent Brenhold at the northwest corner of Summer Street and Spring Garden Road in the City of Halifax. The appellants had opposed the proposed development when it was under consideration by City Council, appealed the Council's decision to the Board and have now appealed the Board's decision to this court.

The proposed development for the site was expressly permitted by Council pursuant to By-Law 16AE(a) which states:

> "16AE(a) Council may, by resolution, under the authority of the Planning Act, and Policy 6.8 of Part II, Section II of the Municipal Planning Strategy, permit any development by contract agreement in any building, part of a building, or on any lot on which a building is situated that is registered as a heritage property, pursuant to Policy 6.1.2 of Part II, Section II of the Municipal Planning Strategy and in accordance with Policy 6.8 (*Refer to #59 in Amendment Section)."

The appeal to the Board was on several grounds, in particular, that Council was not authorized by By-Law 16AE(a) to permit the proposed development as substantial parts of it were adjacent to but outside the boundaries of the lot on which a registered heritage building known as Garden Crest apartments was situated. The appellants also alleged that the City misinterpreted Policy 6.8 of Section II of the Municipal Planning Strategy in arriving at its decision to permit the development. Policy 6.8 provides:

> 6.8 In any building, part of a building, or on any lot on which a registered heritage building is situated, the owner may apply to the City for a development agreement for any development or change in use not otherwise permitted by the land use designation and zone subject to the following considerations:

(i) that any registered heritage building covered by the agreement shall not be altered in any way to diminish its heritage value;

(ii) that any development must maintain the integrity of any registered heritage property, streetscape or conservation area of which it is part;

(iii) that any adjacent uses, particularly residential use are not unduly disrupted as a result of traffic generation, noise, hours of operation, parking requirements and such other land use impacts as may be required as part of a development;

(iv) that any development substantially complies with the policies of this plan and in particular the objectives and policies as they relate to heritage resources."

The appellants also asserted before the Board that the proposal offended the Policy that guards against developments that could cause shadowing in the Public Gardens.

The Board's jurisdiction with respect to the hearing of an appeal from a decision to enter into a development agreement is defined by **ss. 78(4)**, **(5)**, **(6)** and **(7)** of the **Planning Act**, R.S.N.S. 1989, Chapter 346 which provides:

"78(4) The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy.

(5) The Board shall

(a) confirm the decision of the council;

(b) make any decision the council could have made; or

(c) refer the matter back to the council for further consideration.

(6) The Board shall not interfere with the decision of the council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy.

(7) The Board shall not make any decision pursuant to clause (b) of subsection (5) which commits the council to make any expenditures with respect to the development."

As is apparent from **s. 78(6)** the scope of the Board's appellate review has been limited by the Legislature.

The Board heard evidence from both parties as well as the general public. The appellants' position before the Board was that the Council did not have the authority to enter into the proposed development agreement in that part of the development was not on the heritage building site and that the development would not only diminish the heritage value of the Garden Crest apartments and thus infringe Policy 6.8(i) but would destroy it and thus would fail to maintain the integrity of the heritage building as required by Policy 6.8(ii). The Board did not accept the position advanced by the appellants; the Board concluded that it was unable to determine that the decision of City Council could not reasonably be said to be consistent with the intent of the municipal planning strategy and therefore the Board confirmed the decision of Council. The awkward wording of the Board's conclusions is a reflection of the limitation on the Board's jurisdiction as prescribed by **s. 78(6)** of the **Planning Act**.

An appeal to this Court is governed by **s. 30** of the **Utility and Review Board Act**, R.S.N.S. 1992, c.11 which provides:

> " 30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.
>
> (2) A notice of appeal shall contain the names of the parties and the date of the order appealed from.
>
> (3) A copy of the notice of appeal shall be served upon the other parties within ten days of filing the notice of appeal with the Supreme Court.
>
> (4) Where there is a conflict between this Section and another enactment, that enactment prevails."

Summary of the Board's decision

In its decision the Board described the site and the proposed development and reviewed the history of events giving rise to the appeal to the Board from 1988 when Brenhold made a development application for the site until February 28, 1991, when City Council approved the entry into the development agreement with Brenhold. The Board heard evidence from seven witnesses called by the appellants and six called by Brenhold. The Board also heard evidence from the general public and took a view of the site and a tour of the Garden Crest apartments. The Board determined there were six issues to be answered on the appeal and then proceeded to deal with those issues. The Board was mindful of the limitation on its jurisdiction as imposed by **s. 78** of the **Planning Act**. The Board reviewed the municipal planning strategy of the City of Halifax as contained in the Plan. The Board decided that Policy 6.8(i) and (ii) should not be interpreted in the manner proposed by the appellants and accepted the interpretation put forward by Brenhold and the City.

With respect to Policy 6.8(i) the Board found:

> " ...the Board must determine whether or not Council's decision can reasonably be said to be consistent with the intent of the M.P.S. The Board does not accept the submission of counsel for the Appellants that because a property is registered as a heritage property the entire building and lot must be maintained in order to preserve its heritage value. That would be too narrow an interpretation of Policy 6.8(i). In the opinion of the Board, Policy 6.8(i) contemplates that there would be alterations to registered heritage properties but the alterations cannot diminish the heritage value of the building. The question to be determined is what is the heritage value of a registered heritage property for purposes of determining whether alterations to the structure diminish its heritage value."

The Board then went on to state that in determining whether alterations to a structure diminished its heritage value each case must be determined on its merits. The Board considered the arguments put forward by the opposing parties and the conflicting evidence respecting the issue. The Board stated it was difficult for it to interfere with

Council's decision where there was such a wide difference of expert opinion on the subject. The Board concluded that:

> " Policy 6.8(i) limits these alterations to alterations which do not diminish the heritage value of the structure. The Board finds that the proposed treatment of the Garden Crest building does not diminish its heritage value and the Appellants have not discharged the onus on them of proving that the decision of Council is inconsistent with the intent of Policy 6.8(i)."

With respect to the interpretation of Policy 6.8(ii) the Board accepted:

> " ...the submissions of counsel for the developers that integrity does not refer to the continued physical existence of a building in its exact physical form but rather refers to its aesthetic wholeness or how a building relates to its environment. The Board finds that the proposed treatment of the subject property contained in the development agreement maintains the integrity of the property and that the Appellants have not discharged the onus on them of proving that the decision of Council is inconsistent with the intent of Policy 6.8(ii)."

With respect to the interpretation of Policy 6.8(i) and (ii) and its application by the City to the Brenhold proposal the Board concluded:

> " Based on the evidence presented, the Board is unable to determine that the decision of Halifax City Council to enter into the development agreement cannot reasonably be said to be consistent with the intent of the heritage resource policies of the M.P.S."

The Board then dealt with the so-called shadow issue which involved the application by City Council of Policy 8.1.1 and 8.1.2 of the Plan. The Board reviewed the evidence before it and addressed the issue whether the proposed development would cast a significant amount of shadow on the Public Gardens during the period of the year when the Gardens was open to the public. The Board decided:

> " ...none of the evidence before it is sufficient in its contradiction of the Bidwell Report, which was considered by Council and the Board, to cause the Board to determine that the proposed development agreement is contrary to the intent of the M.P.S. The Board finds that

> Council's decision to enter into the development agreement can reasonably be said to be consistent with the intent of Policies 8.1.1 and 8.1.2."

With respect to issue 5 the Board decided that the public had full opportunity to participate in the planning process as required by the **Planning Act** and the municipal planning strategy of the City.

The final issue addressed by the Board was the so-called lot consolidation issue. The Board decided that lot consolidation was not a prerequisite to approval by Council of the Brenhold development proposal and that Brenhold was entitled, pursuant to Policy 8.1.2 and Implementation Policy 3.1.1 to develop on that part of the land outside the site of the Garden Crest Apartment building without the need to come within the provisions of Policy 6.8 and By-Law 16AE(a). The Board's examination of this issue concluded with the following:

> " In examining all of the evidence relating to the lot consolidation issue, the Board is of the opinion that Council's decision to enter into a development agreement must be said to be reasonably consistent with the intent of the M.P.S."

The Board concluded its decision with the following summary:

> " In summary, the Board has examined the proposed development and Council's decision in approving the entering into such a development agreement in light of the total M.P.S. It has reviewed the basic approach and overall objective. It has looked at all the relevant policies contained in the City-Wide Objectives and Policies and in specific those relating to Heritage Resources. It has looked at the specific policies of the Peninsula Centre Area Plan and the specific policies relating to the Spring Garden Road Sub-Area. In addition to those policies already mentioned, the Board has specifically reviewed Residential Environment Policies 1.9 to 1.9.6, and Commercial Facilities Policy 2.2.1.
>
> The Board has examined the proposed development agreement and evidence in relation to each of the six issues. In each of these issues it has determined that the agreement is consistent with the intent of the M.P.S. as required by Section 78(4) of the **Planning Act**.
>
> The Board has examined the decision of Council to enter into the

proposed development agreement in light of all of the evidence before it and the policies of the M.P.S. As required by Section 78(6) of the **Planning Act** the Board will not interfere with the decision of Council. In the Board's opinion, it is unable to determine that the decision of Council cannot reasonably be said to be consistent with the intent of the M.P.S.

Therefore, as provided by Section 78(5) of the **Planning Act**, the Board confirms the decision of Council and dismisses the appeal."

Grounds of Appeal to this Court

In the appellants' factum counsel stated that they would deal with the thirteen enumerated grounds of appeal as follows:

" **A. What is the Standard of Review?**

3. The Board erred in law and exceeded its jurisdiction when it failed to comply with the provisions of Section 27(2) of the *Utility and Review Board Act, supra*.

B. Did the Board incorrectly interpret the Heritage Resource Provisions of the MDP?

5. The Board erred in fact and law and exceeded its jurisdiction when it determined that the City of Halifax did not have a standard set of criteria to determine the heritage value of a structure.

7. The Board erred in law and exceeded its jurisdiction when it failed to make a determination as to which expert opinion evidence would be accepted by it.

6. The Board erred in fact and law and exceeded its jurisdiction when it incorrectly determined that the proposed development agreement would not diminish the heritage value of the Garden Crest apartments.

14. The Board erred in law and exceeded its jurisdiction when it failed to consider the significance and impact of the *Heritage Property Act*, R.S.N.S. 1989, c. 199, as amended S.N.S. 1991, c. 10 on the proposed development agreement.

4. The Board erred in law and exceeded its

jurisdiction when it interpreted Part II, Section II of the Plan, City-Wide Objectives and Policies, and in particular erred in its interpretation of Policies 6.1, 6.4, 6.4.1 and 6.8 of Subsection 6, Heritage Resources.

C. Did the Board incorrectly interpret the Spring Garden Road Sub-Area Provisions dealing with the Public Gardens?

8. The Board erred in fact and law and exceeded its jurisdiction in its interpretation and application of Part II, Section VI of the Plan, Peninsula Centre Area Plan, Objectives and in particular, Policies 8.1.1 and 8.1.2 of Subsection 8, Sub-area policies, when it determined that the proposed development agreement was consistent with the same.

D. Did the Board incorrectly interpret the Land-Use By-Laws and Lot Consolidation Provisions of the MDP?

11. The Board erred in law and exceeded its jurisdiction when it determined that a development agreement could be entered into which allowed for substantial variance from the City of Halifax, Land Use By-Law, Peninsula and Mainland Areas, (the "Land Use By-Law") merely because one of the lots involved was the site of a registered heritage property.

12. The Board erred in law and exceeded its jurisdiction when it determined that Implementation Policy 3.11 of Part II of the Plan permitted the City of Halifax to enter into a development agreement which did not meet the provisions of the Land Use By-Law. In particular the Board erred in law and exceeded its jurisdiction when it ignored Section 16AB(d) of the Contract Provisions of the Land Use By-Law which only permit the City of Halifax to enter into development agreements pursuant to Policy 8.1.2 of Part II, Section VI of the Plan which would otherwise not be permitted by the height requirements of the Land Use By-Law.

13. The Board erred in law and exceeded its jurisdiction when it determined that the policies of the Plan were not necessarily interdependent upon each other.

E. Did the Board incorrectly decide that the Proposed

> **Development Agreement was consistent with the overall objective and intent of the MDP?**
>
> 1. The Board erred in law and exceeded its jurisdiction in its interpretation and application of Section 78(4) of the *Planning Act*, *supra* when it held that the proposed development agreement was consistent with the overall objective and intent of the MDP for the City of Halifax (the "Plan").
>
> 2. The Board erred in law and exceeded its jurisdiction in its interpretation and application of Section 78(6) of the *Planning Act, supra* when it held that the decision of Halifax City Council to enter into the proposed development agreement was reasonably consistent with the intent of the Plan.

Appeal Book, Part I, Volume I, pp. 001-003.

34. The written submissions of the Appellants will not address the grounds set out in the ninth (9th) and tenth (10th) paragraphs of the Notice of Appeal which read as follows:

> 9. The Board erred in fact and law and exceeded its jurisdiction in its analysis and application of the report of Dr. Bidwell.
>
> 10. The Board erred in fact and law and exceeded its jurisdiction when it concluded that the procedures of the City of Halifax with respect to the approval of the proposed development agreement did not violate the *Planning Act* or the intent of the MDP."

In summary, the appellants assert that the Board erred (i) in repeatedly deferring to the decision of the Council rather than exercising independent judgment based on the facts and the law as required by **s. 27(2)** of the **Public Utilities and Review Board Act**; (ii) in its interpretation of Policy 6 of Section II of the Plan and, in particular, Policy 6.8(i) and (ii); (iii) in its interpretation of Policy 8.1.1 and 8.1.2 of Section VI of the Plan (the policies relating to shadows cast on the Public Gardens by proposed developments to the west of the Gardens); (iv) in its interpretation of the Land Use By-Law when it determined that Council could permit a development that allowed for substantial variation from the Land Use By-

Laws because the Garden Crest apartment site was part of the development; and (v) erred in its interpretation of **s. 78(4)** and **(6)** of the **Planning Act** in finding that the decision of the City Council to enter into the development agreement was reasonably consistent with the intent of the municipal planning strategy.

I have concluded that the appeal should be dismissed. The Board did not misconstrue its duty under **s. 78** of the **Planning Act** nor did it misinterpret the **Planning Act**, the **Utility and Review Board Act** nor the policies and by-laws of the City of Halifax in the manner suggested by the appellants.

Relevant Legislation, Policies, By-Laws & Background Facts

In order to lay the foundation for my reasons for dismissing the appeal it is necessary to review the scheme of the provincial legislation respecting municipal land-use planning and that respecting the preservation of heritage property. In order to interpret Policy 6 of Section II of the municipal planning strategy and By-Law 16AE(a) it is necessary to review the municipal planning strategy for the City of Halifax (the Plan) and the history of the proposed development and planning policies established by the City.

The **Planning Act** has several purposes. Most relevant to the issues raised in these proceedings are those set forth in **ss. 2(b)** and **(c)** of the **Act** which state:

> " 2. The purpose of this Act is to
>
> (b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character through the adoption of municipal planning strategies, land-use by-laws and subdivision by-laws consistent with the policies and regulations of the Province;
>
> (c) establish a consultative process which will ensure the right of the public to have access to information and participate in the formulation of policies, regulations, strategies and by-laws, including the right to be notified and heard before decisions are made under this Act;"

The **Planning Act** authorizes a municipality to adopt a municipal planning strategy for all or part of the municipality; the strategy takes effect upon approval by the Minister of Municipal Affairs (**s. 36** of the **Act**). The purpose of the planning strategy is to provide statements of policy for the management of the municipality and to further this purpose:

> " 37 It shall be the purpose of a municipal planning strategy to provide statements of policy for the management of the municipality and to further this purpose to
>
> (a) establish policies which address problems and opportunities concerning the development of land and the environmental, social and fiscal effects of that development; and
>
> (b) establish and specify programs and actions necessary for the implementation of the planning strategy."

It is clear that the policies are to address both problems and opportunities concerning development of land and its effects.

