DECISION **2017 NSUARB 58**
M07031

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF AN APPEAL by **RUSSELL BRET MINER AND MARJORIE JEAN MINER** to the approval of Council to amend the Land-Use By-Law map amendment to rezone 410 Ben Jackson Road, Lockhartville, from Forestry (F1) to Highway Commercial (C11) - Municipality of the County of Kings and to amend the C11 Zone

BEFORE:	Wayne D. Cochrane, Q.C., Member
APPELLANTS:	**RUSSELL BRET MINER and MARJORIE JEAN MINER** Douglas Lutz, LL.B.
RESPONDENT:	**MUNICIPALITY OF THE COUNTY OF KINGS** Jonathan G. Cuming, LL.B.
APPLICANT:	**GLOOSCAP FIRST NATION ECONOMIC DEVELOPMENT CORPORATION** Jason T. Cooke, LL.B. Keith D. Lehwald, Articled Clerk
HEARING DATES:	October 20, 2015; February 24, 2017
SUBMISSION DATES:	October 13, 2015; February 9, 10, 13, 2017
SITE VISIT DATE:	**April 6, 2017**
DECISION DATE:	**April 25, 2017**
DECISION:	**The Board dismisses the appeal, upholding the decision of County Council to re-zone property from Forestry F1 to Commercial C11, and to amend uses possible within the C11 zone.**

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I INTRODUCTION

[1] This appeal to the Nova Scotia Utility and Review Board relates to a developer's proposal to build a large highway service centre, catering to the needs of travelling highway motorists and tourists, near a major interchange on a high-speed divided highway.

[2] The centre is proposed to develop in three phases. Under the present plans, Phase I would include a gas station with coffee shop, convenience store, car wash, and two fast food restaurants; Phases II and III would include another restaurant, a motel, leased commercial space, and other facilities, including a Mi'kmaq cultural centre.

[3] The Municipality of the County of Kings, through its Municipal Council, approved the project. It granted the developer's request to re-zone the subject property from Forestry F1 to Highway Commercial C11, which specifically relates to highway service centres. Council also amended the C11 zone itself to somewhat expand the uses possible in that zone, in part to accommodate the developer's plans.

[4] The owners of a small farm across the road from the site of the proposed development appealed Council's decision. They indicated that a principal concern was that the development, which will necessarily involve such things as increased traffic, lights, and noise, will not be compatible with how they have lived, and hope to continue to live, in the family farmhouse.

[5] The Appellants appealed on multiple grounds, and, in this decision, the Board dismisses all their claims.

[6] The Board found, first, that the Appellants failed to show that Council's decisions to re-zone the subject property from F1 to C11, and to expand the uses possible in the C11 zone did not reasonably carry out the intent of the MPS.

[7] The MPS and LUB specifically refer to the possibility of developments of this type occurring at interchanges on the highway. The MPS and LUB expressly and impliedly recognize that there may be incompatibility between the highway service centre uses made possible by the C11 zone and existing uses in the F1 zone, including residential ones such as the Appellants' house.

[8] Council's staff planner herself had recognized there would be incompatibility between the developer's proposal and existing residential uses, and informed Council of this. However, under the County MPS, residential uses do not enjoy primacy in the Forestry F1 zone, which, the Board finds, has a greater focus on resource and commercial activity.

[9] Under the MPS, Council is required to, among other things, satisfy itself that any incompatibility resulting from rezoning the property from F1 to C11 would not be inappropriate in the circumstances.

[10] In the Board's judgment, the Appellants did not succeed in establishing on the balance of probabilities that Council's decision to re-zone from F1 to C11, or to expand the uses possible in C11, failed to carry out the intent of the MPS. With respect to the re-zoning, the Board, after some hesitation, decided to uphold Council's decision to re-zone the entire property, not just the property needed for Phase I.

[11] The Appellants also claimed that Council's approval was not reasonably consistent with the Provincial Statement of Interest in Agricultural Lands. The Board

likewise dismissed this ground of appeal, although the Board found it unnecessary to make a finding as to whether people like the Appellants actually do, or do not, have standing to raise such a claim in the first place.

[12] In dismissing the Appellants' claim with respect to the Provincial Statement, the Board found, among other things, that the subject property was not in active agricultural use. Until the developer bought it, it had been almost completely timbered. The subject property, like the Appellants', was not zoned agricultural, but in a designated forestry district, and zoned Forestry F1.

[13] Further, the land had limited potential for agriculture, because of a number of factors, including that most of the property has significant slopes, or has drainage problems, or has problems with soil condition (including shallow rooting depths), or a combination of some or all of these.

[14] With respect to the suggestion by one of the Appellants' expert witnesses that there might be some potential to use the land for an orchard or vineyard, the Board was not persuaded that this would be a viable use of the land. Apart from the nature of the land itself, the subject property is not particularly large (only about 27 acres), and is wedged between the divided highway, the interchange's access ramps, and a provincial road.

[15] In summary, applying the standards which the *Municipal Government Act* requires to be met for an appeal of this type to succeed, the Board resolved the three major issues in this appeal as follows:

- Have the Appellants established on the balance of probabilities that Council's decision to rezone the subject property from F1 to C11 fails to

reasonably carry out the intent of the MPS? The Board answers this question as “no.”

- Have the Appellants established on the balance of probabilities that the decision of Council to expand the scope of Zone C11 to include additional uses fails to carry out the intent of the MPS? The Board answers this question as “no.”

- Have the Appellants established on the balance of probabilities that Council’s decision to rezone the subject property from F1 to C11, and to expand the scope of C11, is not consistent with the Provincial Statement of Interest in Agricultural Lands? The Board answers this question as “no.”

II WITNESSES CALLED BY VARIOUS PARTIES

Appellants

Russell Bret Miner

[16] The farmhouse in which the Appellant, Marjorie Miner, lives, is the same one in which her son, the Appellant, Bret Miner, was raised. Set amid a small 35-acre farm, it has a backdrop of woods on one side, and a field on the other. A driveway several hundred feet in length leads from the house to Ben Jackson Road, which borders the farm.

[17] The other side of Ben Jackson Road is entirely wooded – or was, until sometime in 2015, when Glooscap (see paragraphs 43 and 43 below) began extensive timber cutting and other site work in preparation for the project which it intends to build. This apparent pastoral setting is, however, deceptive: not more than 700 feet from the part of Ben Jackson Road which runs in front of the Miner farm lies Highway 101, and a large interchange, known as Exit 8A. It is in the wooded, or at least formerly wooded, area between Ben Jackson Road and Highway 101, and directly opposite the Miner house,

that Glooscap proposes to build, among other things, the gas station portion of its large highway service centre.

[18] From the limited evidence before the Board with respect to present agricultural activities on the farm, the Board concludes that these are relatively small, although Mr. Miner did confirm that, at least in the fall of 2015, some sheep were being pastured. The Miner Property is not zoned Agricultural, but rather Forestry F1.

[19] Mr. Miner no longer lives on the farm occupied by his mother, but on a larger farm elsewhere. His principal source of income is a directional drilling company. It has been his intention to eventually move back to the farm where his mother lives, or to have one of his children move there and "enjoy it the same as it is now."

[20] Mr. Miner says that he believes the proposed Glooscap development:

> …doesn't suit the scale of our rural way of life that we have now. I think it's huge in comparison, and it will impact us with noise; 24-hour noise, potentially. It will certainly alter, you know, future plans that we had to enjoy the place.

[21] Referring to his clients' reaction to Glooscap's development, Counsel for the Appellants, in closing summations, urged the Board to "put yourself in the shoes of the Appellants," describing it as "almost unbelievable" that a development of this type could land, as he put it, practically in their front yard.

Jens Jensen, P. Eng., MCIP

[22] Mr. Jensen qualified as a professional engineer in 1970, and began working in professional planning in 1972. He became a member of the Canadian Institute of Planners in 1976, and continues his registration in both professions.

[23] He is a charter member under planning legislation for professional planners adopted in Nova Scotia in 2005, has sat on the Board of the Atlantic Planners Institute,

and as Chair of the Professional Practice Review Committee of the Atlantic Planners Institute.

[24] He was formerly the Executive Director of the Cumberland District Planning Commission, and did consulting work on municipal planning for municipalities in Newfoundland. He appeared a number of times before the Provincial Planning Appeals Board, a predecessor of the present Board. He appeared before the Board once, in the early 1990s, as an expert witness in an application relating to polling district boundaries. He indicated to the Board that he stopped working in, as he put it, "the municipal world" in the late 1990's.

[25] By agreement among the parties, the Board ordered that Mr. Jensen be qualified as an expert:

> …in land use planning, capable of giving expert opinion evidence on land use planning matters, including the intent of the Municipality of the County of Kings Municipal Planning Strategy and Land Use Bylaw, and the extent to which the application is or is not compliant with their intent and policies.

and:

> …as an expert in civil engineering, capable of giving expert opinion evidence on the municipal infrastructure, including the adequacy of the proposed water supply, sewerage and site design aspects of the application.

Kevin Keys, BSc MSc, RPF, P.Ag.

[26] Mr. Keys provided written and oral evidence to the Board respecting soil conditions on Glooscap's property at Exit 8A.

