DECISION **2019 NSUARB 113**
M09006

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

-and-

IN THE MATTER OF AN APPEAL by **JESSICA GAUDET, GRANT GAUDET, KRISTA O'CONNELL, MATT O'CONNELL, JEFF LEBLANC, MONETTE LEBLANC, DONNA MESSENGER, JOHN MESSENGER, HUBERT POTHIER, SARA BELLIVEAU, VICTOR MOULAISON AND SHARON HOUSTON** from a decision of Council for the Municipality of the District of Argyle approving a development agreement with 3316791 Nova Scotia Limited, or Jules Leblanc, or both of them, to permit the construction and operation of a sea cucumber processing plant at Tusket Industrial Park, in Tusket, Nova Scotia

BEFORE:	Roland A. Deveau, Q.C., Vice Chair
APPELLANTS:	**JESSICA GAUDET et al.** Gavin Giles, Q.C.
RESPONDENT:	**MUNICIPALITY OF THE DISTRICT OF ARGYLE** Richard W. Norman, LL.B.
DEVELOPER:	**3316791 NOVA SCOTIA LIMITED and JULES LEBLANC** Jocelin P. d'Entremont, J.D.
HEARING DATE:	May 14, 2019
WRITTEN SUBMISSIONS:	June 18, 2019
DECISION DATE:	**September 5, 2019**
DECISION:	**Appeal is dismissed.**

Document: 271081

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I INTRODUCTION

[1] A group of residents and property owners in the Tusket area appealed the decision of Council for the Municipality of the District of Argyle, which approved a development agreement to permit the construction and operation of a sea cucumber processing plant located in the Business Park, at Tusket, Nova Scotia.

[2] Under s. 251(2) of the *Municipal Government Act*, the Board can only allow the appeal if the decision of Council approving the development agreement failed to reasonably carry out the intent of the Municipal Planning Strategy (MPS).

[3] The Municipality's MPS provides for the establishment of a Business Park in the Tusket area, which is zoned Business Park (BP) Zone in the Land-Use Bylaw (LUB). Policy B-10 provides for a wide variety of uses in the Business Park, including all commercial and light industrial uses. All heavy industrial uses are also permitted in the Park by way of development agreement, excluding fish reduction plants, fish composting operations, and other specified exclusions. Fish reduction plants, fish composting operations and sea cucumber processing plants are all defined differently in the LUB. A sea cucumber processing plant is not specifically excluded from the Business Park. Thus, a sea cucumber processing plant is a permitted heavy industrial use in the Business Park.

[4] Policy B-10A provides that in approving a development agreement for a heavy industrial use, Municipal Council must give consideration to the impact of the proposed development on adjacent residential uses in the area with regard to noise, odour and emissions, traffic generation, hours of operation, adequate buffering to screen the development from adjacent uses, and any matter which may be addressed in the LUB. Based on its review, Municipal Council considered the impact of all these matters

in its approval of the development agreement, and included provisions in the development agreement to help mitigate or eliminate the impact from such factors upon adjacent residential uses.

[5] The Board concludes that Council's decision reasonably complies with the intent of the MPS. Accordingly, the appeal is dismissed.

II DESCRIPTION OF PROPOSED PLANT AND SURROUNDING AREA

[6] On December 10, 2018, an appeal under the *Municipal Government Act*, S.N.S. 1998, c. 18 (*MGA* or *Act*) was filed with the Board by Jessica Gaudet, Grant Gaudet, Krista O'Connell, Matt O'Connell, Jeff Leblanc, Monette Leblanc, Donna Messenger, John Messenger, Hubert Pothier, Sara Belliveau, Victor Moulaison and Sharon Houston (Appellants) with respect to the decision of Municipal Council for the Municipality of the District of Argyle (Municipality or Argyle) approving a development agreement with 3316791 Nova Scotia Limited, or Jules Leblanc, or both of them (Developer), to permit the construction and operation of a sea cucumber processing plant located in the Tusket Business Park, at Tusket, Nova Scotia (proposed plant).

[7] The Board considers it helpful to provide a factual context for this appeal, including some background about the Business Park, the residential properties of the Appellants (and other vacant property owned by some Appellants), and the proposed plant itself.

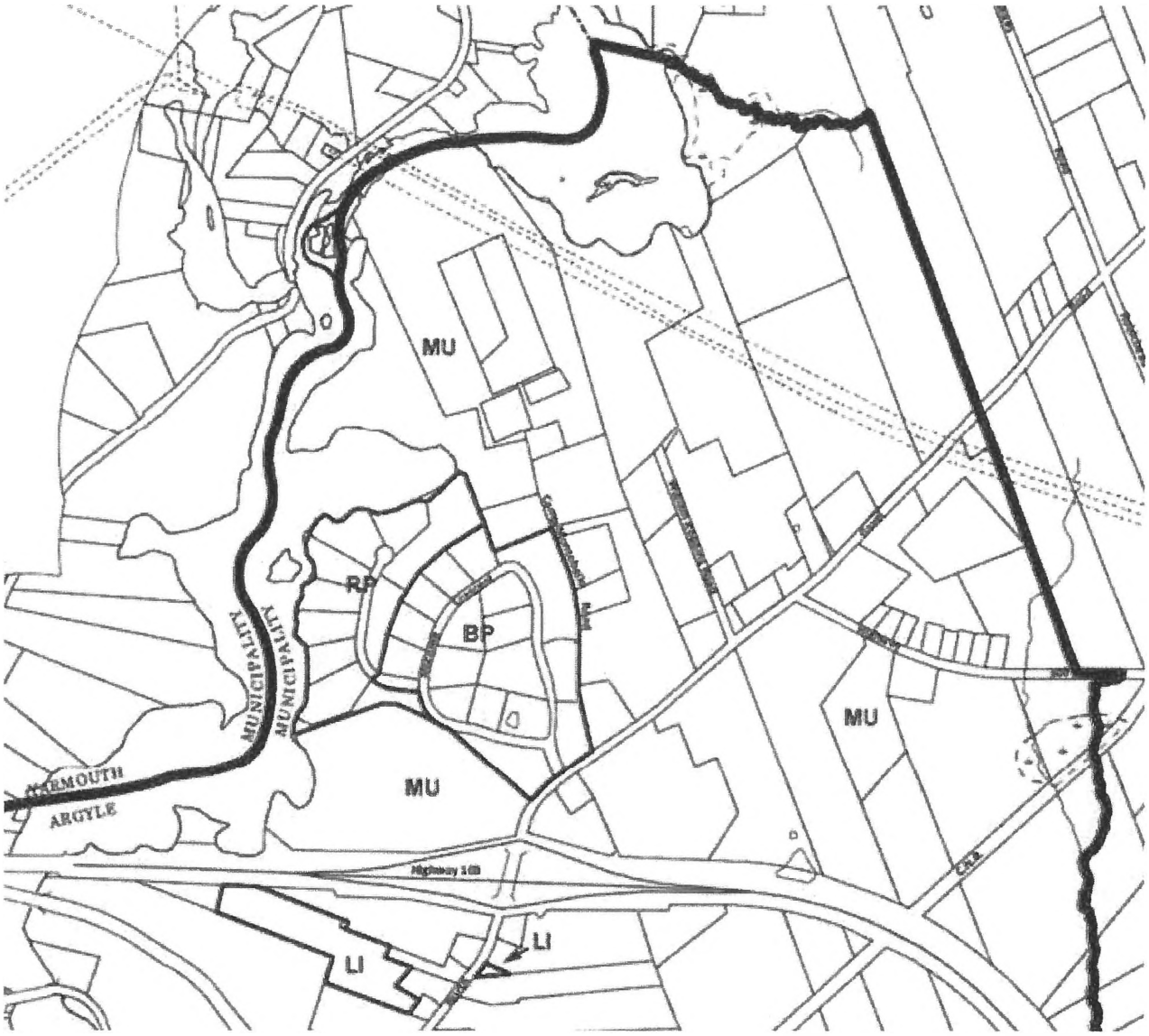
[8] The Business Park was established in 1989 in the community of Tusket, Yarmouth County, Nova Scotia. It is zoned Business Park (BP) Zone. It is conveniently located just a few hundred feet from a major highway, having immediate access to

Highway 103 (Interchange 33) via Highway 308. When it was originally created, the Park contained approximately 40 acres, and was clearly intended to promote commercial and industrial activity in the Municipality. The Business Park was bounded at the time by Highway 308 to the east, by the Tusket River to the west, and by private lands to the north and south. Slocomb Crescent, a circular service road, was constructed within the Park to serve its occupants.

[9] The lots created in the Park were each approximately two to three acres in size and served by central systems and dug or drilled wells. A few institutional and commercial uses were initially developed in the Park, including an administration building for Université Sainte Anne, a Department of Fisheries and Oceans (DFO) building, and a construction company storage building. However, the Park did not develop to the degree that had been hoped. As a result, according to the Municipality's CAO at the hearing, the Municipal Council decided in 2008 to convert some of the Business Park lands to a Residential Park. Thus, lands in the western portion of the Business Park abutting, and in the vicinity of, the Tusket River were re-zoned to Residential Park (RP) Zone and the Municipality started selling residential lots to the public.

[10] In terms of topography, the Business Park lots are generally located on flat higher ground, adjacent to Highway 308, while Gardner Lane was built off Slocomb Crescent to access the new Residential Park lots located down a gentle embankment near the Tusket River. As a result, the Business Park is now bounded by Highway 308 to the east, by the Residential Park to the west, and by private lands to the north and south.

[11] For illustrative purposes, a map entered as Exhibit G-14, which shows the area of the Highway 103 interchange at Tusket, the Business Park, and the Residential Park, appears below:



[12] In the map above, the Business Park is identified by the letters BP, with Slocomb Crescent forming a circular road within the Park. The proposed plant is to be located on the three upper lots inside Slocomb Crescent, including the two lots on which the letters BP are located, and the lot immediately above it. The Residential Park lots are also shown on the map, with Gardner Lane (which is not named on the map) branching

off the western portion of Slocomb Crescent and leading down a sloped embankment to the lots along the Tusket River in the area marked as RP. In this area, the Tusket River generally acts as the boundary line between the municipalities of Yarmouth and Argyle. Highway 103 is also shown on the map, with the interchange being near the Business Park. The lands shown as MU between the interchange and the Business and Residential Parks are the lands of Hubert Pothier, an Appellant, described below.

[13] Since the creation of the Residential Park, the Appellants have purchased their lots and constructed new homes. One Appellant who purchased a lot (Donna LeBlanc-Messenger) intends to build her retirement home there. One other Appellant (Hubert Pothier) did not buy one of the Residential Park lots, but is the owner of a 25 acre parcel of land located to the south of the Business Park and Residential Park, next to the Tusket River. While the degree of buffering will be discussed at greater length later in this Decision, both the Business Park and Residential Park contain mature tree vegetation.

[14] In recent years, a retail brewery operation and a warehouse for another local construction company have been built in the Business Park. There are also numerous vacant lots remaining in the Park.

[15] The Board observes here that the Park was referred to in these proceedings as both a Business Park and an Industrial Park, depending on which party was involved. One of the Appellants (Ms. LeBlanc) suggested that the Park had changed from Industrial Park to Business Park after the Residential Park was created and the Municipality began selling residential lots. In the Board's view, nothing turns on this distinction. The merits of this appeal must be considered on the basis of the policies in the MPS. While the Park

is described in the MPS as a Business Park and is zoned Business Park (BP) Zone, it is clear that along with other commercial developments, both light industrial uses and heavy industrial uses (with a few listed exceptions) are permitted in the Park. Thus, regardless of how the Park is named, industrial uses may occur in the Park. The Board will refer to the Park in this Decision as the Business Park or simply Park, but it will remain mindful of the policy direction in the MPS for this area of land.

[16] The proposed plant is to be constructed on three lots in the Business Park, on the rear section of Slocomb Crescent. Two buildings are proposed. The processing facility is to be about 60 feet x 70 feet, with a portion of the building extending 50 feet in height. A second building to be used for cold storage would be 50 feet x 60 feet in size. For the sake of completeness, the Developer's description of the processing operation was set out in his application as follows:

> SEA CUCUMBER NUTRACEUTICAL PRODUCT PROCESSING DESCRIPTION - TUSKET BUSINESS PARK
>
> Ocean Pride Fisheries Ltd. intends to manufacture natural health products such as but not limited to Fish Oil and powder from sea cucumber waste materials through an organic natural process with no use of solvent chemicals. All processes are undertaken within a wholly closed building in the Tusket Business Park. The manufacturing process involves a 3-phase power supply to a high pressure boiler and associated machinery to produce a final product produced from the sea cucumber waste material. The boiler system is designed to operate in a manner to mitigate odour. Commercial odour mitigation solutions such as Air Scrubbers and Thermal Oxidizers could be incorporated in the system if warranted. The well insulated structure, and if necessary, additional sound barriers will mitigate noise produced by the high pressure boiler and related machinery and the compressors used to run cooling/freezing units.
>
> Refrigerated space will be used to store raw material until it is processed. It is expected an additional separate cold storage building for storage of incoming raw materials on the site may be needed as the business develops. It is intended to utilize the current waste materials from the Ocean Pride sea cucumber facility in Wedgeport with the ultimate goal of utilizing all of the Ocean Pride product which is harvested from the sea and also have the potential for utilizing raw material from other processors of sea cucumber.
>
> The manufacturing process which follows the boiler process involves drying the processed raw material to produce a final dry powder nutraceutical product. This process involves venting to the exterior of the building which includes the potential for applying standard odor mitigation solutions machinery if warranted. The dry final product is then packaged in containers and stored in barrels or bins for shipping to a third party offsite encapsulation

> plant. The encapsulated goods would be returned to Ocean Pride for packaging and export.
>
> In terms of waste, our process is designed to have minimal levels of organic process waste. The most waste we expect to have is spillage and runoff from the machinery, as well as the water and cleaning solutions used in the daily cleaning of the facility. Our estimated waste water daily output is 1000 usg per day. Process waste means loss of income so it is in our best interest to minimize this.
>
> In essence, this is not a 'wet' operation. It is our intention that what we take into this facility as frozen raw material all, except for what collects on the surfaces of the machinery and pipes during process flow, will be collected and sent out in barrel or large container. These bulk products will be collected and send to private encapsulators and these encapsulating companies have are capable of packaging into forms ready for export.
>
> Local traffic will be minimal, as we would take in frozen materials in large quantity sporadically and any shipping will be done for bulk products on domestic carriers, like Midland Transport. All of this should take place within normal business hours during the work week.
>
> At this time we are estimating once we are up to reasonable level of production volume we would be operating for 72 hours straight (3 fully days) through the middle part of the week. This will help limit washdown and cleanup and minimize the work week while maximizing the output. Our forecast is being 2 years before getting up to this level of production. Until then we will probably run 1 day of production per week.
>
> [Appeal Record, pp. 4-5]

III BACKGROUND OF PROCEEDINGS

[17] The Developer applied to the Municipality on February 15, 2018, for a development agreement with respect to the proposed plant.