Section 38(2)(p) of the **Act** is relevant to the issues under consideration. It provides:

> "(2) A municipal planning strategy or an inter-municipal planning strategy may include statements of policy with respect to any or all of the following:
>
> (a) the goals and objectives of the municipality for its future;
>
> (o) measures for informing or securing the views of the public regarding contemplated planning policies and actions or regulations arising from such policies;
>
> (p) policies governing
>
> (i) the use of development agreements in accordance with Section 55,"...

Section 45 of the **Act** prevents a municipality from undertaking any development within the scope of the planning strategy in any manner inconsistent or at variance with the

strategy.

Pursuant to **s. 51** of the **Act** the council of a municipality is required to adopt a land-use by-law where the planning strategy contains statements of policy with respect to the control of the land-use and development.

Section 53 of the **Act** requires the establishment of zones in the planning area and by-laws shall prescribe for each zone permitted or prohibited uses of land or structures.

Section 55 of the **Act** deals with development agreements and is therefore relevant to the matters we have under consideration. **Section 55** provides:

> " 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.
>
> (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."

Section 78 of the **Planning Act** gives an aggrieved person the right to appeal a decision of a municipality to enter into a development agreement.

Sections 78(4), **(5)** and **(6)** of the **Act** are particularly relevant to this appeal in that the **Planning Act** confers a limited power of review on the Nova Scotia Utility and Review Board. Those sections have already been set out in this decision.

Turning to the facts of this case for a moment, the City pursuant to the **Planning Act,** developed a municipal planning strategy which is labelled "Municipal Development Plan for Halifax". I will refer to this as the Plan. The introduction to the Plan states:

> " Part II constitutes the Municipal Development Plan for the City of Halifax as required by the Planning Act. It sets forth statements of policy with respect to present and future land use, transportation facilities, service facilities (schools, parks, open spaces), budgeting and citizen participation. The geographic implications of these policies are shown in map form. The

framework for the control of land use is addressed through statements of policy dealing with land use regulations and a statement of policy (in map and text form) dealing with generalized future land use."

Part II (the Plan) is divided into Sections I to XII followed by a part entitled "Implementation Policies". Section I of the Plan sets out the basic approach and overall objective of the Plan. This is important in a consideration of the issues that were before City Council and important when considering the role of the Board and this Court in dealing with appeals from development decisions reached by City Council. Section I of the Plan states:

" The basic decision-making approach to the City of Halifax with respect to development is that:

Objectives, policies, plans, and programs shall be identified and shall be the foundation for decision-making with regard to the physical, social and economic development of Halifax. In consideration of development matters, alternative courses of action shall be identified and evaluated, whereupon the proper course of action can be selected.

The overall objective of the Halifax Municipal Development Plan and for ongoing planning is:

The enhancement of the physical, social, and economic well-being of the citizenry of Halifax through the preservation, creation, and maintenance of an interesting and livable City, developed at a scale and density which preserve and enhance the quality of life."

The objectives and policies are the foundation for decision-making with regard to the physical, social and economic development of the City. Most importantly the Plan recognizes that very often there are alternative courses of action to be considered. It is also clear from the basic decision-making approach and the overall objectives that economic considerations are very real in arriving at planning decisions. The overall objective of the Plan is the enhancement of the citizenry through not only the preservation but the creation and maintenance of an interesting and livable city.

The City-wide objectives and policies are set out in Section II of the Plan. As the heading of this section indicates these policies apply City-wide. Other sections of the Plan refer to specific geographic areas of the City. The City-wide policies which are of particular relevance to these proceedings are set out in Section II Subsection 6. I have underlined those parts that are particularly relevant to these proceedings. That subsection provides:

"6. **HERITAGE RESOURCES**

Definitions

"Heritage Property" means an area, site, structure or streetscape of historic, architectural or cultural value registered in the Halifax Registry of Heritage Property.

"Heritage Conservation Area" means an area of concentration of properties unified by similar use, architectural style or historical development, which retains the atmosphere of a past era and which is registered in the Halifax Registry of Heritage Property.

Objective The preservation and enhancement of areas, sites, structures, streetscapes and conditions in Halifax which reflect the City's past historically and/or architecturally.

6.1 The City shall continue to seek the retention, preservation, rehabilitation and/or restoration of those areas, sites, streetscapes, structures, and/or conditions such as views which impart to Halifax a sense of its heritage, particularly those which are relevant to important occasions, eras, or personages in the histories of the City, the Province, or the nation, or which are deemed to be architecturally significant. Where appropriate, in order to assure the continuing viability of such areas, sites, streetscapes, structures, and/or conditions, the City shall encourage suitable re-uses.

6.1.1 The criteria by which the City shall continue to identify such areas, sites, structures, streetscapes and/or conditions identified in Policy 6.1 are set out in the official City of Halifax report entitled An Evaluation and Protection System for Heritage Resources in Halifax (City Council, 1978).

6.1.2 The City should designate those properties which meet the adopted criteria as registered heritage properties or registered heritage conservation areas and protect them within the terms of the Heritage Property Act.

6.2 The City shall continue to make every effort to preserve or restore those conditions resulting from the physical and economic development pattern of Halifax which impart to Halifax a sense of its history, such as views

from Citadel Hill, public access to the Halifax waterfront, and the street pattern of the Halifax Central Business District.

6.3 The City shall maintain or recreate a sensitive and complimentary setting for Citadel Hill by controlling the height of new development in its vicinity to reflect the historic and traditional scale of development.

6.3.1 The intent of such height controls shall be to establish a generally low to medium rise character of development in the area of approximately four traditional storeys in height immediately adjacent to Citadel Hill and increasing with distance therefrom.

6.3.2 Within the area bounded by North Street, Robie Street and Inglis Street, no development shall be permitted that is visible over the top of the reconstructed earthworks on the Citadel ramparts, from an eye-level of 5.5 feet above ground level in the Parade Square of the Citadel.

6.3.3 Policy 6.3.2 above shall not be deemed to waive any other height or angle controls.

6.4 The City shall attempt to maintain the integrity of those areas, sites, streetscapes, structures, and/or conditions which are retained through encouragement of sensitive and complementary architecture in their immediate environs.

6.4.1 The City shall regulate the demolition and exterior alterations under the provisions of the Heritage Property Act, and should secure inducements for retention, maintenance and enhancement of registered heritage properties.

6.4.2 The City shall study the use of preservation easements and restrictive covenants to determine the extent to which they can be used in the preservation of registered heritage properties.

6.4.3 The City shall consider acquisition of registered heritage properties whenever acquisition is the most appropriate means to ensure their preservation.

6.4.4 The City shall organize and maintain a data bank on heritage conservation methods including data on costs, sources of funding, techniques, methods, and materials used on successful recycling or restoration projects, both for its own use and to encourage private sector involvement in heritage conservation.

6.5 The City shall budget an annual amount to ensure that a fund is available should purchase or other financial involvement be considered by the City for a registered heritage property. The specific terms of this budget are set forth in Policy 11.3.2 of this section of this Plan.

6.6 In the purchase or lease of space for its own use, the City shall first

consider accommodation in designated heritage structures.

6.7 The City shall investigate the possibility of establishing Heritage Conservation Zones to protect registered heritage conservation areas and registered heritage streetscapes under the provisions of the Planning Act. The results of such investigation should be incorporated as amendments to this Plan and to the Land Use Bylaw."

6.8 **Note**: This Policy has already been set out in full earlier in the decision.

Section 6.8 is the focus of the issues raised on this appeal. I have underlined parts of ss. 6.1, 6.2, 6.4 and 6.4.1 to point out that the policy recognizes that preserving heritage property is not easy but that the City should try to do so. Policy 6 is simply a policy that the City must consider along with all other planning policies as outlined in the Plan when considering applications for development by agreement.

As important as Policy 6 of Section II of the Plan is to the matters under review one cannot lose sight of other city-wide objectives of the Plan including those set out under Policy 1 - Economic Development. I would refer specifically to subsections 1.2 and 1.2.2 which provide:

"1.2 The City should strive to expand its tax base so that it can maintain its tax rates at levels that are competitive with other municipalities of the region.

1.2.2 In considering new development regulations and changes to existing regulations, and development applications, the City shall give consideration of any additional tax revenues or municipal costs that may be generated therefrom."

Also Policy 2.3 should not be overlooked:

"2.3 The City shall investigate alternative means for encouraging well-planned, integrated development."

Section VI of the Plan sets out the objectives and policies for the Peninsula Centre Area. It is in this area that the respondents' proposed development site is located. Policy 6.1 of Section VI deals with Heritage Resources in this specific area of the City and provides:

"6.1 The City shall continue to seek the preservation, rehabilitation and restoration of areas, streetscapes, buildings, features and spaces in the Peninsula Centre area consonant with the City's general policy stance on heritage preservation (See Section II, Policy Sec 6)."

I have underlined the words "continue to seek" to illustrate that the thrust of the policies respecting heritage preservation is that it is a task of seeking to preserve. The ability of the City to preserve heritage property is not a given.

Section VI of the Plan provides that within the Peninsula Centre area are several sub-areas in which specific policies apply. The proposed Brenhold development is in the Spring Garden Road Sub-area. Several policies for this sub-area are relevant to the issues raised in this appeal; they are sub-area policies 8.1 to 8.1.2:

"8.1 SPRING GARDEN ROAD SUB-AREA

8.1.1 The City shall amend its zoning bylaws to include a height restriction on development in the vicinity of the Public Gardens so as to ensure a minimum of shadow casting on the Public Gardens.

8.1.2 The City shall consider an application under the provisions of Section 33(2)(b) of the Planning Act for a development in the Spring Garden Road Sub-Area north of Spring Garden Road which would exceed the height precinct so established through Policy 8.1.1 above, and, in so doing, the City shall require that any proposed development not cast a significant amount of shadow on the Public Gardens during that period of the year during which the Public Gardens is open to the public."

The height restriction for development in the Spring Garden Road Sub-area as provided in the zoning by-law is 45 feet.

After the planning policies for the various areas of the City are detailed in the Plan there is a section entitled "Implementation Policies". This section deals, as the label implies, with the implementation of the policies as prescribed by s. 37(b) of the **Planning Act**. Under the heading "General" the policy of the implementation section is stated to be:

"1. The City of Halifax Municipal Development Plan provides the major

> framework to guide decision-making with respect to development in the City. This Plan shall be implemented through the powers of City Council under the Planning Act, the Halifax City Charter, and such other statutes as may apply."

The section "Implementation Policies" specifically deals with the implementation of various policies in the Plan in a numerical order. Relevant to the issues we have under consideration are Implementation Policies 3.11 and 3.11.1 which provide:

> "3.11 Further to Policies 1.8, 1.12, 6.1.1, 8.1.2, 8.1.3, 8.1.4, and 8.3.3 respectively in Section VI of this Plan, the City may, under the development agreement provisions of the Planning Act, issue a development permit for a development which would not otherwise meet the provisions of the Land Use Bylaw.
>
> 3.11.1 In entering agreements pursuant to Policy 3.11, Council shall be guided by the policies contained in Section VI of this Plan, and shall not enter into agreements which are inconsistent with those policies of this Plan."

Section VI of the Plan provides for the policies that apply in the Peninsula Centre Area. The reference in implementation policy section 3.11 to policy 8.1.2 of section VI is a reference to the section which permits a development by agreement in the area north of Spring Garden Road even if it will exceed the height restriction so long as the development does not violate the shadow policy. A development agreement must be consistent with the policies in Section VI of the Plan but need not otherwise meet the provisions of the Land Use By-Law so long, of course, as the development agreement is approved by City Council. Section VI Policy 6.1 provides that the City shall continue to seek the preservation, rehabilitation and restoration of buildings in the Peninsula Centre area consonant with the City's policy on heritage preservation as set out in Section II Policy 6 which has been set out in full in this decision. Although the Brenhold development agreement was brought forward under By-Law 16AE(a) and Policy 6.8, it would also have to comply with Policy 8.1.2.

Under the authority of the **Planning Act** the mayor and the City Council enacted

Land Use By-laws for the "Peninsula Area" (where the development site is located). The By-law provides for contract development under the authority of different policies for different parts of the Peninsula. With respect to Spring Garden Road Contract Development By-Laws 16AB(d), (e), (f) and (i) and By-Law 16AE(a) provide considerable scope for developments that do not comply with various by-laws:

"16AB(d) Council may, by resolution under the authority of Sections 33(2)(b) and 34 of the Planning Act, and Policy 8.1.2 of Part II, Section VI of the Municipal Planning Strategy, permit any specific development in the Spring Garden Road sub-area described in Section VI of the Municipal Planning Strategy consistent with the zoning designation which would not otherwise be permitted by the height requirements of this Bylaw and in accordance with said policy;

16AB(e) Council may, by resolution under the authority of Sections 33(2)(b) and 34 of the Planning Act, and Policy 8.1.3 of Part II, Section VI of the Municipal Planning Strategy, permit office uses on the ground floor of apartment buildings which would not otherwise be permitted by this Bylaw in accordance with said policy;

16AB(f) Council may, by resolution under the authority of the Planning Act and Policy 8.1.4 of Part II, Section VI of the Municipal Planning Strategy, permit any residential development which would not be consistent with the Height Precinct Map ZM-17 in accordance with the said policy. (*Refer to #33 in Amendment Section).

16AB(i) Approval by Council under Clauses (a) through (h) shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct. (*Refer to #21 in Amendment Section)

16AE(a) Council may, by resolution, under the authority of the Planning Act, and Policy 6.8 of Part II, Section II of the Municipal Planning Strategy, permit any development by contract agreement in any building, part of a building, or on any lot on which a building is situated that is registered as a heritage property, pursuant to Policy 6.1.2 of Part II, Section II of the Municipal Planning Strategy and in accordance with Policy 6.8 (*Refer to #59 in Amendment Section)."

By-Law 16AE(a) permits "any development" on "any lot" on which a heritage building is situated so long as it complies with Policy 6.8. This By-Law would appear to

apply City-wide. This is the By-law that the City Council acted under in approving the entry into a development agreement with Brenhold on the site in issue.

In summary, a review of these provisions of the **Planning Act**, the Land Use By-Law and the Municipal Development Plan satisfied me that the City Council had authority to permit the proposed development provided it came within the terms of relevant By-Laws, was consistent with Policy 6.8 of the Plan and did not violate the Public Garden's shadow policy. The appellants contend that the City and the Board misinterpreted this By-law and the policies and that the proposed development is not consistent with the Municipal Development Plan. At the centre of the controversy is heritage property, the Garden Crest apartments. Therefore the **Heritage Property Act**, being the legislation which regulates the use of heritage property in the province, is of great relevance, in particular, the provisions applicable to municipalities.

I will review that **Act** and its impact on the issues that were before the City Council and subsequently the Board. But before doing so a review of the facts would be appropriate. The site covered by the development agreement contains several parcels of adjacent land. On one of the parcels is a designated heritage building (the Garden Crest apartments). Under the terms of the development agreement, as approved by City Council, all but the front facade of the building will be torn down; it will then be rebuilt to a similar exterior design and size as the original Garden Crest which was constructed in the early 1900's. There is evidence that the building is in very poor condition. The building has no historical value; the appellants are of the opinion that the building has architectural value as a heritage building and that the decision of the City Council to approve the development agreement is inconsistent with the planning policies of the City as it will result in the destruction of the Garden Crest apartments. The developer Brenhold, the staff of the City of Halifax and apparently City Council and ultimately the Board were of the view that the only heritage

value the building possesses is in the front facade including the verandas which Brenhold proposes to restore and retain.

It is important to assess what the purpose of the relevant legislative provisions are that impact on these issues. Fortunately, the purpose of the **Heritage Property Act**, which was first enacted in 1980, is described in **s. 2** of the **Act** as follows:

> " 2. The purpose of this Act is to provide for the identification, designation, preservation, conservation, protection and rehabilitation of buildings, structures, streetscapes, areas and districts of historic, architectural or cultural value, in both urban and rural areas, and to encourage their continued use."

In the **Act** as initially passed, Chapter 8 of the **Acts** of 1980, Section 3 set out the purpose in substantially the same terms as those in the present Section 2.