[27] He has been a member of the Registered Professional Foresters Association of Nova Scotia since 2001, and a member of the Nova Scotia Institute of Agrologists since 2008. Mr. Keys is the only person in Nova Scotia with the dual designation of professional soil scientist (P.Ag.) and professional forester (RPF). He is

currently a PhD candidate in biology and has 25 years of experience in soil site assessment, classification and interpretation. He has worked as a forester for the Nova Scotia Department of Natural Resources and as a soil scientist for the engineering firm, Jacques Whitford Limited. He has been an instructor at both the University of New Brunswick and Saint Mary's University, in Halifax.

[28] The Board qualified Mr. Keys to give opinion evidence as:

> …an expert in soil and site classification and qualified to conduct soil classification investigations in Nova Scotia and to provide opinion evidence as to various land-use suitabilities based on soil and site characteristics.

[29] No other party supplied expert evidence with respect to the same subject area as that appearing in Mr. Keys' evidence. The Board saw the factual aspects (e.g., numerical data associated with such things as soil classification, slope of property, etc.) of his evidence to be, in the main, accepted by all parties, and by the Board. However, Counsel for the opposing parties, the County and Glooscap, did disagree as to the significance of his observations in the light of the MPS, LUB, and Provincial Statement of Interest in Agricultural Lands.

[30] In this decision, the Board has generally accepted the positions on this point as advanced for Counsel for the County and Counsel for Glooscap.

Witness Called by the Respondent, Municipality of the County of Kings

Leanne Jennings, LPP, MCIP

[31] Ms. Jennings received a Masters of Planning in 2008, having worked as a planning intern for Kings County in 2007 and a planning intern with Parks Canada on the Trent Severn Waterway National Historic Site, in Ontario, in 2005-2006. She has worked for the County's Department of Community Development Services since May 2008,

serving as a municipal planner between May 2008 and September 2015, and as acting supervisor of planning services since September 2015.

[32] In October 2015, Counsel for the Appellants objected to Ms. Jennings being permitted to testify as an expert. The Board dealt with this matter in a preliminary hearing on October 16, 2015, at which the presiding Board Member orally dismissed the objection.

[33] Counsel for the Appellants had argued that, as the planner for the Municipality responsible for recommending the Glooscap project to Council, Ms. Jennings lacked the necessary objectivity and lack of bias to provide expert testimony. The Board ruled that Ms. Jennings was qualified by training and experience to testify as an expert witness, but that it would be conscious of the importance of determining the appropriate weight to be given her evidence given the role she had played in the County's approval of Glooscap's project.

[34] The Board notes that, when the hearing on the merits resumed on February 24, 2017, Counsel for the Appellants at one point appeared to perhaps be renewing his objection to Ms. Jennings' giving testimony at all. The Board treated his remarks as relating solely to submissions on the weight to be given Ms. Jennings' evidence, did not alter its October 16, 2015 finding, and received oral evidence from Ms. Jennings.

[35] The Board accepted as expert reports Ms. Jennings' Response, dated October 9, 2015, to Mr. Jensen's Report, which is relatively brief, as well as the much longer report documentation prepared by her for the Planning Advisory Committee and Council.

[36] The Board ordered that Ms. Jennings was qualified to give opinion evidence:

> …as an expert in the field of land use planning, capable of giving expert opinion evidence on land use planning matters, including the intent of the Municipality of the County of Kings Municipal Planning Strategy and Land Use Bylaw, and the extent to which the rezoning application is or is not compliant with their intent and policies.

Relative Weight Given to Evidence of Experts on Planning Testifying for the Appellants and for the County

[37] In this decision, the Board has given, in general, relatively great weight to the opinions expressed by Ms. Jennings, the County's planner, in both her oral and written evidence; it has given relatively little weight to the evidence of Mr. Jensen.

[38] In brief, the Board considers that both experts are properly qualified by way of training.

[39] With respect to experience, Mr. Jensen certainly has had many years of experience working in planning. However, he has not, it seems, worked in the field for 20 years or more.

[40] Ms. Jennings has far fewer years of experience, but, in the judgment of the Board, her opinions as to the proper interpretation of the Municipal Planning Strategy and Land-Use By-Law much more accurately reflect the directions given by the Court of Appeal, in a long line of decisions with respect to the interpretation of such documents, than do those of Mr. Jensen. The Board refers to its view of Mr. Jensen’s evidence in more detail below, beginning at paragraph 263.

Witnesses for the Applicant, Glooscap

[41] Glooscap called no witnesses.

III FACTS

[42] Highway 101 is a high-speed, four-lane, divided highway which leads from Halifax northwesterly into the Annapolis Valley.

[43] The community of Glooscap First Nation is one of the smaller First Nations bands established under the *Indian Act*, which is administered by the Federal Department of Indian Affairs and Northern Development. The department appears, in the evidence before the Board, to variously use either the name Aboriginal Affairs and Northern Development Canada, or Indigenous and Northern Affairs Canada. For the purposes of this decision, the Board will refer to the Department as "Aboriginal Affairs."

[44] Glooscap First Nation and the Glooscap First Nation Economic Development Corporation are, the Board concludes from the evidence, legally separate, but intimately related, entities. The Board was, at certain points in the evidence, uncertain as to whether Glooscap First Nation or Glooscap First Nation Economic Development Corporation was being referred to. It eventually concluded that the Corporation was being referred to in the main, but not always. For simplicity in this decision, the Board has chosen to simply use the term "Glooscap" in most of this decision, except where words expressly necessitating the distinction are seen to the Board as important.

[45] The Town of Wolfville, located in Kings County, in the Annapolis Valley, is roughly 90 km from Halifax on Highway 101. About 15 km east of the Town, and only a couple of kilometres inside the Kings County-Hants County boundary, lies Exit 8A. Exit 8A was first established in 1967, but has grown with the "twinning" of Highway 101, i.e., its conversion into a four-lane, divided highway in the area.

[46] The site lies along a 45-kilometre stretch of Highway 101 that does not currently have a gas station or other similar services on the highway. Undisputed evidence before the Board indicates that Glooscap's project, if carried through all three phases, could result in over $125,000 in commercial taxes payable annually to the County, and up to $5 Million in payroll for 150 to 175 full and part-time employees.

[47] From the southwestern end of the Highway 101 overpass, Ben Jackson Road continues southerly, before dividing in two directions. The first direction, to the right, is relatively short, and includes at present Anstrum's Farm Market, which is only about 900 feet by motor vehicle from the end of the overpass. Also on this short northwesterly extension of Ben Jackson is Tim Thomson Auto Repair, a home-based business, about 400 feet from the end of the overpass.

[48] The property involved in this dispute is nestled against the highway and the overpass. It has as its northern boundary the edge of the Highway 101 lanes leading from the Valley towards Halifax. Its northwestern boundary is the end of the overpass, and two existing exit and entry ramps of Highway 101, and Ben Jackson Road itself. The southwesterly boundary of the subject property fronts on Ben Jackson Road, which, after leaving the overpass in the southeasterly direction, runs (very roughly) parallel to Highway 101 for a little over a mile.

[49] When Glooscap bought the subject property in the summer of 2014, it did so with the specific intention of developing it as a commercial highway service centre. At that time, the property was almost entirely wooded, although a small portion of it, closest to the end of the overpass and the entrance and exit ramps, had been cleared. There

was also a house and garage on the property, but apart from that there was no other development according to the evidence before the Board.

[50] Although there is limited evidence before the Board on the point, the Board concludes that Glooscap has, since buying the subject property, carried out a significant amount of site preparation, including clearance of timber.

[51] The subject property comprises two properties each with separate PID numbers. The larger of the two is 19.5 acres in size; the smaller is 5.3 acres in size, for a total of 24.8 acres.

[52] In addition to the 24.8 acres bought by Glooscap in 2014, Glooscap negotiated with the Provincial Department of Transportation and Infrastructure Renewal to buy a two-acre portion of the right-of-way for Highway 101 in June 2015. This two-acre portion lies to the northwest of the land purchased in 2014, and abuts it, making the total size of the subject property roughly 27 acres.

[53] In December of 2013, Glooscap First Nation produced a document (updated in February 2014), entitled “the Glooscap First Nation Economic Development Corporation Ten-Year Strategic Plan.” The Plan contemplated the formation by Glooscap First Nation of the Glooscap First Nation Economic Development Corporation, and contained a key finding (relevant to the present proceeding) that the location of Glooscap First Nation near Highway 101 presented an important commercial opportunity.

[54] A few months later, in April 2014, the Glooscap First Nation Economic Development Corporation was established.

[55] Glooscap retained Stantec Consulting Limited, a consulting firm, to give an opinion with respect to the feasibility of the commercial development of the subject property, which had not yet been bought by Glooscap.

[56] In late April, 2014, Stantec submitted a report for development of the lands, which forms the foundation for the project which is the subject of this appeal.

[57] In its Report, Stantec referred to “currently unsatisfied demand” and a “significant gap” in the services available on Highway 101 between Windsor and New Minas. Stantec referred to a number of specific features, or activities, which could be included on the property (such as commercial vehicle service, a market, a restaurant, and “pow wow grounds”).

[58] The Board notes that while Stantec identified these activities as ones which could be economically feasible on the subject property, it was not asserting that these activities could legally be done with the existing zoning. Different zoning would be needed.

