DECISION **2017 NSUARB 31**
M07811

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **CLIFFORD AND LOUISE MACNEIL** from a decision of a Development Officer for the **Cape Breton Regional Municipality** dated December 16, 2016, which refused to approve a plan of subdivision at Lakeland Heights, Groves Point Road, Bras D'Or, Cape Breton Regional Municipality

BEFORE:	David J. Almon, LL.B., Member
APPELLANTS:	**CLIFFORD and LOUISE MACNEIL** Clifford MacNeil
RESPONDENT:	**CAPE BRETON REGIONAL MUNICIPALITY** Demetri Kachafanas, LL.B.
SUBMISSION DATES:	January 21, 2017 February 3, 2017
PRELIMINARY HEARING DATES:	January 12, 2017 February 24, 2017
DECISION DATE:	**March 9, 2017**
DECISION:	**Appeal is dismissed for lack of jurisdiction.**

I INTRODUCTION

[1] This decision arises from a dispute between the parties to a municipal planning appeal, as to the proper forum of the appeal.

[2] The appeal is by Clifford MacNeil and his wife, Louise MacNeil ("Appellants"). They reside on Hillside Boularderie Road, Groves Point, Cape Breton Regional Municipality.

[3] The dispute centres on a subdivision application, made in 1994, and the building of a public road (Neil's Drive) and Lots five through 17, on the property.

[4] In the course of time, stretching approximately 21 years, some work was undertaken by Mr. MacNeil on the project; discussions, correspondence, and telephone calls were had with various government officials, but, clearly, there were periods of inactivity by both parties over the long timeframe.

[5] On December 16, 2016, Sandra Bobyk, Development Officer for the Cape Breton Regional Municipality ("CBRM"/ "Respondent") advised the Appellants that their "application has been deemed refused and the file is now closed."

[6] Mr. MacNeil filed a Notice of Planning Appeal, with a letter attached, with the Nova Scotia Utility and Review Board ("Board") on December 23, 2016, which states:

> Briefly, my plan for subdivision received approval to build a subdivision road from Dept of Transportation (province) prior to CBRM amalgamation. When CBRM took over these approvals or roads, it was understood that it would be grandfathered and no time limit or expiry date was attached to the provincial approval (see letter attached, dated July 22, 1994 from Dept of Transportation, Area Manager, Gerald C. Murray, to Development Officer, Brian Spicer). I've also attached a letter from then solicitor, David Muise of the Municipality of Cape Breton of May 26, 1995 after amalgamation on what the policy was on changes to the sub-division laws after approvals were granted.
>
> The other part of subdivision with respect to lot sizes and on site septic was all controlled by the provincial Dept. of Environment. Once the Dept Engineer assessed the property, the information was gives to the surveyor to lay out the subdivision. Once the survey of the lots was completed and received approval from Dept of Environment it was considered lifetime with no expiry date. See letter of December 01, 2015 from Inspector Specialist, Michael Florian, NS Dept of Environment, confirming same to Development Officer, Sandra

> Bobyk. Mr. Florian is referring to attached letter dated July 20, 1994 from the Dept. Engineer, Bill Bailey.
>
> I refer to the attached letter from Malcolm Gillis, CBRM Director of Planning and Development, Dec 08, 2015. It is clear to him to his legal department that no time limit was attached to my approvals nor do they seem certain as to whether they can even impose one. A quote from the letter says, "based on their research." However, they did impose one and it resulted in the closing of my files, even with other Departments suggesting otherwise.
> …
>
> [Exhibit M-1, p.7]

[7] In his letter, attached to the Notice of Appeal, Mr. MacNeil wrote:

> We are not developers, only a family trying to utilize property which has been in the family since 1864.
>
> [Exhibit M-1, p.7]

[8] Following the first preliminary hearing on January 12, 2017, setting out the timeline, the date of the hearing, the restrictions and the powers of the Board on appeal, Counsel for the Respondent, Demetri Kachafanas, filed with the Board, a brief, advising that the appeal does not raise any issues that are within the jurisdiction of the Board and are, more properly, within the jurisdiction of the Supreme Court of Nova Scotia.

[9] The Appellants, in a letter to the Board, dated February 3, 2017, addressed the Respondent's Brief, arguing that it was:

> …within the Board's jurisdiction to decide if the combined actions of the CBRM's Legal and Planning departments resulted in an unreasonable decision of the planning office. Their actions did not reasonably carry out the intent of the Municipal Planning Strategy ("MPS").