The **Act** provides for a provincial registry of heritage property and for the establishment by the Governor-in-Council of a provincial advisory committee. If a property is designated as "provincial heritage property" it "shall not be substantially altered in exterior appearance or demolished without the approval of the Governor-in-Council." (s. 11(1))

The **Act** also authorizes a municipality to establish by by-law, a municipal registry of heritage property (**s. 12**). The City of Halifax has done this by enacting Ordinance 174; which provides for the establishment of a heritage advisory committee. Pursuant to s. 13 of the **Heritage Property Act** and the by-law the heritage advisory committee may advise the City respecting:

> ...
>
> "13(a) the inclusion of buildings, streetscapes and areas in the municipal registry of heritage property;
>
> (b) an application for permission to substantially alter or demolish a municipal heritage property;
>
> (d) any other matters conducive to the effective carrying out of the intent and purpose of this Act."

The foregoing provisions are substantially the same as when the **Act** was initially passed in 1980.

In 1986 the Garden Crest apartments were designated by the City as a municipal heritage property. Brenhold acquired the property in 1988. In October, 1989, the Province registered it as provincial heritage property. Although it is not relevant to the issues under consideration, the information before us would indicate that as of the date of the hearing of this appeal Brenhold had not applied to obtain approval of the Governor-in-Council to substantially alter the exterior appearance of the Garden Crest apartments.

Section 17(1) of the **Act** is relevant; it provides:

> "17(1) Municipal heritage property shall not be substantially altered in exterior appearance or demolished without the approval of the municipality."

Section 17(2) provides that an application to substantially alter the exterior appearance or to demolish may be made to the municipality and it will be referred by the municipality to the heritage advisory committee for advice. However, unlike the statutory provisions respecting provincial heritage property, if the application is not approved by the municipality the owner of the municipal heritage property, one year and not later than two years after the application, may make the alteration or carry out the demolition. This is so because **s. 18** of the **Act** (formerly **s. 15**) provides:

> " 18 Notwithstanding Section 17, where the owner of municipal heritage property has made an application for permission to alter the exterior appearance of or demolish the property and the application is not approved, the owner may make the alteration or carry out the demolition at any time after one year from the date of the application, provided that the alteration or demolition shall not be undertaken more than two years after the date of the application."

In short, the legislation insofar as municipal heritage property is concerned, is more or less toothless in that the registered heritage building can be substantially altered or, in fact, demolished without the approval of the municipality one year after the application has been made and subsequently refused.

It is also to be noted that the **Act** only limits an owner's ability to alter exterior appearance or to demolish. Accordingly, it would appear that an owner can gut the interior of a heritage building without approval of the municipality at any time without offending the **Act**.

The events leading up to the approval by the City Council to authorize the entry by the City into the development agreement with Brenhold can be briefly summarized; Brenhold owned several properties to the west of Summer Street and to the north of Spring Garden Road for a number of years. In 1988 Brenhold acquired Garden Crest which was adjacent to its other properties, the result being it had a large parcel of land on which there were a number of buildings. I will refer to this parcel of land as the site. On May 3rd, 1988, Brenhold submitted a development application to the City proposing two 20-storey high rise residential structures for the site. The intent of the proposal was to demolish the Garden Crest apartments and five other buildings on the site. On July 12th, 1988, Brenhold applied to the City for a demolition permit. The heritage advisory committee of the City recommended against granting the demolition permit with respect to the Garden Crest apartments. The demolition permit was not granted thus leaving Brenhold in a position vis-à-vis the City to demolish the Garden Crest apartments after July 12th, 1989.

The evidence before the Board would indicate that from May 1988, through to the spring of 1990, Brenhold and the City staff carried out extensive negotiations with respect to the development of Brenhold's lands.

On February 13th, 1989, Policy 6.8 of Section VI of the Plan (which had been

adopted by Council on October 12th, 1988) was approved by the Minister of Municipal Affairs. It would appear that the addition of this Policy arose out of the City's desire to encourage the preservation of heritage property by permitting development that would not otherwise meet the requisites of the planning policies or land use by-laws.

There was also evidence before the Board that the shadow policy 8.1.2 had been adopted years before at the request of Brenhold. Mr. Hanusiak, a senior planner in the City Development Control Division, testified before the Board:

> " My understanding of the literature and interviews of past members of staff is that policy 8.1.2 was placed in the Peninsula Centre Plan at the time of adoption at the request of Brenhold Limited, that they had come forward to the planning process at the time and indicated their intention to develop the site for high density residential . . . My understanding is that they made it clear that they were consolidating the properties. They had been doing so for a long time. And at some point in time in the foreseeable future, an application would be made for high density, high rise development. "

Clearly high rise development was contemplated for the area north of Spring Garden Road between Summer Street and Robie Street on the west as there are two high rise residential buildings and one high rise office building in the area.

By letters to the City dated March 19th and 21st, 1990, Brenhold amended its original development application. There were further negotiations with City staff over a period of months. By letter to the City dated June 26th, 1990, Brenhold agreed:

> " to accept certain recommendations of City Staff. Brenhold now proposed to construct four buildings on the northwest corner of Spring Garden Road and Summer Street. A 12-story residential South Tower building would be accompanied by an 11-story residential North Tower condominium building. A 3-story commercial building on Summer Street would also be built. Finally, Brenhold proposed to construct a 4-storey building on the site of the present Garden Crest. ... Brenhold proposed to partially maintain the current front facade and verandas of the Garden Crest and reconstruct them where necessary."

The Brenhold proposal involved a substantial alteration to the exterior appearance

of a heritage building. As a consequence it was open to the heritage advisory committee to advise the City with respect to this matter. In fact, **s. 17(3)** of the **Act** requires the municipality to refer such an application to the heritage advisory committee for its recommendations. The staff of the City prepared a report dated July 17th, 1990, recommending the proposed development; it was submitted to the City's heritage advisory committee. The committee considered the report at its meetings of July 26th and August 2nd, 1990. The Committee recommended to City Council that the City accept the development application as described in the July 17th, 1990, staff report subject to some minor changes.

The staff of the City then prepared a report for City Council recommending that Council agree to enter into the development agreement as proposed with Brenhold. This staff report was dated August 27th, 1990, and reads in part as follows:

> " APPLICATION
>
> This is an application for development agreement to permit the following mixed-use development adjacent to the northwest corner of the intersection of Spring Garden Road and Summer Street (Sketch 1):
>
> - Restoration and partial reconstruction of the Garden Crest Apartment Building - a registered heritage building located at 1538-48 Summer Street;
>
> - Construction of a three-storey commercial building adjacent to the intersection of Spring Garden Road and Summer Street;
>
> - Construction of two condominium buildings, one being 12 storeys in height (with ground floor commercial space) and the other 11 storeys; and
>
> - Construction of an underground parking garage for 132 automobiles.
>
> The development does not meet a number of the "by-right" requirements of the land use bylaw - specifically, land use, height, angle controls and landscaped open space. However, where a site

contains a registered heritage building, Section 16AE(a) of the peninsula portion of the land use bylaw permits contract agreements for any development that would not otherwise meet with the property's zoning or future land use designation (Appendix "A").

This application has been modified on a number of occasions since being first received in May of 1988. The course of action proposed herein results from lengthy discussions between the applicant and staff and is premised on the belief that all relevant policies of the Municipal Development Plan have been satisfied.

PROJECT DESCRIPTION

Details of the development are depicted in Sketches 2-11 inclusive. The applicant has also supplied a variety of studies and technical reports, which are hereto attached for Council's information.

The site is approximately 65,740 sq. ft. in area with 198 ft. of frontage on Spring Garden Road and 332 ft. on Summer Street. It is bounded to the west by Spring Garden Terrace Apartments and to the north by Camp Hill Cemetery. With the exception of the Garden Crest apartment building, all other buildings will be demolished and the site consolidated into one lot.

The site is zoned R-3 (Multiple Dwelling) Zone with an allowable population of 502 people. The development proposes approximately 418 people; however, this figure could fluctuate depending upon final unit composition. It is presently intended that the development contain 19 one bedroom units, 80 two bedroom units and 35 three bedroom units.

The land use bylaw provides a by-right height limit of 45 ft. The Garden Crest will maintain its existing height of 40 feet. The three storey "companion" building will be slightly lower at 36 feet. The south condominium building will be 115 ft. in height while the north building will be one storey lower (106 ft.).

As illustrated by Sketches 10 and 11, the Garden Crest will undergo extensive restoration and reconstruction. The front main wall and balconies will be retained, behind which a new building will be constructed to the same size and general configuration as the original structure. The front wall including windows, casings and doors will be reconditioned and re-painted. The new roof will replicate the original mansard design and will be of asphalt shingles. New chimneys will be of the same style and materials as the originals. The whole of the building will be clad in a stucco textured finish. Period style dormers and windows will be installed on the sides and rear of building along with a series of small open-air balconies."

The Staff Report to Council then pointed out the various by-law deficiencies. The Report then dealt with Policy 6.8 of Section II of the Municipal Development Plan and did a full analysis for Council of the considerations to be taken into account as provided for in Policy 6.8. With respect to heritage value of the Garden Crest apartments the Report stated at p. 5:

> " Like City Council, staff is of the belief that the heritage value of the Garden Crest rests solely in the front facade and roof line as viewed from Summer Street and the Public Gardens. The remainder of the building is not an issue relative to the City's preservation interests. However, the soured appearance of the side and rear walls coupled with hodge podge of fire escapes and exterior claddings seriously detracts from the building's few redeeming features.
>
> . . .
>
> The remainder of the building will be reconstructed in a manner that reinforces its "Edwardian Resort" facade. This is accomplished by reinstating the building's original proportions through the extension of complementary balconies, windows, stucco facing, dormers and mansard-style roof. While staff recognizes this approach may be considered a form of facadism, it also recognizes that every possible attempt has been made to enhance rather than detract from the building's architectural value. Furthermore, given the building's remarkably poor condition, the intended course of action represents the most responsible approach to heritage preservation in terms of ensuring structure integrity for the life of the development as a whole."

With respect to the issue of "integrity" that arises under Policy 6.8 (ii) the Report stated:

> " The integrity of the Garden Crest is maintained in several ways. First, the three storey companion building provides an appropriate balance relative to size and architectural offerings. Additionally, the building solidifies the streetscape along Summer Street through its orientation, front yard setback, wrought iron fencing and overall design.
>
> Second, although taller than the Garden Crest, the 11 and 12 storey condominium buildings are of insufficient height and mass to cause a disproportionate scale of development (there are numerous examples of this type of mid rise/low rise relationship throughout the city). Equally important, the buildings have been designed in a manner that complements the more noticeable features of the Garden

> Crest facade. This is evident in the proposed mansard roofs, dormers, vertical windows and proportion of materials used.
>
> Finally, as illustrated by Sketches 2 and 6, the whole of the site will be landscaped with a mixture of shrubs, hedges and trees. This will enhance the appearance of the Garden Crest by providing a well balanced and aesthetically pleasing setting. It is worth noting that at the time the Garden Crest was being considered for heritage registration, the following was written about the building's relationship to its immediate surroundings:
>
> > 'It is safe to say the Garden Crest is a good example of Edwardian resort type of large building to be placed in an open, well treed environment.'"

The Staff Report went on to deal with other policy considerations and then dealt specifically with the policy respecting shadows on the Gardens as contained in Policy 8.1.2. The Report stated:

> " This policy was adopted in conjunction with the Peninsula Centre Secondary Planning Strategy [for] properties along the north side of Spring Garden Road between Summer and Robie Streets. The wording clearly intends that a certain amount of shadows on the Gardens will be tolerated from this development (otherwise, the Plan would have insisted that the development cast no shadows). The Plan does not elaborate on the term "significant amount of shadow"; however, common sense dictates that such shadows be in no way detrimental to this heritage resource."

The Report then dealt with the concern that staff would have for the integrity of the Public Gardens an important heritage site and Policy 6.4; the Report stated:

> " Policy 6.4 of Section II directs that the integrity of important sites be maintained through the encouragement of sensitive and complementary architecture. This is accomplished through the restoration of the Garden Crest and the construction of the period-styled companion building. These buildings compliment the Gardens by virtue of their scale, architecture and building orientation. Furthermore, they serve as a buffer for the more intensive land uses to the rear."

The Staff Report dealt with a number of other matters and advised Council that the application had been reviewed by the heritage advisory committee and it was the committee's

unanimous decision to recommend the development be accepted by City Council subject to a few minor conditions. The Report concluded with the following:

> " CONCLUSION AND RECOMMENDATION
>
> The developer proposes an acceptable program for restoring the Garden Crest apartments, a registered heritage property. A three storey companion building will also be built for the purpose of complimenting the latter's architectural merits. A further benefit is derived in terms of perpetuating the current scale of development along the west side of Summer Street.
>
> The remainder of the development does not detract from the architectural importance of the Garden Crest. On the contrary, redevelopment will solidify the buildings presences and return it to a well landscaped and treed environment.
>
> The development will have no adverse impact on the Public Gardens in terms of either unacceptable shadows or visual presence. The developer's environmental reports are factual and all encompassing and the findings of same are supported by the staff.
>
> The development proposal is in keeping with Policy 6.8 of the Municipal Development Plan."

As can be seen from the Report the application for the proposed development agreement was brought forward under land use by-law 16AE(a). At that time Brenhold also applied to consolidate the lots on which the development was to take place. In accordance with an established practice the City reserved decision on the lot consolidation pending the outcome of the development application. The application for lot consolidation is still on hold pending the outcome of this appeal.

The record shows that public hearings were held and many representations were made by the public for and against the proposed development. On February 28, 1991, City Council approved the entering into the development agreement with a few modifications. As previously noted an appeal was taken to the Nova Scotia Utility and Review Board pursuant to **s. 78** of the **Planning Act**. The Board dismissed the appeal and it is from that

decision that the appellants appear in this court.

The Law - Scope of Review

Appeals to this court are limited to questions of law and jurisdiction (**s. 30 Nova Scotia Utility and Review Board Act**).

In **Halifax County (Municipality) v. Maskine and Ghosn**, (1992) 118 N.S.R. (2d) 356 this court considered the scope of an appeal to this court under **s. 34** of the **Municipal Board Act**; that section, with the exception of a leave provision, is the same as **s. 30** of the **Utility and Review Board Act**.

In that case the municipality had refused to approve the entry into a development agreement. The developer appealed to the Board. **Section 79** of the **Planning Act** deals with refusals of Council to enter into a development agreement. **Section 79(4)** contains similar provisions to those in **s. 78(6)** in that the test for interference with a decision of Council is the same. This Court held that the Board had to be correct in its interpretation and application of **s. 79** citing **Canadian Radio-Television & Telecommunications Commission v. Bell Canada**, (1989) 60 D.L.R. (4th) 682. On the appeal the Board had taken the view that the application for the development agreement which involved a re-zoning from R1 to R4 was consistent with the municipal planning strategy. The Board's decision stated:

> " Without repeating the decisions listed above, the board finds that the planner's reasons recommending approval of the proposal fell within the intent of the M.P.S. Council differed from the recommendations without valid planning reasons or for reasons unconnected with planning requirements. Thus, for all the reasons stated above, the board determines that council's refusal decision cannot reasonably be said to be consistent with the intent of the M.P.S. (section 79(4) of the **Planning Act**)."

This court allowed the appeal from the Board's decision. The court stated:

> " While the correct question is posed in that passage with respect a review of the decision shows that the board did not answer the

> question. The board entered into a detailed examination of the procedures followed by the council in arriving at its decision. Those issues were not relevant to the issue before the board. Nowhere does the board make a finding that the decision to reject the application was inconsistent with the intent of the Municipal Planning Strategy. The board substituted its decision for that of the council as the member concluded that the proposal was consistent with the Planning Strategy. In reversing the decision of the council in our view the board erred in interpreting s. 79 of the **Planning Act**."

This court held that the board must correctly interpret and apply the provisions of the **Planning Act**.