[18] The application was initially reviewed by Brad Fulton, a planner engaged by the Municipality, but he retired in September 2018 before preparing any report to Council on the matter. The only report prepared by staff for Council's review was a report prepared by Alain D. Muise, CPA, CA, the Municipality's Chief Administrative Officer, dated November 10, 2018 (CAO's report). The CAO also sent an email to Council on the eve of the final Council meeting, just after midnight on November 20, 2018, in support of the Developer's application. The CAO's report and eleventh-hour email both recommended the approval of the development agreement by Council, but he was not

qualified as a municipal planner and he did not review the MPS policies. The Appeal Record contained no report from planning staff outlining the issues arising from their review of the application. Further, no expert opinion in municipal planning matters was provided by any party during the hearing.

[19] Municipal Council held a public hearing on October 9, 2018. Several members of the public attended the hearing and made presentations. The issues of odour and noise were raised by local residents. In addition, two letters of comment were filed with the Municipality, both of which opposed the development agreement.

[20] On November 1, 2018, the Developer met with residents at the municipal offices to respond to questions about the project.

[21] Municipal Council discussed the application at its Council Meeting on November 13, 2018, but agreed to defer its decision "to allow time to digest recent conversations with neighboring property owners and the development".

[22] Council considered the application at its Council Meeting on November 20, 2018. Council allowed a further 30 minutes for the receipt of comments and questions from members of the public. A motion to reject the development agreement was defeated by a vote of five to four. A motion by Council was then carried to approve the development agreement by a vote of five to four.

[23] The Appellants filed their Notice of Planning Appeal with the Board on December 10, 2018, alleging that Council's decision did not reasonably comply with the intent of the Municipal Planning Strategy in several respects. By consent of the parties, the Appellants filed an Amended Notice of Planning Appeal on March 19, 2019.

[24] The hearing on the merits was preceded by a number of preliminary motions and rulings by the Board, including evidentiary rulings. As a result of a preliminary motion, the Board ruled that ground of appeal #5 should be struck as being outside the scope of the Board's jurisdiction. This ground of appeal alleged that the Municipality was in a conflict of interest as owner of the subject lands when it considered the development agreement.

[25] As a result, the grounds of appeal to be considered in this matter are as follows:

(1) The Appellants are "aggrieved people" as defined pursuant to the provisions of Section 191 of the *Municipal Government Act*.

  (a) Each of the Appellants is an individual who *bona fide* believes the Decision will adversely affect the value and the reasonable enjoyment of their own property.

  (b) Each one of the Appellants resides or owns property adjacent to the Property and will be negatively affected by the noise, disturbance and odours which will or which could result from the establishment of a sea cucumber processing plant on the Property.

(2) The Tusket Business Park is in a BP Zone as defined pursuant to the provisions of Part 11 (1) of the *Municipality of Argyle Land-Use By-Law*.

  (a) As such, the establishment of a sea cucumber processing plant is a prohibited land use.

  (b) Excluded from the permitted uses are, inter alia, "fish reduction plants", "fish composting operations" and "food waste composting". Though no definitions are established or implied for these land uses, it is clear that in their plain and ordinary meaning, they prohibit and are intended to prohibit the operation of plants and facilities which generate noise, disturbances and odours.

(3) Pursuant to the provision of land-use policy adopted by the Municipal Council of the Municipality of Argyle, the establishment of a sea cucumber processing plant would be a "heavy industrial" land-use. As such, and notwithstanding the general prohibition referred to above, no sea cucumber processing plant could be established without the "special agreement" of the Municipal Council of the Municipality of Argyle.

(4) In determining the issuance of and entry into a "special agreement", the Municipal Council of the Municipality of Argyle had an obligation to fairly and reasonably consider such a land-use for a sea cucumber processing plant from its overall compatibility with the Appellants' adjacent approved land uses. In failing to fairly and reasonably consider such a land-use from the perspective of its overall

compatibility with the Appellants' adjacent approved land uses, the Municipal Council of the Municipality of Argyle, in making the Decision appealed from, considered only the economic benefits potentially accruing thereto in the forms of jobs to be potentially created and tax revenues to be potentially generated, and not the overall impact of a sea cucumber processing plant from the perspectives of noise, disturbance, odour and the sightliness of premises and the overall impact of same on the adjacent approved land uses.

(5) [Ground of Appeal struck by Order of the Board]

(6) In determining the issuance of and entry into a "special agreement" with respect to the establishment of a sea cucumber processing plant in the Tusket Business Park notwithstanding the general prohibition referred to above, the Municipal Council of the Municipality of Argyle conducted itself inconsistently with the provisions of the Municipality of Argyle Land-Use By-Law in such other manners as may appear on the record leading to that Decision.

(7) Pursuant to the provisions of Section 212 of the *Municipal Government Act* the Municipal Council of the Municipality of Argyle has established a Municipal Planning Strategy. Pursuant to the provisions of Section 250(1)(b) of the *Municipal Government Act*, an Appeal lies to The Honourable Nova Scotia Utility and Review Board when a municipal council approves a development agreement which does not reasonably carry out the intent of that municipality's Municipal Planning Strategy. In determining the issuance of and entry into a "special agreement" with respect to the establishment of a sea cucumber processing plant in the Tusket Business Park notwithstanding the general prohibition referred to above, the Municipal Council of the Municipality of Argyle conducted itself inconsistently with the provisions of its Municipal Planning Strategy.

(a) *Inter alia*, the Municipal Planning Strategy of the Municipality of Argyle provides that:

> In Tusket, the Business Park designation is intended to accommodate a broader range of resource and non-resource industrial uses.
>
> Council believes that industry can be accommodated within the Mixed Use designation. There is, however, concern that this class of development will encroach and create conflict with the more compatible mix of residential, institutional, recreational and commercial uses. ... .
>
> ...
>
> Nuisance factors associated with some industries include odour, dust, smoke, noise, vibration and the production of wastes that can contaminate soils and watercourses. ...
>
> To accommodate industry in this designation, Council will establish two zones including Light Industrial (LI) and Heavy Industrial (HI). As the zone category implies the LI Zone is to accommodate light industry ... while the HI Zone is to accommodate heavy industry as well as any use permitted in the LI Zone. ... .
>
> However, industry known to generate nuisance effects, are unsightly or are better suited to other areas of the Municipality will be prohibited. Included are fish reduction plants; fish composting operations; asphalt processing plants; scrap yard; salvage yards; sand, gravel, topsoil

operations; landfill; food composting; construction and demolition debris operations.

(b) As such, the establishment of a sea cucumber processing plant is a land use prohibited by the provisions of the Municipal Planning Strategy of the Municipality of Argyle in that a sea cucumber processing plant is or can reasonably assimilated with a "fish reduction plant", a "fish composting operation" or a "food waste composting" operation, none of which are defined within the Municipal Planning Strategy of the Municipality of Argyle. and all of which represent prohibited land uses within the Tusket Business Park pursuant to the provisions of the Municipal Planning Strategy of the Municipality of Argyle.

(c) In the alternative, the establishment of a sea cucumber processing plant is a land use prohibited by the provisions of the Municipal Planning Strategy of the Municipality of Argyle in that a sea cucumber processing plant is or can reasonably assimilated with an "industry known to generate nuisance effects" such as "odour, dust, smoke or noise", or any combination thereof, and which has thus been stated by the provisions of the Municipal Planning Strategy of the Municipality of Argyle to be "better suited to other areas of the Municipality" than the Tusket Business Park.

(8) In determining the issuance of and entry into a "special agreement" with respect to the establishment of a sea cucumber processing plant in the Tusket Business Park notwithstanding the general prohibition set out in the Municipal Planning Strategy of the Municipality of Argyle, the Municipal Council of the Municipality of Argyle conducted itself inconsistently with the provisions of the Municipal Planning Strategy of the Municipality of Argyle Municipality in such other manners as may appear on the record leading to that Decision.

[Exhibit G-5, Underlining indicates amendments made by Appellants in Amended Notice of Planning Appeal]

[26] The Board's hearing was held on May 14, 2019, at the Yarmouth Mariners Centre, in Yarmouth, Nova Scotia. The Appellants were represented at the hearing by their solicitor Gavin Giles, Q.C., while Richard W. Norman, LL.B., acted as counsel for Argyle. Jocelin P. d'Entremont, J.D., acted as solicitor for the Developer, by way of a watching brief at the hearing.

[27] An evening session was scheduled, but only one person, Scott Sweeney, registered to speak. He accepted the Board's invitation to present his comments during the hearing's afternoon session. He owns a vacant lot on Camp Montebello Road, about 100 yards from the proposed plant. Mr. Sweeney opposed the development agreement.

[28] The Board also received one letter of comment, from Ms. LeBlanc-Messenger, who also testified at the hearing, which was opposed to the development agreement.

[29] The Board conducted a site visit immediately following the hearing on May 14, 2019, accompanied by counsel for the Appellants and the Municipality. The Developer indicated he would not participate in the site visit.

[30] Following the conclusion of the hearing, the parties filed written submissions with the Board. The final submission was filed on June 18, 2019.

IV ISSUE

[31] The issue to be determined in this Decision is whether the decision of Argyle's Municipal Council approving the development agreement failed to reasonably carry out the intent of the MPS.

[32] For the reasons described below, the Board concludes that Council's decision reasonably carries out the intent of the MPS. Thus, the appeal is dismissed.

V EVIDENCE

(i) Evidence of the Appellants

[33] The Appellants called four witnesses at the hearing, including Jessica Gaudet, Monette LeBlanc, Donna LeBlanc-Messenger and Hubert Pothier. They expressed similar concerns about odours, noise and emissions potentially emanating from the proposed plant, the hours of operation, traffic generated by the plant, the lack of

screening from adjacent homes, and the scale of the development in terms of the height of parts of the plant in comparison to nearby residential dwellings.

[34] Ms. Gaudet and Ms. LeBlanc, along with their respective spouses, are Appellants in this matter. Both couples purchased lots in the Residential Park from the Municipality and built homes on their properties located on Gardner Lane.

[35] They testified that they purchased the lands from the Municipality with the understanding that lots in the Residential Park were to be developed with homes of a higher standard. They indicated that upon buying the lots, they were both required to comply with covenants attached to their deed which prohibited mobile homes and required them to submit their house plans to the Municipality for approval as to the dwelling's design and size prior to beginning construction. Dwellings had to be a minimum of 900 square feet in area, excluding garage space. The deed covenants were entered as an exhibit at the hearing. At the time of purchase, both couples believed that the Municipality was targeting buyers to create an upscale residential neighbourhood. They both testified that their homes are assessed between $300,000 to $400,000.

[36] Ms. Gaudet indicated that they purchased their lands four years ago and moved into their new home in September 2018. Ms. LeBlanc testified that they purchased their lands eight years ago and had also built their new house. They indicated that there are six homes in the Residential Park, with five located on Gardner Lane and one on Slocomb Crescent. They indicated that there are two vacant lots remaining, one of which is owned by Donna LeBlanc-Messenger.

[37] Ms. LeBlanc-Messenger resides in Shelburne County, but purchased her lands in the Residential Park with the intention of building a retirement home in the future.

She expressed similar concerns about the proposed plant as outlined by Ms. Gaudet and Ms. LeBlanc, adding that her decision to proceed with the construction of her retirement home may depend on the results of this appeal. She also provided a letter of comment to the Board in this matter, outlining her concerns.

[38] Hubert Pothier also testified as an Appellant in this matter. He is a local businessman who owns various properties in the area, including a parcel of land containing approximately 25 acres that are bounded on the north by the said Business Park and the Residential Park, to the east by Highway 308, on the south by Highway 103 and on the west by the Tusket River. Mr. Pothier constructed an access road which branches off Slocomb Crescent and leads through his parcel of land down to the river.

[39] Mr. Pothier indicated that about eight acres of his property is zoned as commercial, but that the majority of his lands are residential. He indicated that his intention is to subdivide the residential lands into seven or eight house lots, but that the lands are not yet subdivided. Like Ms. LeBlanc-Messenger, his decision on future development may be impacted by the results of this appeal.

[40] He indicated that, as a businessman, he is not opposed to new businesses in the area, but is concerned with the unknown impact the proposed plant may have on residential properties in the vicinity.

[41] In terms of the location of the lands of the other Appellants who testified in this hearing, Ms. Gaudet and Ms. LeBlanc acknowledged on cross-examination by counsel for the Municipality that their houses are located about 250 metres and 400 metres, respectively, from the proposed plant. Ms. LeBlanc-Messenger acknowledged in

cross-examination that her property is about 300 metres from the proposed plant, a little further away than Ms. Gaudet's property.

[42] Ms. Gaudet, Ms. LeBlanc and Ms. LeBlanc-Messenger all described similar circumstances surrounding the purchase of their building lots from the Municipality. Upon learning about the Municipality's intention to sell lots, they were directed to meet or contact the local municipal solicitor, who provided the property covenants to them, received their purchase funds, and delivered the deed to the new owners. While they all acknowledged that they were aware the lots were located next to the Tusket Business Park, it was their belief that the Municipality would not want to jeopardize the upscale nature of the residential subdivision which it had created next to the Park. Thus, these Appellants believed that any new developments in the Business Park would be limited to office or light commercial uses that would not have a negative impact on residential properties in the area. At the time they purchased the lands, they were aware that the Park contained the Université Sainte Anne administration building, the DFO building, and a storage warehouse for a local construction company. They were not concerned with such uses next to their residential neighbourhood.