[10] For the reasons discussed in the decision, the Board is persuaded by Mr. Kachafanas' submissions and finds that this appeal should be dismissed for lack of jurisdiction, as the Appellants have failed to raise matters which are within the Board's jurisdiction to consider as required by s.250(3) of the *Municipal Government Act,* S.N.S. 1998, c. 18 as amended ("*MGA*"). There may be another legal remedy through a *certiorari* application to the Supreme Court, although the Board makes no finding on this point.

II FACTS

[11] Given the rather unusual circumstances of this matter, which can be best described as a saga, the Board will recount the 21-year-long chain of events for subdivision approval, and how this appeal came before it.

[12] In doing so, the Board compiled a narrative from a chronology of various milestones, culled from references in the Appeal Record [Exhibit M-2], the Appellants' evidence [Exhibit M-6], and responses provided by the Appellants to the Respondent's position on standing.

[13] It would be accurate to state that a great deal of work undertaken on the application first occurred, primarily, in 1994 and 1995, with intermittent work in the years 1999, 2000, 2007 and 2010, with activity picking up again in 2015. However, there have been, the Board finds, literally years, where, according to the evidence before the Board, the Appellants did nothing.

[14] In 1994, the Cape Breton Metro Planning Commission ("Metro Planning") was the government body charged with dealing with planning matters and employing development officers to make planning decisions. Brian Spicer, Development Officer, took charge of the file.

[15] Mr. MacNeil alleged that he was stopped from proceeding in 1994 "after a new paving law was implemented" [Exhibit M-2, p.26]. While he was told by the Municipality he "would have to pave the road," David Muise, then Clerk/Solicitor for the Municipality of the County of Cape Breton (now CBRM), eventually took a contrary opinion [Exhibit M-2, p.26].

[16] In July 1994, Mr. MacNeil made his application for subdivision approval. Mr. MacNeil alleged that he, Brian Spicer, William Bailey, then Regional Health Engineer, Department of Environment and Gerald Murray, P.Eng., then Area Management, Department of Transportation and Communications "reached an agreement on how to deal with those of us who are being caught in the process of subdividing lands weeks before the paving by-law was implemented" [Exhibit M-2, p.27]. Mr. MacNeil claimed that Mr. Spicer "never changed nor backed away from his agreement of 1994" [Exhibit M-2, p.27].

[17] The alleged agreement which Mr. MacNeil claims to be relying upon was with the Department of Transportation, but also involved representation from the Department of Environment and CBRM. It is, in the judgment of the Board, even if one were to accept Mr. MacNeil's version of it, an amorphous arrangement.

[18] Mr. MacNeil claims, at a meeting in 1994, that he was "advised" (he does not say by whom) that he should:

> …prepare a subdivision plan for all the property we wished to subdivide (immediately) and the Department of Environment would grant final approval for the lots.
>
> [Exhibit M-2, p.27]

As well, he further claimed that the Department of Transportation advised that:

> …we could develop the roads in stages of a minimum of 500 feet at one time as we sold the lots.
>
> [Exhibit M-2, p.27]

[19] The Board notes by letter dated July 20, 1994, from William Bailey to Brian Spicer:

> … lots 2 to 17 are approved by the Department of the Environment for the installation of an on-site sewage disposal system for single family detached residential use. Subject to the conditions…
>
> [Exhibit M-2, p.17]

[20] On July 22, 1994, in a letter from Gerald Murray, P.Eng., to Brian Spicer, he advised:

> Re: Subdivision Approval
> Lands of Clifford MacNeil
> Lakeland Heights – Groves Point
>
> Tentative approval is herewith granted for the construction of a subdivision road on lands of Clifford MacNeil…
>
> [Exhibit M-2, p.18]

[21] Referring to this letter in his December 22, 2016, letter to the Board [Exhibit M-2, p.7], Mr. MacNeil wrote that "no time limit or expiry date was attached to the Provincial approval," referencing Mr. Murray's advice that "when the road is constructed to meet our subdivision standards, it will be accepted for listing…" [Exhibit M-2, p.18].

[22] On July 28, 1994, Brian Spicer wrote the Appellants advising that the "engineered storm drainage plans" were required to be submitted for approval, as well as the required 5% recreation fee to be paid in cash [Exhibit M-2, p.16].

[23] The Board notes that this matter was raised by Sandra Bobyk, Assistant Development Officer, Planning Department, CBRM, in her December 16, 2015, letter to the Appellants, and some 20 years after the initial request [Exhibit M-2, p. 4]. A review of the Appeal Record and correspondence, by the Board, appears to indicate that Mr. MacNeil never did do the items stated as requirements in the July 28, 1994, letter.