The Board's jurisdiction to review a decision of a municipality to approve or refuse the entry into a development agreement is limited by the provisions of **s. 78(6)** of the **Act**. As stated by Sopinka J. in **United Brotherhood of Carpenters & Joiners of America, Local 579 v. Bradco Construction Ltd.**, [1993] 2 S.C.R. 316 at p. 331:

> " The standard of review to be applied to a decision of an administration tribunal is **governed by the legislative provisions which govern judicial review, the wording of the particular statute conferring jurisdiction on the administrative body**, and the common law relating to judicial review of administrative action including the common law policy of judicial deference."

The appellants have argued that the decision of the Board does not comply with **s. 27** of the **Utility and Review Board Act**. That section provides:

> " 27 (1) A final decision of the Board shall be in writing and shall set forth reasons for the decision.
>
> (2) The reasons for the final decision shall include
>
> (a) any agreed findings of facts;
>
> (b) the findings of fact on the evidence; and
>
> (c) the conclusions of law based on the findings referred to in clauses (a) and (b).
>
> (3) A copy of a final decision shall be certified by the Clerk and sent to each party to the proceeding."

Section 27 of the **Utility and Review Board Act** does not expand on the jurisdiction conferred on the Board by **s. 78** of the **Planning Act**. It simply directs the Board to make reasoned decisions based on the facts and the law. In my opinion the Board made the findings of fact necessary to arrive at its decision.

The Board has a duty under **s. 78(4)** of the **Planning Act** to determine if the decision of a municipality to enter into a development agreement is consistent with the intent of the planning policies. There is not a full right of appeal to the Board in that **s. 78(6)** does not permit the Board to interfere with the decision of Council unless the decision of Council cannot be said to be reasonably consistent with the intent of the municipal planning strategy.

What is the proper approach to the interpretation of a municipal planning strategy? This is a fundamental question because it was the Board's duty to determine if the decision to enter into the development agreement with Brenhold was inconsistent with the intent of the Plan.

There does not appear to be very much law on the proper approach to the interpretation of a municipal planning strategy. I have a sense that an orthodox approach to interpretation may be inappropriate in reviewing a municipal council's decision to enter into a development agreement given the limitation on judicial review as prescribed by the **Planning Act**. In the Introduction to **The Interpretation of Legislation in Canada**, 2nd edition, Côté reviews what he refers to as the official theory of statutory interpretation, its dominant features and its inadequacies. Côté refers to it as the official theory because:

> "...it derives from recognized authorities, that is, the courts, and, to a lesser extent, Parliament. Those who claim to follow judicially recognized practices in the interpretation of statutes or regulations must know this theory and abide by it. It underlies the arguments of lawyers and the justifications of magistrates. It is, in effect, the orthodox position."

In a footnote the author states:

> "Being above all a normative theory, it is less concerned with explaining how things really take place than with prescribing how they should take place, at least from the standpoint of argument. Many jurists, in their roles as attorney, counsel, judge or scholar, profess faith in the model provided by official theory, yet admit that this official, orthodox theory only provides a partial, distorted, almost absurd, vision of the reality of interpretation as they themselves conceive of it."

Côté says the official theory:

> "...considers interpretation as a component in the activity of communication between the author of an enactment and its reader. The enactment's author (Parliament, the Government, the municipal council, the minister, etc.) has adopted an enactment in order to transmit a message, or more specifically, to communicate a rule of law. Interpretation of a statute or regulation consists in reconstructing the idea that its author wished to transmit, the rule he sought to decree, taking the text of the enactment as the starting point."

The essence of the task of statutory interpretation, according to the official theory, is to determine the intention of the legislature at the time of the enactment, that the meaning is contained in the words of the enactment, that there is only one true meaning and that the interpretation and application are two successive and unrelated phenomena. Côté makes the point that in reality while it is the official theory of interpretation it is often departed from by Canadian jurists. The author states at p.10:

> " Despite the fact that the official theory predominates in the arguments of attorneys and in the reasoning of judgments, ideas that challenge the orthodox vision imposed by the official doctrine are also present. The following are some examples found in the case law of these departures from the official doctrine.
>
> 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. In some cases the judge admits the impossibility of determining legislative intention, despite a reasonable effort at finding a relatively certain meaning.
>
> In the interpretation of an obscure enactment, it is considered acceptable to refer to administrative interpretations. However, this practice is difficult to rationalize, if interpretation's sole purpose is to determine Parliament's intent. Administrative interpretation is not part of the law, nor of its context of elaboration, and any possible relevance

> is hard to explain. The use of precedent in statutory interpretation is also a reality which the official theory fails to account for adequately. Prior judicial decisions, rendered after adoption of the text and unknown to the historic legislator, are irrelevant if the interpreter's sole preoccupation is the intent of the enactment's author.
>
> Constitutional interpretation provides a partial exception to the rigours of the official doctrine, often presented as the exception that confirms the rule. Constitutional law must be dynamic rather than static, and its interpretation is analyzed less as a quest for the thoughts of its framers, as one for the rule which, at the time the Constitution is applied, will provide the more adequate solution to the problem then before the court.
>
> In many cases it is very clear that the application of the law determines its interpretation, and not the contrary. How otherwise can it be explained that a judge writes '...when one interpretation can be placed upon a statutory provision which would bring about a more workable and practical result, such an interpretation should be preferred if the words invoked by the legislature can reasonably bear it'? As we shall see, if the goal of interpretation in Canadian law is to reveal the intention of the legislator, there is also an implicit objective: to find a reasonable solution to a genuine and concrete problem.
>
> According to the official doctrine, modification of an obsolete statute must be left to the legislator: the judge should apply it even at the price of what may seem to be, at the time of application, an unjust or even absurd result. Not all judges are disposed to apply this directive blindly: in place of faithfulness to the historic legislator, some opt for what seems just in the specific case.
>
> These exceptions to the precepts of the official theory confirm both the dominant character of the static ideology in the conception of interpretation advanced by the official doctrine and the presence of other conceptions, less widespread, which take a dynamic approach to interpretation. Serious criticisms of the explanatory value of the official theory finds support in a review of its exceptions."

Côté takes the position that the official model of statutory interpretation is inadequate in several respects one of which is, in my opinion, relevant to the interpretation of Policy 6.8, that is, the "impact of application upon interpretation". He states at p. 15:

> " Legal interpretation goes beyond the mere quest for historical truth. The judge, in particular, does not interpret a statute solely for the intellectual pleasure of reviving the thoughts that prevailed at the time the enactment was drafted. He interprets it with an eye to action: the application of the statute. Legal interpretation is thus often an 'interpretative operation', that is, one linked to the resolution of concrete

> issues. Most authors recognize that the application of statutes returns to influence their interpretation. An attentive review of case law suffices to illustrate what some have called an 'inversion of reasoning', that is, the phenomenon by which the end point of judicial reasoning (application) affects the determination of its premises, notably that of the meaning of the enactment which is to be applied."

Although he agrees with writers who state that this uncontested phenomenon is better left unsaid he nevertheless concluded with the following:

> " By completely avoiding this fundamental element of the interpretative practice of jurists, the official doctrine fails, in this respect, to provide a convincing model. Consequently, new models are required."

In his discussion as to acceptable alternatives to the so-called official theory Côté points out that, in fact, judges do not always apply the official theory of statutory interpretation. For example:

> "In very many cases it cannot be said positively that one construction is right and the other is wrong." Lord Reid in *Jones v. Secretary of State for Social Services,* [1972] 1 All E.R. 145 (H.L.), p. 149; There is no one interpretation which can be said to be 'right' [in the circumstances]." Dickson J. in *C.U.P.E. v. N.B. Liquor Corporation*, [1979] S.C.R. 227, 237."

In my opinion Côté's assessment as to how Canadian jurists approach the task of interpretation is realistic; he states at p. 19:

> " The Canadian jurist approaches legislative enactments within a predetermined framework, which consists of guidelines of interpretation setting out the goals being sought (notably, an explicit goal: the revelation of legislative intent, and a tacit goal: a reasonable application of the enactment), and the factors which may or must be considered (notably, the formulation of the enactment being interpreted, the judicial system to which it belongs, the history of the enactment, its objectives, the consequences of its application, and the authorities).
>
> This model, while leaving room for the influence of the interpreter's personality, also permits the drafter to orient interpretation. In effect, the drafter, aware of the interpretative strategies which will be followed in construing the meaning of a text, may take into account the constraints which will influence the reader, and thereby determine with some precision the latter's bounds. The drafter may in no case control interpretation: at the most, he may anticipate it, taking into account the

> linguistic, systemic and functional constraints likely to arise in the future, at the time of interpretation.
>
> This concept of interpretation as a controlled construction of meaning, rather than as the discovery of an enactment's latent meaning, may influence the definition of errors of interpretation. According to the official theory, an enactment has a 'correct' meaning, which corresponds to legislative intent, and a multitude of 'incorrect' meanings. The model being proposed makes a distinction in each case between reasonable and unreasonable interpretations of the same enactment, that is, those which are unfounded, taking into account recognized guidelines of interpretation. The same enactment may therefore generate several acceptable meanings, to the extent that the constraints on the creation of meaning are unable to orient the interpreter towards a single meaning.
>
> This alternative model is also better suited than the official model to dealing with the dynamic relationship between drafter and interpreter, of the interaction between drafting and interpretation. The statute does not fix the meaning, because this is born of interpretation. On the other hand, the statute may constrain the meaning and establish its limits: according to the scope that the drafter wishes to leave to the interpreter, his enactment will be more or less precise."

Statutory interpretation is an exercise of applying principles to ascertain the meaning of an enactment. Over the years certain principles have more or less given way to others. Côté notes at p. 33:

> " Today, there is reason to believe that what one writer has called a state of war between the judiciary and the legislature is being replaced by a degree of cooperation. Legislators have long been asking the courts to interpret statutes liberally, and thus enable them to attain the objectives for which they are intended. Literal interpretation is on the decline, as the purposive method finds favour among growing numbers of judges. Principles of strict interpretation for specific types of statutes (penal laws, tax laws, laws creating exceptions to common law, laws restraining property rights, etc.) are being overshadowed in the interest of a genuine inquiry into the legislature's intent."

With respect to interpreting the meaning of a particular provision of an enactment Côté makes what I consider to be an insightful comment where he states at pp. 35-36:

> " Recourse to principles of interpretation in determining the meaning or

> scope of an enactment requires that the act be read as a whole in the light of all relevant principles. To do this, the reader must prepare a kind of balance sheet. It is quite possible that nearly all principles will point to a single interpretation: for example, the literal meaning of the enactment is confirmed by the meaning of related provisions, it best promotes the objectives of the statute, fits logically into the legislative history of the enactment, leads to no absurd or patently unjust result, and so on. Here it can be said that legal communication has been attained, and that Parliament has successfully transmitted its intent. But the courts rarely encounter such interpretative problems: the debate would be too onesided.
>
> On the other hand, indications of legislative intent drawn from the application of interpretative principles are often contradictory: several conflicting interpretations may seem warranted. One litigant might invoke the wording of the text, while the other would cite the legislative goals. Such a situation is more typical of cases brought before the courts: Parliament has not succeeded in transmitting its message clearly, the law is obscure, and the judge is called upon to make a ruling. In this situation, interpretative principles are used not so much to discover the meaning of a text as to justify a particular interpretation."

Côté concludes his introduction to statutory interpretation with the following at p. 37:

> " To summarize, principles of statutory interpretation may be defined as a body of standardized interpretative arguments, accepted by the legal community, varying in strength, and used to show that a certain interpretation is not only reasonable but also justifiable in law."

In my opinion the statutory provisions of the **Interpretation Act**, R.S. 1989, c-235 are relevant in attempting to interpret a municipal planning strategy and by-laws. **Section 7(1)** of the **Act** states:

> "7(1) In this Act and in any other enactment.....
>
> (e) 'enactment' means an Act or a regulation or any portion of an Act or regulation;"

Section 7(3) provides:

> " (3) In this Act and every enactment made at the time, before or after this subsection comes into force, "regulation" includes any

> rule, rule of court, order prescribing regulations, tariff of costs or fees, form, by-law, resolution or order made in the execution of a power given by an enactment except where the definition of "regulation" as defined by the *Regulations Act* applies or where a contrary intention appears from the enactment.

In my opinion by-laws of the City of Halifax made pursuant to the **Planning Act** would fall within the definition of a "regulation". It is not clear that a municipal planning strategy would. The issue was not raised on the appeal and it is not of sufficient relevancy to analyze on this appeal other than to say that a municipal planning strategy should be interpreted as a remedial measure adopted by a municipality to control land use and development. Accordingly, **s. 9(5)** of the **Interpretation Act** contains provisions that are relevant in attempting to interpret Policy 6.8 of the Plan. **Section 9(5)** provides:

> " 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject."

In my opinion the court should take what Côté refers to as a pragmatic approach to interpretation of planning policies respecting development by contract rather than a strict literal approach because the provisions of a plan are merely the framework to guide municipal councils in their decision-making. In that sense, such planning policies are not unlike a constitutional document which the courts interpret liberally and purposively. When

Côté refers to a pragmatic approach to interpretation he means that the court will consider the effects of a given interpretation. Such an approach is appropriate for interpreting planning policies as they are simply the tools which a municipal council works with in arriving at a decision whether to enter into a development agreement and on what terms.

It has been historically recognized that legislation that encroaches on the use and enjoyment of a citizen's property should be strictly construed. Planning by-laws have been so construed, however, there has been somewhat of a retreat from this approach as noted by Côté where he states at pp. 403-404:

> " However, this traditional approach to urban planning bylaws, an outgrowth of the laissez-faire philosophy which prevailed in the nineteenth century, is now being questioned in the name of the general public interest and a more rational organization of urban life. Thus, urban planning legislation is being interpreted less strictly. This trend, manifested principally in decisions of the Ontario courts, has influenced the Supreme Court of Canada. Justice Spence, in *Bayshore Shopping Centre v. Township of Nepean*, [1972] S.C.R. 755, summarized the two conflicting philosophies regarding urban planning regulation: a restrictive attitude, because such bylaws limit free enjoyment of property (the traditional approach), and a more liberal attitude, aimed at protecting society and promoting the public interest (the innovative approach). Taking note of this contradiction, he approached 'the interpretation and application of the by-law without acknowledging any compulsion to consider its provision either strictly or liberally'.
>
> If, in the *Bayshore* case, a restrictive interpretation was overruled by a neutral one, the Court went a step further in *Soo Mill & Lumber Co. v. City of Sault Ste-Marie*, [1975] 2 S.C.R. 78 by liberally interpreting the Ontario *Planning Act* and the regulations of application authorized by it. This evolution reflects major changes in values. It is taking place unevenly, from province to province and from court to court. But despite some wavering, a definite trend has been established."

In the **Soo Mill** case Chief Justice Laskin in writing for the Court held that a municipal planning strategy should be liberally construed. He stated at p. 83:

> " I do not call upon any special or novel principle of interpretation in approaching *The Planning Act* from the viewpoint of giving effect to its purpose. Although the Act contains no directory preamble, the definition of 'official plan' in s. 1(h) and the elaborate system of approvals and

> checks which are associated with the adoption of an Official Plan, indicate to me that planning policies reflected in such a Plan should be liberally construed as (in the words of s. 1(h)) 'designed to secure the health, safety, convenience or welfare of the inhabitants of the area' in which the Plan operates. Implementing by-laws (which by s. 19 of the Act must be in conformity with the purposes of the Plan) are hence integrated with it and deserve similar liberal consideration."

Therefore, there is case law to support the view that a liberal and purposive approach to the interpretation of planning policies is appropriate. The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality.

Support for a pragmatic approach to interpretation is to be found in **Berardinelli v. Ontario Housing Corporation**, [1979] 1 S.C.R. 275, where Mr. Justice Estey stated at p. 284:

> "When one interpretation can be placed upon a statutory provision which would bring about a more workable and practical result, such an interpretation should be preferred if the words invoked by the Legislature can reasonably bear it . . ."