[59] In the summer of 2014, Glooscap bought the subject property which was the subject of the Stantec Report for $350,000.

[60] In January 2015, Glooscap contacted the Department of Communities Culture and Heritage in relation to a variety of different topics, including botany, zoology, paleontology and archaeological reviews to be carried out on behalf of Glooscap.

[61] A subject of particular interest in the archeological review was the known existence, prior to 1872, of a Baptist church and cemetery established by black residents in the area. While the Board received a significant amount of documentary evidence in

relation to the church and cemetery, it will only touch relatively briefly on the matter, which seems to have been resolved to the satisfaction of everyone concerned.

[62] By 1902, the church had been demolished, or moved away to another site. In the ensuing century, the cemetery's grave markers, which consisted of wooden crosses, rather than inscribed stones, vanished.

[63] The presence in the area of the sites of the former church and cemetery was already known to the Provincial Department of Transportation and Infrastructure Renewal, which took particular account of their importance when it began twinning Highway 101 in the area in 2004.

[64] With respect to Glooscap's specific proposal, it seems there is now a general consensus that it would not impinge on the areas believed to be the sites of the cemetery and church.

[65] The Board infers from the evidence that, well before making application to the County in relation its proposal, Glooscap had been involved in informal discussions with the County's planning department.

[66] By March 17, 2015, Glooscap was ready to hold an "open house," at a building on the Reserve, at which it publicly presented its proposed project, and engaged in discussion with interested residents in the surrounding community.

[67] Mr. Miner attended the open house, and expressed concerns about the development. He discussed with representatives of Glooscap his concerns about the possible impacts of the proposed development (including both noise and light) and whether these could be reduced if the development proceeded.

[68] Mr. Miner also raised the subject of “Additions to Reserves” (i.e., not just the purchase of land by an aboriginal band, as has occurred here, but the subsequent addition of the land to the reserve). The Board will refer to this topic further below.

[69] In developing its proposal for Exit 8A, Glooscap worked closely with Aboriginal Affairs, to whom it applied for infrastructure funding.

[70] Ultimately, from the limited evidence before the Board, the Board finds that the Department made undertakings to Glooscap with respect to present and future funding.

[71] For example, the evidence and submissions before the Board mentioned, more than once, an initial advance of $1.7 Million which Aboriginal Affairs was prepared to make available to Glooscap by March 2016.

[72] As already noted, the project being contemplated by Glooscap, as outlined in Stantec’s Report, was not possible with the existing zoning of the subject property.

[73] Also around this time, in April 2015, Glooscap says it received a “serious inquiry” from a developer associated with an International hotel chain, expressing interest in building a hotel having more than 60 beds. If such a development were to occur, it would, according to Glooscap’s plan, occur in Phase II.

[74] While Glooscap was consulting Stantec, and engaging in financing discussions with Aboriginal Affairs, it continued to be in frequent contact with the County’s planning department. On May 4, 2015, the CEO of Glooscap told Ms. Jennings, the County’s planner, that Glooscap intended to immediately move forward with the project.

[75] Only two days later, on May 6th, Glooscap filed its application with the County to rezone the subject property from Forestry F1 to Highway Commercial C11.

[76] Ms. Jennings replied immediately – that same day – to Glooscap's application, saying that the County's planning services department intended to move it "along as quickly as possible." True to her word, on the day that she received the application form, she scheduled a public information meeting respecting Glooscap's application, to occur in less than three weeks, on May 21st, at Lockhartville Community Hall. The County did, in fact, hold the public information meeting on that day.

[77] On May 7th, the day after receiving Glooscap's application, Ms. Jennings sent a letter to property owners within 500 feet of Glooscap's proposed development, telling them of the meeting on May 21st.

[78] At this stage, Glooscap's application had only one component, that being rezoning from Forestry F1 to Highway Commercial C11. Ms. Jennings' letter to the property owners about the May 21st meeting described the proposal as simply a rezoning from F1 to C11.

[79] However, between Ms. Jennings' May 7th letter to the property owners, and the public information meeting on May 21st, various discussions ensued within the County's planning department which ultimately led to the conclusion that a rezoning from F1 to C11 would not be enough. To permit everything Glooscap wanted to do, even in just Phase I, the Planning Department concluded amendments to the LUB relating to the C11 Zone itself were also necessary. While the Planning Department chose to use the term "housekeeping amendments" to describe the proposed changes to the LUB, their effect would be to expand the range of uses possible in C11.

[80] Ms. Jennings reached this conclusion, at least in part, as a result of consultations with Mandy Burgess, a County development officer.

[81] Ultimately, Ms. Jennings decided that amendments relating to the C11 Zone were necessary to three provisions within the LUB: Section 6.1.1 (entitled “Permitted Commercial Buildings”), Section 6.1.2 (entitled “Services Stations, Drive-in Restaurants and Gas Bars”) and Section 15.2 (entitled “Highway Commercial (C11) Zone”).

[82] The terms “commercial building,” “group commercial building,” and “grouped commercial facility” are defined in the County’s By-Law 1.37, at 1.37.1.2 and .3 respectively:

> 37 **Commercial Buildings**
>
> …
>
> 1.37.2 **Group Commercial Building** means any building with a gross leasable area of less than 50,000 square feet from which several businesses are carried on.
>
> 1.37.3 **Grouped Commercial Facility** means two or more buildings located on the same lot with a total gross leasable area of less than 50,000 square feet from which several businesses are carried on.

[83] Up until the time of the amendments relating to the C11 Zone, LUB 6.1 (“General Provisions for all Commercial Zones”) contained the following provision, which omits any reference to the C11 Zone:

> 6.1.1.1 Commercial buildings, group commercial buildings and grouped commercial facilities are permitted in the C1, C2 and C5 Zones.

The C1 Zone is “General Commercial”; C2 is “Central Business”; and C5 is “Community Commercial.” All of these commercial zones, as well as certain residential ones, are classed as “Urban Zones” in the LUB.

[84] The F1 Forestry Zone, which includes the subject property and the area surrounding it (except for the P2 Recreational Open Space Zone on the other side of Highway 111) is a rural zone.

[85] The C11, or Highway Commercial Zone, is what is termed in the LUB as a "common zone," i.e., it does not appear either in the list of urban zones or rural zones. The P2 Recreational Open Space Zone is likewise a common zone.

[86] Ms. Jennings, when speaking at the public hearing held just before Council rendered its decision on July 30, 2015, said that "all other commercial zones in the County" could have group commercial buildings and grouped commercial facilities, but "somehow" the C11 Zone had been missed. Part of Ms. Jennings' proposed changes (which, like her other suggestions, were approved by Council) was that LUB Section 6.1.1.1 be amended to add the C11 Zone to the C1, C2 and C5 Zones, so that it would now read:

> 6.1.1.1 Commercial buildings, group commercial buildings and grouped commercial facilities are permitted in the C1, C2, C5 and C11 Zones.

[87] Likewise, up until the proposed amendment to C11, LUB Section 6.1.2, which sets out requirements for service stations, drive-in restaurants and gas bars, referred to the C1, C2, C3 ("Shopping Centre Zone"), C5 and C7 ("Neighbourhood Commercial") Zones, but omitted any reference to the C11 Zone:

> 6.1.2 Service Stations, Drive-in Restaurants and Gas Bars
>
> The following requirements shall apply to service stations, drive-in restaurants and gas bars in the C1, C2, C3, C5 and C7 Zones: …

The section goes on to list, in seven separate sub-sections, detailed requirements for such facilities.

[88] Ms. Jennings' proposed amendment to LUB Section 6.1.2 was, once again, simply to add C11 to the list of zones included in MPS 6.1.2.

[89] Finally, she proposed an amendment relating to convenience stores to the C11 provision itself (LUB Section 15.1.2, "Highway Commercial C11 Zone"). The existing

LUB provision read as follows:

> 15.1 **HIGHWAY COMMERCIAL (C11) ZONE**
> …
> 15.1.2 **Permitted Uses**
>
> No Development Permit shall be issued in a Highway Commercial (C11) Zone except for one or more of the following uses and subject to the following requirements:
>
> Existing Residential Uses
> Fixed Roof Overnight Accommodation
> Restaurants
> Service Stations
> Tourist Centres

[90] The amendment which she proposed for this provision was adding the term "convenience stores" in the list of permitted uses. This amendment was intended to resolve any ambiguity (which had been the topic of repeated communications among planning staff) as to whether a convenience store is normally regarded, today, as simply an expected part of a gas station.

[91] The recommendation to expand the scope of C11 has broader implications for the County than the purely local implications of the rezoning of the subject property from F1 to C11. The rezoning from F1 to C11 applies only to the subject property. However, the amendment to the C11 Zone to expand the permitted uses affects not only the subject property, but also all C11-zoned property in the County, and any property which may in future be rezoned to C11. The Board will return to this point in its discussion of Issues 1 and 2, below.

[92] The expansion of Glooscap's application from being solely an application for rezoning from F1 to C11 to an application also involving amendments to the LUB provisions relating to C11 itself was relatively sudden and unexpected.