[43] These three Appellants all testified that they were not advised by the municipal solicitor about the potential light and heavy industrial uses that could be built in the Business Park under the MPS and LUB. However, on cross-examination, and in questioning from the Board, they acknowledged that none of them inquired about the status of such potential development under the MPS policies pertaining to the Business Park.

[44] These witnesses all felt that the proposed plant should not be built in the Business Park because it was not generally compatible with the nearby residential homes in the Residential Park. They expressed concerns about a number of issues, including odours emanating from the plant, the hours of operation, noise and traffic generated by the proposed plant, and the height of parts of the plant in comparison to their residential homes.

[45] In her testimony at the hearing, when questioned by her counsel, Ms. Gaudet stated:

> A. My message [to Municipal Council] was, "Why jeopardize our community that is growing with young families, with a business that you cannot guarantee will not pose a threat to our homes. Why would you jeopardize our community for something that goes against your bylaws, something that goes against your Municipal Planning Strategy. Why are you jeopardizing -- why are you trying to fix a good thing?"
>
> Q. And what do you mean when you say, "Why are you trying to fix a good thing"?
>
> A. Young families are moving to Tusket. They have the same reasons we do. You want to be here. You want -- there's schools here. It's close to Yarmouth. People are moving here. People are attracted to the region. Why place something that is potentially going to ruin a good thing.
>
> Q. Did you have any particular concerns regarding the possibility of the location of the sea cucumber processing plant virtually adjacent to your own house?
>
> ...
>
> A. Yes. Odour would have been No. 1, as well as noise and traffic. And, as well, my No. 1 concern was why they were entertaining the idea when the bylaw clearly stated, "no fish processing plant."
>
> Q. Okay. Of course, we've all learned subsequently that sea cucumber is not fish.
>
> A. Yes. That was made clear.
>
> ...
>
> Q. You mentioned traffic as the subject that you raised with the municipal council, when it was deliberating these issues, Ms. Gaudet. What did you say to the municipal council about traffic?
>
> A. When we mentioned the issue about traffic, it was pretty chalked up to "you're living next to a business park." "It's the result of the business park." But our concern wasn't necessarily the amount of traffic that was going to go through, our issue was the timing of the traffic. This was a 24-hour operation. There is a home that is directly across from where this sea cucumber processing plant would be. That family has a small child, having

another small child, and having trucks go in and out of there in the middle of the night, that was a concern. And if you visit -- which you've already stated you're intending to visit the area -- you realize how quiet it is, and a simple beeping of a truck backing up, you can hear it. You can hear it in the surrounding area. Especially across the road.

...

Q. Did you discuss, Ms. Gaudet, as part of your presentation to Argyle Municipal Council the size of the proposed sea cucumber processing plant in relation to your house and neighbouring structures?

A. That wasn't a major concern for us as -- I don't think as much as the home across the road. We, necessarily, won't look -- if we look out our front window, we're not going to see this building, but for them across the road, when they look out their front window, they're going to see a towering 50-foot building in front of their home.

[Transcript, pp. 26-31]

[46] In cross-examination, on the issue of a sea cucumber processing plant versus a facility that processes fish, Ms. Gaudet indicated:

Q. So, were you aware when you purchased your lot that a lobster pound could be built in the business park, as-of-right, without a development agreement?

A. No. When I'd seen "fish processing plant," there wasn't an extensive list of what was included in fish. So, it was the assumption that when they said "fish," it meant sea marine life.

...

A. So, fish processing, it says it involves drying the processed raw material to produce a final nutraceutical oil.

So, I would say that that was fish processing if you're taking a sea marine life and boiling it down to make something else. I would say that that was fish processing.

[Transcript, p. 37 and p. 41]

[47] When asked by counsel for the Appellants about her concerns with respect to the proposed plant, Ms. LeBlanc testified:

Q. When you wrote in your letter [to Municipal Council] about the beauty of the area and the proximity of the Tusket River, what did you mean?

A. The Tusket area is a beautiful area. It's mostly residential homes. As well, Gardner Lane runs through -- along the Tusket River, and it's just gorgeous.

Q. And was the proximity of the river to the lots where you were going to build, was that an attraction to you and your husband?

A. Yes.

Q. For the purposes of aquatic recreation, and that sort of thing?

A. Yes. We use the water daily in the summer.

Q. Just watching it flow by, too.

A. Um-hmm.
Q. When you wrote about the business park potentially posing a threat to your quality of life and the hundreds of thousands of dollars you were investing in your property in house, what did you mean?

A. The business park did not pose us any threat up until now. What was there, the Université of Sainte-Anne, the DFO building, as well as Garian Construction are all very quiet businesses, in a peaceful neighbourhood.

Q. And when you wrote, about the middle of your letter, "Had we known that something like this would be remotely possible, we would never" -- the word never being underscored --"have moved here. You should know that by now."

What did you mean?

A. Just that. That we would never have invested our lives into our home at that area -- in that area knowing that this threat would be possible.

Q. The threat being the possibility of the development of sea cucumber processing plant.

A. Right.

Q. Or I suppose any processing plant.

A. If we wanted to live next to a fish plant, we would have built somewhere else. [Emphasis in original]

[Transcript, pp. 69-70]

[48] Ms. LeBlanc-Messenger indicated in her testimony:

Q. So, as you sit here today, do you think you will, or do you think you won't ultimately develop the property at Ruelle Gardner Lane?

A. Well, this is a huge concern what's going to go on with the development of the sea cucumber plant, whether that's going to come into play or not.

So, we don't know at this point. We're just kind of putting things on the backburner, waiting for the outcome.

Q. And what is your concern about the potential for the sea cucumber plant being built?

A. It's the same as everybody else's. It's the sound problem and the smell problem and possibly whatever attraction of traffic that might entail as well, and the time of day that that would happen, and all the various same concerns as everybody else has voiced here.

[Transcript, pp. 93-94]

[49] On the issue of a processing plant for sea cucumbers as opposed to fish, she stated:

> Q. And when you said in your letter [to Municipal Council] that you found it offensive for the municipality to hang its hat -- my words, not yours -- on the suggestion that a sea cucumber is not a fish, what did you mean?
>
> A. Well, because they were just using semantics in order to get the goal that you were aspiring to. What mattered whether it was a fish or not a fish, that's just something that you have in your bylaw, and bylaws are revisited all the time. And oftentimes, what causes a bylaw to be revisited is situations. You go back and you revisit, and you redo them. You look them over. It takes months. We all know -- anybody who has been involved in the municipal government knows that, and it's usually circumstances that cause that.
>
> So, the fact that that said "fish" -- it could have been something else. It's just -- the impact is what was the important thing there, and I'd like to think that the municipality is looking at impact, and their intent is to preserve the quality of life for the people living in the area of a development such as that.
>
> [Transcript, pp. 103-104]

[50] While these three witnesses all felt that the proposed plant was equivalent, in effect, to a fish composting operation or a fish reduction plant when these terms (which are defined in the LUB) were referred to them by counsel for the Municipality, they all acknowledged that they were not generally aware of the basic operations which would be conducted in a sea cucumber processing plant. They also did not have any personal knowledge of what odours or noise would be produced by such an operation.

(ii) **Evidence of Municipality**

[51] The Municipality called three witnesses at the hearing: namely, Jules Milton LeBlanc, the Developer; Mr. Muise, Argyle's CAO; and Dr. Marlon R. Lewis, Ph.D. Dr. Lewis was qualified by the Board to testify as an expert, able to provide opinion evidence on matters related to marine biology and biological oceanography.

[52] In his testimony, Mr. LeBlanc provided a description of the proposed production process, which was consistent with that outlined in his application. He stated

that the proposed plant will produce a nutraceutical product. Currently, his facility in Wedgeport, located several kilometres away in the same Municipality, performs the primary processing of sea cucumbers, which are marketed to Asia. His hope is that the new nutraceutical product can be distributed across a more global market as a natural health product, because of its anti-inflammatory benefits.

[53] He then described the differences between the processes carried out in Wedgeport and in the proposed facility in Tusket:

> Q. Can you tell us in your own words -- just explain how the process would work at this proposed development?
>
> A. Sure. So, basically, what we would do is we would bring in frozen material from Wedgeport, where we do the initial primary processing. We would freeze parts and pieces of the cucumber not generally going to food manufacturing or food sale in Asia, bring it to this facility, put it through a process of cooking, drying and separation. And in the end, we would have powders and oils for sale for a nutraceutical product.
>
> ...
>
> Q. And when you talk about the primary processing in Wedgeport, can you tell us a bit more about how -- what type of sea cucumber processing occurs in the Wedgeport facility?
>
> A. Mostly cutting, eviscerating, cleaning. Some separation of meat and skin and drying of the flesh.
>
> Q. And then the product from that facility is that sold to market?
>
> A. It is.
>
> Q. Okay. Can you tell me more about the process that you would use in the proposed development in Tusket?
>
> A. More about the process in terms of more details of the process?
>
> Q. Yeah. From the time the sea cucumber -- frozen sea cucumber comes into this proposed facility, what process does it undergo?
>
> A. So, as needed and required, and depending on the production flow, we would take frozen material out of the freezer, thaw it, grind it, put it through a process -- a cooking process, a heating process, and then dry it for bulk powder distribution.
>
> Q. Okay. And where does -- what happens to the powder?
>
> A. The bulk powder would then leave our facility and go to an encapsulator offsite.
>
> [Transcript, pp. 155-157]

[54] Mr. LeBlanc hopes to employ about 10-15 employees at the proposed plant.

[55] In terms of traffic, noise, and the hours of operation generated by the proposed plant, Mr. LeBlanc testified:

> Q. Can you talk -- can you tell us about the potential traffic that may result from the proposed development?
>
> A. I don't foresee any issue in high levels of traffic. The process -- the business would be bringing in frozen material from Wedgeport. If we were doing one delivery a day, that would be it. But I mostly foresee it being a delivery a week or potentially a delivery a month.
>
> Q. So, you heard the evidence, Mr. LeBlanc, from several of the appellants today, expressing their concerns about the potential nuisances. What do you have to say about those concerns that you've heard today?
>
> A. ...In terms of noise, I think there's nothing unreasonable about what we're proposing. Refrigeration equipment, if we were putting up a public cold storage, that would require this type of equipment, and these are found all over the province within residential or close to residential areas.
>
> In terms of traffic, I mean, a business park is supposed to bring in traffic. If there's no traffic in a business park, I wouldn't consider it a very successful business park.
>
> [Transcript, pp. 173-174]

[56] In questioning by the Board about deliveries and time of day, he stated:

> Board: Okay. So, one thing that I didn't quite understand and I've heard it described -- I've read it -- I think it was the CAO's report, and I think, perhaps, in a few other locations -- I've heard that the product in terms of the product coming in or -- I've heard -- or the traffic issue, I've heard once per day. I've heard once per week. And I've heard once per month. So, which one is it? I know, it's beginning with something but ---
>
> A. Right. Exactly. So, it could be any of those options. It just depends on the requirements and how the business is going, and I guess logistics. If we can bring in enough raw material -- you know, one shipment per month that's what we would -- you know, we would do.
>
> A truck would come in. It would back up to our building and put the raw materials into cold storage and that would be our supply for the month.
>
> Q. So, if there is a cold storage, you anticipate it would be once a month.
>
> A. No, not necessarily. I guess, it depends on space in Wedgeport as well. If we need to get product out that's destined for this facility, this business, and we're busy -- you know, we're getting packed in our freezer in Wedgeport, maybe even more frequent deliveries to Tusket.
>
> Q. So, is the -- are you limited more by the production of the material, or by the supply of the raw product?
>
> A. I'm not sure at this point.

Q. Okay. So, let's tackle this another way. Is it your expectation that it will be once a month when you begin, but your hope is that it will get to once per week, and hopefully once a day?

A. Once a week, I think, would suffice.

Q. At the ultimate?

A. Yeah.

Q. At your maximum?

A. Yeah.

Q. So, there was a lot of concerns -- the residents spoke about the time of day being an issue.

A. Right.

Q. So, I'm just puzzled by -- if you're looking at once -- even once a day or once a week, it seems to me the issue was the time of day. They didn't want stuff coming in at 3 o'clock in the morning.

I'm just wondering, why wouldn't that be in the agreement?

A. Because there could be reasons for a delivery through the evening. It may be the logistic issue, when trucks do their pick-ups and do their delivery.

Q. On a once per week basis? I just find that very strange.

A. Yeah. No -- because in my business, the seafood business, food manufacturing, yeah, many things happen for odd reasons, and relying on truck schedules is -- relying on couriers to show up before 5:00 p.m. closing, you can't -- you know, who knows when they are going to come. So, you can't guarantee -- there's no guarantees about ---

Q. I don't think they were worried about 6:00 p.m. They were worried about 3 o'clock in the morning.

A. Yeah, which is highly unlikely.

Q. So, what -- again, from your point of view, why didn't you insist putting that in the agreement if you knew that was an issue?

A. I would have no problem putting a time limit between, say, midnight and 6:00 a.m., as no deliveries. But reasonably thinking about it, that -- I don't see a reason why that would happen anyway.

[Transcript, pp. 190-193]

[57] Mr. LeBlanc stated that the traffic would be much less for the outgoing finished product as it would be shipped out by public courier or transport.

[58] He also described the equipment he would incorporate into the production process to mitigate or eliminate any negative impact on nearby homes. As described later in this Decision, he stated that the refrigeration equipment to be used on the property will produce noise consistent with the level found in a residential environment. He will also use special equipment to reduce or eliminate the impact from odour and emissions from the proposed plant, including wet scrubbers and thermal oxidizers.

[59] Dr. Lewis was called as an expert witness to testify about the sea cucumber. As described in greater detail later in this Decision, Dr. Lewis confirmed that, based on his expertise in marine biology, the sea cucumber is not a fish. On cross-examination by counsel for the Appellants, Dr. Lewis also confirmed that lobsters, shrimp, scallops, clams, oysters, squid and octopus are similarly not fish.

[60] Mr. Muise has been the Municipality's CAO since 2006. He testified about the Municipality's review of the proposed plant from the initial filing of the application to Council's approval of the development agreement on November 20, 2018. As noted earlier in this Decision, he prepared the CAO's report to Council dated November 10, 2018, wherein he recommended the approval of the development agreement.