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

more than one meaning that a policy is reasonably capable of bearing. This is such a case. In my opinion the **Planning Act** dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. The Board should not be confined to looking at the words of the Policy in isolation but should consider the scheme of the relevant legislation and policies that impact on the decision. In this case that would be the **Planning Act**, the **Heritage Property Act**, the objects and purposes of the planning policies of the City and the application of the policies by Council. This approach to interpretation is consistent with the intent of the **Planning Act** to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions.. I agree with Côté's observations that if the goal of interpretation is to reveal the intention of the law maker there is also an implicit objective of interpretation "to find a reasonable solution to a genuine and concrete problem". The Legislature recognized this when it enacted **s. 78(6)** of the **Planning Act**. In short, the Board must determine if a municipality's interpretation and application of a planning policies with respect to the development agreement decision in issue was one that the language of the policies would reasonably bear.

I turn back to the question of what is the intent of the Plan? There is no single intent. Primarily it is to control development of land. This is done by the establishment of policies, many of which are inherently in conflict. Development and preservation policies in the finite space of the Peninsula Centre area of the City clash head on. It is clear that the **Planning Act** provides for development by contract (**s. 55**). The very fact that development can take place by contract agreement even though the development does not comply with all the general policies of the Plan is in itself in conflict with the general policies but such policies that permit contract development are an integral part of the Plan. Therefore in undertaking the exercise to determine the so-called intent of the Plan the provisions for

development by contract agreement cannot be ignored. Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review by enacting **s. 78(6)** of the **Planning Act**. The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course, by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are to be made. The Plan must be made to work. A narrow legalistic approach to the meaning of policies would not be consistent with the overall objective of the municipal planning strategy. The **Planning Act** and the policies which permit developments by agreement that do not comply with all the policies and by-laws of a municipality are recognition that municipal councils must have the scope for decision-making so long as the decisions are reasonably consistent with the intent of the plan. Very often ascertaining the intent of a policy can be achieved by considering the problem that policy was intended to resolve.

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 By-laws or committed jurisdictional error that would give rise to a successful appeal to this court.

The Board's decision carefully addresses the issues raised by the appellants before the Board. Those issues, with minor exceptions, are the same issues we have been asked to consider.

I reject the appellants' argument that the Board erred in "repeatedly deferring" to

the City Council in its decision-making process. While I am mindful of **s. 27** of the **Utility and Review Board Act** and the duties it imposes upon the Board and also mindful of the provisions of **s.78(4)** of the **Planning Act**, the Legislature by enacting **s. 78(6)** of the **Planning Act** clearly intended to restrict the scope of the Board's powers to interfere with a decision of a municipality approving the entry into a development agreement pursuant to **s. 55** of the **Planning Act**. While **s. 78(4)** of the **Planning Act** requires the Board to determine whether the proposed agreement is consistent with the intent of municipal planning strategy subsection (6) clearly states that the Board "shall not interfere with the decision of the Council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy." This restriction on the scope of the Board's powers to interfere with such decisions respecting development agreements is consistent with the objective of the **Planning Act**, as set out in that **Act**, to place the primary responsibility for planning with the municipalities. The ultimate question before the Board was to determine if the development agreement was reasonably consistent with the intent of the municipal planning strategy. (**Halifax County (Municipality) v. Maskin and Ghosn**, supra) I do not accept the appellants' argument that the Board did not make a determination as required by **s. 78(4)** of the **Act** that the entry into the development agreement was consistent with the intent of the municipal planning strategy. I would refer to the passages I have quoted from the Board's decision where the Board reached that conclusion with respect to its consideration of policies 6.8(i) and (ii) and 8.1.2 as those provisions applied to the Brenhold development agreement. It was not an error, rather it was the Board's duty, as prescribed by **s. 78** of the **Planning Act** to defer to City Council's decision if the appellants could not persuade the Board that the Council's decision could not reasonably be said to be consistent with the intent of the municipal planning strategy.

The Lot Consolidation Issue - Policy 6.8

Before dealing with the manner in which the Board interpreted Policy 6.8(i) and (ii) I shall deal with the lot consolidation issue. The appellants assert that the Board incorrectly interpreted the land use by-laws and Policy 6.8 when it concluded that it was not necessary to have the various parcels of land consolidated into one lot prior to the City agreeing to enter into the development agreement. The law is clear: lot consolidation is not a pre-condition to Council's approval of the City entering into a development contract. (**Heritage Trust of Nova Scotia et al v. Provincial Planning Appeal Board** (1981, 50 N.S.R. 2d 352). The appellants' assert that the above-noted case is entirely distinguishable from the facts we have under consideration in that the Brenhold agreement was made pursuant to s. 16AE(a) of the Peninsula Land-Use By-Law which makes reference to a lot which is the site of a registered heritage property whereas **s. 84(d)** of the By-Law which Chief Justice Cowan considered did not. The appellants submit that the variations permitted by By-Law 16AE(a) are contingent on the existence of a registered heritage property on the lot whereas By-Law 84(d) is worded differently. By-Law 84 provides:

> "In any area shown as Schedule "F", any use shall be permitted which is permitted by the zoning designation of such area, provided that:
>
> (a) Uses permitted in the C-2 Zone shall not exceed 40 feet in height;
>
> *(b) No parking lot shall be permitted. (*Refer to #6 in Amendment Section)
>
> *(ba) No amusement centre shall be permitted; (*Refer to #22 in Amendment Section)
>
> (c) No parking garage shall be permitted;
>
> *(d) Council may, after public hearing and by resolution, approve any specific development requested which would not otherwise be permitted by this By-Law, provided that no approval shall be given inconsistent with the Municipal Planning Strategy, or inconsistent

> with Section 7, 25, 26A, or 26B of this Bylaw.; (*Refer to #'s 16 and 37 in Amendment Section)
>
> (e) Approval by Council under subsection (d) above shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct."

Council could approve any specific development in an area shown as Schedule "F".

There is a distinction between the two cases but not a distinction with any relevance to the issues before the court. As noted by Chief Justice Cowan **s. 533** of the **City Charter** requires lot consolidation before the issuance of a building permit. He stated lot consolidation would have no bearing on the right of Council to approve a development under **s. 84** of the **Zoning By-Law**. Council could approve any specific development in an area shown as Schedule "F". Whether the development is in an area or on a lot is of no relevance. Lot consolidation is required before a building permit is issued, not before the approval of the entry into a development agreement. But that does not end the lot consolidation issue.

It is the appellants' position that under City wide Heritage Resource Policy 6.8 the development agreement could only relate to a development on the parcel of land on which the Garden Crest apartments sits and not the entire site which Brenhold proposes to develop. I do not agree with the appellants' position. The words of the Policy and the By-Law do not refer to "the" lot on which a heritage building is situated rather the words are "any" lot. Apart from the words used it is clear that the Policy was designed to induce and encourage developers to preserve what is of value in heritage property. To impose a narrow construction on the words would likely defeat the purpose of the Policy. Such a result could not have been the intent of the policy given the weakness of the **Heritage Property Act** to

preserve municipal heritage property. It must be borne in mind that under the **Heritage Property Act** a developer can completely gut the interior of a registered heritage building without the approval of the municipality or even the Province. Furthermore, pursuant to **s. 18** of the **Act**, a developer can demolish a municipal heritage building on the expiration of one year from the date of the application to demolish if approval has not been obtained. Therefore, other than delay, there are no serious impediments to a developer demolishing a municipal heritage building under the **Heritage Property Act**. That state of the law on preservation of municipal heritage buildings is destructive of the preservation interest of the City. Following the City's refusal to grant Brenhold a demolition permit Brenhold was in a position to demolish the Garden Crest apartments on July 12th, 1989.

Given the weak position the City was in it is not reasonable that the City intended to only provide a mechanism that would enable an owner to develop on the original parcel of land on which the heritage building sits; that would not appear to be much of an inducement to preserve the building. If the restrictive interpretation urged by the appellants were adopted there would be little scope for development on the site.

The evidence shows that Policy 6.8 was developed and enacted at a time when the Brenhold proposal at the corner of Spring Garden Road and Summer Street was being negotiated. In a letter dated August 12, 1988, from the Heritage Advisory Committee to the Mayor and Council in which the Committee recommended that Council not support the issuance of a demolition permit that would allow Brenhold to demolish Garden Crest as initially sought by Brenhold the chairman stated:

> "As an additional but important point, the Heritage Advisory Committee is concerned that, in some areas of the City, the present policies and development control mechanisms appear to be inflexible to the point where they preclude inventive or innovative solutions to the kinds of development issues that are beginning to emerge. In this case, the restrictions of the R-3 zoning has prevented Brenhold Limited from considering the inclusion of a registered heritage

> property in the development proposal. The Committee hereby takes this opportunity to advise Council that they intend to broach this matter with appropriate City staff, to see what steps should be taken to improve this position. This matter will be pursued in conjunction with staff's current investigation of incentive programs to encourage the retention of the City's built heritage."

The Heritage Advisory Committee clearly recognized the need for a broader policy respecting development in this area as did staff.

Subsequently Policy 6.8 and by-law 16AE(a) were passed by the City. In February of 1989 after Policy 6.8 had been approved by the Minister the development control officer for the City, a Mr. Hanusiak, asked the City's legal department for an interpretation of by-law 16AE(a) which is the by-law relating to the implementation of Policy 6.8. On February 22, 1989, the senior solicitor of the legal department responded as follows:

> "You have asked whether the newly enacted 16AE(a) of the Land Use Bylaw permits the approval of a development agreement for a newly created lot on which is located a registered heritage building. In other words can a lot on which the heritage building is located <u>when registered</u> be consolidated with other lots to which the development agreement would apply?
>
> The wording of Section 16AE permits that interpretation."

However, the solicitor, in his letter, did go on to point out some concerns he had which would flow from such an interpretation.

On February 27, 1989 Mr. Hanusiak wrote counsel for Brenhold as follows:

> "Your letter 17 February 1989 regarding the above referenced matter is acknowledged.
>
> I have outlined your concerns to Messrs. Algee and Campbell (Senior Planners, Development Control and Planning Divisions) and both agree that Policy 6.8 allows for a contract development covering the entire 197' x 332' site. It is our position that Policy 6.8 provides for a binding agreement between the owner of the site and the City of Halifax, wherein relief from certain provisions of the Land use Bylaw could be granted in exchange for the retention and restoration of the Garden Crest Apartment Building - provided of course, that the development as a whole is in keeping with all of the provisions of

> Policy 6.8.
>
> Your concerns have also been put to the City's Legal Department. The department agrees that Policy 6.8 can be used in the Brenhold case. Legal did raise some interesting points about potential abuses of this Policy; however, these were not relevant to the case at hand.
>
> City staff has provided you with some thoughts on the redevelopment of this site, said redevelopment being premised on the assumption that the Garden Crest Apartment Building and possibly one of the two 'sister buildings' would be retained and restored. I suggest that the degree of relief granted to certain sections of the Land Use Bylaw would be directly proportional to the degree of restoration and enhancement of one or both of these buildings.
>
> I note in paragraph three of your letter that it may come to pass that the redevelopment of this site involves the retention of only the corner sister building. Let me remind you again that Policy 6.8 deals with development agreements involving registered heritage buildings - i.e. the Garden Crest Apartment Building. Staff do not have the ability to consider the use of Policy 6.8 if the only structure being retained is the unregistered corner building."

The opinion of the City's legal department does not resolve the issue as to what the words "any lot" in Policy 6.8 mean; it does indicate, however, that the City interpreted the By-law as to permit a development agreement with respect to the entire site pursuant to By-Law 16AE(a).

In looking at the words used in Policy 6.8 it would seem to me that the intent of the policy was to induce developers to preserve what was of value with respect to heritage property as the **Heritage Property Act** is entirely ineffective as a preservation tool with respect to municipal heritage property. Such a policy is in keeping with the objectives and policies set out in Section II subsection (6) of the Plan (city-wide heritage resource policies) and in particular policies 6.1 and 6.4.1 which provide that the City continue to seek the preservation of heritage buildings and, where appropriate, in order to ensure the continued viability of such buildings to encourage suitable re-uses and to secure inducements for the

maintenance and enhancement of registered heritage properties in keeping with its policy to regulate the demolition and exterior alterations of heritage buildings under the provisions of the **Heritage Property Act**.

One must ask the question if there is anything in the wording of Policy 6.8 or By-Law 16AE(a) to indicate that the City intended that Policy 6.8 could not be used when the heritage building was only on a portion of the land on which the development was proposed. The words used in Policy 6.8 do not convey that meaning. Such an interpretation would largely frustrate the objective of preserving the heritage value of such buildings as otherwise there would be too little in it for the developer, faced with the expense of working with an old building, to preserve what was of heritage value. There is apparently a concern that an owner can use a heritage building as a "hook", to use terminology of the appellants' counsel to construct any sort of a development he chooses on the larger parcel of land of which the heritage building site is a part. That is not a legitimate concern because Council can refuse to enter into a development agreement if the proposal is not one that Council would accept. Therefore, an owner, in these circumstances, would not have a free hand to do whatever he wishes on a consolidated lot.

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.

In the first paragraph of the Plan the Introduction states that the policies provide a "framework" for the control of land use. A review of the Plan shows that the policies set forth in it are full of exceptions to general policy statements. The provisions of the Plan should be recognized for what they are - simply policies. In many instances policies conflict.

For example, the need to consider improving the tax base when considering land development versus the desire to preserve what is of historical or architectural value in heritage properties. 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 in the Plan.

A relevant example of the existence of flexibility in the planning policies is contained in Section VI Policy 8 re The Public Gardens. First, there is a policy requiring a height restriction on developments to the west of the Public Gardens which is recognized by all as an important heritage resource in the City. The City is properly concerned about developments that will encroach upon the public's enjoyment of the Gardens. That is why Policy 8.1 in Section VI relating to the Spring Garden Road sub-area dictates a height restriction of 45 feet for buildings in that area to "ensure a minimum of shadow casting on the Public Gardens." Yet immediately following Policy 8.1 is Policy 8.1.2 which permits development which would exceed the height limitation set out in Policy 8.1 so long as the proposed development does not cast "a significant amount of shadowing on the Public Gardens during that period of the year in which the Public Gardens is open to the public." So on the one hand there is a policy that sets forth a very limited height restriction "so as to ensure a minimum of shadow casting on the Public Gardens" but is immediately followed by a policy that permits a development that does not comply with Section 8.1 so long as it does not cast a significant amount of shadow on the Public Gardens. The evidence shows that Policy 8.1.2 policy was adopted to facilitate high rise development in the R3 zone north of Spring Garden Road and west of Summer Street. Therefore the Plan has made provisions for high rise development in this area; that is consistent with the existing high rises in that area of the City. The Brenhold proposal does not impose high rise buildings in a low density residential area of the City.

Policies that enable City Council to approve developments that do not comply with all the policies and by-laws is consistent with the objectives of the **Planning Act** to place the primary responsibility for planning with the municipality. An integral component of the municipal planning strategy (the Plan) as enacted by the City of Halifax and approved by the Minister under the **Planning Act** is that there can be departure from general policies pursuant to development agreements to the extent allowed by the policies. The City By-Laws, likewise approved by the Minister, provide the mechanism for entering into such development agreements.

It must be conceded that Policy 6.8 of Section II and By-Law 16AE(a) could be interpreted as urged by the appellants to permit the City to enter into a development agreement that affected only the parcel of land on which the heritage property is situate and not on a consolidated lot that includes that parcel of land. The words in Policy 6.8 are not as clear as they might be. The City interpreted the policy as allowing the entry into a development agreement on a consolidated lot which in this case included the Garden Crest parcel of land. A court is not bound by the author's interpretation but the propriety of a board or a court resorting to such an aid to interpretation is given modest sanction by Côté in the **Interpretation of Legislation in Canada**, (1992) at p. 455 where he states:

> " At times, an administrative agency may be required to interpret enactments which it has itself drafted. Such authentic interpretation (i.e., by the author) deserves particular consideration."