[93] As the Board has already noted, the notice of the May 21, 2015, meeting – delivered to neighbours in the area less than three weeks before the meeting – made no

mention of it. Even the agenda for the meeting still referred to just the proposed F1 to C11 rezoning as the sole topic for the meeting: there was no reference to a proposal that C11 be amended.

[94] The slide presentation prepared by the Planning Department did hint at the possibility of amendments to the C11 Zone, noting that the County's planning staff had "initiated" a "review [of] permitted uses in the C11 Zone."

[95] The May 21, 2015, public information meeting was held in the Lockhartville Community Hall, which is not far from Exit 8A. Ms. Jennings made a presentation, as did Jason Peters, Claude O'Hara, Michael Peters and Scott Olszowiec on behalf of Glooscap.

[96] About a dozen speakers made comments or asked questions.

[97] Among other things, Mr. Peters and Mr. O'Hara said the project would include, in Phase I, a truck stop, convenience store and coffee outlet. Glooscap also proposed two additional phases, II and III, which it hoped would include a "local market bistro" carrying Annapolis Valley foods and Annapolis Valley wines and craft beers, as well as a fish market.

[98] Also referred to was a cultural centre respecting the history of the Mi'kmaq and their relationships with Acadians, planters and black residents of the area.

[99] Mr. Miner raised the question of reducing the impacts on adjacent properties. This topic was also raised in a written submission from Ms. R. Thomson, another resident in the area, who expressed opposition to the development. She said she enjoyed the:

> …peace, quiet and view that we have now…

She feared that the end result of approval of Glooscap's project would mean that she, as a shift worker, would not be:

> …getting much rest during the construction or after the service centre begins operating.

Further, she was also concerned that it is "unlikely that anyone would buy" her house, as:

> …who would move to a country setting to see a gas bar through the front window?

[100] One of the other speakers was Lynda Andres, of Anstrum's Farm Market, itself located adjacent to Exit 8A, and only a few hundred feet from the subject property. As the Board has already noted, Glooscap's plans include, at least at certain phases, not just a convenience store, but also a market which might include farm products. Comparing Glooscap's financial situation with that of Anstrum's, she referred to Aboriginal Affairs' funding of Glooscap's project, saying:

> The competition is unfair as [Glooscap] can get money from the [Federal] Government that [Anstrum Farm Market] cannot.

[101] When Keith Smith, one of the residents of Ben Jackson Road in attendance at the meeting, asked if a casino would "ever" be permitted at the development site, Jason Peters of Glooscap said it would not be permitted because "the land is not First Nation land." Leanne Jennings stated that the C11 Zone does not allow casinos. Glooscap also indicated that the subject property, as it was not part of the Reserve, would be providing tax revenue to the County.

[102] In the course of the meeting, Mr. Miner raised the related question of the possibility of adding the subject property to the Reserve, so that it would become a part of it. According to the minutes of the meeting, the reply to the question of whether the land would one day become part of the Reserve was "unknown."

[103] Later comments made by Ms. Jennings (in an email to Councillor Ennis on July 21, 2015, in relation to the discussions at the May 21st meeting) indicate that Mr. Peters, in responding to Mr. Miner's question, said that it would be possible:

> …through a long application process to the Federal Government…

for Glooscap to have the subject property incorporated into the reserve.

[104] On May 25th, Mr. O'Hara, of Glooscap, sent Ms. Jennings documentation relating to large waste water treatment plants. The area of the subject property is not one that can be serviced by sewer under the current MPS. The Board will return to the topic of sewage disposal, and water supply, later in this decision.

[105] On May 29th, Stantec issued the final version of its "Glooscap Landing Feasibility Study." This report was referred to at length in Mr. Jensen's subsequent report prepared as an exhibit for the Board.

[106] The Board notes that the description of the developments to occur on Glooscap's property, which appear in Ms. Jennings's Report to the planning advisory committee and Council, and the various plans produced by Stantec for Glooscap (including the May 2015 plans), are generally, but not exactly, consistent.

[107] Ms. Jennings, in her Report, says that Glooscap's Phase I will include a gas station, convenience store and coffee outlet. She refers to a potential for a market, hotel, and cultural centre in Phases II and III.

[108] Stantec's plan of May 6th (the date Glooscap applied to the County) and a later plan of May 29th, both show, for Phase I, a gas station, coffee shop and car wash in one building, and "fast-food restaurants" in another building. A third building symbol,

which appears on each plan, but is unlabeled, is, the Board surmises, simply the structure containing the gas pumps.

[109] Both plans, then, list two uses in Phase I not mentioned in the Jennings Report: a separate building labelled “fast-food restaurants,” and a “car wash.” On the other hand, Ms. Jennings’ Report mentions a “convenience store,” which does not appear on either plan.

[110] Phase II, in Stantec’s May 6th and May 29th plans, shows provision for a “motel,” and another for a “commercial lease space,” illustrated by a long rectangle.

[111] Phase III is captioned as containing a “Mi’kmaq Cultural Centre”; “pow wow grounds”; a “storm water pond”; and a fourth item identified as a “land mark.”

[112] On June 2, 2015, Ms. Jennings asked Heidi Walsh Sampson (referred to as the County’s in-house legal counsel) referred to as the County’s “in-house” legal counsel, for her immediate review, with Ms. Sampson replying briefly the same day. One of the topics she referred to was the matter of buffering, which the Board will return to under “Analysis and Findings” below.

[113] County staff then informed Glooscap that they had included Glooscap’s proposal on the agenda for the June 9th meeting of the Planning Advisory Committee. When that committee met on June 9th, they had before them a report by Ms. Jennings which included reference to both the F1 to C11 rezoning, and the amendments relating to the C11 Zone.

[114] PAC decided to recommend to Council that the project be given first reading in a public hearing by Municipal Council.

[115] Consistent with her promise that the County would deal expeditiously with Glooscap's application, Ms. Jennings told Glooscap that the public hearing would occur on July 30th (23 days after first reading on July 7th) and that if approved by the County Council, the appeal period would expire on August 27th.

[116] She expressed the hope that this schedule would work out "well in regards to the timing of your funding," referring to financing by Aboriginal Affairs.

[117] As part of its preparations for the development, Glooscap retained Earth Water Concepts Incorporated to do a hydrogeological assessment of the well water supply potential at Glooscap Landing. Earth Water issued its 50-page report in July of 2015. The Board will return to this topic under "Analysis and Findings" below.

[118] On July 7th, Council did give first reading to the proposed amendments. Council voted unanimously with respect to the rezoning from F1 to C11, and by a vote of 9-1 in relation to the amendments to the C11 Zone.

[119] After Glooscap's proposal for rezoning from F1 to C11, and amending C11, was given first reading on July 7, 2015, the County's Planning Department sent a Notice of Public Hearing to property owners within 500 feet reflecting this change. Unlike the previous Notice, it did include a reference, albeit a general one, to the proposed amendments relating to the C11 Zone. It said simply that the proposal included "enabling [of] convenience stores as a permitted use in the C11 Zone."

[120] On July 28th, Ms. Sampson, the County's in-house legal counsel, sent an email to Councillor Mike Ennis, in response to a previous conversation she had with the Councillor about the subject of Additions to Reserves (referred to as "ATRs" in the documentation). While Ms. Sampson did not herself express an opinion on the point, she

provided to the Councillor a copy of a portion of a Federal Government website (bearing the heading “Aboriginal Affairs and Northern Development Canada”) entitled “Frequently Asked Questions – Additions to Reserves.” The excerpt is several pages long, and contains among other things, 16 questions and answers.

[121] One of these points out that the approach to Additions to Reserves described in the document is simply a policy, and not legislation. The policy was created by the Federal Government to fill a legislative gap resulting from the fact that ATRs are not addressed in the *Indian Act* or other Federal legislation.

[122] Two other questions and answers in the ATR documentation relate in particular to matters raised in the course of Glooscap’s application to the County.

[123] First, it seems a local government, such as the County, does not have a veto over an application made by a First Nation to the Federal Government to add land to a reserve. There is reference within some of the documentation to what is referred to as a “good neighbour policy.” One might infer from this that compatibility with nearby uses not on reserve lands is a value which may be taken into account in decisions relating to Additions to Reserves.

[124] Nevertheless, ultimately, any decision to proceed, or not, with an Addition to Reserve is one which is, it seems, ultimately made independently by the Federal Government:

> …in limited cases the [Federal Government] retains a discretion to proceed with an ATR even if local government concerns have not yet been resolved.

[125] Secondly, if an addition to a reserve does occur, the land-use planning and zoning by-laws of the local government, such as the County, no longer have any

application to the property in question. This is a point which was identified as a matter of concern more than once by speakers at meetings where Glooscap's proposal was discussed.

[126] If an addition to a reserve does occur, it is the First Nation which then has the authority to decide in future how to use the lands added to the reserve. Accordingly, in such circumstances, the First Nation concerned can make its own by-laws with respect to land-use planning and zoning. There is not, it seems, any requirement, whether in the ATR policy or the *Indian Act* itself, that requires such by-laws to be compatible with those of a neighbouring municipal government, such as the County.

[127] As the Board has noted, the possibility of the subject property becoming an addition to the Reserve was a topic which was referred to frequently in the evidence before the Board. Nevertheless, the Board concludes – from the limited information before it – that the possibility of the subject property being added to the Reserve would exist whether or not the County decided to approve Glooscap's application.