[24] On May 26, 1995, David Muise wrote Mr. MacNeil regarding the Municipality's requirement that developers pave roads when developing new subdivisions, assuring the Appellants that if their application was made "to Metro Planning and received preliminary approval prior to the date of implementation of the paving policy then you will not be required to pave the streets in the proposed subdivision" [Exhibit M-2. p.9].

[25] The Board notes that there is no reference in the letter to the date the policy was adopted, or whether Mr. Muise considered that Mr. MacNeil's application meets those date requirements.

[26] The *Cape Breton Regional Municipality Act,* the enabling legislation that created CBRM was implemented on August 1, 1995.

[27] Mr. MacNeil advised that, in 1999, work was stopped on the final step of the first stage of the subdivision road:

> …because of the Engineering Department and their specs for gravel. This in turn, delayed things until the following year for takeover of the road.
>
> [Exhibit M-2, p.26]

[28] On January 4, 1999, the *Cape Breton Regional Municipality Act* was repealed and provisions incorporated in the new *MGA.*

[29] According to Mr. MacNeil, Phase 1 - the 500 feet of road - was turned over to the Department of Transportation in the year 2000 [Exhibit M-2, p.26].

[30] The Board notes that no documents dated in or around 2000 have been filed with the Board with respect to this alleged event, either by Mr. MacNeil or by CBRM.

[31] Also, according to Mr. MacNeil, the lots "took until 2007 to sell" [Exhibit M-2, p.27].

[32] The Board notes that there are no documents produced in or around 2007, filed with the Board with respect to this alleged event.

[33] Mr. MacNeil claims that Mr. Spicer "tried on several occasions to straighten things out with the Department of Engineering "between 2010 and 2015" and "to get things moving again." He said that this resulted in "two phone conversations with the Department of Engineering, assuring me that they would be able to do the inspections" [Exhibit M-2, p.27].

[34] The Board notes, again, that there were no dates or even years, given by Mr. MacNeil for the alleged conversations.

[35] In 2010 (as recounted by Mr. MacNeil, in a December 13, 2015, letter to Malcolm Gillis), “Phase 2 of the subdivision road was ready for grading and gravel.” Mr. MacNeil says he called the Department of Engineering to request a grubbing inspection. He says the receptionist he spoke to was “uncooperative and adamant that my subdivision plan has expired.” The Board concludes, according to Mr. MacNeil’s own evidence, that he did nothing further to pursue this matter with someone, other than the receptionist in 2010, in the ensuing years through to 2015 [Exhibit M-2, p.26].

[36] In the summer of 2015, Development Officers, Brian Spicer and Sandra Bobyk, met with Mr. MacNeil [Exhibit M-2, p.12].

[37] Also, sometime in 2015, according to Mr. MacNeil, Mr. Gillis told him that he required “a new approval from the Department of Environment” but that the Department informed Mr. MacNeil that “this is not necessary” and that they have sent a memo to the Development Officer to clear up the issue [Exhibit M-2, p.26].

[38] On April 22, 2015, in a letter from Mr. MacNeil to Malcolm Gillis, Director of Planning, the Appellants referenced a meeting he had with Mr. Gillis the previous year where Mr. Gillis had raised a couple of concerns, one being the length of time since the approval of the plan, and the other whether the Appellants’ application should have to fall under the new regulations and pave the road. He also expressed concern that:

> …it is unfair for you and your staff to sit in your offices and say that I’ve done nothing for twenty years. Whereas out here in the real world, market conditions dictate everything, including a shoe string budget.
>
> [Exhibit M-6, p.6]

[39] He continued:

> Considering all this, I believe I am proceeding in a reasonable time frame. I can't say that for your department.
>
> [Exhibit M-6, p.6]

[40] On June 26, 2015, Sandra Bobyk wrote to Mr. MacNeil confirming an upcoming meeting slated for July 6, 2015, where a number of outstanding items were to be discussed including current approval from the Department of the Environment with regard to on-site septic; the need for additional survey plans to comply with the current land registry system; timelines for completion of construction and road takeover by CBRM; and the possible requirement of additional engineering drawings [Exhibit M-6, p.10].

[41] On July 6, 2015, Ms. Bobyk met with Mr. MacNeil to discuss the application [Exhibit M-2, p.4].

[42] On November 24, 2015, Sandra Bobyk sent a note attached to a copy of her June 26, 2015 letter, to Mr. MacNeil inquiring "we have not heard a word from you since our meeting in July. Please phone me asap" [Exhibit M-6, p.10]. In response, in a letter dated November 28, 2015, Mr. MacNeil advised that "the answer is that there has been nothing to report until now" [Exhibit M-6, p.8].