While the City is not an administrative agency it does draft its own policies and by-laws and in this respect is in an analogous position; it drafts the policies and by-laws which it will be applying in planning decisions. The words used in Policy 6.8 of Section II and By-Law 16AE(a) do not require the interpretation put on the word "lot" by the appellants. A lot is defined in the Plan as "a parcel of land whether or not occupied by a

building or structure." I am satisfied that the words "any lot" in Policy 6.8 are reasonably interpreted to mean a consolidated lot that includes as part of the consolidated lot the parcel of land on which the heritage property is situate. Following consolidation a group of lots would become one parcel of land and one lot. To come to any other conclusion for the reasons I have indicated would be to unduly restrict the words and the purpose of Policy 6.8 which was designed to encourage the preservation of the heritage value of registered heritage properties. So long as the heritage value of the property is preserved does it matter that the building and parcel of land on which it sits is part of a larger parcel of land? I think not. The objective of both preserving the City's heritage and at the same time creating a livable City are both objectives of the Plan. Both objectives can be achieved by this interpretation. The words of Policy 6.8 and By-Law 16AE(a) should be interpreted in a manner that achieves the intent of the Plan where the words of the Policy so permit.

The reasons why Policy 6.8 should be interpreted as allowing a development on a consolidated lot on which a heritage building is situate can be summarized as follows: (i) the wording of the policy refers to "any lot" on which a heritage building is situate; there is no reason not to include a consolidated lot and there are many reasons why it should be included. This is a reasonable interpretation that remedies a problem created by the weakness of the **Heritage Property Act**. (ii) The **Planning Act** and the case law support the view that broad planning policies be interpreted liberally and purposively. (iii) Such an interpretation furthers both the Plan objectives of preserving the heritage value of heritage property while enhancing the quality of life by creating a development for a living city. Thus, the overall objectives set out in Section I of the Plan are advanced. (iv) The Plan contemplates residential (including a ground floor commercial component) high rise development by contract in the area north of Spring Garden Road so long as a proposed development does not offend the Public Gardens shadow policy. (v) The legal department

of the City as well as its planners interpreted Policy 6.8 as being applicable where a heritage site is on a consolidated lot; the authors of the policy presumably have some insight into its intended meaning and their view is of some, albeit, limited relevance. (vi) There is no reason why the heritage value and integrity of a heritage building cannot be preserved equally as well on a consolidated lot as on the original lot on which it sits, in fact, the evidence would indicate that in this case it might be the only way. (vii) The policy should be interpreted in a manner that will facilitate the curing of deficiencies in the provincial legislation respecting municipal heritage property which allow a developer to demolish a heritage property; better a half a loaf than no loaf. By interpreting the policy to apply to a consolidated lot there is a reasonable inducement for a developer to retain what is of heritage value; and (viii) Policy 6.8 was remedial in nature and should be so interpreted in accordance with recognized canons of construction.

I am satisfied that the language of Policy 6.8 is reasonably interpreted to permit Council to authorize the entry into a development agreement on a lot that will result from a consolidation.

Lot Consolidation By-Law 16AE(a)

How should By-Law 16AE(a) which mirrors the language of Policy 6.8 be interpreted? In **The Law of Canadian Municipal Corporations**, Rogers (2d) in dealing with the judicial construction of zoning and planning by-laws, states at p. 772:

> " As has been the case with other classes of by-laws restrictive of common law rights, the courts have applied different canons of construction to building and zoning by-laws. Both the legislative provisions and the by-laws carrying them into effect have in certain instances received a liberal interpretation from the courts whereas in others, the doctrine of strict construction has been applied. On the one hand, such statutes have been considered remedial since they are designed to preserve residential districts and to secure community amenity. By-laws of this general class, it has been said, ought to be

> benevolently interpreted and supported if possible. It has been declared that they should be liberally interpreted. Their interpretation is to be governed by the question, what was the mischief and defect which the by-law attempts to cure and for which the common law failed to provide. A by-law will generally be interpreted to limit the use of buildings to the purpose for which their erection was permitted.
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> On the other hand, the courts have more frequently applied the rule of strict construction: common law rights cannot be held to have been taken away or affected by a statute or by-law passed under its authority unless it is so expressed in clear language. It has been repeatedly stated in one form or another that "the statutory power conferred upon the municipality must be clearly indicated and then specifically followed in any by-law passed thereunder". So if there is any uncertainty or doubt whether a restriction applies to a particular property the matter will be resolved in favour of the owner. The rule that any ambiguity as to the applicability of a by-law to certain premises also applies to a building regulation with the result that the owner is entitled to the benefit of the doubt. If expressions used in a by-law are of doubtful meaning in their application that doubt must also be resolved in favour of the owner. A by-law being penal in nature is to be strictly construed and in favour of the person against whom it is to be applied.
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> Where it is not a matter of the encroachment into a residential zone of some building which would affect the amenities of life of the residents, the court may approach the interpretation of a by-law without acknowledging a compulsion to consider its provisions either liberally or strictly."

There is nothing in this authoritative statement that throws any doubt on my view that the By-Law should be interpreted so as to give effect to the policies.

By-Law 16AE(a) was passed to enable Council to act on Policy 6.8 which was adopted in an effort to induce owners to preserve what was of heritage value in the City subject to the considerations set forth in the policy. For the reasons I have outlined as to why Policy 6.8 should be interpreted as including a lot that results from a consolidation, it is my opinion that By-Law 16AE(a) should too be so interpreted as it is merely the mechanism which allows the City Council to act on Policy 6.8 and therefore should be interpreted in a manner consistent with the words and intent of Policy 6.8.

Therefore By-Law 16AE(a) was sufficient authority for the Council, if satisfied that the proposed development complied with the policy considerations of Policy 6.8 to enter into the development agreement with Brenhold.

The Board did not embark on the exercise of interpreting By-Law 16AE(a) because the Board concluded that Council had the authority to approve the entry into the proposed development agreement pursuant to Policy 8.1.2 and Implementation policy 3.1.1 of the Plan. In view of my conclusion that By-Law 16AE(a) permitted the Council to approve the entry into the development agreement with Brenhold upon the lot that will result from the consolidation, it is not necessary to consider if the Board erred in deciding that the development agreement could be approved on the lands outside the Garden Crest site under Policy 8.1.2 and implementation policy 3.1 and 3.1.1.

In considering Policy 6.8 and the Plan as a whole as well as the weak heritage legislation that bears on the purpose of enacting Policy 6.8 one cannot say that the decision of City Council to allow the development as proposed by Brenhold on a lot to be consolidated was not reasonably consistent with the intent of the Plan.

In view of my interpretation of policy 6.8 the Board did not reach an erroneous conclusion when it stated at p. 52 of its decision "in examining all of the evidence relating to the lot consolidation issue the Board is of the opinion that Council's decision to enter into a development agreement must be said to be reasonably consistent with the intent of the MPS."

There is one ancillary point respecting the lot consolidation issue. The appellants contend that the lot cannot be consolidated because the proposed development results in a shortage of 6,300 square feet of open space required under the by-laws. Policy 7.9 of the Plan provides:

> "7.9 In consideration of applications for subdivision, resubdivision, lot consolidation, rezoning, or development agreements, it shall be the policy of the City to examine the availability of adequate

> recreational open spaces, and to grant approval to such applications only where the legally enforceable standards of the City can be reasonably met."

In considering the application for lot consolidation, (which is presently on hold) the City will have to consider the provisions of Policy 7.9 and determine whether or not to approve the application. That is simply another hurdle for Brenhold to get over as is the approval of the proposed development by the Governor-in-Council as required by the **Heritage Property Act**. The shortage of open space is not fatal to the approval of the development agreement pursuant to By-Law 16AE(a) although it may scupper the development in the final analysis if the open space requirements cannot reasonably be met.

Interpretation of Policy 6.8(i) and (ii)

I turn now to the appellants' assertion that the Board misinterpreted Policy 6.8(i) and (ii) of Section II of the Plan. The appellants argue that the Brenhold's proposal which saves only the front facade and the veranda is not an alteration but a demolition that clearly diminishes the heritage value of the Garden Crest apartments and, therefore, the development agreement is inconsistent with Policy 6.8(i) and the City was not authorized to enter into the agreement. At first blush, this argument seems persuasive until considered in the context of the entire planning process provided for in the **Planning Act** and the law relating to municipal heritage property in the **Heritage Property Act** which I have reviewed and commented on. In this case the Heritage Advisory Committee recommended that the City enter into the development agreement as proposed by Brenhold (with a few minor changes). The Council for the City held public meetings as required by **s. 73** of the **Planning Act** and following extensive hearings Council authorized the City to enter into the development agreement which saved the front facade and verandas of Garden Crest but provided for

demolition of the remainder of the building. It is clear from the record that the heritage advisory committee, the City staff and the Council concluded that the heritage value would not be diminished by the development proposed by Brenhold. The staff report of August 27th, 1990, which has already been set out in part in this decision makes this abundantly clear.

The Board on the appeal from the Council's decision heard a substantial body of conflicting opinion evidence from architects and others as to the heritage value of Garden Crest apartments. In its decision the Board stated at p. 30:

> " The evidence presented to the Board indicated there are a variety of acceptable techniques to preserve the heritage value of a structure including the retention of its facade. The evidence also referred to the actual development of other heritage properties within the City of Halifax and the variety of ways in which Council approved alterations to these buildings were able to maintain the heritage value of the buildings.
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> There are obvious strongly held opinions by individuals that the heritage value of a property can only be maintained by preserving the entire building and by others who maintain that heritage value of a property can be maintained by preserving key features of a structure such as its facade. It is difficult for the Board to interfere with Council's decision when there is such a wide difference of expert opinion on this issue.
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> Policy 6.8 of the M.P.S. permits the development of a heritage property by a development agreement for uses not otherwise permitted subject to certain conditions. The development agreement proposes significant alterations to a registered heritage property which would not otherwise be permitted.
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> Policy 6.8(i) limits these alterations to alterations which do not diminish the heritage value of the structure. The Board finds that the proposed treatment of the Garden Crest building does not diminish its heritage value and the Appellants have not discharged the onus on them of proving that the decision of Council is inconsistent with the intent of Policy 6.8(i)."

This is essentially a finding of fact by the Board and is not appealable. However, the appellants contend that the Board erred in arriving at this finding because it misinterpreted Policy 6.8(i). With respect, I do not agree the Board erred in its interpretation.

Had the City intended that a registered heritage building could not be altered at all, the policy would have so stated. The test is whether the alteration diminishes a building's heritage value. That is an issue that permits of widely differing opinions as is evidenced from the testimony heard by the Board.

The appellants argue that the Board was "clearly wrong" when it determined that there is no standard set of criteria accepted by City Council to determine the heritage value of a structure for the purposes of determining whether alterations to a structure diminish its heritage value. It is clear that there is a scoring criteria attached to Ordinance 174 for the purpose of evaluation of what buildings might be designated as registered heritage property. The appellants' counsel takes the view that by "obvious implication" this criteria should apply when assessing whether alterations to a structure diminish its heritage value which is one of the considerations in determining whether a development agreement should be entered into under Policy 6.8.

While it might be reasonable to apply such a criteria it was not an error for the Board to state that there is no criteria for determining whether alterations diminish the heritage value of a structure because, in fact, there is no such criteria. Nor is there any requirement to reconsider the criteria applied in designating the building as a registered heritage building when determining the issue that arises when applying Policy 6.8(i). Whether heritage value of a building is diminished by alterations would turn on the facts of any particular case. The Heritage Advisory Committee that had recommended the registration of Garden Crescent as a heritage building, by approving the Brenhold proposal, obviously concluded that the heritage value was not diminished by the proposal. In summary there was a substantial body of opinion to support the Board's finding that the proposed treatment of the Garden Crest apartments did not diminish its heritage value. I am satisfied that the interpretation of Clause (i) of Policy 6.8 was one that the language would reasonably bear.

I will now deal with the appellants' argument the Board misinterpreted policy 6.8(ii). Pursuant to this policy the City Council must consider, in determining whether or not to enter a development agreement under policy 6.8 if the proposed development maintains the "integrity of any registered heritage property, street scape or conservation area of which it is a part." The Board stated on this issue:

> "Policy 6.8(ii) requires that the development maintain the integrity of the registered property. The Board accepts the submissions of counsel for the developers that integrity does not refer to the continued physical existence of a building in its exact physical form but rather refers to its aesthetic wholeness or how a building relates to its environment. The Board finds that the proposed treatment of the subject property contained in the development agreement maintains the integrity of the property and that the Appellants have not discharged the onus on them of proving that the decision of Council is inconsistent with the intent of Policy. 6.8(ii)."

The appellants have referred this Court to the evidence of Mr. Douglas Miller, an expert in architectural planning and a former president of the Royal Architectural Institute of Canada who equated the word "integrity" as used in the subsection with completeness "like a complete structure, the integrity of the building." It was his opinion that the development agreement did not maintain the integrity of the property. The appellants also referred the Court to the evidence of Mr. Harry Jost, an architect who has restored several heritage buildings in Nova Scotia. He testified before the Board that the window treatment near the back of the Garden Crest apartments "is very much an integral part of the development of the building". It was Mr. Jost's opinion that the integrity must include the whole building. The Board had before it the evidence of Douglas Franklin, Director of Government Relations for the Heritage Canada Foundation who testified that the entire building has an integrity and it was his opinion that the development agreement diminished the integrity and severely compromised it. The appellants also called Dr. Donald Chard, Historic Park Planner for the Atlantic Region of the Canadian Park Services, who testified

"integrity means wholeness its the entire structure" and that "if you take a building and are left with just the facade you have diminished significantly the integrity of the structure".

Counsel for the appellants asserts the Board should have accepted this expert evidence rather than accept a definition of integrity which was part of the submissions made by counsel for Brenhold that integrity in the context of policy 6.8 (ii) refers to its aesthetic wholeness or how the building relates to its environment not its continued physical existence. It is trite to say that a fact finding body can accept or reject expert opinion. In this case the Board had before it the opinions of architects and planners as to the meaning of the word "integrity" as used in the clause. With respect I am unable to conclude that these witnesses were any more experts in the interpretation of the words used in clause (ii) than a person trained in law. In my opinion, the witnesses called by the appellants interpreted the word "integrity" out of context and without sufficient regard to clause (i) or the intent of the Policy to induce the retention of what is of value in heritage property.

It is significant to note that the proposed building for the Garden Crest site is to be constructed to the same scale as the Garden Crest apartments, has a similar roof line and other architectural features in addition to retaining the front facade and the verandas. The following statement from the staff report of August 27, 1990 bears repeating:

> "As illustrated by Sketches 10 and 11, the Garden Crest will undergo extensive restoration and reconstruction. The front main wall and balconies will be retained, behind which a new building will be constructed to the same size and general configuration as the original structure. The front wall including windows, casings and doors will be reconditioned and re-painted. The new roof will replicate the original mansard design and will be of asphalt shingles. New chimneys will be of the same style and materials as the originals. The whole of the building will be clad in a stucco textured finish. Period style dormers and windows will be installed on the sides and rear of building along with a series of small open-air balconies."

The evidence shows that these are features which will replicate to a great extent the exterior appearance of Garden Crest as viewed from Summer Street.