[128] On July 30th, Council held its public hearing (and, subsequently, Council meeting) in relation to Glooscap's application. In preparation for the public hearing and Council meeting, Mr. Miner communicated directly with his own councillor, and sent an email to all of the councillors, once again expressing his opposition to Glooscap's proposal. He said:

> The potential for large 24hr traffic and the ability for Glooscap to apply for Addition to Reserve Process in the future are huge concerns for neighbors near the proposed development. I am opposed to the development in its present location.
>
> I am asking only that you debate how appropriate the location is on Ben Jackson Rd this evening and consider approving the development in a Commercial Zone.

[129] Council approved Glooscap's proposal. Just as it had on July 7th, Council voted unanimously to give second reading to the rezoning from F1 to C11, and 8-1 to give second reading to the amendment to C11.

[130] Subsequently, on August 17, 2015, the Appellants filed a Notice of Appeal with the Board. The Notice expressly raised, with respect to the rezoning of the subject property from F1 to C11, arguments that the decision was inconsistent with the Municipal Planning Strategy and also that the decision "offends" the Provincial Statement of Interest in Agricultural Lands.

[131] The Board, with the agreement of the parties, scheduled a hearing on the merits in this matter to begin October 20, 2015.

[132] A few weeks before the scheduled hearing date, in early October, a dispute arose between the Appellants and the Applicant, Glooscap, and Respondent, County, as to whether the Notice of Appeal included an appeal of the amendments relating to the C11 Zone (expanding the uses possible under it), or just the rezoning from F1 to C11. The Board made provision for a preliminary hearing later in October to deal with the matter.

[133] Before that could occur, however, and just prior to the commencement of the hearing on the merits on October 20, 2015, the Board learned of an intent by counsel for the Appellants to apply to the Supreme Court of Nova Scotia to quash at least part of Council's decision of July 30th.

[134] The Board did commence the hearing on the merits on October 20, 2015, receiving evidence from one of the Appellants, Mr. Miner, and Mr. Jensen, one of the Appellants' expert witnesses.

[135] With the agreement of the parties, the Board postponed further hearings by it until resolution of the Appellants' application to the Supreme Court.

[136] Ultimately, the Appellants did not succeed in either their application to the Supreme Court, or subsequent appeal to the Court of Appeal. After the latter Court's decision on January 17, 2017, Counsel for the Appellants informed the Board that his clients now wished to proceed with the present appeal before the Board.

[137] The Board received submissions from the parties on February 9th, 10th and 13th, 2017, respecting the scope of the Notice of Appeal. In a decision issued on February 16th, *Miner v. the Municipality of the County of Kings,* 2017 NSUARB 22, the Board said the Notice of Appeal was at best ambiguous with respect to the second ground of appeal, but ordered that it in effect be amended, to include both grounds.

[138] The end result was that both questions (the rezoning from F1 to C11, and the amendments relating to the C11 zoning) were matters in issue before the Board for the purpose of the present decision.

Site Visit

[139] The Board Member presiding over the hearing subsequently carried out a site visit on Thursday, April 6, 2017. Counsel for the Appellants (Bret and Marjorie Miner), and Counsel for the Applicant, Glooscap, chose not to be in attendance, but Counsel for the Respondent County was present throughout.

[140] The Board Member viewed Exit 8A from Highway 101, including its entry and exit ramps on both sides of the highway. He drove north from Exit 8A on the Ben Jackson connector which intersects Highway 1, viewing the lands zoned P2 (Recreational

Open Space) which are on the northeast side of Highway 101, and are the only lands not zoned F1 in the area.

[141] The Board Member viewed Anstrum's Farm Market (including the exterior of its large building, and associated parking area), which is adjacent to the exit ramp from the eastbound lanes of Highway 101, and the nearby site of Tim Thomson Auto Repair.

[142] After viewing the subject property, the Board Member viewed the Appellants' house and field which abut Ben Jackson Road, and then drove approximately one mile southeastwards along Ben Jackson Road, which at this point roughly parallels Highway 101, past the southeastern limit of Glooscap's property.

IV ANALYSIS AND FINDINGS

Standard of Proof

[143] In reaching its decision in this appeal, the Board has applied the balance of probabilities as the standard of proof for the determination of facts.

Applicable Principles of Statutory Interpretation

[144] The Board considers that the liberal and purposive approach to statutory interpretation applies in this proceeding: see, for example, *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board),* [1994] N.S.J. 50.

[145] *Heritage Trust (1994)* directs the Board to give the applicable provisions "a liberal and purposive interpretation," saying that the municipal plan "must be made to work." The provisions must be interpreted reasonably.

[146] Of particular significance is the fact that:

> ...there is not necessarily one correct interpretation…

of the relevant policies. In other words, it is possible for more than one outcome to be reasonably consistent with an MPS. Thus, it is possible – not only theoretically, but practically – that a council's decision to approve, or to disapprove, the same development agreement could each be reasonably consistent with the applicable MPS.

[147] Consistent with the *Heritage Trust (1994)* purposive approach is the decision of J.M. MacDonald, J. (as he then was), in *MacDonald v. Halifax Investments (1997),* 162 N.S.R. (2d) 214 (SC), an application respecting the National Building Code. The Court referred to:

> …the dilemma of balancing competing rights in the context of land use legislation… [para. 16]

[148] He went on to refer to community based property rights, saying:

> Courts in recent years have endorsed an erosion of individual property rights in favour of land use planning which is primarily designed to benefit the community as a whole. I refer again to *Driedger* at page 373;
>
> > In the past, common law courts assumed that the free use and disposition of property, and contractual freedom generally, benefited not only the owner of the property but also society as a whole. While free markets and free trade remain respectable common law values, courts today are less likely to believe that what is good for property owners is good for society as a whole. In current interpretative practice, the value of protecting the freedom of property owners easily gives way to competing values and goals.
>
> I, as well, refer to *Heritage Trust of Nova Scotia v. Nova Scotia Utility & Review Board*, (1994), 1994, 4114 (NS CA), 128 N.S.R. (2d) 5; where at paragraph 97, Hallett, J.A., noted:
>
> Therefore, there is case law to support the view that a liberal and purposive approach to the interpretation of planning policies is appropriate. The purpose of planning legislation is to control the use of land for the benefit of the citizens of a municipality. [para. 14]

[149] The Court further noted that the:

> …purposive approach to statutory interpretation is as well embodied in our *Provincial Interpretation Act*, 1989, R.S.N.S. c. 235, s. 9(5) provides in part:
>
> > 9 (5) every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters:

> (a) the occasion and necessity for the enactment;
> …
> (c) the mischief to be remedied;
> (d) the object to be obtained;
> …
> (f) the consequences of a particular interpretation;… [para. 15]

Board's Fact Finding Role

[150] In *Midtown Tavern & Grill Ltd. v. Nova Scotia (Utility and Review Board),* 2006 NSCA 115, the Court of Appeal stated that 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…

Municipal Councils as the "Primary Authority" for Planning

[151] Section 190(b) of the *Municipal Government Act* expressly states that municipalities are to have "the primary authority for planning," a legislative principle which has been repeatedly identified, and emphasized, by the Court of Appeal. For example, in *Midtown*, MacDonald, C.J.N.S., stated:

> [46] I reject the opponents' assertion that the Board owed no deference to Council despite the fact that the Board conducted its own full scale hearing. In fact, *I believe Council and not the Board to be the primary decision maker* when it comes to this type of planning issue. Let me briefly elaborate.
>
> [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. [per MacDonald, C.J.N.S.; Emphasis added]

[152] The concept of municipal council being the primary authority for planning is a well-established one. The *Planning Act* (the predecessor of the *Municipal Government Act,* under which this appeal was held) had a similar provision. In *Heritage Trust 1994* the Court of Appeal said the intent of the *Planning Act* was:

> …to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions...

The Board's Limited Authority on Planning Appeals

[153] In keeping with the concept of municipal councils being the primary authority, s. 250(1)(b) of the *Act* limits the grounds for an appeal to the Board of a decision by a municipal council in relation to a development agreement:

> 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;

[154] 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.

[155] Thus, the Board must not interfere with a decision of a council to enter into a development agreement unless it determines that the decision does not reasonably carry out the intent of the MPS. As the Board has noted, the burden of proof is on an Appellant to establish this.

[156] Accordingly, if an Appellant shows, on the balance of probabilities, that a decision by a council does not reasonably carry out the intent of the MPS, the Board must reverse that decision. If, however, the Appellant fails to meet this standard of proof, it is the Board's duty to defer to Council's decision. On this point, see *Heritage Trust (1994):*

> [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 by-laws of a municipality are recognition that *municipal Councils must have the scope for decision-making so long as the decisions are reasonably consistent with the intent of the plan. Very often ascertaining the intent of a policy can be achieved by considering the problem that policy was intended to resolve*. [Emphasis added]

[157] The Court of Appeal in *Heritage Trust (1994)* further held:

> [163] 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 decision…

Summary of Planning Law in Archibald

[158] More recently, in *Archibald v. Nova Scotia*, 2010 NSCA 27, the Court of Appeal did an extensive review of the previous case law, and stated a summary of planning principles. Speaking for the Court, Fichaud, J.A., said:

[24] …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, 2001 NSCA 98 , 2001 NSCA 98 , 2001 NSCA 98, ¶ 19). So, if the MPS' intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council's decision reasonably bears that intent. [Emphasis added]

(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.