[43] He also wrote that the Legal Department ruling said that he could continue with his subdivision by the 1994 rules for which he was approved, noting:

> I am still waiting for a copy of that ruling adding that I waited years for that ruling and I should have received it in writing. I'm still waiting for it. I will be requesting a copy from Malcolm Gillis or the Legal Department.
>
> [Exhibit M-6, p. 8]

[44] A number of other items were discussed by Mr. MacNeil including an inspection on the road and an outline from the CBRM engineers as to what was required to finish it. He noted that:

> Once I receive the engineer's report the contractor can give me a price and as well, the timeline which is also something you were looking for. Not that there was a timeline in my approval! Then, I will be able to decide how much of the road I am able to complete at once. So this was one of the last things that Brian Spicer requested at that same, July meeting.
>
> [Exhibit M-6, p.9]

[45] Mr. MacNeil added:

> I would need to take this year, at least, to get paper work in place and to sort out these new requests that you've placed on me. The winter will be a good time for that, as everyone has more time.
>
> [Exhibit M-6, p.9]

[46] On November 28, 2015, Mr. MacNeil wrote to Mr. Gillis [Exhibit M-2, p.4].

[47] On December 1, 2015, CBRM Engineering Services wrote to Sandra Bobyk. She confirmed with Mr. MacNeil that:

> The plan and profile for the proposed Neil's Drive, as submitted in 1994, are accepted and approved by CBRM Engineering Services; therefore, the road shall be built in accordance with this design.
>
> [Exhibit M-2, p. 4]

[48] On December 1, 2015, Michael Florian, Inspector, N.S. Environment, confirmed to Sandra Bobyk that:

> …any lots recommended for approval under previous legislation regarding development…are applicable today as being previously recommended by the department having authorized at that time.
>
> The Department of Health had the authority at that time and this development would still be considered recommended for development today.
>
> Please apply that correspondence dated July 20, 1994, as the response to complete this Development approval (indecipherable) today."
>
> [Exhibit M-2, p.12]

[49] The Board concludes that Mr. Florian was saying that, in his opinion, the 1994 approval remained in effect [Exhibit M-2, p.12].

[50] On December 8, 2015, Malcolm Gillis wrote Mr. MacNeil advising him that:

> She (Sandra Bobyk) will be imposing a time limit that we feel confident will be reasonable considering it has now been more than 20 years since the date of the above-referenced letter from Development Officer Brian Spicer.

[51] In reference to "a legal ruling Mr. MacNeil was seeking" Mr. Gillis advised him that:

> …what I was seeking was a legal opinion from our Legal Department. I received that in the form of an inter-office memo. I do not have the authority to circulate this outside the CBRM administration, but we are able to provide you with the gist of the opinion and I understand Development Officers Brian Spicer and Sandra Bobyk did that during their meeting with you back in the summer.
>
> [Exhibit M-2, p.12]

[52] In the same letter, Mr. Gillis noted that:

> …although there was no time limit imposed on you or the development officer in the enabling legislation, i.e., the *Municipal Government Act*, or the Subdivision By-Law of the CBRM, it is our Legal Department's opinion (based on the research they conducted) that the development officer should have imposed his own time limit on you that was reasonable. He obviously didn't.

[53] Mr. Gillis further advised:

> So we are obliged to continue to process your application in compliance with all of the pertinent regulatory provisions at the time the Development Officer sent you his letter dated July 28th, 1994 promising "to grant final approval" of your submitted plan of subdivision if you did what he asked. Because he didn't impose a date defining when he would expect you should do what he asked, we are essentially stuck in time back to 1994.

[54] He also forewarned the Appellants to expect a letter from Sandra Bobyk:

> Explaining just what it is our Engineering and Public Works Department will be expecting to ensure the proposed public street/road is in compliance with the specifications of the Traffic Authority at the time (i.e. the Nova Scotia Department of Transportation and Infrastructure Renewal).
>
> [Exhibit M-2, p.13]

[55] This appears to be referring to whatever standards the then Department of Highways would have had in 1994.

[56] The Board has no evidence before it as to whether, or how the Department's requirements with respect to highway development – particularly with respect to critical matters relating to safety – may have changed. The Gillis letter seems to simply assume

that compliance with the 1994 requirements would be satisfactory for the development of a new subdivision in 2015, or even in decades to come.

[57] The Board also considers that it has no information before it to indicate that such approval would, as a matter of course, be forthcoming from that Department. If such was the case, one might then be contemplating a situation in which standards which were considered acceptably safe for subdivision roads in 1994, but no longer are so considered in 2016, must always be accepted, just because a tentative approval was provided in 1994; it could mean Mr. MacNeil has the right to delay not just for a year, but for decades before finally carrying out a development.