Policy 6.8 must be read as a whole and clause (ii) in context. The use of the word integrity in this clause (ii) cannot mean, as the appellants' experts suggest, that the owner is not permitted to alter the building in any way as clearly that is permitted under clause (i) so long as the heritage value is not diminished. Insofar as a developer can completely gut the interior of a heritage building, it is difficult to see how clause (ii) would be any sort of an inducement to retain what is of heritage value if the interpretation urged by the appellants were accepted as under such an interpretation the owner could not even remove a door knob. Paragraph (ii) deals with a situation where a proposed development is a part of a registered heritage building or a part of a registered heritage streetscape or conservation area. The difference being that in the Brenhold proposal the heritage building (Garden Crest apartments) is part of the development. It would appear that the staff report of August 27, 1990, considered the issue of integrity in accordance with this interpretation in that the staff report reviewed the Brenhold development proposal as to how it would impact on the integrity of the Garden Crest apartments, Summer Street and the Public Gardens. The staff report stated, in part:

> "Integrity
>
> The integrity of the Garden Crest is maintained in several ways. First, the three storey companion building provides an appropriate balance relative to size and architectural offerings. Additionally, the building solidifies the streetscape along Summer Street through its orientation, front yard setback, wrought iron fencing and overall design.
>
> Second, although taller than the Garden Crest, the 11 and 12 storey condominium buildings are of insufficient height and mass to cause a disproportionate scale of development (there are numerous examples of this type of mid rise/low rise relationship throughout the city). Equally important, the buildings have been designed in a manner that complements the more noticeable features of the Garden Crest facade. This is evident in the proposed mansard roofs, dormers, vertical windows and proportion of materials used.
>
> Finally, as illustrated by Sketches 2 and 6, the whole of the site will be landscaped with a mixture of shrubs, hedges and trees. This will enhance the appearance of the Garden Crest by providing a well

> balanced and aesthetically pleasing setting. It is worth noting that at the time the Garden Crest was being considered for heritage registration, the following was written about the building's relationship to its immediate surroundings:
>
> > 'It is safe to say the Garden Crest is a good example of Edwardian resort type of large building to be placed in an open, well treed environment'. (Appendix "D")"
>
> "Integrity of Gardens
>
> Policy 6.4 of Section II directs that the integrity of important sites be maintained through the encouragement of sensitive and complementary architecture. This is accomplished through the restoration of the Garden Crest and the construction of the period-styled companion building. These buildings complement the gardens by virtue of their scale, architecture and building orientation. Furthermore, they serve as a buffer for the more intensive land uses to the rear."

The Board's interpretation of clause (ii) is a far better interpretation than that proposed by the appellants which would contradict Clause (i). In my opinion the Board did not misinterpret clause (ii) of Policy 6.8; its interpretation was one that the language would necessarily bear.

Other Points Raised on the Appeal

Before turning to the issues raised with respect to the Board's interpretation of policy 8.1 and 8.1.2 of Section VI of the Plan there are a few ancillary matters raised by the appellants which should be considered. The appellants submit that the development agreement was improperly brought forward pursuant to By-Law 16AE(a) of the land use by-law and that it should have been brought pursuant to policy 6.4.1 as the proposal involved the partial demolition and/or substantial alteration of a registered provincial heritage property. There is no provision in policy 6.4.1 to bring forward a proposal for development by agreement whereas Policy 6.8 and By-Law 16AE(a) clearly provide for this.

I would also note that Implementation Policy 3.1.1 provides for development

agreements pursuant to policy 8.1.2 where the height restriction in section 8.1 will be exceeded by buildings proposed for the site. By-Law 16AB(d) permits City Council to enter into development agreements in this area of the City so long as the development complies with the shadow policy in policy 8.1.2. I do not consider it fatal that the matter was only brought forward to Council under By-Law 16AE(a). It may have been more technically correct to have also made reference to By-Law 16AB(d) when the matter was considered by City Council. However, all the facts relevant to a consideration of the shadow issue were brought forward and considered by Council in arriving at its decision to approve the development agreement proposed by Brenhold. The public had full opportunity to participate in the public hearings which encompassed all the issues relating to development on heritage property and on lands west of the Public Gardens and north of Spring Garden Road.

The appellants also assert that an application should have been brought by Brenhold for substantial alteration under Ordinance 174 rather than by Brenhold filing an amended application for development on June 20, 1990. The application was apparently considered by City staff to be an application not only for development but for substantial alteration of a registered heritage building as the amended application was forwarded by staff to the Heritage Advisory Committee for review. Although the application was not stated to have been an application for a substantial alteration under Ordinance 174 the important fact is that the Brenhold proposal was referred to the Heritage Advisory Committee. The Committee considered the proposal and recommended that the City enter into the proposed development agreement.

The appellants also argue that there ought to have been a report from the building inspector as required by Ordinance 174. Given the history of the matter up to that time the provision of a report to the Heritage Advisory Committee from the building inspector as required by s. 13.2 of Ordinance 174 would have been entirely redundant as the Committee

had been provided with a comprehensive report from city staff dated July 17, 1990. That report contained all relevant information that the Committee would need to address the issue whether or not it would recommend to Council that the City enter into the development agreement that affected registered municipal heritage property. In support of the argument that Brenhold and the City did not carry out the procedures necessary to substantially alter or demolish a provincial or municipal registered heritage property the appellants submit:

> " The Supreme Court of Canada found that a detailed scheme of procedures set out in the **Ontario Heritage Act**, 1974 must be observed and carried out as provided in the Statute, **Re Trustees of St. Peter's Evangelical Lutheran in the City of Ottawa** (1982), 140 D.L.R. (3d) 577 (S.C.C.)." (Appellants' Factum , para. 105)

That case is clearly distinguishable from the factual situation we have under consideration. In that case the owner was not given the notices required under the **Heritage Property Act**; the notice requirement was found by the Supreme Court of Canada to be a substantive measure to protect the property owner's rights. The thrust of that decision is that property owner's rights are to be zealously respected and that the purpose of the Ontario heritage preservation legislation (which is similar to that of Nova Scotia) is not only to preserve heritage property but certain provisions are there to protect the interests of the land owners concerned. The Court held that both purposes are to be given effect. In the case we have under consideration the public was provided a full opportunity to be heard by City Council at the time they were considering whether to enter into the development agreement or not. The Heritage Advisory Committee had all the information it needed to arrive at a reasoned decision. It considered the matter and recommended to City Council that the Brenhold proposal be approved with some modifications. In my opinion the statements made in the **St. Peter's Church** case were made in such a markedly different factual situation that they should not be applied in this case.

The appellants allege that the Board erred "when it failed to make a determination as to which expert opinion evidence would be accepted by it."

In some instances the Board did not expressly state what opinion evidence it accepted on an issue. However, it is implicit from the Board's findings in such instances that it did not accept the evidence of the appellants' experts. The burden of proof was on the appellants. There is no legal requirement for a decision-maker to expressly state which of conflicting opinions are accepted. It is clear from the decision that the Board was not persuaded by the evidence adduced by the appellants' experts that the Board should not confirm City Council's decision to enter into the development agreement. By implication the Board rejected these opinions.

The appellants allege in ground 6 of their notice of appeal that

> " the Board erred in fact and law and exceeded its jurisdiction when it incorrectly determined that the proposed development agreement would not diminish the heritage value of the Garden Crest apartments."

That is a question of fact, at the most a question of mixed fact and law. It is not a question of law and is not appealable to this court.

Appeal Ground 13 states:

> " The Board erred in law and exceeded its jurisdiction when it determined that the policies of the Plan were not necessarily interdependent upon each other."

In my opinion the policies of the Plan must be read as a whole. Nothing turns on that statement by the Board.

Appeal ground 9 states:

> " The Board erred in fact and law and exceeded its jurisdiction in its analysis and application of the report of Dr. Bidwell."

It was the duty of the Board to consider the evidence before it, including Dr.

Bidwell's report. It was the Board's right to accept or reject the opinion evidence adduced. This ground of appeal does not raise a question of law.

Other Concerns

Although it was not specifically raised by the appellants I have some concern as to whether the Brenhold proposal meets the criteria in Policy 6.8(iv) which states that a development to be entered pursuant to Policy 6.8 should substantially comply with the policies of the Plan and in particular Heritage resource policies.

A review of the staff report to City Council does not expressly deal with clause (iv) although it expressly deals with all the other relevant clauses and policies. The report to Council does quote Policy 6.8 in full and then states:

> " It is the opinion of staff that the proposed development is in keeping with all relevant requirements of the MDP. This position is best illustrated by grouping arguments in accordance with the four categories of Policy 6.8."

The staff report reviews the provisions of clauses (i), (ii) and (iii) of Policy 6.8, the shadow policy, the integrity of the Gardens (Policy 6.4), commercial uses, wind effects, and certain matters that will be provided for in the development agreement to ensure that the development proceeds in the manner anticpated.

The Board did not expressly direct its attention to Policy 6.8(iv).

It is clear from the staff report that the development does not comply with the general by-laws respecting land use, height of buildings, angle controls and open space for the zone in which the site is located. It is also clear that the angle violation is a minor infraction and that the height limitation in the R-3 zone is overcome by meeting the requirements of Policy 8.1.2. The open space issue can be dealt with on the lot consolidation application. That leaves the issue of the use of the land. The general policies and zoning by-law for the site permit ground floor offices in the high rise residential buildings. The site

being zoned R-3 permits limited commercial development. The Brenhold proposal includes the 3-storey companion building which will house two floors of retail space and a third floor for offices. The proposal provided for residential or office use in Garden Crest. With respect to this matter of commercial usage on the site the staff report states:

> " Commercial Uses:
>
> Approximately one-half of the development site is designated "Residential-Commercial Mix". This would normally allow consideration of ground floor offices in association with high density residential uses by development agreement.
>
> The use of the Garden Crest for professional offices is not the first choice of staff - the preferred course would be a continuation of residential accommodations. However, consideration must be given to the costs associated with such an extensive renovation program, as well as Council's past attitude towards the reuse of heritage buildings for commercial purposes (e.g., McCully House, Henry House, 1480-84 Carlton Street and 5248 Morris Street). The draft development agreement provides for residential or office uses in the building. City Council must make the final determination.
>
> The three storey companion building promises a high quality retail and office area consistent with its superior location and the need to compliment the development as a whole. The amount of commercial space (approximately 14,000 sq. ft.) is insignificant relative to the whole of Spring Garden Road, yet its presence will generate pedestrian movement and interest at ground level. The commercial "mews" is viewed as an imaginative and inviting use of land which might otherwise be reserved solely for private residential purposes."

The Board did conclude that the Brenhold proposal was consistent with the intent of the Plan and the Board was well aware of the exact uses proposed for the site including the commercial component in the so-called companion building.

The focus of the hearing before the Board related to the lot consolidation issue, the interpretation of clauses (i) and (ii) of Policy 6.8 and the interpretation and application of Policy 8.1.2.

The extent of the commercial component of the Brenhold proposal does not appear to have been raised as a concern at the Board hearings. It was not raised on this appeal. In

considering this issue I have concluded that whether a development substantially complies with the policies of the Plan is not a question of law and therefore not appealable. Nor did the Board decline jurisdiction when it did not expressly deal with this question as it was not raised at the Board hearing.

The Shadow Issue

Turning now to the so-called shadow issue, the appellants argue that the Board misinterpreted s. 8.1.1 and 8.1.2 of Section VI of the Plan. That is, whether the proposed development would create a significant amount of shadowing on the Public Gardens during the period of the year that it was open to the public. The issue before the Board was essentially one of fact. The Public Gardens is 15.9 acres in size. There was a great deal of evidence put before the Board as to the shadow effect of the Brenhold proposal. The appellants submit that the shadow cast by the development would vary between 14,000 to 43,000 square feet and that one acre of shadowing (the higher of the two estimated figures respecting shadowing) is a significant amount of shadowing and is certainly more than a minimum of shadow casting within the meaning of policy 8.1.1. What is a significant amount of shadow? The Oxford English Dictionary defines the word "significant" in several ways. Most relevant to the context in which the word is used in policy 8.1.2 is the meaning "of considerable amount or effect." The Board concluded that the shadow from the proposed towers would not cast a significant amount of shadow on the Public Gardens. That is a finding of fact and does not give rise to an appeal to this Court even though the Board misstated the acreage of the Gardens in its decision. The Board was satisfied Dr. Bidwell's opinions were not successfully challenged by the appellants. Therefore there was a foundation for the Board's opinion in the evidence.

This leads to the final issue raised by the appellants; whether the approval by the City of Halifax of the entry into the development agreement was reasonably consistent with

the intent of the Plan as found by the Board. This was the critical issue before the Board. The interpretation of Policy 6.8 while essential to the Board properly exercising its jurisdiction was only incidental to the Board's paramount duty to answer this question. The Board had before it a substantial body of evidence to support its conclusion that this question be answered in the affirmative. The Board's interpretation of the policies was reasonable and its interpretation of the relevant provisions of the **Planning Act** correct. Therefore the Board did not err in law or jurisdiction.

Summary

I have already set out the concluding remarks of the Board in its decision and they need not be repeated. Although the language of the penultimate paragraph is awkward, a review of the entire decision clearly shows that the Board found that the appellants had not persuaded the Board that Council's decision to enter the development agreement could not reasonably be said to be consistent with the intent of the municipal planning strategy. The Board complied with the duty imposed on the Board by **s. 78** of the **Planning Act**.

The planning policies contained in the Plan give City Council the necessary flexibility it needs in planning decisions. The policies should be given a pragmatic interpretation so as to achieve the objectives of the policies. The by-laws should be interpreted in a manner consistent with the interpretation of the policies as they are the means to implement the policies. The **Planning Act** imposes on municipalities the primary responsibility in planning matters. The **Act** gives the municipal council the authority to enter into development by contract which permits developments that do not comply with all the municipal by-laws (**s. 55** of the **Act**). In keeping with the intent that municipalities have the primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (**s. 78** of the **Act**). Planning policies address a multitude of planning considerations some of which are in conflict. Most striking are those that relate to

economics versus heritage preservation. Planning decisions often involve compromises and choices between competing policies. Such decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions. So long as a decision to enter into a development contract is reasonably consistent with the intent of a municipal planning strategy the Nova Scotia Utility and Review Board has no jurisdiction to interfere with the decision (**s. 78(6)**). There is an appeal to this court but limited to questions of law and jurisdiction. Neither the Board nor this Court should embark on their review duties in a narrow legalistic manner as that would be contrary to the intent of the planning legislation. Policies are to be interpreted reasonably so as to give effect to their intent; there is not necessarily one correct interpretation. This is implicit in the scheme of the **Planning Act** and in particular in the limitation on the Board's power to interfere with a decision of a municipal council to enter into development agreements. In this case the intent of Policy 6.8 was to encourage the retention of what is of value in heritage property by allowing development that would not otherwise comply with the land-use by-laws. Such a policy was needed because the **Heritage Property Act** was totally inadequate to preserve municipal heritage property and still is. City Council is the arbitrator of how far it will allow a development to depart from compliance with the general policies and by-laws in applying Policy 6.8. City Council is the body designated to undertake this task and its decisions to enter into a development agreement can only be interfered with when it can be shown that the development agreement is not reasonably consistent with the intent of the municipal planning strategy. It is my opinion that the Board did not err in law or in jurisdiction in refusing to interfere with the decision of City Council in this case. I would dismiss the appeal with costs in the amount of $2,500 plus disbursements to each of Brenhold and the City of Halifax.

Doane Hallett

Concurred in:

Matthews, J.A.

JONES, J.A.: (Dissenting)

The issue on this appeal is whether a development agreement between the City of Halifax and Brenhold Limited for the development of Brenhold's properties on the corner of Spring Garden Road and Summer Street conforms with the City's Municipal Planning Strategy and by-laws.

The property comprises a number of lots on which there are low rise buildings. On one of the lots at 1544 Summer Street is the Garden Crest Apartment building. This building was registered by the City as a heritage property in 1986. It was registered as a provincial heritage property in October, 1989. Brenhold purchased the property in 1988. On the opposite side of Summer Street is the Halifax Public Gardens.

On February 21, 1991, city council passed a resolution requiring the City to enter into a development agreement with Brenhold for the development of the entire property. Under the agreement Garden Crest would be demolished and reconstructed, except for the front of the building. A three story commercial building would be built on the corner of Spring Garden Road and Summer Street. The design of this building would compliment the front of Summer Gardens. On the remaining lots to the rear would be two condominium buildings 12 and 11 stories high. All of the buildings would share a common foundation with underground parking. The main access to the development would be from Summer Street.

The development will require the consolidation of the lots. It does not meet a number of the requirements of the land use by-laws, including land use, height, angle

controls and landscaped open space. The area is zoned R-3 and the height restriction for buildings is 45 feet.

City council approved the agreement under s. 16AE(a) of the land use by-law which provides as follows:

> "16AE(a) Council may, by resolution, under the authority of the **Planning Act** and Policy 6.8 of Part II, Section II of the Municipal Planning Strategy, permit any development by contract agreement in any building, part of a building, or on any lot on which a building is situated that is registered as a heritage property, pursuant to Policy 6.1.2 of Part II, Section II of the Municipal Planning Strategy and in accordance with Policy 6.8."