[159] The Board now turns to the MPS, and the amendments to the LUB, in the Kings County planning documents which are at the center of this dispute.

[160] The specific issues which the Board will address in this part include the following:

- Issue 1: Have the Appellants established on the balance of probabilities that Council's decision to rezone the subject property from F1 to C11 fails to reasonably carry out the intent of the MPS?

- Issue 2: Have the Appellants established on the balance of probabilities that the decision of Council to expand the scope of Zone C11 to include additional uses fails to carry out the intent of the MPS?

- Issue 3: Have the Appellants established on the balance of probabilities that Council's decision to rezone the subject property from F1 to C11, and to expand the scope of C11, is not consistent with the Provincial Statement of Interest in Agricultural Lands?

[161] The Board sees much of the law and facts which are relevant to Issue 1 as also relevant to Issue 2. The Board's discussion of 1 and 2 is, therefore, largely blended together.

[162] The Board does deal with Issue 3 separately, but incorporates expressly or impliedly much of the law and facts upon which it relies in Issues 1 and 2.

Issues 1 and 2

[163] An important part of the Appellants' position in this appeal is related to the significance attached by the Appellants' expert (Mr. Jensen) to forestry and agriculture, and resources generally, in the County's MPS.

[164] Indeed, Counsel for the County and Counsel for Glooscap do not dispute that the MPS attaches great significance to forestry and agriculture. They do, however, disagree as to the proper interpretation of the MPS with respect to this topic. In so doing, they rely principally upon the evidence of Ms. Jennings, the County's planner.

[165] The Board concludes from the evidence before it that Council, in reaching the decision it did in relation to Glooscap's project, accepted the recommendations of Ms. Jennings.

[166] In this decision, the Board likewise has largely accepted her conclusions. The following summary of applicable MPS provisions, and their application to the Glooscap project, reflects in part the written and oral evidence of Ms. Jennings.

[167] In the view of the Board, the 1992 MPS, beginning with its lengthy and detailed introduction, and continuing thereafter, does indeed point to the importance of agriculture to the County, as well as forestry and other resources. The County's natural resource base, the MPS says, forms "the back bone" of the County's economy.

[168] Consistent with this, MPS 3.1 ("Resource and Rural Development Districts") says in its introduction that:

> Of *overriding importance* in planning for the rural areas is the protection and enhancement of the County's natural resources. [Emphasis added]

[169] One encounters similar language in subsequent provisions of the MPS. For example, MPS 3.3.2.2 echoes the words "of overriding importance" in its statement that "precedence" is to be given to forestry uses in the Forestry Districts:

> 3.3.2.2 Council intends to give *precedence* to uses related to forest harvesting and reforestation operations, forestry industries and related land uses, over all other permitted land uses in the Forestry Districts. [Emphasis added]

The Board will return to such words and phrases as “overriding importance” and “precedence” subsequently in this decision, particularly in its discussion of Mr. Jensen’s expert opinion.

[170] MPS 1.3 contains the general goals of the MPS, as well as urban and rural goals. One of the rural goals, MPS 1.3.3.3, is to:

> …designate forestry districts where forest activities are given priority over other land uses.

[171] In keeping with this, the MPS, among other things, confirms that the County wants to:

> MPS 1.2.3.1 Direct the majority of future population growth and associated urban services into designated growth centres.

[172] However, in the view of the Board, the MPS also refers to the importance of things other than agriculture or resource-based industries. For example, when one turns, in MPS 1.3.1, to the “General Goals” of the County’s MPS, one finds that the first of the five listed goals is to “facilitate a broad economic base” (MPS 1.3.1.1).

[173] In facilitating this broad economic base, MPS 1.3.1.1 does make reference once again to a wish to support:

> …the continued growth of the agricultural industry…

However, the same provision, MPS 1.3.1.1, also refers to:

> …providing opportunities for expanded industrial, commercial, and tourism development…

[174] In the view of the Board, the development proposed by Glooscap certainly falls in this category, in that it can be seen as providing opportunities for expanded commercial and tourism development. Further, in the view of the Board, nothing in MPS 1.3.1.1 implies that providing opportunities for such development is a goal which is inferior to supporting the continued growth of the agricultural industry.

[175] While the Board was not entirely certain of the meaning of his answers on the point, the Board interpreted at least part of the cross-examination of Mr. Jensen by Counsel for the County as an acknowledgment by him that these two goals could be seen as being accorded “equal weight” in MPS 1.3.1.1.

[176] However, in the view of the Board, the MPS also refers to the importance of things other than agriculture or resource-based industries. For example, it specifically talks about:

> 4.4.1.4 …providing opportunities for expanded industrial, commercial and tourism development…

[177] The MPS, having identified in its introductory provisions various general themes (such as Resource, including Agriculture and Forestry, as well as Commercial and Tourism development), goes on to develop them further, in subsequent separate sections of the MPS.

[178] Of direct relevance to this appeal, of course, are the various provisions in the MPS which deal specifically with the possibility of rezoning properties to C11.

[179] The Board sees the provisions dealing with C11 which appear in the Forestry section as particularly important. However, before turning to those provisions, the Board will first briefly refer to MPS 2.2.5 (which is headed “Highway Commercial District Policies”). This provision is part of MPS 2.2, entitled “Urban Commercial Development.” While this is in the Urban section, rather than the Forestry section, of the MPS, it does contain a reference to the purpose of C11 zoning:

> **2.2.5 Highway Commercial District Policies**
>
> To provide opportunities for commercial uses orientated to the travelling public in proximity to the interchanges along Highway # 101, a Highway Commercial Zone has been established. Highway Commercial uses will be accommodated within the General

> Commercial Districts in Aylesford and Coldbrook whereas a specific Highway Commercial District may be considered in other Growth Centres.
>
> 2.2.5.1 Council may establish a "Highway Commercial District" (H) designation to be applied to lands in proximity to interchanges along Highway # 101.
>
> 2.2.5.2 Council shall establish a Highway Commercial (C11) Zone in the Land Use Bylaw. Permitted uses in the C11 Zone will include services catering to the needs of travelling highway motorists and tourists. The Land Use Bylaw will strictly control signs and special provisions will address the need for visibility from the highway.
>
> 2.2.5.3 Council shall provide for Highway Commercial uses in Commercial Zones adjacent to Highway # 101 interchanges in General Commercial Districts. The provisions of the Land Use Bylaw for sign visibility for the Highway Commercial Zone shall be made optional for Highway Commercial (C11) Zone uses.

[180] MPS 2.2.5 is incorporated by reference in the MPS provisions dealing with C11 zoning in the Forestry District. MPS 2.2.5 provides for C11 zoning, stating its purpose as:

> To provide opportunities for commercial uses orientated to the traveling public in proximity to the interchanges along Highway #101…permitted uses in the C11 Zone will include services catering to the needs of travelling highway motorists and tourists…

[181] The Board now turns to MPS 3.3, entitled “Forestry Districts.” The subject property is included in such a district.

[182] In the view of the Board, one finds in the provisions dealing with forestry districts that the MPS once again places great weight upon the importance of resource industries, while at the same time referring to non-resource activity as also being of importance.

[183] Thus, in the introduction to MPS 3.3 (entitled “Forestry Districts”), we find once again references to the MPS placing:

> …a *dominant emphasis* on resource production and associated industrial development. [Emphasis added]

[184] Nevertheless, the MPS once again makes it clear that the resource industry, and related activities, are not the only activities which are important in the Forestry District.

[185] Of particular relevance to this appeal, the MPS provisions dealing with the Forestry District contain a number of provisions which deal specifically with the possibility of rezoning land currently zoned Forestry F1 to Highway Commercial C11. In addition to the possibility of rezoning Forestry District land to C11, MPS Policy 3.3.2.3 also contemplates the possibility of rezoning it to one of 12 other zones.

[186] MPS Policy 3.3.2.3(f) specifically provides for the possibility of Council rezoning land from F1 to Highway Commercial C11, but also to the possibility of rezoning it to one of 12 other zones: Rural Commercial C9; Resource Industrial M4; Resource Extraction M7; Salvage Yard Industrial M6; Community Facility CF; Resort Comprehensive Development C12; Parkland P1; Recreational Open Space P2; Environmental Open Space O1; Water Supply O2; Transportation Utilities T1; and Airport Height Restriction T2.

[187] The Board concludes that – far from restricting the use of lands zoned F1, and located in the Forestry District, to resource activities only (which was one of the core beliefs expressed by Mr. Jensen in his evidence) – the MPS clearly contemplates the possibility of rezoning forestry lands from F1 to a variety of other activities.

[188] Turning to MPS Policy 3.7 (entitled “Rural Commercial”), one finds more specific reference to the applicability of the C11 Zone to interchanges on Highway 101. An introductory paragraph in MPS Policy 3.7.7 provides:

> …similar to the Growth Centre Policies for Highway Commercial Uses, provision is made for comparable development opportunities near the Highway #101 interchanges in rural areas except Agricultural or Shoreland Districts.