[61] The Board notes that neither the November 10th CAO's report, nor his eleventh-hour email to Council on November 20, 2018, contained any discussion or reference to the MPS and the applicable policies therein. In fact, Mr. Muise's enthusiastic support for the proposed development was entirely based on the economic development benefits of this proposal. On this point, the Board observes that the applicable MPS policies do not contain any reference whatsoever to economic development.

[62] At the hearing, counsel for the Municipality sought to have Mr. Muise testify about the interpretation and application of the MPS to the proposed plant. The Board indicated that such evidence would constitute expert opinion evidence in the field of municipal planning. Since Mr. Muise was not a planner, and did not have training or experience as a planner, he was not permitted to provide opinion evidence about municipal planning matters. However, the Board did permit him to provide the factual background surrounding the application itself, including the facts made known to him by the Developer about the proposed development, and the proceedings carried out by Council relating to the application. He was also permitted to testify about the concerns raised by local residents during the application process and how these concerns were addressed in the provisions of the development agreement.

[63] As noted earlier, Mr. Muise testified that the planner engaged by the Municipality, Brad Fulton, retired in September 2018 before being able to prepare any report on the application for the benefit of Council. Consistent with its ruling above, the Board also prohibited Mr. Muise from testifying about any statements by Mr. Fulton, or inferences to be taken from Mr. Fulton's actions, by Mr. Muise or Council, about the compliance of the proposed plant with the MPS policies.

[64] Mr. Muise did testify about the process contemplated in s. 2.2 of the development agreement with respect to possible complaints that could be made by local residents with respect to odour or noise. He indicated that any such complaints received by the Municipality would be the subject of by-law enforcement by his staff. He said that the complaints would be logged according to normal practice and investigated, with the

referral of the complaint to a third party if necessary. He also noted that the Municipality has a Noise By-law which is applied by the by-law enforcement officer.

[65] In his testimony, Mr. Muise indicated that when the Residential Park was created, the Municipality also retained the ownership of a treed buffer, or green space, between the new Residential Park and the Business Park.

(iii) **Evidence of Developer**

[66] The Developer participated by way of a watching brief, and did not present any other evidence at the hearing (except for his testimony on behalf of the Municipality).

(iv) **Site Visit**

[67] The Board conducted a site visit immediately following the conclusion of testimony at the hearing. Accompanied by counsel for the Appellants and the Municipality, the Board travelled along the entire length of both Slocomb Crescent and Gardner Lane. It observed both the commercial uses in the Business Park and the homes in the Residential Park. The nature of the tree vegetation, the separation distances between the proposed plant and the homes, and the general topography of the area were consistent with that described at the hearing.

VI SCOPE OF BOARD'S REVIEW

(i) Case Law

[68] The burden of proof is on the Appellants in this appeal to show, on the balance of probabilities, that Municipal Council's decision approving the development agreement does not reasonably carry out the intent of the MPS.

[69] Under s. 250(1)(b) of the *Municipal Government Act*, the grounds for appealing such a decision are limited:

> **250 (1)** An aggrieved person or an applicant may only appeal
> …
>
> **(b)** the approval or refusal of a development agreement or the approval of an amendment to a development agreement, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy;

[70] The powers of the Board are similarly limited on such an appeal:

> **251 (2)** The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law. [Emphasis added]

[71] Thus, the Board must not interfere with the decision of Council unless it determines that Council's approval does not reasonably carry out the intent of the MPS. The burden of proof is on the Appellants to establish, on a balance of probabilities, that in the words of s. 251(2), "... the decision of council...does not reasonably carry out the intent of the municipal planning strategy."

[72] The Board notes here that the Appellants argued the test the Board normally applies should be modified. This argument is canvassed (and rejected) later in this Decision, but the Board will set out in this section how it, and the Courts, have interpreted the test.

[73] Notwithstanding the Appellants' assertion that Council's decision to approve the development agreement fails to reasonably carry out the intent of some parts, at least, of the MPS, the issue to be addressed by the Board in the present appeal is whether Council's decision to approve the development agreement fails to reasonably carry out the intent of the MPS, in its entirety. The Board has no jurisdiction to allow the Appellants' appeal if Council "interpreted and applied the [MPS] policies in a manner that the language of the policies can reasonably bear": see *Heritage Trust, infra*, at para. 99 of that decision.

[74] Accordingly, as noted above, if the Appellants can show, on the balance of probabilities, that Council's decision does not reasonably carry out the intent of the MPS, the Board must reverse Council's decision to approve the development agreement. If, however, the Appellants fail to meet this standard of proof, it is the Board's duty to defer to the decision of Council (see *Heritage Trust, infra*).

[75] The Nova Scotia Court of Appeal has considered the standard by which this Board must review a council's decision. Clearly, the Board is not permitted to substitute its own decision for that of council. The Board's mandate is restricted to the jurisdiction conferred upon it by the *Municipal Government Act* (formerly the *Planning Act*), as noted by Hallett, J.A., in *Kynock v. Bennett et al.* (1994), 131 N.S.R. (2d) 334 (C.A.) and *Heritage Trust of Nova Scotia et al. v. Nova Scotia Utility and Review Board et al.* (1994), 128 N.S.R. (2d) 5 (C.A.). The extent of the Board's jurisdiction in planning appeals generally, and in appeals respecting development agreements specifically, is described in *Heritage Trust* at pages 34-35:

> [99] 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 bylaws 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... 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...

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

[76] The Court of Appeal further held at page 52:

[164] ... 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 bylaws (**s.55** of the **Act**). In keeping with the intent that municipalities have 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...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...

[77] The approach to be followed by the Board was also described by the Court of Appeal in *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 115. MacDonald, C.J., stated:

> [47] Despite the Board's detailed hearing, it must be remembered that members of Council are elected and accountable to the citizens of HRM. As such they exercise discretion and are accordingly entitled to deference. As earlier noted, one purpose of the *MGA* is to provide municipalities with autonomy when it comes to planning strategies and development. This decision fell within Council's discretion, provided it reasonably reflected the intent of the MPS. As elected officials, their decisions must be respected. This court has said as much on several occasions. For example in **Tsimiklis v. Halifax (Regional Municipality)**, [2003] N.S.J. No. 64, 2003 NSCA 30, Chipman, J.A. observed:
>
> > para 24 A review of the MPS confirms, as one would surmise, that many of the policies are, to use the words of Hallett, J.A. in **Heritage Trust**, *supra*, at para. 100 "inherently in conflict". The Board recognized this in its decision. The MPS recognises a number of competing interests necessarily involved in the creation of a workable planning regime and, of necessity, Council must have considerable latitude in striking a balance among those interests in making a planning decision.
> >
> > ...
> >
> > para 64 As I have already pointed out, planning decisions often involve compromises and choices between competing policies which are best made by the elected representatives, so long as they are reasonably consistent with the intent of the MPS. To my mind, read against these policies Council's decision here is reasonably consistent with that intent.
>
> [48] So it is not for the Board to impose its interpretation of the MPS. Instead the Board must defer to Council. Thus, this court in **Kynock v. Bennett et al.**, (1994), 131 N.S.R. (2d) 334 (C.A.) observed:
>
> > para 27 ... Clearly the legislature did not intend to confer a *de novo* jurisdiction on the board when hearing an appeal from a municipal council decision to enter into a development agreement. The board is functioning in a review capacity and is limited by the jurisdiction conferred on it under the *Planning Act*.
>
> [49] Also this court in **Mahone Bay Heritage & Cultural Society v. 3012543 Nova Scotia Ltd.**, [2000] N.S.J. No. 245, 2000 NSCA 93 concluded:
>
> > para 9 ... The Board also recognized ... that the MPS may be capable of being interpreted reasonably in several ways; there is not necessarily one correct interpretation.
> >
> > para 10 The Board must look at the MPS as a whole in order to ascertain if the [Council's] decision is consistent with the intent of that MPS.
>
> [50] Thus, in the end, resort inevitably must be had to specific directions contained in the statute. By doing so, the fundamental question therefore becomes: Can it be said that Council's decision does "not reasonably carry out the intent of the MPS"?

> [51] To answer this question, the Board must embark upon a thorough fact-finding mission to determine the exact nature of the proposal in the context of the applicable MPS and corresponding by-laws. As in this case, this may include the reception of evidence as to the intent of the MPS.
>
> [52] However the Board should not then take its body of decided facts and use this work product to conclude how it feels the MPS should be interpreted. In this regard, I agree with the developer. Instead, after completing its factual analysis, the Board should go immediately to Council's conclusion. The Board should then ask itself, based on the facts as determined, have the opponents established that Council's decision did not reasonably carry out the intent of the MPS?
>
> [53] This would be consistent with the approach taken by this court over the years and as first enunciated by Hallett, J.A. in **Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)**, [1994] N.S.J. No. 50, Hallett, J.A. noted... [para. 99 of *Heritage Trust*]. [Emphasis added]

[78] In *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27, Fichaud, J.A., outlined the applicable principles for the Board's review in appeals from council decisions in planning matters:

> [24] The Board then (¶ 51-62) recounted the provisions of the *MGA* and passages from decisions of this court that state the principles to govern the Board's treatment of an appealed planning decision. I will summarize my view of the applicable principles:
>
> **(1)** The Board usually is the first tribunal to hear sworn testimony with cross-examination respecting the proposal. The Board should undertake a thorough factual analysis to determine the nature of the proposal in the context of the MPS and any applicable land use by-law.
>
> **(2)** The appellant to the Board bears the onus to prove the facts that establish, on a balance of probabilities, that the Council's decision does not reasonably carry out the intent of the MPS.
>
> **(3)** The premise, stated in s. 190(b) of the *MGA*, for the formulation and application of planning policies is that the municipality be the primary steward of planning, through municipal planning strategies and land use by-laws.
>
> **(4)** The Board's role is to decide an appeal from the Council's decision. So the Board should not just launch its own detached planning analysis that disregards the Council's view. Rather, the Board should address the Council's conclusion and reasons and ask whether the Council's decision does or does not reasonably carry out the intent of the MPS. Later (¶ 30) I will elaborate on the treatment of the Council's reasons.
>
> **(5)** There may be more than one conclusion that reasonably carries out the intent of the MPS. If so, the consistency of the proposed development with the MPS does not automatically establish the converse proposition, that the Council's refusal is inconsistent with the MPS.
>
> **(6)** The Board should not interpret the MPS formalistically, but pragmatically and purposively, to make the MPS work as a whole. From this vantage, the Board

> should gather the MPS' intent on the relevant issue, then determine whether the Council's decision reasonably carries out that intent.
>
> **(7)** When planning perspectives in the MPS intersect, the elected and democratically accountable Council may be expected to make a value judgment. Accordingly, barring an error of fact or principle, the Board should defer to the Council's compromises of conflicting intentions in the MPS and to the Council's choices on question begging terms such as "appropriate" development or "undue" impact. By this, I do not suggest that the Board should apply a different standard of review for such matters. The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. But the intent of the MPS may be that the Council, and nobody else, choose between conflicting policies that appear in the MPS. This deference to Council's difficult choices between conflicting policies is not a license for Council to make *ad hoc* decisions unguided by principle. As Justice Cromwell said, the "purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council's authority should be exercised" (*Lewis v. North West Community Council of HRM*, 2001 NSCA 98 (CanLII), ¶ 19). So, if the MPS' intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council's decision reasonably bears that intent.
>
> **(8)** The intent of the MPS is ascertained primarily from the wording of the written strategy. The search for intent also may be assisted by the enabling legislation that defines the municipality's mandate in the formulation of planning strategy. For instance ss. 219(1) and (3) of the *MGA* direct the municipality to adopt a land use by-law "to carry out the intent of the municipal planning strategy" at "the same time" as the municipality adopts the MPS. The reflexivity between the MPS and a concurrently adopted land use by-law means the contemporaneous land use by-law may assist the Board to deduce the intent of the MPS. A land use by-law enacted after the MPS may offer little to the interpretation of the MPS.
>
> [25] These principles are extracted from the decisions of this court in: *Heritage Trust*, ¶ 77-79, 94-103, 164; *Lewis v. North West* ¶ 19-21; Midtown Tavern, ¶ 46-58, 81, 85; *Can-Euro Investments*, ¶ 26-28, 88-95; *Kynock v. Bennett* (1994), 1994 CanLII 4008 (NS CA), 131 N.S.R. (2d) 334, ¶ 37-61; *Tsimiklis v. Halifax (Regional Municipality)*, 2003 NSCA 30 (CanLII) ¶ 24-27, 54-59, 63-64; *3012543 Nova Scotia Limited v. Mahone Bay Heritage and Cultural Society*, 2000 NSCA 93 (CanLII), ¶ 9-10, 61-64, 66, 84, 86, 89, 91-97; *Bay Haven Beach Villas Inc. v. Halifax (Regional Municipality)*, 2004 NSCA 59 (CanLII), ¶ 26. [Emphasis added]

[79] *Archibald* indicates that the impact of the MPS as an interpretive tool to "elicit meaning from ambiguity" is more pronounced when the MPS and LUB are enacted concurrently. In this case, there have been some amendments to both the MPS and the LUB. However, the relevant MPS provisions which give rise to interpretation issues in this appeal (i.e., policies B-10 and B-10A) were enacted after the amendments to the LUB and the policies were clearly enacted with reference to the corresponding LUB provisions.

[80] In *Tsimiklis v. Halifax (Regional Municipality)*, [2003] NSCA 30, the Court of Appeal made the following comments regarding a number of subjective and imprecise terms which appeared in the MPS:

> ... Such notions as "appropriate development" and "undue impact" as applied to the appellant's project are primarily for the consideration of Council, not the Board. There is no sharp line of division in these policies as they relate to the appellant's proposal that were crossed by Council. [para. 63]

[81] The role of the Board in discerning the intent of an MPS was further canvassed in the decision of the Nova Scotia Court of Appeal in *Mahone Bay Heritage and Cultural Society v. Town of Mahone Bay and 3012543 Nova Scotia Limited*, [2000] N.S.J. No. 245. The Court in *Mahone Bay*, while affirming the principles in *Kynock* and *Heritage Trust,* cautioned that the principles referred to in *Heritage Trust* "were made in the context of the issues raised by the facts of that appeal", and need not be applied "when the intent of the strategy is clear", as the Court found it to be in *Mahone Bay*.