The appellants appealed to the Nova Scotia Utility and Review Board under s. 78 of the **Planning Act**, R.S. 1989 c. 346 which provides:

> "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 Board shall
>
> (a) confirm the decision of the council;
>
> (b) make any decision the council could have made; or
>
> (c) refer the matter back to the council for further consideration.
>
> (6) The Board shall not interfere with the decision of the council unless the decision cannot reasonably be said to be consistent with the

intent of the municipal planning strategy."

The Review Board found that the agreement was consistent with the intent of the Municipal Planning Strategy. In coming to that decision the Review Board had to interpret the provisions of the Strategy relating to heritage resources and the City zoning by-laws with respect to development agreements and height restrictions in relation to the Public Gardens. The Review Board dismissed the appeal.

The appellants have appealed from that decision under s. 30 of the **Utility and Review Board Act** which provides:

> "30(1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order."

This matter has a lengthy history including public hearings before council and committees. As the appeal is restricted to questions of law and jurisdiction, I have only briefly outlined those facts which are necessary to consider the legal issues. I will expand on the facts where required in dealing with the issues. As the legal questions are ultimately for this Court it is not necessary with respect, to elaborate, in detail, on the reasoning of the Review Board. The standard of review is whether the Council and the Board were legally correct in interpreting and applying the provisions of the Municipal Planning Strategy and by-laws in approving the agreement. It is not the function of this Court to weigh the evidence or determine the merits of this proposal. See **Halifax (County) v. Maskine**, 118 N.S.R. (2d) 356 at p. 358.

The Review Board had to determine whether the proposed agreement was consistent with the strategy. The agreement would not meet that test if it violated the strategy. The duty of Council is made clear by s. 45 of the **Planning Act**, R.S. 1989 c. 346 which provides:

> "45 The adoption by a council of a planning strategy shall not commit the council to undertake any of the projects therein suggested or outlined but shall prevent the undertaking by the council of any development within the scope of the planning strategy in any manner inconsistent or at variance therewith."

There are three main issues on this appeal. The first is whether the agreement complies with the heritage resources provisions of the Municipal Planning Strategy. The relevant provisions are as follows:

"HERITAGE RESOURCES

Definitions

'Heritage Property' means an area, site, structure or streetscape of historic, architectural or cultural value registered in the Halifax Registry of Heritage Property.

'Heritage Conservation Area' means an area of concentration of properties unified by similar use, architectural style or historical development, which retains the atmosphere of a past era and which is registered in the Halifax Registry of Heritage Property.

Objective	The preservation and enhancement of areas, sites, structures, streetscapes and conditions in Halifax which reflect the City's past historically and/or architecturally.
6.1	The City shall continue to seek the retention, preservation, rehabilitation and/or restoration of those areas, sites, streetscapes, structures, and/or conditions such as views which impart to Halifax a sense of its heritage, particularly those which are relevant to important occasions, eras, or personages in the histories of the City, the Province, or the nation, or which are deemed to be architecturally significant. Where appropriate, in order to assure the continuing viability of such areas, sites, streetscapes, structures, and/or conditions, the City shall encourage suitable re-uses.
6.1.1	The criteria by which the City shall continue to identify such areas, sites, structures, streetscapes and/or conditions identified in Policy 6.1 are set out in the official City of Halifax report entitled An Evaluation and Protection System for Heritage Resources in Halifax (City Council, 1978).
6.1.2	The City should designate those properties which meet the adopted criteria as registered heritage properties or

registered heritage conservation areas and protect them within the terms of the **Heritage Property Act**.

6.3.3 Policy 6.3.2 above shall not be deemed to waive any other height or angle controls.

6.4 The City shall attempt to maintain the integrity of those areas, sites, streetscapes, structures, and/or conditions which are retained through encouragement of sensitive and complementary architecture in their immediate environs.

6.4.1 The City shall regulate the demolition and exterior alterations under the provisions of the **Heritage Property Act**, and should secure inducements for retention, maintenance and enhancement of registered heritage properties.

6.4.2 The City shall study the use of preservation easements and restrictive covenants to determine the extent to which they can be used in the preservation of registered heritage properties.

6.4.3 The City shall consider acquisition of registered heritage properties whenever acquisition is the most appropriate means to ensure their preservation.

6.4.4 The City shall organize and maintain a data bank on heritage conservation methods including data on costs, sources of funding, techniques, methods, and materials used on successful recycling or restoration projects, both for its own use and to encourage private sector involvement in heritage conservation.

6.5 The City shall budget an annual amount to ensure that a fund is available should purchase or other financial involvement be considered by the City for a registered heritage property. The specific terms of this budget are set forth in Policy 11.3.2 of this section of this Plan.

6.6 In the purchase or lease of space for its own use, the City shall first consider accommodation in designated heritage structures.

6.7 The City shall investigate the possibility of establishing Heritage Conservation Zones to protect registered heritage conservation areas and registered heritage streetscapes under the provisions of the **Planning Act**. The results of such investigation should be incorporated

as amendments to this Plan and to the Land Use By-law.

6.8 In any building, part of a building, or on any lot on which a registered heritage building is situated, the owner may apply to the City for a development agreement for any development or change in use not otherwise permitted by the land use designation and zone subject to the following considerations:

(i) that any registered heritage building covered by the agreement shall not be altered in any way to diminish its heritage value;

(ii) that any development must maintain the integrity of any registered heritage property, streetscape or conversation area of which it is part;

(iii) that any adjacent uses, particularly residential use are not unduly disrupted as a result of traffic generation, noise, hours of operation, parking requirements and such other land use impacts as may be required as part of a development;

(iv) that any development substantially complies with the policies of this plan and in particular the objectives and policies as they relate to heritage resources."

The appellants contend that these provisions refer to and must be read in the light of the **Heritage Property Act**, R.S. 1989, c. 199. The following provisions of that **Act** are relevant:

"2 The purpose of this **Act** is to provide for the identification, designation, preservation, protection and rehabilitation of buildings, streetscapes and areas of historic, architectural or cultural value and to encourage their continued use.

3 In this **Act**,

(i) 'provincial heritage property' means a building, streetscape or area registered in the Provincial Registry of Heritage Property;"

This **Act** provides for the registration of heritage properties with the province or municipalities.

Section 11(1) of the **Act** states:

> "11(1) Provincial heritage property shall not be substantially altered in exterior appearance or demolished without the approval of the Governor in Council."

Sections 17(1), 17(2), 17(5) and 18 provide:

> "17(1) Municipal heritage property shall not be substantially altered in exterior appearance or demolished without the approval of the municipality.
>
> (2) An application for permission to substantially alter the exterior appearance of or demolish municipal heritage property shall be made in writing to the municipality.
>
> (5) The municipality may grant the application either with or without conditions or may refuse it.
>
> 18 Notwithstanding Section 17, where the owner of municipal heritage property has made an application for permission to alter the exterior appearance of or demolish the property and the application is not approved, the owner may make the alteration or carry out the demolition at any time after one year from the date of the application, provided that the alteration or demolition shall not be undertaken more than two years after the date of the application."

There is no provision in that **Act** for development agreements. The City has passed an ordinance under the **Heritage Property Act** which provides for the registration of heritage properties in the City. On July 12, 1988, Brenhold applied to demolish the Garden Crest building. On August 12, 1988, the Heritage Advisory Committee recommended against the demolition permit to council. The proposal to reconstruct the Summer Gardens building is set out in the staff report:

> "As illustrated by Sketches 10 and 11, the Garden Crest will undergo extensive restoration and reconstruction. The front main wall and balconies will be retained, behind which a new building will be constructed to the same size and general configuration as the original structure. The front wall including windows, casings and doors will be reconditioned and re-painted. The new roof will replicate the original mansard design and will be of asphalt shingles. New chimneys will be of the same style and materials as the originals. The whole of the building will be clad in a stucco textured finish. Period style dormers and windows will be installed on the sides and rear of building along with a series of small open-air balconies."

There was considerable evidence by experts as to whether the proposal with respect to Summer Gardens would diminish the heritage value of the structure or maintain its integrity as prescribed by s. 6.8 of the heritage resources policy. The appellants' witnesses contended that the policy was intended to maintain the building and not simply the facade. Witnesses for the respondents contended that only the front of the building had any heritage value and therefore the heritage value of the property was not diminished provided the front was maintained. The Planning Advisory Committee recommended that the structure be retained and restored. The Review Board held that s. 6.8 of the Strategy did not require that the entire building be maintained in order to preserve its heritage value.

The appellants contend that the heritage value of a property is reflected in all the factors which cause the property to be registered as a heritage property. The appellants' main argument is set out in their brief as follows:

> "The Appellants submit that the clear purpose of Policy 6.8 is to protect and preserve registered heritage properties in the City of Halifax. Accordingly, the Appellants submit that the Board interpreted and applied Policy 6.8 incorrectly when it upheld the decision of City Council to allow the Development Agreement.
>
> Through Policy 6.8 developers are offered certain privileges by way of exemptions from the Land-Use By-Law, in exchange for the protection and preservation of registered Heritage Properties in the City. It is a complete misreading of the Policy to suggest that such inducements are to be granted for the demolition of 90% of a Registered Heritage Building. Policy 6.8 was not designed to protect the 'doorknobs' and front facades of registered heritage properties.
>
> In the instant case the Development Agreement would permit exemptions from the zoning requirements for height, open space, angle controls, density limits and commercial use, all because the Garden Crest, a Registered Heritage Property (both municipally and provincially, rests on one of the lots. In exchange, the Development Agreement requires the demolition of most of the Garden Crest and the substantial alteration of its front facade and roof line. The Board clearly acted incorrectly when it determined the Development Agreement complied with the MDP and in particular with Policy.6.8 of the MDP."

The respondents argued that the evidence established it was impossible to restore

the building because of its condition and that the only heritage significance of the structure was the front including the balconies. They also contend the policy if strictly enforced would result in no changes being permitted and that was not consistent with the intent of the policy. The following passage is from the respondent's brief:

> "It is important to take note of the evidence as to the purpose and intent to Policy 6.8. It was adopted mid-way through the Brenhold process. As noted by Mr. Hanusiak prior to its adoption, the only mechanism available to the City to preserve heritage value was registration under the **Heritage Property Act**. In effect, that required an owner to wait approximately a year prior to demolition. On the expiry of the year there was no further mechanism for preservation.
>
> It was the purpose of Policy 6.8 to improve that position and to put the City into a position to negotiate with an owner in order to achieve heritage preservation. It does that by permitting an owner to have variances from existing restrictions in exchange for the owner agreeing to preserve what is of heritage value in the property."

I agree with the appellants' contention that the provisions of the Municipal Planning Strategy must be read in the light of the **Heritage Property Act**. The policy of that **Act** is made abundantly clear by s. 2. It is for the "preservation, protection and rehabilitation of buildings" of historic, architectural or cultural value and to encourage their continued use. That **Act** sets out the policy which applies at both the provincial and municipal levels. The **Act** provides for the registration of heritage buildings. There is no provision in the **Act** for the registration of parts of buildings. While the **Act** provides for the alteration or demolition of buildings that are registered it is not the object of the **Act** to encourage that course. We have not been referred to any provision in the **Planning Act**, which enables a municipality to establish policies contrary to the provisions of the **Heritage Property Act**. In fact there do not appear to be any provisions in that **Act** dealing specifically with heritage property. Section 2(b) of the **Planning Act** provides:

> "2 The purpose of this **Act** is to
>
> (b) enable municipalities to assume the primary

> authority for planning within their respective jurisdictions, consistent with their urban or rural character through the adoption of municipal planning strategies, land-use by-laws and subdivision by-laws consistent with the policies and regulations of the Province;"

Section 43(2)(a) of the **Planning Act** states:

> "43(2) The Minister shall approve a planning strategy submitted to him unless
>
> (a) it contravenes or conflicts with the law;"

The effect of the interpretation placed on s. 6.8 of the Strategy policy by the Review Board would be to allow council to approve any scheme for the development of heritage property, provided some aspect of the heritage value of a property is preserved. That would promote the destruction and not the preservation of heritage property. Such an interpretation would be inconsistent with the **Heritage Property Act** and avoid the necessity of complying with that **Act**.

In my opinion, with respect, such an interpretation is not consistent with the language of the Strategy. The objective of the policy is clearly stated as the preservation and enhancement of structures in Halifax which reflect the City's past historically and architecturally. Section 6.1 states that the City shall continue to seek the retention, preservation, rehabilitation and restoration of structures which impart a sense of the city's heritage. All of the sections reflect that policy. Section 6.8 is one section and the clauses must be read as whole. That section refers to heritage buildings. It clearly states that any development must maintain the integrity of the property and that any heritage building must not be altered in any way so as to diminish its heritage value. In order to provide for the preservation of a structure suitable re-uses are encouraged under the Strategy provided the structure is not substantially altered so as to diminish its heritage value. The agreement does not preserve the heritage value of the building and is inconsistent with the Strategy policy.

Section 6.4.1 adds nothing to the powers of the City under the **Heritage Property Act** and refers to the retention of heritage properties.

This brings me to the interpretation of s. 16AE(a) of the by-laws which is the second issue. That clause refers specifically to Policy 6.8 and must be interpreted in accordance with the intent of that policy. Section 16AE(a) refers specifically to any building or lot which is registered as a heritage property. What is contemplated is a development agreement specifically dealing with the heritage building on that lot. With respect the section does not contemplate the use of that provision as opening the door to development agreements on adjoining properties as part of an overall scheme. To allow such agreements as part of heritage preservation is simply a means of undermining the Municipal Development Policy. Where development agreements are authorized under the **Planning Act** on adjoining properties an overall development may be possible provided the Heritage Resources policies are followed with respect to the heritage property. The City never suggested that the development was possible except under s. 16AE(a) of the by-laws. In my view s. 16AE(a) did not authorize the Council to enter into a development agreement for the development of the properties adjoining the Garden Crest lot.

The remaining issue relates to the extension of the height restrictions set out in the City by-laws. Policies 8.1.1 and 8.1.2 of the Strategy provide:

> "8.1.1 The City shall amend its zoning bylaws to include a height restriction on development in the vicinity of the Public Gardens so as to ensure a minimum of shadow casting on the Public Gardens.
>
> 8.1.2 The City shall consider an application under the provisions of Section 33(2)(b) of the **Planning Act** for a development in the Spring Garden Road Sub-Area north of Spring Garden Road which would exceed the height precinct so established through Policy 8.1.1 above, and, in so doing, the City shall require that any proposed development not cast a significant amount of shadow on the Public Gardens during that period of the year during which the Public Gardens is open to the public.

The land use by-law provided a 45 foot height limit on Brenhold properties. The development proposal anticipates a height of 115 feet for the south tower and 106 feet for the north tower. Evidence was adduced by the parties as to the effect the shadow from these buildings would have on the Public Gardens. Council had to ensure that any proposed development did not cast a significant amount of shadow on the Public Gardens during the period of the year when the Gardens is open to the public. The words in the policy are to be given their ordinary meaning. The ultimate question is essentially one of fact. The appellants argue that the Review Board erred in its interpretation of the evidence and in reading s. 8.1.2 of the Policy. I have carefully reviewed the decision of the Board and I am not satisfied that the Board erred in law in interpreting those policies. It is clear that the Review Board considered the issue essentially one of fact for the Council and that the decision of Council was reasonably consistent with the intent of the policy. I would dismiss this ground of appeal.

I would allow the appeal with costs to the appellants against Brenhold Limited and the City of Halifax in the amount of $5000.00 plus disbursements. I would further order that the agreement be set aside on the ground that it is inconsistent with the City's Municipal Planning Strategy and by-laws.

J.A.

C.A. No. 02839

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HERITAGE TRUST OF NOVA SCOTIA and FRIENDS OF THE PUBLIC GARDENS	)	
Appellants	)	
- and -	)	R E A S O N S FOR
	)	JUDGMENT BY:
NOVA SCOTIA UTILITY AND REVIEW BOARD, BRENHOLD LIMITED and THE CITY OF HALIFAX	)	HALLETT, J.A.
	)	JONES, J.A.
Respondents	)	(Dissenting)