So, Council can rezone to C11 lands near Highway 101 interchanges, provided the lands are not located in agricultural or shoreland districts. As the Board has already noted, the subject property is located in neither of these districts. It is in a Forestry, or F1, district.

[189] Consistent with the introductory words just quoted by the Board, we find, in MPS Policy 3.7.8.3, a specific provision dealing with C11 rezonings at Highway 101 interchanges. The provision refers to Urban Policy 2.2.5.2 (mentioned previously by the Board at paragraph 179) and then says that Council can apply such zones in three districts, one of which is Forestry.

[190] MPS Policy 3.7.8.3 permits rezoning to C11 if express conditions are met:

> 3.7.8.3 A Highway Commercial (C11) Zone was provided for in Urban Policy 2.2.5.2. Council may provide for the establishment of highway commercial uses in the Country Residential, Forestry Districts or Hamlets adjacent to interchanges on Highway # 101 to permit highway commercial uses by an amendment to the Land Use Bylaw provided that:
>
> a. access is gained by a road other than the limited access highway
>
> b. the development complies with appropriate requirements of the Land Use Bylaw for signage, siting, buffering, parking, outdoor display and storage
>
> c. properties will be abutting Highway # 101 or an access ramp
>
> d. rezoning will only apply to sufficient land to accommodate the proposal.

[191] In bullet form, the conditions which MPS 3.7 requires to be met if C11 zoning is to be applied to a property such as Glooscap's, are as follows:

- that the property in question be Country Residential, Forestry District, or a hamlet (the subject property is in a Forestry District, so it qualifies);
- that the property be adjacent to an interchange on Highway 101 (the subject property is so adjacent);
- that there be access to the subject property by road other than the limited access highway (the subject property is so accessible, via Ben Jackson Road);

- compliance with LUB requirements with respect to signage, siting, buffering, parking, outdoor display and storage (later in this decision the Board discusses the matter of buffering, along with the related issue of incompatability, a term used elsewhere in the MPS);

- that the subject property abut Highway 101 or an access ramp (in the present case, the subject property abuts both Highway 101 and the access ramp);

- that rezoning will only apply to sufficient land to accommodate the proposal (later in this decision, at paragraph 247, the Board discusses this matter as well).

[192] In addition to these criteria, found in MPS 3.7, any council, before making a decision to rezone property at an interchange from F1 to C11, must also take into account the general provisions found in MPS 6.2.2 (entitled “Amendment to the Land-Use By-Law”) which apply to any amendment to the Land-Use By-Law, and not simply to (for example) a proposed rezoning from F1 to C11.

[193] MPS 6.2.2.1 says, in effect, that Council must, when considering whether to rezone to C11 (in addition to consideration of MPS 3.7.8.3 and any other relevant criteria in the MPS), satisfy itself with respect to 14 enumerated items listed in MPS 6.2.2.1:

> **6.2.2 Amendment to the Land Use Bylaw**
>
> 6.2.2.1 In considering amendments to the Land Use Bylaw, in addition to all other criteria as set out in various policies of this Strategy, Council shall be satisfied:
>
> a. the proposal is in keeping with the intent of the Strategy, including the intent of any Secondary Planning Strategy, and can meet the requirements of all other Municipal Bylaws and regulations
>
> b. the proposed rezoning is not premature or inappropriate by reason of:
>
> i. the financial capability of the Municipality to absorb any costs relating to the development of the subject site

ii. the impact on, or feasibility and costs of, sewerage and water services if central services are to be provided, or adequacy of physical site conditions for private on-site sewer and water systems

iii. the potential for creating, or contributing to, a pollution problem including contamination of watercourses

iv. the adequacy of storm drainage and the effect on adjacent uses

v. the adequacy and proximity of school, recreation, and any other community facilities

vi. the adequacy of street or road networks in, adjacent to, or leading to the subject site

vii. the potential for the contamination of a watercourse due to erosion or sedimentation

viii. creating extensive intervening parcels of vacant land between the existing developed lands and the proposed site, or a scattered or ribbon development pattern as opposed to compact development

ix. traffic generation, access to and egress from the subject site, and parking

x. incompatibility with adjacent uses and the existing development form of the surrounding area

xi. the potential for overcrowding on lakeshores or the reduction of water quality.

xii. the potential for contamination of, or interference with a designated groundwater supply protection area

c. the proposed site is suitable for development in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway rights-of-way and other similar factors that may pose a hazard to development

[194] Of the 14 enumerated items, MPS 6.2.2.1(b)(x) (incompatibility) is a matter of particular significance to the Appellants, and the Board explores this issue, and the related matter of buffering, at length below.

[195] Before doing so, the Board will turn first, more briefly, to the matter of water and sewer.

Water and Sewer

[196] MPS 6.2.2.1(b)(ii) relates to water and sewer services, about which the Board received some evidence, although not a great deal.

[197] The area in which the subject property is located is well outside that in which the MPS permits sewer service. The Board concluded that both the County, and the appellants' expert, Mr. Jensen (T127), were in agreement that the wastewater needs of all three phases of Glooscap's project could be accommodated with on-site disposal services.

[198] With respect to water, Mr. Jensen doubted that on-site water supply would be adequate. The County's planning staff, on the other hand, were of the opinion that it was feasible. Earth-Water Concepts 2015 report to Glooscap, filed as an exhibit with the Board, estimates the possible water demands for all the proposed operations in the three phases. It concluded that producing adequate volumes of groundwater on-site might be a limiting factor for all three phases to be in operation, but if so, water could be piped from the Davidson Lake water supply to the site a cost of $175,000-$250,000. There was no evidence before the Board that caused it to conclude that Aboriginal Affairs would not make this money available to Glooscap should it be required, or that such an investment would be disproportionate given the projections of the likely revenues to be generated ultimately by the project.

[199] The Board further notes that this appeal is not with respect to a development agreement, in which such issues would be expected to be addressed in considerable detail. Here, even after re-zoning from F1 to C11, construction can only occur if the County issues a development permit or permits. Ultimately, whatever arrangement or

arrangements with respect to water and sewer may occur in any of the phases will be determined as part of the development permit application process relating to whatever forms of development may eventually occur in those phases.

[200] Taking all of the evidence into account, the Board finds on the balance of probabilities that the Appellants have not established that Council's decision to approve Glooscap's project failed to reasonably carry out the intent of the MPS by reason of the circumstances relating to water supply and sewage disposal.

Incompatibility of Uses and Buffering under the Kings County MPS

[201] The Appellants have consistently expressed their concerns about the effect of Glooscap's project upon neighbouring properties, such as theirs. As the Board has noted, Mr. Miner expressed these concerns from the very beginning, at, for example, public meetings where the project was being discussed by Glooscap and the County.

[202] Certainly the evidence of the Appellants, as expressed by Mr. Miner, makes clear their apprehension as to the effect the Glooscap project will likely have on their property. As noted, it is directly across the road from the portion of Glooscap's Property where the gas station, with its associated intensive uses, will be located.

[203] Mr. Jensen, in his report, graphically describes what the effect of such a project may be. Predicting the "very large scale and intensity of activity" which he foresees if Glooscap's Phases I, II and III become a reality, he refers to:

> …heavy traffic 24 hours a day, a large hotel with restaurant and bar, substantial retail trade (perhaps evolving into occupying one or more 50,000 square foot buildings), large trucks idling and being washed, widespread intense yard lighting, noise from on-site vehicle movements and customers' voices, and windblown litter.

[204] In a not dissimilar, but less graphic way, Ms. Jennings, in her evidence (including the planning report submitted to Council) was direct in acknowledging that

issues of incompatibility, and buffering are inherent in a project of the type proposed by Glooscap. As she summarized in her Response Report of October 9, 2015 (filed with the Board in reply to that of Mr. Jensen):

> …the residential uses in the area may not be compatible with the proposed commercial uses of the subject site…

[205] The MPS provisions do make reference to evaluating the effect of new development upon existing uses, using such terms as “incompatibility” and a need for “buffering.”

Incompatibility of Uses

[206] The Board will first explore the provisions relating to incompatibility.

[207] MPS 6.2.2.1(b)(x), referred to by the Board previously at paragraph [194], refers specifically to incompatibility. It requires, in part, that council “be satisfied” that a proposed rezoning, such as from F1 to C11, not be:

> …inappropriate by reason of:
>
> (x) incompatibility with adjacent uses and the existing development form of the surrounding area.

[208] What are the “adjacent uses” and “existing development form” in the surrounding area? This is a topic which Ms. Jennings addressed in some detail in the planning report which her department made to Council. The Board considers that the description she provided is a reasonably comprehensive and accurate one. She made specific reference to Anstrum’s Farm Market, very near the exit. She also referred to there being a few rural residential uses, Mr. Miner estimating the number to be perhaps six or eight, running along the stretch of Ben Jackson Road which is roughly parallel with Highway 101.

[209] Some of these residential uses have businesses associated with them – such as Tim Thomson's Auto Repair establishment, a landscaping supply business and a hair salon.

[210] In short, both Mr. Jensen, on behalf of the Appellants, and Ms. Jennings, on behalf of the County, recognize that Glooscap's project, if built, would entail incompatibility with existing uses such as, for example, the Miner house.