[58] The Board notes that Mr. MacNeil firmly maintains his belief about there being a time limit:

> I refer to the attached letter from Malcolm Gillis, CBRM Director of Planning and Development, December 08, 2015. It is clear to him [Gillis] and to his legal department that no time limit was attached to my approvals nor do they seem certain as to whether they can even impose one.
>
> [Exhibit M-1, p.7]

[59] In the December 13, 2015, letter, Mr. MacNeil claimed in 2015, 21 years after his alleged “agreement” (which he says was with the Department of Transportation but also had Municipality representation) as to how subdivision of his land should occur, that he, Mr. MacNeil, “was proceeding at a reasonable pace in accordance with the real estate market and in line with our 1994 agreement with the Department of Transportation” [Exhibit M-2, p.27].

[60] In the same letter, Mr. MacNeil makes references to having his “own legal advisor.” He is critical of the opinions he has received from the Municipality in its various departments over the years, claiming the information he has been supplied with is “always incorrect and caused years of delay.”

[61] The Board concludes that there is nothing in the evidence filed with the Board, which indicates that Mr. MacNeil ever involved a lawyer to act on his behalf, much less a lawyer who has provided him with advice contrary to the "incorrect advice" which he claims to have received from various of the Municipality's departments over the years. In fact, Mr. MacNeil confirmed, at the second preliminary hearing, that he did not have a legal advisor during the application process.

[62] The Board notes that Mr. MacNeil alleges that one of the municipal departments took an incorrect position in 1994 in relation to a new paving by-law but then says it was a "legal opinion by Mr. David Muise" which corrected that. Mr. Muise was not Mr. MacNeil's "legal advisor", but was a lawyer in the employ of the Municipality [Exhibit M-2, p.26].

[63] In the same letter, he wrote:

> Phase 2 was ready for completion (gravel) in 2010. If there was a time limit put on anyone, it should have been on the Dept. of Engineering contacted in 2010 for inspections and arrive at the end of 2015.

[64] The Board considers that these two sentences are, as much as any other in the evidence before it, illustrative of Mr. MacNeil's remarkable approach to development of his property. According to his own evidence in 2010, he contacted the Municipality's Department of Engineering to request a grubbing inspection. Faced with a receptionist he described as "uncooperative," who tells him that his "subdivision plan has expired," it seems – again, according to Mr. MacNeil's own evidence – that he simply does nothing further for five years. In December 2015, "someone from Engineering arrives" to do an inspection. His five years of inactivity is, as maintained by Mr. MacNeil, all the Municipality's fault, claiming "I can't get the last five years back" [Exhibit M-6, p. 27].

[65] If, indeed, he felt entitled to an inspection occurring in 2010, the Board finds inexplicable the failure of Mr. MacNeil to take appropriate action in 2010 to enforce the rights he claimed to have.

[66] In a letter to Mr. MacNeil dated December 16, 2015, Ms. Bobyk says that in the meeting of July 6, 2015, CBRM said it would "endorse and register your subdivision application as applied for in 1994, once all outstanding issues are complied with" [Exhibit M-2, p.4].

[67] In the same letter, Ms. Bobyk confirmed that the correspondence received from the Provincial Department of Health dated July 20, 1994, pertaining to approval for on-site septic will be applied to complete the subdivision application "as I have correspondence from Mr. Michael Florian, Inspector with Nova Scotia Environment, stating same" [Exhibit M-2, p.5].

[68] As well, Ms. Bobyk stated that "the regulations that were in effect in 1994 will be used for endorsement of this plan" [Exhibit M-2, p.4].

[69] Again, in the same letter, Ms. Bobyk accepts the "plan and profile for the proposed Neil's Drive as submitted in 1994," for the purposes of her letter of 16 December 2015, saying that "the road shall be built in accordance with this design… *copy of memo dated Dec 1st, 2015, from CBRM Eng. Services is attached."*

[70] Ms. Bobyk stated that:

> ... as this application has been on file for the past 21.5 years, I as Development Officer for the CBRM, am hereby granting a one-year extension to this file to assist you in the completion of your application. This one-year extension will end on December 16, 2016.

[71] She added:

> Should our office not be in receipt of the above-noted outstanding items, in their entirety, by Dec. 16, 2016, the application will be deemed refused and the file will be closed. No further extension will be granted.
>
> [Exhibit M-2, p. 5]

[72] The letter also required the deeding of the new street or road and any required easements and road reserves to CBRM, once construction is completed and approved.

[73] The Board observes in the same letter, in reference to the requirement for engineered storm drainage plans to be submitted for approval, a handwritten notation declaring “submitted on Jan.27, 2016” [Exhibit M-2, p.5].