[82] Further, s. 219(1) of the *Municipal Government Act* describes the relationship between an MPS and LUB:

> **219 (1)** Where a council adopts a municipal planning strategy or a municipal planning strategy amendment that contains policies about regulating land use and development, the council shall, at the same time, adopt a land-use by-law or land-use by-law amendment that shall enable the policies to be carried out.

[83] The LUB, or amended LUB, so adopted, is to carry out the intent of a municipal planning strategy:

> **219 (3)** A council shall not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.

[84] In *J & A Investments Ltd. v. Halifax (Regional Municipality)*, [2000] N.S.J. 92 (S.C.), where the meaning of an LUB was in issue, Justice Davison reasoned that s. 219(1) means that an MPS may be used to help determine the intent of the LUB.

[85] The language of s. 219(1) is similar to, but not identical to, that which appeared in s. 51(1) of the *Planning Act*, which required council to "concurrently" adopt or amend the LUB. Referring to s. 51(1) of the *Planning Act*, the Court of Appeal in *Mahone Bay* stated that a review of the LUB may assist in "throwing light on the intent" of the MPS, and therefore used a provision of Mahone Bay's LUB to assist in interpreting the MPS:

> A search for the intent of a municipal planning strategy requires a careful review of the strategy represented by the policies of the municipality and, very often, a review of the By-laws implementing the strategy as the by-laws adopted concurrently with the MPS may assist in throwing light on the intent of the strategy. [para. 95]

[86] Thus, according to Nova Scotia's present case law, it seems one may use the MPS to help determine the intent of the LUB (*J & A Investments*), and use the LUB to help determine the intent of the MPS (*Mahone Bay*). In the present case, it is the intent of the MPS which is in issue.

(ii) **Applicable Principles of Statutory Interpretation**

[87] The principles of statutory interpretation apply when interpreting an MPS. In determining the intent of any particular statute, this Board is mindful of *Verdun v. Toronto Dominion Bank,* [1996] 3 S.C.R. 550, and cases following it (see, for example, *Chartier v. Chartier,* [1998] S.C.J. No. 79; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), which make it clear that the Supreme Court of Canada has adopted what it calls the "modern contextual approach" to legislative interpretation, supplanting earlier rules it has supported, such as the "equitable construction approach", the "plain meaning rule", and the "golden rule".

[88] In *Re Rizzo & Rizzo Shoes Ltd.*, Mr. Justice Iacobucci said:

> ...Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p.87, he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[89] On the matter of the purpose of legislation, *Nova Scotia (Crop and Livestock Insurance Commission) v. DeWitt,* [1996] N.S.J. No. 566 (S.C.), is of interest. Goodfellow, J., quotes Driedger (3rd ed.) at pages 38 - 39:

> ... Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews, J.A. recently wrote in *R. v. Moore* [(1985), 67 N.S.R. (2d) 241, at 244 (C.A.)]:
>
> > From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.
>
> ...in *Thomson v. Canada* (Minister of Agriculture), [1992] 1 S.C.R. 385, at 416, where L'Heureux-Dubé, J., wrote:
>
> > [A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.

[90] In a recent judgment, the Nova Scotia Court of Appeal reiterated the modern principle of statutory interpretation in *Sparks v. Holland*, 2019 NSCA 3. Farrar, J.A., stated:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the *Act*, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
> 2. What did the Legislature intend?

3. What are the consequences of adopting a proposed interpretation?

(Sullivan, pp. 9-10)

[*Sparks*, 2019 NSCA 3, paras. 27-29]

[91] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

> **9(1)** The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> **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.

VII MPS AND LUB IN THIS APPEAL

[92] The proposed plant would be located in the Tusket Business Park zone, which is zoned Business Park (BP). The Appellants all live or own property which is zoned Residential Park (RP), and which is located adjacent to, or in the vicinity of, the Business Park.

[93] The MPS contains specific policies relating to developments in the Business Park zone. These policies permit heavy industrial uses by development agreement only. However, a few specific uses are excluded. Fish reduction plants and fish composting operations are examples of heavy industrial uses excluded in the Business Park. Notably, however, sea cucumber processing plants are not excluded.

[94] The relevant policies in this appeal include the following, which commences with the preamble to the Business Park policies:

BUSINESS PARK DESIGNATION AND ZONE

The Tusket Business Park was established in 1989 and is operated on behalf of Council by the Yarmouth Area Industrial Commission. The park is located on approximately 40 acres in the northern sector of the community. It is bound by Highway 308 North to the east, the Residential Park to the west and private lands to the north and south.

As of 2009, seventeen lots have been created. All lots are approximately 2 acres in area and are served by central systems and dug or drilled wells. Slocomb Crescent, the park's service road accesses Highway 308 North which, in turn, has immediate access to Highway 103 via interchange 33. The park is presently occupied by a community college, a provincial fisheries department facility and a construction company storage building.

The park's location is intended to encourage a diversity of growth and development in the western portion of the Municipality. To facilitate this concept, Council will designate these lands as Business Park on GFLUM 9. Within this designation, Council will accommodate all commercial, light industrial uses, community colleges, communications and utilities, emergency services and government buildings. Heavy industrial uses will also be accommodated by development agreement; however, fish reduction plants, fish composting operations, asphalt processing plants; landfill, food waste composting (except in-vessel composting and construction and demolition debris operations will not be permitted.

To regulate development, Council will establish a Business Park (BP) Zone in the By-law and require development permits for all permitted uses. Council will zone all lands within this designations as Business Park (BP) on Schedule D of the By-law. Council will consider proposals for the expansion of existing industry or new industry beyond the Business Park (BP) Zone boundary into the immediately adjacent Mixed Use (MU) Zone. Such consideration will only be by amendment to the By-law subject to the criteria of Policy B-6.

B-10 It shall be the intention of Council to designate business park lands in the Rural Centre of Tusket as Business Park on GFLUM 9 to accommodate:

-all commercial and light industrial uses;
-all heavy industrial uses by development agreement excluding fish reduction plants, fish composting operations, asphalt processing plants, landfill, food waste composting (except in-vessel composting), construction and demolition debris operations;
-community colleges;
-emergency services;
-government buildings;
-utility and communication buildings and structures.

B-10A It shall be the intention of Council to require a Development Agreement for all Heavy Industrial uses in the Business Park (BP) Zone with consideration to the following matters:
The impact of the proposed development on adjacent residential uses in the area with regard to
i) The impact of noise, odour and emissions from the development
ii) The impact of traffic generation as a result of the development
iii) The hours of operation of the development
iv) Provisions for adequate buffering to screen the development from adjacent uses
v) Any matter which may be addressed in the By-Law, e.g. requirements for yards, parking All other matters enabled under Section 227 of the Municipal Government Act.

B-11 It shall be the intention of Council to establish a Business Park (BP) Zone in the By-law to permit and require development permits for all uses identified in Policy 10.

B-12 It shall be the intention of Council to zone all lands within the Business Park designation as Business Park (BP) on Schedule D of the By-law.

B-13 It shall be the intention of Council to consider proposals for the expansion of existing industry or new industry beyond the Business Park (BP) Zone boundary into the immediately adjacent Mixed Use (MU) Zone only by amendment to the By-law subject to the criteria of Policy B-8. [Emphasis added]

[MPS, pp. 23-24]

[95] The above MPS policies respecting the BP Zone are mirrored in the LUB requirements:

PART II – BUSINESS PARK (BP) ZONE

1. BP Zone Permitted Uses

The following uses shall be permitted in the Business Park (BP) Zone:

- All commercial uses;
- All heavy industrial uses excluding fish reduction plants, fish composting operations, Asphalt processing plants, landfill, food waste composting (except in-vessel composting), scrap yards and salvage yards, construction and demolition debris operations;
- All light industrial uses;
- Business offices accessory to any main use permitted in the BP Zone;
- Commercial uses accessory to any main use permitted in the BP Zone;
- Community colleges;
- Emergency services;
- Government buildings;
- Utility and communication buildings and structures.

2. Development Agreement Required

The Municipal Planning Strategy provides that all Heavy Industrial uses in the Business Park (BP) Zone shall be dealt with by development agreement. [Emphasis added]

[LUB, p. 27]

[96] In Part 22 of the LUB, the Definition section, "heavy industrial" use is defined as follows:

46. Industry, Heavy means a use engaged in the basic process and manufacture of material or products predominately from extracted or raw materials, or a use engaged in storage of, or manufacturing processes that potentially involve hazardous or commonly recognized offensive conditions and includes but not necessarily limited to abattoirs; aggregate related industries; agricultural related industries; asphalt processing plants; bulk chemical storage; bulk fuel storage; concrete component manufacturing; fertilizer production, mixing and blending;

> fishing and marine related industries such as fish processing plants, fish reduction plants, fish composting operations, marine plant processing operations, boat building and repair shops; sawmills, planer mills, scrap yards, salvage yards; landfill, food waste composting, construction and demolition debris operations; welding and/or machine shops; and uses similar to the foregoing. [Emphasis added]
>
> [LUB, p. 62]

[97] As noted above, "fish composting operations" and "fish reduction plants" are expressly prohibited in the Business Park. These types of uses are defined in the LUB as follows:

> **33.** **Fish Composting Operation** means any operation conducted in a building or part of a building or the use of land where fish offal, whole or parts of fish, fish by-products or any combination thereof is mixed with other organic material to produce a compost but does not include a fish reduction plant.
>
> **34.** **Fish Reduction Plant** means a building or part of a building where fish offal, whole or parts of fish or any combination thereof is rendered into fish meal, fertilizers, a slurry or other by-product but does not include a fish composting operation.
>
> [LUB, p. 60]

[98] Moreover, "sea cucumber processing plant" is also defined:

> **90A.** Sea Cucumber Processing Plant means a building or part thereof wherein sea cucumbers are processed in any one or more ways including skinning and cleaning; the cooking and/or drying of their skins; the preparation for the freezing of their raws meats and; the weighing, packaging and storing of said products for future sale to the wholesale or retail markets but does not include any method of processing sea cucumber for any other products which includes but not limited to their oil or proteins.
>
> [LUB, p. 68]

[99] The Board notes that "fish processing plant" is not defined in the LUB, although the term appears in the MPS and LUB.

VIII ANALYSIS AND FINDINGS

[100] The Appellants raised various grounds of appeal in support of their view that Council's decision did not reasonably comply with the MPS. The Board considers their appeal raises four main grounds, which the Board will canvass, in turn.

(i) Should the Board's scope of review be expanded?

[101] As described earlier in this Decision, the scope of the Board's review in an appeal from a council's decision is expressly set out in s. 251(2) of the *Municipal Government Act*. In the case of a municipal council's consideration of a development agreement, the Board shall not allow an appeal unless it determines that the decision of council does not reasonably carry out the intent of the municipal planning strategy.

[102] There is significant jurisprudence on the Board's jurisdiction in such appeals. This jurisprudence was reviewed, extensively, earlier in this Decision.

[103] Notwithstanding the above case law, counsel for the Appellants submitted that an additional level of review should be introduced to the Board's consideration of this appeal, suggesting a two-part test applies. Referring to the Board's recent Decision in *MacInnis et al. v. Cape Breton Regional Municipality*, 2019 NSUARB 9, counsel for the Appellants sought to expand the Board's review to add an initial phase. He acknowledged the Board's jurisdiction under s. 251(2) of the *MGA*, but then added:

> (70) The Appellants understand that [the test under s. 251(2)]; as they do the onus devolving to them to row the labouring oar in these proceedings. But the Appellants underscore also that the onus devolving to them is only on the balance of probabilities. They thus take comfort from the Board's Decision in *MacInnis* at Paragraphs 96 and 97:
>
> > Notwithstanding the Appellants' assertion that Council's decision to approve the LUB amendment fails to reasonably carry out the intent of some parts, at least, of the MPS, the issue to be addressed by the Board in the present appeal is whether Council's decision to approve the LUB amendment fails to reasonably carry out the intent of the MPS in its entirety. The Board has no jurisdiction to allow the Appellants' appeal if Council interpreted and applied the [MPS] policies in a manner that the language of the policies can reasonably bear.
> >
> > Accordingly, as noted above, if the Appellants can show, on the balance of probabilities, that Council's decision does not reasonably carry out the intent of the MPS, the Board must reverse Council's decision to approve the rezoning of the property. If, however, the Appellants fail to meet this standard of proof, it is the Board's duty to defer to the decision of Council.
>
> (71) In the Appellants' respectful submission, the Board, in these two Paragraphs, has set out something of a two-part test. The first test requires a seminal finding that the subject municipality council in fact interpreted and applied its municipal planning strategy in the

> lead-up to its decision being attacked on appeal. The second test requires the collateral finding that in its interpretation and application of its municipal planning strategy to its decision being attacked on appeal, the subject municipality was acting reasonably (albeit not necessarily correctly in the Board's determination). [Underlining and Double Underlining added in original]
>
> [Appellants' Submission, June 3, 2019, paras. 70-71]

[104] The Board observes that the language highlighted by counsel for the Appellants has been adopted by the Board from almost identical language used by Hallett, J.A., in the seminal case of *Heritage Trust*:

> …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. … [Emphasis added]
>
> [*Heritage Trust*, p. 34]

[105] As noted elsewhere in this Decision, there was no planning staff report or opinion provided to Municipal Council in this matter. The only report provided to Council was prepared by Mr. Muise, the CAO, who is not a planner, and who has no expertise in the planning field. There were no references in his report to the applicable MPS policies, and no discussion of the application of the MPS to the proposed development. He identified economic benefits from the project, but such objectives do not appear in the applicable MPS policies. Mr. Muise made factual references to some of the issues mentioned in the relevant MPS policies (e.g., odour, noise and traffic), but made no attempt whatsoever to tie them back to the MPS. His eleventh-hour email to Council on November 20, 2019, fared no better. Likewise, there was no expert planning evidence presented to the Board during the hearing respecting the MPS and its application to the proposed plant. Counsel for the Municipality called the CAO as a witness. He again provided some factual context, but gave no testimony on the MPS and its application in this case. Indeed, he was not permitted to provide such evidence as he was not qualified by the Board as an expert.

[106] Relying on the Board's above discussion in *MacInnis*, and the identical language by Hallett, J.A., in *Heritage Trust*, counsel for the Appellants submitted that the Municipality's failure to show how it actually interpreted and applied the MPS to the proposed development should lead to the result that Council's decision was not reasonable.

[107] Counsel for the Appellants submitted:

> (72) ...And there was no evidence before the Board as to how — if at all — the Respondent Municipality considered and applied its governing MPS in arriving at its decision to authorize the impugned Development Agreement.
>
> ...
>
> (74) ...there is no proof the Respondent Municipality had considered and applied its governing MPS in arriving at its decision to authorize the impugned Development Agreement. Accordingly, there is no deference to be paid by the Board to the Municipal Council's decision.
>
> (75) At best, from the Respondent Municipality's perspective, the circumstances of the decision underpinning these proceedings would clothe the Board with something akin to a form of *de novo* jurisdiction. At worst, again from the Respondent Municipality's perspective, the circumstances of the decision underpinning these proceedings would require the Board to rule that without proof of any interpretation and application by the Municipal Council of the governing MPS, it would be impossible to find that such an interpretation and application could have in any manner whatsoever been reasonable. [Emphasis added]
>
> [Appellants' Submissions, June 3, 2019, paras. 72, 74-75]

[108] It is an important tenet of administrative law that a decision making body has a duty to provide reasons for its decisions. The absence of such reasons, or the inadequacy of reasons, is generally a factor to be considered in the review of administrative decisions. This is certainly the state of the law with respect to the review of a decision by a statutory delegate: *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[109] However, given the well-established jurisprudence respecting the Board's limited jurisdiction on municipal planning appeals, as outlined earlier in this Decision, the Board does not accept the argument that it should apply a two-step test, as suggested by the Appellants. The Board has reached this conclusion for several reasons.

[110] First, the Board notes that the test it must apply is specifically set out in the statute, i.e., the *MGA*. In the case of an appeal from a decision of council, the test is described in s. 251(2).

[111] Second, as noted by counsel for the Municipality, s. 230(6) of the *MGA* specifically directs a municipal council to provide reasons when a development agreement is refused, but is silent on the need for reasons when the development is approved. Thus, where a development agreement is approved by council, as in the present case, the *MGA* does not require, at least impliedly, that reasons be provided. For the Appellants to suggest that they should succeed on this appeal because Municipal Counsel has not provided any basis for its decision through its deliberations, or in its failure to provide reasons, on how it interpreted and applied the MPS, would not be consistent with the provisions of the *MGA* that do not require the issuance of any reasons whatsoever for its approval of the development agreement.

[112] Third, as noted in the *MGA*, a municipal council is the body which is provided the authority to make policy choices under an MPS. Section 190 of the *MGA* provides that the purpose of the planning provisions of the *Act* is to "enable municipalities to assume the primary authority for planning within their respective jurisdictions". In that vein, a municipal council makes pure policy choices about development in its municipal unit, provided its decisions reasonably comply with the intent of the MPS. The comments

of individual councillors do not form the reasons for a decision by Council. Council speaks through the collective voice of all its councillors as a group, not of the individual councillors. Thus, the actual reasons for a particular decision approving a development agreement may be difficult to discern, as different councillors may have voted for a particular result because of different reasons: see also *Weatherhead v. Halifax Regional Municipality*, 2019 NSUARB 17, paras. 148-151.

[113] Fourth, the Board refers to the guidance of MacDonald, C.J., in *Midtown*, in which he refers to the process to be followed by the Board, after looking at the MPS as a whole, to answer the fundamental question laid out in the *MGA*: "Can it be said that Council's decision does 'not reasonably carry out the intent of the MPS'"? He states:

> [51] To answer this question, the Board must embark upon a thorough fact-finding mission to determine the exact nature of the proposal in the context of the applicable MPS and corresponding by-laws. As in this case, this may include the reception of evidence as to the intent of the MPS.
>
> [52] However the Board should not then take its body of decided facts and use this work product to conclude how it feels the MPS should be interpreted. In this regard, I agree with the developer. Instead, after completing its factual analysis, the Board should go immediately to Council's conclusion. The Board should then ask itself, based on the facts as determined, have the opponents established that Council's decision did not reasonably carry out the intent of the MPS? [Emphasis added]
>
> [*Midtown* Decision, paras. 51-52]

[114] On this point, the Board notes that HRM Council initially approved the development agreement in *Midtown*, which decision was on appeal to the Board. There were no reasons given by HRM Council in that instance. Applying the direction of MacDonald, C.J., the Board's task, after reviewing the MPS as a whole and undertaking its fact-finding exercise, was to resort directly to Council's conclusion, without reasons, and to determine if it reasonably complied with the intent of the MPS. Thus, in *Midtown*, the Court of Appeal did not consider the lack or inadequacy of reasons, in and of

themselves, to be an impediment to the Board applying the scope of its review as outlined in the *MGA*.

[115] Finally, even where no reasons are given by a Court or other decision maker, recent case law provides that the reviewing Court or tribunal is required to refer to the record in applying the appropriate standard of review to an impugned decision. The lack of reasons or the failure of a decision maker to outline its reasoning process does not prevent the reviewing body from having to consider the entire record in determining the reasonableness of an outcome (i.e., in the case of the reasonableness standard of review). In *Halifax (Regional Municipality) v. Rehberg*, 2019 NSCA 65, the Court stated:

> [49] The Committee gave no reasons for its decision to refuse the requested four-month extension. There is no reasoning path to examine. I interject that the respondent has never suggested he was denied procedural fairness in any aspect of the proceedings, including the absence of reasons by the Committee.
>
> [50] Where there are no reasons, the reviewing court must consider what reasons could be offered in support of the administrative decision. This entitles the reviewing court to examine the record, including submissions before the tribunal and on judicial review for the purpose of assessing the reasonableness of the outcome.
>
> [51] This was most recently affirmed in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, where the majority wrote:
>
> > [29] Reasonableness review requires "a respectful attention to the reasons offered or *which could be offered* in support of a decision" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 48 (emphasis added); see also *Newfoundland and Labrador Nurses' Union. v. Newfoundland & Labrador* (*Treasury Board*), 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 11). Reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (*Agraira v. Canada* (*Minister of Public Safety and Emergency Preparedness*), 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at para. 52, quoting *Newfoundland Nurses*, at para. 15). ... [*Emphasis in original*] [Emphasis (underline) added]

[116] Taking all of the above into account, the Board concludes that, in its review of Council's decision, it should not apply the two-step process submitted by the Appellants. In the view of the Board, its proper scope of review in this appeal is as set out in s. 251(2) of the *MGA*, which states that the "Board shall not allow an appeal unless

it determines that the decision of council…does not reasonably carry out the intent of the municipal planning strategy". There is nothing in the case law, or in the Board's prior decisions, including *MacInnis*, which sets out a different test to be applied in this appeal.

(ii) **Is a sea cucumber a fish?**

[117] Throughout their testimony, and in their submissions, the Appellants have maintained that the proposed plant is, effectively, a fish processing plant: see, for example, Appellants' Submissions, June 3, 2019, at para. 25:

> (25) And there is nothing consistent with sound planning that would place what is to the Appellants a fish processing plant virtually in the backyards and front yards of their houses, which in some instances, are worth as much as $400,000 dollars.

[118] In terms of the Appellants' testimony on the subject, the Board infers the witnesses considered that the ordinary person would equate the sea cucumber to a fish. Indeed, in her testimony, Ms. Gaudet assumed that the term "fish" would extend to include any sea marine life. At first glance, the Board does not consider this to be an unreasonable belief.

[119] In the Appellants' view, there is no practical distinction between a fish and a sea cucumber as it relates to the application of the MPS in this matter. Counsel for the Appellants reiterated this view in his Reply Submissions:

> Again with obvious respect, such "process" as was engaged in by the Respondent Municipality was only tantamount to an exercise on how best a square peg could be inserted – or pounded – into a round hole.
>
> At least part and parcel of this ephemeral process was the recognition that a sea cucumber is not a fish. Though much has been made by the Respondent Municipality of that distinction, it is one which is meaningless to the planning process and represents nothing more than a cynical side-step of the applicable MPS Policies.
>
> [Appellants' Reply Submissions, June 18, 2019, p. 2]

[120] Before embarking on a broader review of the relevant MPS policies in this matter, the Board considers it instructive to canvass the treatment afforded by the Municipality in its MPS and LUB to the terms "fish" and "sea cucumber" in order to ascertain the meaning intended for these terms in the planning documents.

[121] The Municipality engaged Dr. Lewis to address this issue, leaving no doubt, from a biological perspective, that a sea cucumber is not a fish:

> Sea cucumbers are a ubiquitous group of organisms found on the sea bottom throughout the world where they carry out a sedentary lifestyle feeding on microorganisms and microscopic organic particles. They are cucumber-shape (hence the name) and range in size from a few centimeters to more than a meter. They are a primitive group of echinoderms, closely related to sea urchins; they are most definitely not fish.
>
> Sea cucumbers lack a backbone (invertebrate) and an organized nervous system. They do not have sensory organs and they do not have a brain. They exchange gases (oxygen and carbon dioxide) by drawing water into their anus, and do not have an articulated skeleton.
>
> On the other hand, while 'fish' refers to a very diverse group of organisms, all share common characteristics. They have backbones (chordates), a brain, and an organized nervous system. They have sensory organs – eyes, olfactory organs and pressure sensors that respond to sound. They exchange gases through gills.
>
> In no sense can the sea cucumber be considered a fish. …
>
> [Exhibit G-6, p.1]

[122] The Board accepts Dr. Lewis' evidence on this point, i.e., that in the field of marine biology, a sea cucumber is not a fish. However, that is not necessarily the definitive answer to the question to be considered by the Board.

[123] As outlined earlier in this Decision, determining the intent to be given to language in a statute or a municipal planning strategy must be done in the context of that particular statute or municipal planning strategy. Again, as stated in *Sparks*:

> The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [Sparks, para. 27]

[124] The Board is mindful that a word or phrase may have a scientific or industry meaning, or even an ordinary meaning in common parlance, but reference must ultimately be made to the context in which the words are to be considered. In this case, that is the meaning to be given to sea cucumber and fish as they appear in the MPS, in its entirety.

[125] Based on the Board's review, it is clear the intent was that there should be a distinction between a fish and a sea cucumber in terms of the MPS policies. This is readily apparent from the different references made to the operations relating to fish and sea cucumbers in the text of the LUB, which can be used to shed some light on the interpretation of the MPS. Specifically, the operations relating to each were distinguished in the Definition section of the LUB. There are separate definitions for "fish composting operation", "fish reduction plant" and "sea cucumber processing plant".

[126] Further, the processing activities relating to these different forms of marine life are differentiated in the MPS itself. In one of the key MPS policies which apply in this appeal, i.e., Policy B-10, which excludes fish composting operations and fish reduction plants as heavy industrial uses in the Business Park, sea cucumber processing plants are not excluded.

[127] Taking into account all of the above, including the biological definition of fish and sea cucumbers, but, more importantly, the intent to be assigned to those words when considered in the context of the MPS, in its entirety, the Board finds that for the purpose of this appeal, it is a reasonable interpretation to conclude that a sea cucumber is not a fish.

(iii) **Is the proposed plant a permitted land-use in the Business Park?**

[128] The Appellants submitted that the proposed plant is not an appropriate development for the Business Park, given the plant's location in proximity to the Appellants' residential properties. Their position was summarized in their submissions as follows:

> (4) In sum and substance, the Appellants oppose the development and operation of Mr. LeBlanc's Sea Cucumber processing plant on the basis that it represents:
>
> (i) a land use inconsistent with the provisions of the applicable Municipal Planning Strategy and Land-Use By-Law,
>
> (ii) a land use otherwise unsuitable for the intended (agreed-upon) location of the Mr. LeBlanc's Sea Cucumber processing plant...
>
> [Appellants' Submissions, June 3, 2019, p.1]

[129] Further, despite their reluctant acknowledgement that a sea cucumber may not be a fish, the Appellants argued, referring to Principle 6 in *Archibald*, that the MPS policies should not be interpreted formalistically, but pragmatically and purposively. In their view, if Council had turned its mind to the issue when it drafted the MPS, it would not have allowed the processing of any "sea creatures" or "sea animals" in the Business Park. Counsel for the Appellants submitted:

> (98) Even at that, there is no evidence before the Board that the Respondent Municipality's Council ever considered the precise nature of Sea Cucumbers; or whether their precise nature could so define a related processing plant such that it could fit within the relevant [MPS] as a whole. Rather, the reference to the precise nature of Sea Cucumbers should be seen by the Board, in the Appellants' respectful submission, as a cynical afterthought and a banal attempt on the part of the Respondent Municipality to bootstrap an *ad hoc* decision which was itself devoid of any underpinning analytical elegance.
> ...
>
> (100) Though the Appellants make the following submission only with the greatest of respect, it could hardly be pragmatic and purposeful for the Respondent Municipality to dredge up both cynical and banal afterthoughts in an effort to circumvent a clear intention established with the relevant MPS that primary resource processing of any type would not be permitted within the Respondent Municipality's Business Park.
>
> (101) Examining the matter retrospectively, the rhetorical question might be whether the proponent of the Sea Cucumber processing plant would — or even could — be permitted

> on the basis of a change in operational strategy to process lobsters. Or crabs. Or scallops. Or clams. Or quahogs. Or oysters. Or shrimp. All of which are "shellfish" in common parlance according to the Respondent Municipality's Dr. Lewis; but none of which are fish. Or octopi. Or squid. Or whales. Or dolphins. Or seals. All of which are "sea creatures" — even "sea animals" according to Dr. Lewis, but none of which are "fish".
>
> (102) Again posing the question only rhetorically, could it possibly be that the Respondent Municipality would be permitted by way of a pragmatic and purposeful interpretation of the relevant MPS to authorize by way of Development Agreement the processing of any of the other "sea creatures" or "sea animals" set out above? The answer would have to be unstintingly in the negative. As it should be with respect to the Respondent Municipality's purported interpretation of the relevant MPS to permit the impugned Sea Cucumber processing plant by way of Development Agreement.
>
> [Appellants' Submissions, June 3, 2019, pp. 21-22]

[130] In the Board's opinion, its analysis on this point must begin with the actual provisions in the MPS, as well as the LUB. First, heavy industrial uses may be developed in the Business Park (BP) Zone. The BP Zone is specifically enabled by MPS Policy B-10.