[74] On December 16, 2016, one year later, Ms. Bobyk wrote the Appellants referring to her letter of December 16, 2015, refusing his application, closing the file and telling him he can appeal to the Board.

[75] In his December 22, 2016, letter to the Board filed with the Notice of Appeal, Mr. MacNeil makes reference to the imposition of a time limit noting:

> When CBRM took over these approvals of roads, it was understood that it would be grandfathered and no time limit or expiry date was attached to the Provincial approval. …
>
> [Exhibit M-1, p.7]

Mr. MacNeil also refers to the matter of lot sizes and on-site septic and “controlled by the Provincial Department of Environment” and that the approval “was considered a lifetime with no expiry date,” referring to the Florian letter of December 1, 2015, [Exhibit M-2, p.10] and the Bailey letter of July 20, 1994, [Exhibit M-2, p.17].

III ANALYSIS AND FINDINGS

Does the Notice of Appeal raise a matter within the jurisdiction of the Board?

[76] Following the preliminary hearing, the Board received submissions from CBRM stating that it was their position that:

> … this appeal does not raise any issues that are within the jurisdiction of the Utility and Review Board. The issues raised by this appeal are properly within the jurisdiction of the Supreme Court of Nova Scotia.

[77] In support of his argument, Mr. Kachafanas cites *Hillcrest Development Company Limited v. Kentville (Town),* 2008 NSUARB 123. He states:

> It is sufficient to state that the Board does not have the power to determine if the procedure of reaching a planning decision of the Town Council or its Development Officer meets the requirements of the *Act.* One could argue that whether there is a valid decision before the Board is a necessary and ancillary legal question the Board must consider in a planning appeal. Necessary and ancillary legal questions are within an administrative board's powers as determined by the Supreme Court of Canada in *Ontario v. 974649 Ontario Inc.,* 2001 SCC 81 [2001] 3 S.C.R. 575, at paragraph 70. However, the Nova Scotia Court of Appeal…has decided the Board's jurisdiction does not include determining whether the procedure of the development officer's decision complies with the provisions of the *Act, Maskine v. Halifax County* (1992), 118 NSR 2d (2d) 356, (NSCA et al.). The Court has decided these issues must go before the Court and cannot be determined by the Board.

[78] In further submissions at the second preliminary hearing Mr. Kachafanas reiterated his position when he argued:

> It's a decision of the Development Officer, who I guess made a decision that the Appellants failed to fulfill a number of conditions under…that he was supposed to and I guess deny the application on that basis. I think it's more of an argument for a court that the Development Officer's decision to do that doesn't apply with the legislation. He is saying that there are no timelines, but that doesn't really talk to the intent of the Municipal Planning Strategy or the Subdivision By-Law. I don't think it's a matter for the Board to hear his arguments, I understand his arguments, but they are, I just think they are in the wrong forum. The Board's jurisdiction, as you state under s.251 is very narrow and it is, you know, it's the intent of the Municipal Planning Strategy or the provisions of the By-Law and he doesn't raise any of those in his appeal, in our position.
>
> [Hearing Sound File, February 24, 2017, Track 1, 3:31]

[79] Mr. MacNeil, unrepresented by Counsel, disagrees and in his response to CBRM's brief he argued:

> We don't claim to understand all of the legalities of the Municipal Planning Strategy. However, the intent of the Municipal Planning Strategy we believe, would not be to impede or unreasonably kill a subdivision which would provide economic growth and improvement for the CBRM. This, in fact, was the case, even though, we did everything right and over 20 years of development, were always in compliance. Additionally, we hired all the proper professionals and abided by all that was asked of us, at great expense. So, yes, hopefully it's within the Board's jurisdiction to decide if the combined actions of the CBRM's legal and planning departments resulted in an unreasonable decision of the planning officer. Their actions did not reasonably carry out the intent of the Municipal Planning Strategy.
>
> [Exhibit M-6, p. 2]

[80] Under Section 250(3) of the *MGA,* the grounds for appealing a decision are limited:

> **Restrictions on appeals**
> **250**
> …
> (3) An applicant may only appeal a refusal to approve a concept plan or a tentative or final plan of subdivision on the grounds that the decision of the development officer does not comply with the subdivision by-law.

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

> **Powers of Board on 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.

[82] The NSCA's decision in *Ghosn (Re)*, 2016 NSCA 90, referred to the Board finding, stating:

> [49] The Board concluded by re-emphasizing its restrictive appellate mandate…
>
> [169] The Board's authority in appeals such as this is strictly limited by the statute: it must not allow the appeal unless it determines that the Development Officer's decision "conflicts with" or "does not comply with" the applicable provisions of the Land-Use By-Law.
> …
>
> [175] Ultimately, the Board concluded that Appellants have failed to establish, on the balance of probabilities, and using a standard of review akin to correctness (as established by the Court of Appeal in *Anglican Diocesan* and affirmed in *Royal Environmental*), that the Development Officer's decision conflicts with or does not comply with the provisions of the LUB.