[131] The permitted uses in the BP Zone are set out in the LUB. The permitted uses outlined in the LUB mirror, exactly, the uses contemplated in Policy B-10 for the Business Park. The LUB allows the following permitted uses:

> **PART II – BUSINESS PARK (BP) ZONE**
> **1. BP Zone Permitted Uses**
>
> **The following uses shall be permitted in the Business Park (BP) Zone:**
>
> - All commercial uses;
> - All heavy industrial uses excluding fish reduction plants, fish composting operations, Asphalt processing plants, landfill, food waste composting (except in-vessel composting), scrap yards and salvage yards, construction and demolition debris operations;
> - All light industrial uses;
> - Business offices accessory to any main use permitted in the BP Zone;
> - Commercial uses accessory to any main use permitted in the BP Zone;
> - Community colleges;
> - Emergency services;
> - Government buildings;
> - Utility and communication buildings and structures. [Emphasis added]
>
> [LUB, p. 27]

[132] The proposed plant has been referred to by the Appellants as a "sea cucumber processing plant", while the Municipality described the proposed plant in the development agreement as a "nutraceutical/dietary supplements production facility". In the Board's opinion, the important factor to be addressed here is the substantive nature of the operation that will be carried out in each facility, not the descriptive title of the plant itself.

[133] Based on the Board's review, there is no difference between these two uses for the purposes of this appeal. The processes carried out under each description are materially the same. The LUB definition of sea cucumber processing plant contemplates a building where "sea cucumbers are processed in any one or more ways including skinning and cleaning; the cooking and/or drying of their skins; the preparation for the freezing of their raw meats; and, the weighing, packaging and storing of said products for future sale". As noted earlier, the Developer described the proposed production facility as providing a manufacturing process using a high pressure boiler and associated machinery to produce a final product produced from the sea cucumber waste material. Refrigerated space will be used to store raw material until it is processed. The manufacturing process which follows the boiler process involves drying the processed raw material to produce a final dry powder. In describing the process in his testimony, the Developer used terms such as "cooking" and "drying" of the sea cucumber. The dry final product is then packaged in containers and stored in barrels or bins for shipping to a third party offsite encapsulation plant.

[134] In the Board's view, the above process falls squarely within the definition of a sea cucumber processing plant. It contemplates the cooking and/or drying of the sea

cucumber into a final powder product. Further, the Board considers the above process does not fall within the exclusion set out in the said LUB definition for sea cucumber processing plant. The process is not "for any other products".

[135] The Board is mindful that the proposed development agreement provides that the raw materials for the plant may include both sea cucumbers and "other raw products of the sea". It is also mindful the agreement permits a final product in powder form, oil form and in encapsulated form. The Board is satisfied that despite this broader scope of raw materials and finished product forms, the proposed process is clearly not a fish reduction plant or a fish composting operation, as those are defined in the LUB.

[136] Taking into account all of the above, the Board concludes that the proposed plant is a sea cucumber processing plant. However, given the ultimate disposition of this appeal, the result would be the same even if the Board were to find the proposed plant is a nutraceutical/dietary supplements production facility. Both of these uses are permitted uses in the Business Park Zone by way of development agreement.

[137] Policy B-10 of the MPS, and Section 2 of PART II of the LUB, both provide that all heavy industrial uses (excepting those uses specifically excluded) can occur in the Business Park by way of development agreement. In the Board's opinion, the list of exclusions is clearly exhaustive. The provisions state that all heavy industrial uses are permitted, except an enumerated list. The Board notes that fish reduction plants and fish composting operations (both defined terms in the LUB) are among those heavy industrial uses that are specifically excluded from the Business Park. However, sea cucumber processing plants (also a defined term in the LUB), and fish processing plants, are not excluded in the Business Park. As the Board concluded earlier in this Decision, it is a

reasonable interpretation of the MPS, in its entirety, that a sea cucumber is not a fish. It is also clear that fish reduction plants, fish composting operations and sea cucumber processing plants are all different uses. Indeed, again, they are all defined differently in the LUB.

[138] Interestingly, fish processing plant is not a defined term in the LUB, but it is a phrase that appears both in the MPS and the LUB. The Board finds it instructive that while fish processing plants, fish reduction plants and fish composting operations are all included in the definition of heavy industrial use, only the latter two are specifically excluded from the Business Park. Like sea cucumber processing plants, fish processing plants are not specifically excluded from the Business Park.

[139] Counsel for the Appellants also referred to preamble text at pp. 19-20 of the MPS as support for the submission that "industry known to generate nuisance effects, are unsightly or are better suited to other areas" would be prohibited. He then refers to Policy B-6A as an example of this prohibition. However, the Board accepts the submission by Municipality's counsel that this Policy and the identified preamble text are located in a different part of the MPS relating to the Mixed Use Zone. They do not apply to the BP Zone.

[140] In terms of the Appellants' general submission that uses generating nuisances were not intended to be situated in the Business Park, the Board considers this argument to be unfounded. Heavy industrial uses are specifically contemplated to be located in the Business Park under Policy B-10. The LUB definition of heavy industrial uses describes them as uses that "potentially involve hazardous or commonly recognized offensive conditions".

[141] Further, even light industrial uses that could potentially generate nuisances for neighbouring properties (e.g., in terms of odour, noise, and traffic) are permitted as of right in the Park. Light industrial uses are also defined in the LUB as follows:

> 47. **Industry, Light** means a use engaged in the manufacture, predominantly from previously prepared materials, of finished products or parts, including processing, fabrication, assembly, treatment, packaging, incidental storage, sales and distribution of such products and includes but not necessarily limited to building and construction contractors; building supplies and equipment sales; cold storage facilities, bait freezers; commercial greenhouses, heavy equipment storage and maintenance; recycling depots; service industries; transportation and trucking; warehousing; wholesale distribution and sales; lobster pounds; fish farms; marine plant farms; and uses similar to the foregoing but does not include a welding and/or machine shop.
>
> [LUB, p. 62]

[142] Thus, light industrial uses such as lobster pounds, fish farms, marine plant farms, bait freezers, and heavy equipment storage and maintenance could be developed in the Business Park as of right. These uses, and others, would not require a development agreement.

[143] Moreover, the Board finds it instructive that the policy direction in the MPS for the creation of the Residential Park (i.e., Policies B-14 to B-16) was approved concurrently with the adoption of Policies B-10 and B-10A relating to the presence of heavy industrial uses in the Business Park (with a few specified exclusions). Municipal Council clearly envisaged residential uses being in proximity to heavy industrial uses in the Business Park. Such heavy industrial uses would not be permitted as of right, but were to proceed by way of development agreement.

[144] Taking all of the above into account, the Board finds that the Municipality intended a wide range of uses in the Business Park, including both light industrial and heavy industrial uses. A sea cucumber processing plant (as well as a nutraceutical/dietary supplements production facility) is a heavy industrial use, which is

not specifically excluded from the Business Park under the provisions of the MPS and LUB. Indeed, it is directed as a matter of policy that such a use must proceed by way of a development agreement in the Park. The Board concludes that Council's decision reasonably complied with the MPS when it determined that a sea cucumber processing plant is a permitted use in the Business Park.

(iv) Did Council consider the impact of the proposed plant on the Appellants' properties?

[145] Having found that the proposed plant is a permitted use in the Business Park, the Board must now address whether Council considered the impact of the proposed plant on neighbouring properties, including the Appellants' homes.

[146] The MPS specifically addresses what Council is to consider when it approves a development agreement for a heavy industrial use in the Business Park (BP) Zone. For convenience, Policy B-10A is repeated here:

> **B-10A It shall be the intention of Council to require a Development Agreement for all Heavy Industrial uses in the Business Park (BP) Zone with consideration to the following matters:**
> **The impact of the proposed development on adjacent residential uses in the area with regard to**
> **i) The impact of noise, odour and emissions from the development**
> **ii) The impact of traffic generation as a result of the development**
> **iii) The hours of operation of the development**
> **iv) Provisions for adequate buffering to screen the development from adjacent uses**
> **v) Any matter which may be addressed in the By-Law, e.g. requirements for yards, parking All other matters enabled under Section 227 of the Municipal Government Act.**
>
> [MPS, pp. 23-24]

[147] Thus, the MPS required Council to give "consideration" to the impact of the proposed plant on adjacent residential uses as it relates to various factors.

[148] Prior to canvassing each of these factors, the Board notes that Policy B-10A refers to "adjacent residential uses". There is clearly a distinction between adjacent uses versus uses that are in proximity or in the vicinity.

[149] Based on the testimony at the hearing and the Board's observations during the site visit, the properties adjacent to the proposed plant, on the interior of Slocomb Crescent, are vacant and still contain mature tree vegetation. Across Slocomb Crescent, on the opposite side of the road, there are commercial uses and one residential home. There is vegetation between the proposed plant and the house on the opposite side of Slocomb Crescent. Most of the Appellants' homes are not strictly "adjacent" to the proposed plant, but are a further distance away on Gardner Lane. As described earlier in this Decision, Gardner Lane starts at Slocomb Crescent, and leads down the sloping topography towards the Tusket River below. The Board notes the Municipality has retained ownership of a green belt between the Residential and Business Parks. Ms. Gaudet and Ms. LeBlanc acknowledged on cross-examination by counsel for the Municipality that their houses are located about 250 metres and 400 metres, respectively, from where the proposed plant is to be built. Ms. LeBlanc-Messenger's vacant lot is located about 300 metres from the proposed plant.

[150] The Board notes that the lands of Appellant Hubert Pothier are located even further afield, separated from the proposed plant by properties on each side of Slocomb Crescent to the south of the plant, and by the residential properties on each side of Gardner Lane to the southwest of the plant. Further, Mr. Pothier's lands are undeveloped. The policy specifically refers to residential properties, not other types of uses. It does not contemplate the impact on commercial properties, or upon vacant lands.

[151] The Board finds that, when considering the application of the MPS to the proposed development, an interpretation that remains mindful of the above locational context, as well as the different type of land uses, is an interpretation that the MPS can reasonably bear. In the Board's view, Council was entitled to take these contextual factors into account in accordance with the MPS.

[152] Further, as noted earlier in this Decision, the CAO's report and eleventh-hour email to Council made no reference whatsoever to the applicable MPS policies. While the CAO's submissions to Council dealt overwhelmingly with the economic benefits of the proposed plant (which benefits are not directly relevant to this appeal), his comments did, in fairness, attempt to canvass some of the concerns of the Appellants. He explained, based on his layman's view (not as a planner), how the development agreement addressed these concerns. The Board also considers it appropriate to take into account this factual context.

a) Noise, odour and emissions

[153] In their grounds of appeal, the Appellants raised concerns about the proposed plant having a negative impact on the enjoyment of their properties in terms of various factors, including noise and odour. In Ground #4 of the Amended Notice of Planning Appeal, the Appellants alleged the Municipality ignored:

> ...the overall impact of a sea cucumber processing plant from the perspectives of noise, disturbance, odour and the sightliness of premises and the overall impact of same on the adjacent approved land uses.
>
> [Exhibit G-5, Ground #4]

[154] The Appellants also alleged in their grounds of appeal that a sea cucumber processing plant can be:

> ...reasonably assimilated with an "industry known to generate nuisance effects" such as "odour, dust, smoke or noise", or any combination thereof, and which has thus been stated by the provisions of the Municipal Planning Strategy of the Municipality of Argyle to be "better suited to other areas of the Municipality than the Tusket Business Park".
>
> [Exhibit G-5, Ground #7(c)]

[155] The Appellants reiterated these concerns in their testimony at the hearing. In their view, the proposed plant would negatively impact the homes they had built on their properties.

[156] In his CAO's report to Council, Mr. Muise identified three potential nuisances, including odour, noise and unsightly premises (see Appeal Record, p. 101).

[157] As noted above, Policy B-10A provides that, in entering a development agreement, Council must give consideration to the impact of the proposed development on adjacent residential uses in the area with regard to the impact of noise, odour and emissions from the development.

[158] In his evidence, the Developer described the various means by which the equipment in the proposed plant would help to mitigate, or hopefully eliminate, the impact of odour and emissions from the production process.

[159] In his application to the Municipality, Mr. LeBlanc filed a letter from the operator of similar production facilities in the Province. The letter from John Houck, P.Eng., dated October 16, 2018, addressed to Mr. LeBlanc, stated (the confidential production process is redacted):

> ...I have experience with running [redacted] as Plant Manager for Ocean Nutrition in Dartmouth, NS as well as for Maritime BioExtracts in Bible Hill, NS. These dryer plants produced marine-based, [redacted] powder products.
>
> Invariably, inside the production facility, the marine smell can be fairly strong during the cooking phase of production. This smell tends to stay within the Production Facility building. There tends to be no appreciable smell outside of the facility during the cooking process.
>
> It is my understanding that you are intending to utilize a wet scrubber system for your dryer exhaust outside of the building. The wet scrubber design, in my experience, is the better

> method of controlling both smell and potential powder particulate discharge into the environment outside of the production facility. As you witnessed when you toured our facility while [redacted] your product several weeks ago, there was virtually no marine/fish-based smell coming from our [redacted] exhaust.
>
> Based on the incorporation of the wet scrubber in your proposed [redacted] exhaust design, I would say that you will mitigate potential smell problems at your new [redacted] facility.
> ...
>
> [Appeal Record, p. 93]

[160] The Board is mindful that, technically, the above excerpt may be considered opinion evidence. Mr. Houck did not file an expert's report in this matter, nor was he called to testify as an expert at the hearing. Accordingly, the Board placed no weight on the above passage as to the truth of its contents, but it did accept its introduction into evidence as proof that this letter was filed with the Municipality in support of the Developer's application and that members of Municipal Council had the letter before them when Council considered the development agreement, along with the comments of local residents about odour and emissions from the proposed plant.

[161] In his application, Mr. LeBlanc also provided a description of regenerative thermal oxidizers (RTOs) to be installed in the plant:

> One of today's most widely accepted air pollution control technologies across industry is a regenerative thermal oxidizer, commonly referred to as a RTO. RTOs use a ceramic bed which is heated from a previous oxidation cycle to preheat the input gases to partially oxidize them. The preheated gases enter a combustion chamber that is heated by an external fuel source to reach the target oxidation temperature which Is in the range between 760 °C (1,400 °F) and 820 °C (1,510 °F). The final temperature may be as high as 1,100 °C (2,010 °F) for applications that require maximum destruction. The air flow rates are 2.4 to 240 standard cubic meters per second.
>
> RTOs are very versatile and extremely efficient - thermal efficiency can reach 95%. They are regularly used for abating solvent fumes, odours, etc. from a wide range of industries. Regenerative Thermal Oxidizers are ideal in a range of low to high VOC concentrations up to 10 g/m^3 solvent. There are currently many types Regenerative Thermal Oxidizer on the market with the capability of 99.5+% Volatile Organic Compound (VOC) oxidisation or destruction efficiency. The ceramic heat exchanger(s) in the towers can be designed for thermal efficiencies as high as 97+%.
>
> [Appeal Record, p. 94]

[162] The above text appears to be from an industry or manufacturer's publication and, again, may be considered to be in the form of opinion evidence. Similarly, the Board

weighed this evidence not as proof of its assertions, but as going to the fact that Council had the description of RTOs before it when it considered the impact of the proposed plant with respect to odour and emissions.

[163] Mr. LeBlanc also described how he sourced refrigeration equipment that would lessen the impact from noise:

> A. ...When it came to noise, there was a lot of talk around compressors, refrigeration equipment. And so, in speaking with my provider in the community for refrigeration equipment, we found suppliers or technology that's out there now that's used by other plants or businesses, in order to dull down the noise emitted from compressors.
>
> Q. Okay. Can you tell us a bit more about that?
>
> A. I can tell you that through inquiries through my service provider, they were told that the decibel level of the specifically manufactured units for -- within residential areas are, I think, in the 80 to 82 decibel range, and that there are options of putting barriers around the units, in order to further dull the noise.
> Q. And those are the types -- are those the types of compressors that would be used in your development?
>
> A. Yes.
>
> [Transcript, p. 161]

[164] Mr. LeBlanc provided the Municipality with an email from his local refrigeration supplier outlining the options that he intends to use to mitigate noise from compressors in his refrigeration equipment.

[165] The Board observes that the Appellants did not specifically challenge the effectiveness of RTOs or wet scrubbers in dealing with odour or emissions, or the effectiveness of the refrigeration equipment in relation to noise.

[166] Mr. Muise, the Municipality's CAO, testified that he arranged for the development agreement to be amended by the Municipality's local solicitor to specifically address these issues before it was submitted to Council. Section 2.2. was added to the development agreement:

2.2 Odour and Noise Mitigation

(a) The Property Owner shall make every reasonable effort to minimize and mitigate odours emanating from the facility as a result of the production processes utilizing commercial odour mitigation solutions such as Air Scrubbers and Regenerative Thermal Oxidizers (RTO or equivalent technology) if warranted. Also, the property owner shall implement a wet scrubber system for the exhaust outside of the building and shall design the exhaust chimney utilizing appropriate engineering best practices, including consideration of the height of the exhaust to ensure odours are diffused at higher elevation levels away from residents and businesses. The building structure shall be well insulated for sound containment and additional sound barriers to mitigate noise produced by the high-pressure boiler(s) and related machinery shall be installed if warranted. For greater clarity, the property owner shall ensure that odours emanating from the facility and noise caused by the processes herein described shall not be offensive to a person, acting and reporting reasonably, who, owns, occupies uses and/or attends a property within reasonable proximity of the property.

(b) In the event the Municipality receives a report as described in subclause (a) above, then at its discretion, the Municipality may engage the services of a third party expert in the field of the complaint so reported, the cost of which to be borne by the property owner, in order to determine if the odour and/or noise is offensive to a person acting reasonably as described above. Should the expert report determine that the odour and/or noise is offensive then, at its discretion, the Municipality may issue a stoppage of operations to the property owner, the result of which shall be that production cease immediately. The property owner shall then, at its costs, remedy the odour and/or noise issues in the manner recommended by the expert report. Upon acceptable remedial work being completed, then the Municipality may authorize the continuation of production.

(c) The property owner shall be permitted to remove trees from the property, to the extent required for his production. The owner shall commit to retain the remaining trees as a natural barrier to potential odour and noise emanating from the property. [Emphasis added]

[Appeal Record, p. 13]

[167] Counsel for the Appellants submitted that the measures outlined in Section 2.2 of the development agreement were insufficient. In his view, the Municipality's reliance on the "reasonableness" test afforded little protection to the Appellants, in that it gave the Municipality too much discretion in deciding whether the Developer had made "every reasonable effort" to minimize and mitigate odours emanating from the proposed plant, and whether the odour or noise was "offensive to a person acting reasonably".

[168] Based on its review, the Board is satisfied that Municipal Council did consider the impact of noise, odour and emissions from the proposed plant upon

neighbouring properties. Council, and the Developer, heard the residents' concerns about these issues during the public hearing process and specifically addressed them in the development agreement. The Board notes that the development agreement makes specific reference to the type of equipment (i.e., RTOs and wet scrubbers) that is to be used by the Developer to mitigate odour and emissions nuisances (s. 2.2). The development agreement also requires him to mitigate noise (ss. 2.2 and 2.6).

[169] Further, the remedial measures included in the development agreement are not limited to the impact upon "adjacent residential uses", as outlined in Policy B-10A. The protective measures in Section 2.2 extend to both "residents and businesses" and the remedial mechanism can be initiated by any person "who, owns, occupies uses and/or attends a property within reasonable proximity of the property."

[170] Moreover, Mr. LeBlanc and Mr. Muise both testified that there is tree vegetation on the property, and on adjacent properties, which serve as a buffer. This was acknowledged by the Appellants in their testimony and was observed by the Board during its site visit. The Board notes that s. 2.2(c) of the development agreement allows the Developer to remove some trees from the property, as required for the operation, but provides that he "shall commit to retain the remaining trees as a natural barrier to potential odour and noise emanating from the property". The Municipality also retained ownership of a treed green space between the Business Park and the Residential Park.

[171] Council clearly considered the impact of noise, odour and emissions by including the above provisions in the development agreement. As a result, the Board finds that, in relation to noise, odour and emissions, Council's decision is reasonably consistent with the intent of the MPS.

b) Traffic generation

[172] The Appellants also alleged that the proposed plant will generate traffic which could be disruptive to their peaceful environment and the enjoyment of the properties.

[173] As described earlier in this Decision with respect to the hours of operation, Mr. LeBlanc testified that the proposed plant would have little impact on nearby properties with respect to traffic generated by the production operations. Indeed, Mr. LeBlanc indicated that he would not have been opposed to including a provision in the development agreement prohibiting deliveries between midnight and 6 a.m., but that would not be necessary because it would not happen in any event. He was just not able to guarantee that traffic would be limited to normal business hours (e.g., 9 a.m. to 5 p.m.). However, he asserted that the traffic generated would be minimal. He added that shipping finished product out of the plant would generally be done in normal business hours with public carriers.

[174] In his report to Council, Mr. Muise outlined the anticipated degree of traffic described by the Developer:

> Local traffic will be minimal, as frozen raw materials are received in large quantity sporadically and any shipping will be done for bulk products on domestic carriers, e.g. Midland Transport. All of this is expected to take place within normal business hours during the work week.
>
> [Appeal Record, p. 101]

[175] The Board is satisfied that the issue of traffic generation from the proposed plant was raised by municipal staff in the CAO's report to Council. Council also heard the comments from residents about the issue of traffic.

[176] As noted below respecting the hours of operation, s. 2.6 of the development agreement also provides that the Developer is to minimize noise resulting from the processing activities.

[177] The Board accepts the Developer's evidence that the traffic generated by the proposed plant will be minimal. The Board concludes that the issue of traffic generation was considered by Municipal Council and finds that, in relation to traffic issues, Council's decision is reasonably consistent with the intent of the MPS.

c) Hours of operation

[178] Policy B-10A of the MPS also provides that Council must give consideration to the hours of operation of the development. The Appellants testified that they are concerned the facility will have a negative impact on them if production occurs in the evening or early morning hours.

[179] The Developer testified that despite the potential for activities throughout the day, any interruptions would be rare. He stated the processing activities would not be disruptive. As noted above, he said that traffic would be limited to the occasional delivery and pick-up, but they would mostly occur during normal business hours. He could not guarantee that the occasional one would not occur during the evening hours, but they would generally be limited to once or twice weekly, not daily, and not in the early morning hours (i.e., midnight to 6 a.m.).

[180] Section 2.6 of the development agreement specifically addresses the hours of operation:

> **2.6 Hours of Operation**
>
> The hours of operation of the nutraceutical production facility periodically involves continuous twenty-four hour activity. During evening hours and overnight hours of operation the Property Owner shall use mitigation methods to minimize noise and vibration resulting from the processing activities.
>
> [Appeal Record, p. 14]

[181] The Board accepts the evidence of the Developer and finds that the nature of the activities on the proposed site during the hours of operation will have a minimal impact on adjacent properties. Further, the development agreement directs him to minimize any noise and vibration from the processing activities.

[182] The Board concludes that Municipal Council has considered the issue of hours of operation and that its approval of the development agreement reasonably complies with the intent of the MPS.

d) Buffering

[183] Policy B-10A also provides that Council must consider the impact of the proposed development on adjacent residential uses in the area with regard to provisions for adequate buffering to screen the development from adjacent uses.

[184] The Board has addressed the issue of buffering and screening in other parts of this Decision in relation to the Appellants' concerns respecting noise, odour, emissions, unsightly premises and the height of the proposed plant. Among other things, the Board noted that the development agreement contains specific sections requiring the Developer to take specific actions that effectively serve as a screen or buffer between the proposed plant and adjacent uses and the public road. Specifically, after removing a sufficient

number of trees for the proposed plant, s. 2.2 commits the Developer to "retain the remaining trees on the property as a natural barrier to potential odour and noise emanating from the property". Moreover, s. 2.4 requires that the Developer "maintain the Property in a neat and presentable condition including all structures, driveways, parking areas, loading spaces and any designated outdoor storage areas used for temporary storage of any items". Section 2.5 also requires that any outdoor storage area shall be screened from the public road by an opaque fence not less than six feet in height.

[185] The Board finds that Council has adopted provisions in the development agreement for adequate buffering to screen the proposed plant from adjacent uses. The Board concludes that, in relation to buffering and screening, Council's decision is reasonably consistent with the intent of the MPS.

e) Any matter which may be addressed in the LUB

[186] In its approval of a development agreement for a heavy industrial use in the Business Park, MPS Policy B-10A provides that Council also give consideration to:

> **v) Any matter which may be addressed in the By-Law, e.g. requirements for yards, parking [sic] All other matters enabled under Section 227 of the Municipal Government Act.**

[187] The Appellants raised a number of other concerns that could possibly fall under this description. They identified concerns about unsightly premises, the height of the proposed plant in relation to nearby homes, and the general compatibility of the proposed plant with neighbouring land uses.

[188] In terms of size and height of the subject development, the application provides that two buildings will be constructed. As noted earlier in this Decision, the processing facility is to be about 60 feet x 70 feet, with a portion of the building extending

50 feet in height. A second building to be used for cold storage would be 50 feet x 60 feet in size.

[189] In conducting its review on this point, the Board considers it important to take into account the planning context of the present application. The application is to build and operate a heavy industrial use in the Tusket Business Park. When canvassing other matters that could be addressed under the LUB with respect to the proposed plant, it must be remembered that the proposal is for a heavy industrial use that is not excluded in the Park. Indeed, the Business Park (BP) Zone was created to host both light and heavy industrial uses. A number of light industrial uses that could potentially create nuisances to other properties are permitted as of right in the Park. Also, the MPS provision allowing for the approval of a development agreement respecting a heavy industrial use in the Park provided Council with the latitude to address particular elements of the development which caused concerns to local residents, or other properties in the vicinity.

[190] In that context, there is specific reference in the development agreement to certain matters which would normally be contained in the LUB. Section 4.2 of the development agreement provides:

> **4.2 Variance**
>
> In accordance with Sections 235, 236 and 237 of the Municipal Government Act, the Development Officer may grant a variance in one or more of the following:
>
> a. size or other requirements relating to yards;
> b. lot frontage or lot area, or both
> c. number of parking spaces and loading spaces required;
> d. ground area and height of a structure;
>
> [Appeal Record, p. 15]

[191] Thus, in relation to such matters as lot and yard setback requirements, parking, and the height of the proposed plant, Council considered these matters and even

determined in its approval of the development agreement that such elements could be the subject of a variance issued by the Development Officer.

[192] On the issue of height of the proposed structure, the Board also notes that its impact will be mitigated by the topography of the area, with the lots in the Residential Park being at a lower elevation than the Business Park and the proposed plant. Further, there is a natural buffer of tree vegetation between the two Parks, as well as on the subject lots containing the plant.

[193] Further, the Board is satisfied the development agreement also addresses the Appellants' concern relating to unsightly premises:

> **2.4 Appearance of Property**
>
> The Property Owner shall at all times maintain all structures and services on the Property in good repair and a useable state, and maintain the Property in a neat and presentable condition including all structures, driveways, parking areas, loading spaces and any designated outdoor storage areas used for temporary storage of any items.
>
> **2.5 Outdoor Storage Areas**
>
> Any outdoor area designated as an outdoor storage area shall be screened from the public road by an opaque fence not less than six (6) feet in height.
>
> [Appeal Record, p. 14]

[194] Thus, the Board finds Council did consider other matters that could be addressed in the LUB. As described above, these matters were specifically addressed in the development agreement. In so doing, the Board is satisfied that Council's decision approving the development agreement reasonably complies with the MPS.

IX CONCLUSION

[195] Having reviewed the evidence, the law and the submissions, the Board is satisfied that the Appellants have not discharged the burden of showing, on the balance

of probabilities, that the decision of Argyle Municipal Council approving the development agreement failed to reasonably carry out the intent of the MPS.

[196] Accordingly, the appeal is dismissed.

[197] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 5th day of September, 2019.

Roland A. Deveau