[83] Thus, the Board must not interfere with the decision of a development officer unless it determines that the decision of a development officer, in refusing the application, conflicts with the Subdivision By-Law.

[84] In 1994, the Appellants set in motion plans to utilize the property, by developing a subdivision – over a period of more than 21 years – dating from the initial application for a subdivision approval.

[85] Work began in earnest that year, following Mr. MacNeil's request for subdivision approval. As part of the application there were certain requirements to be fulfilled by the Appellants relating to such things as the necessary subdivision roads and on-site septic.

[86] While the Development Officer was prepared to grant "final approval" of the subdivision plan in 1994, Mr. MacNeil was advised that endorsement of that approval would not take place until:

> … securities are received for the 5% recreation requirement, engineered storm drainage plans are received, and the roads are excepted for listing by the Department of Transportation.
>
> [Exhibit M-2, p.16]

[87] After 1995, work was intermittent, occurring only in the years 1997, 2000, 2007 and 2010; then nothing until 2015, with Mr. MacNeil placing blame on CBRM for "years of delay" and insistence that no time limit was attached to his approval.

[88] At a meeting with Sandra Bobyk on July 6, 2015, matters for discussion included:

> Outstanding items, in addition to Brian Spicer's letter to you of July 28, 1994 (copy enclosed), will include, but not limited to, the following:
>
> • Current approval from the Dept. of Environment with regard to on-site septic.
>
> • Current approval from the NSTIR for the intersection of Neil's Drive (as proposed street name) with the provincial road being, Lakeland Drive – CBRM street.
>
> • Additional survey plans to comply with the current Land Registry System.
>
> • Time lines for completion of construction and road take over by the CBRM.
>
> • The possible requirement of additional engineering drawings as a result of responsibility of Road take-over has switched from the Province to the Municipality. The CBRM does not

> have the drawings submitted in 1994 as they were sent to the provincial Dept. of Transportation. We will inquire with NSTIR to determine if copies are available.
>
> [Exhibit M-6, p.10]

[89] This correspondence was followed by a letter from Mr. Gillis to Mr. MacNeil warning him that Sandra Bobyk would be imposing a time limit, while continuing to process his application in compliance with all the relevant regulatory provisions, as at 1994.

[90] Ms. Bobyk followed up this letter advising the Appellants that "the CBRM is prepared to endorse and register your subdivision application as applied for in 1994 once all outstanding issues are complied with" [Emphasis added].

[91] While Ms. Bobyk confirmed a number of items, she also outlined the outstanding items which needed to be complied with, prior to the endorsement and registration of the plan, including:

- The construction of the road (Neil's Drive) shall be completed and approved by CBRM Eng. Services in accordance with the survey plan and Eng. design drawings as applied for in 1994. Please be in contact with Billy Wadden, CBRM Eng. Services for all required inspections. Billy may be reached at 902-563-0830, *Copy of memo, dated Nov. 27th 2015, from CBRM Eng. Services are attached for your files.*

- Engineered storm drainage plans are required to be submitted for approval, as requested in a letter from Brian Spicer, dated July 28th, 1994. *Copy of letter attached along with a current memo from CBRM Eng. Services for your files.*

- The required 5% recreation fee in cash, as passed by County Council at the September 13th 1994 council meeting. *Copy of letter, dated Sept. 15th, 1994, attached for your files.*

- Revised survey plans, as required by the Provincial Land Registration Office, incorporating the required changes as noted in their pre-approval comments. *Copy of the pre-approved sheet, dated Dec 11th 2015, is attached for your files.* You may wish to contact Ken Cormier, NSLS for your revised plans as he has taken over Russell MacKinnon's files.

- Once construction is complete and approved by CBRM Eng. Services, a deed duly executed (with the proper N.S. Land Registry Forms) conveying to the CBRM the title of the new street/road (Neil's Drive) and any required easements and road reserves.

- As-built drawings for a new road along with final compaction tests.

[Exhibit M-2, p.5]

[92] She then added:

> … as this application has been on file for the past 21.5 years, I, as Development Officer for the CBRM, am hereby granting one-year extension of this file to assist you in the completion of your application. This one-year extension will end December 16, 2016.
>
> Should our office not be in receipt of the above-noted outstanding items in their entirety, by December 16, 2016, the application will be deemed refused and the file will be closed. No further extension will be granted. [Emphasis added]

[93] In a letter dated December 16, 2016, Ms. Bobyk advised the Appellants of the following:

> To date, we have not received the information required in order to approve and endorse your subdivision application. For this reason, your application has been deemed refused and the file is now closed.

[94] Mr. MacNeil argues that it is within the Board's jurisdiction:

> … to decide if the combined actions of the CBRM's legal and planning departments resulted in an unreasonable decision by the planning office. Their actions did not reasonably carry out the intent of the MPS.

[95] Mr. Kachafanas relies upon the *Hillcrest* case, a Board decision, in arguing that the Board does not have power to determine if the procedure of reaching a planning decision of the Development Officer meets the requirements of the *MGA.*

[96] The Board's limited jurisdiction in planning matters has been confirmed by the Nova Scotia Court of Appeal, which is considered the standard by which this Board must review a council's or development officer's decision. The Board's mandate is restricted to the jurisdiction conferred upon it by the *MGA* as noted in *Kynock v. Bennett et al* (1994) 131 NSR 2d 334 (CA); *Heritage Trust of Nova Scotia et al v. Nova Scotia Utility and Review Board et al* (1994) 128 NSR (2d)(5)(CA); *Mahone Bay Heritage and Cultural Society v. 3012543 Nova Scotia Limited* (2000), 186 NSR 2d 201 (CA); and *Kings (County) v. Lutz* (2003) NSCA 26.

[97] The Nova Scotia Court of Appeal has interpreted the very limiting provisions of the Board's powers within the *MGA* and has decided the Board's jurisdiction should not include determining whether the procedure of the development officer's decision complies with the provisions of the *MGA.*

[98] Mr. MacNeil is alleging that the actions of the legal and planning department resulted in an unreasonable decision by the planning office. Their actions, he argued, did not reasonably carry out the intent of the Municipal Planning Strategy.

[99] Mr. Kachafanas submitted that there is no suggestion in the Appellants' letter that they had, in fact, fulfilled the required conditions, such that the Development Officer should have approved the application.

[100] The Appellants, in this case, are arguing that because of the various approvals received in 1994, CBRM cannot reject their application and must allow it to remain open indefinitely, the Board finds, until they finally get around to complying with the requirements set by the Municipality.

[101] Clearly, the Development Officer's decision was based on the Appellants failure to fulfill a number of conditions for endorsement of approval under the pertinent regulatory provisions in effect in 1994.

[102] Moreover, CBRM gave the Appellants a second chance – a full year long - from December 2015 to December 2016, to fulfill the conditions. Again, the Appellants failed to take action to satisfy those requirements.

[103] Having reviewed the evidence, and the parties' submissions, the Board can find nothing in the Appellants' Notice of Appeal which refers to a matter over which the

Board can properly assert jurisdiction under the *MGA.* This is not an issue of compliance with the Subdivision By-Law or the intent of the Municipal Planning Strategy.

[104] In the view of the Board, if there are allegations by the Appellants that the combined actions of the CBRM's Legal and Planning Departments resulted in an unreasonable decision by the Development Officer, the only remedy for such an alleged procedural error may be by means of a judicial review, i.e., through recourse to the Supreme Court, not to this Board.

[105] The Board finds that this appeal should be dismissed for lack of jurisdiction.

IV SUMMARY OF BOARD FINDINGS

[106] This matter involves a subdivision application first begun in 1994, and which was intermittently worked on over a period of 21 years, and, ultimately, refused by the Development Officer.

[107] In this Decision, the Board dismisses an appeal of a CBRM's Development Officer's refusal of an application for subdivision approval.

[108] The Board's authority in appeals such as this is strictly limited by statute: it must not allow the appeal unless it determines that the Development Officer's decision "conflicts with" or "does not comply with" the applicable provisions of the Land-Use By-Law.

[109] The grounds for appeal, as set out in the Appellants' Notice of Appeal, with attached letter, are that the Development Officer could not reject their application because a previous approval had been granted in 1994, which remained binding on the Development Officer.

[110] This is not an issue of compliance with the Subdivision By-Law or the intent of the Municipal Planning Strategy but, rather, whether the Appellants had accrued any vested rights under the *Planning Act* in 1994, that would survive the repeal of the *Planning Act* and its subsequent replacement by the *MGA*, thus preventing the Development Officer from issuing a valid rejection of their application.

[111] The Board finds that the Appellants have failed to raise matters which are within the Board's jurisdiction to consider as required by s.250(3) of the *MGA.*

[112] There may be another legal avenue to pursue a remedy through a judicial review, by means of an application to the Supreme Court, although the Board makes no finding on this point.

[113] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 9th day of March, 2017.

David J. Almon