[211] The MPS, however, does not require that Council find that a project such as Glooscap's be compatible with existing uses.

[212] Instead, the MPS simply requires that Council satisfy itself that the proposal is not "inappropriate" by reason of its incompatibility with such adjacent and existing uses as the Miner farm, or the various other uses in the surrounding area to which the Board had just referred.

[213] The development of such a project by Glooscap is likely to be at least somewhat disturbing, and perhaps even very disturbing, to someone such as Mrs. Miner, or (to cite another example) Ms. Thomson, the shift worker who also expressed concerns.

[214] Is this incompatibility "inappropriate" within the meaning of the MPS? In a situation like this, a municipal council is faced with making choices which can be extraordinarily difficult. The choices may involve such things as weighing the economic value to be attached to the commercial development which would occur as a result of Glooscap. At the same time, a council would also be aware of the importance which people living in existing housing in the area attach to maintaining a level of peace and quiet which they have enjoyed in past years.

[215] Where such a choice must be made, the Court of Appeal has repeatedly held that, in general, it is a value judgment to be made by Council, and not by the Board, provided the decision is reasonably consistent with the MPS. As but one example, in *Archibald v. Nova Scotia* (quoted above in paragraph 158), the Court said, in part:

> 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…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. [Emphasis added]

[216] In the passage just quoted, the Court of Appeal specifically refers to the word "appropriate"; as the Board has noted, the word "inappropriate" appears in MPS 6.2.2.1(b). The choice before Council, then, was precisely the type of question which the Court of Appeal has said is one to be made by Council, and not the Board.

[217] The Board is conscious of the fact that the simple presence of such words as "appropriate," or "inappropriate" or "undue" does not mean that the Board no longer has a responsibility to determine whether Council's decision fails to reasonably carry out the intent of the MPS. As the Court of Appeal put it in *Archibald:*

> …deference [by the Board] to Council's difficult choices between conflicting policies is not a license for Council to make ad hoc decisions unguided by principle.

[218] Is Council's decision to approve Glooscap's project one "unguided by principle," or is it one which reasonably carries out the intent of the MPS? The Board considers that the answer to this question is clearly the latter.

[219] Council, in setting the standards for such a rezoning in the MPS, did not require that there be no incompatibility – simply that the incompatibility not be "inappropriate."

[220] An incompatibility with a residential use might be seen by some, at first blush, as so problematic as to justify refusing Glooscap's application.

[221] Under the County's MPS, however, residential uses do not enjoy primacy in the F1 Zone – the situation is, in fact, quite the contrary. In effect, the MPS for the County states that, in the Forestry District, resource development has priority over residential uses.

[222] The MPS, while saying that new permanent residential uses may be considered along public roads, expressly states that Council:

> …will not promote the Forestry District for residential development.

[223] The relative unimportance of residential uses in the F1 Zone, under the County's MPS, has been the subject of at least two earlier decisions at the Board, and one decision of the Court of Appeal: *Re Lutz*, 2003 NSCA 26; *Deveau v. Kings (Municipal Council),* 2003 NSUARB 38; *Ledge Rock Construction Ltd. (Re),* 2015 NSUARB 202.

[224] Here, Glooscap is proposing a commercial activity, and not a quarry or other similar industrial or resource-related activity, which was subject of the decisions just cited. However, commercial activity is an important goal under the County's MPS.

[225] Further, the commercial activity Glooscap proposes is a highway service centre. This is not just any commercial activity, but one which the MPS specifically recognizes as possible for property located in land zoned Forestry at interchanges on Highway 101.

[226] As the Board has explored in detail elsewhere, the MPS specifically contemplates the possibility of imposing C11 zoning on property which is zoned F1,

where, as here, the property meets detailed descriptors found in the MPS (such as being adjacent to Highway 111, at an interchange, etc.).

[227] Just how many interchanges are there on Highway 111 in Kings County where such centres can be built? The Board does not have, in its judgment, clear evidence of this. Six was a number referred to as a possibility at certain points in the evidence, including a cross-examination of Mr. Jensen by Counsel for Glooscap.

[228] Even if one were to hypothetically assume that six is the correct number, it is possible, as was also pointed out in that cross-examination, that not all properties at interchanges on Highway 101 would qualify under the MPS for rezoning to C11. For example, property near an interchange which is zoned Agricultural could not be rezoned from Agricultural to C11.

[229] In enacting provisions permitting C11 zoning at interchanges in a rural area, on Highway 111, one may reasonably infer that Council was therefore not thinking simply generally, but about, at most, a handful of known interchange locations in the County. Each of these locations would have their own particular characteristics that would lead to more, or less, incompatibility with a highway service centre if one were to be built there.

[230] Ms. Jennings expressed, in part, that idea in her report to Council, when she said that:

> …Council, through [adopting] the MPS's Highway Commercial [C11] policies, has weighted the benefits of economic development and the provision of highway-oriented services over other compatibility issues which may exist in a rural setting.

Her report refers to such incompatibility issues as the presence of residential uses.

[231] To the extent that this passage might be interpreted as suggesting that in adopting the C11 policies in the MPS Council has in all instances decided that the benefits of economic development and commercial activity through provision of highway-oriented

services will outweigh compatibility issues (such as the presence of nearby residential uses), the Board does not agree. Instead, in the judgment of the Board, the MPS requires Council to satisfy itself that in approving a project such as that proposed by Glooscap any incompatibilities with existing uses that may arise are ones that are appropriate.

[232] Nevertheless, the County's MPS, in contemplating the possibility of C11 zoning being applied at interchanges where other uses already exist, has not just implicitly but explicitly recognized that a rezoning from F1 to C11 may involve some incompatibility.

[233] This arises, as Counsel for the County suggested in an argument the Board found particularly persuasive, simply from the fact that some uses must have been present in the existing F1 Zone, and rezoning to C11 will permit a whole new set of uses in the same location. It is, perhaps, very unlikely that at any interchange there will not be at least some measure of incompatibility between the existing F1 uses and the new uses made possible under C11.

[234] Here, at Exit 8A, there are several residential uses, one of which (the house occupied by Mrs. Miner) will be directly across the road.

[235] Moreover, it is possible that Glooscap's project (which, as noted, is to include a market) will be at a competitive advantage (and thus, relatively speaking, incompatible) with the existing Anstrum's Farm Market, located only a few hundred yards away.

[236] Council was, however, aware of all these particular factors. In effect, in the present instance, Council concluded that rezoning from F1 to C11, in the particular circumstances of the various uses surrounding Exit 8A, would not result in an incompatibility with those uses which would be "inappropriate."

Buffering under the Kings County MPS

[237] The Board now turns from the provisions specifically relating to incompatibility to the related ones concerning buffering.

[238] As the Board has previously noted, both the MPS and LUB refer to buffering as a factor to be considered in relation to the C11 Zone.

[239] MPS 3.7.8.3(b) (quoted in full above at paragraph 190) refers in part to buffering in relation to C11 zoning. It says that council may provide for C11 uses in forestry districts, provided that the development complies with (among other things):

> …requirements of the Land-Use By-Law for…buffering…

[240] The Board concludes that the LUB provisions respecting buffering reinforce the view that residential uses in the F1 Zone can reasonably be seen in the MPS and LUB as subordinate to such things as resource development or commercial activity (at least where the C11 Zone is involved).

[241] Part 15.1 of the LUB contains specific provisions relating to the C11 Zone, including such things as permitted uses, the location of accesses in relation to street intersections and the entrance or exit ramps of Highway 101. It also contains specific reference to buffering and screening. Section 15.1.5 of the LUB states, in part:

> 15.1.5 **Buffering and Screening**
>
> Where a Highway Commercial Zone *abuts* a residential use the following requirements shall apply:
>
> 15.1.5.1 A 20 foot wide landscaped buffer shall be required, consisting of retained or newly planted coniferous trees with a minimum height of 10 feet, capable of growing to and being maintained at 20 feet high, with a minimum average spacing no less than 10 feet.

[242] The buffering requirement in LUB s. 15.1.5 applies only in relation to abutting residential uses. "Abutting" has a narrow meaning in the County's LUB. Section 1.2 of the LUB says that "abut" refers to properties sharing "a common lot line or a

common point along a lot line." In essence, this means properties which touch in some way.

[243] Thus, this provision does not apply to the Miner property (which is across Ben Jackson Road). It also certainly does not apply to the more distant Tim Thomson Auto Repair, or the Anstrum's Farm Market, or other properties lying to the east of the subject property but not actually touching it. One property that does touch the subject property lies to the east of it, at the end away from the gas station facility.

[244] A highway service centre built, as Glooscap's is proposed to be, at an interchange on Highway 111, can be expected to often be a noisy and brightly lit place. The Board thinks it instructive of the intent of the MPS, as expressed in the LUB, that even when such a centre abuts (touches) a residential property, the LUB requires only a 20 foot wide landscaped buffer of evergreen trees. And those trees can be as much as ten feet apart.

[245] In the view of the Board, this reinforces yet again the subordinate status accorded by the MPS to residential uses in the Forestry Zone.

Summary with Respect to Incompatibility and Buffering

[246] Taking into account all of the provisions of the MPS, as well as the specific circumstances of Exit 8A itself, the Board concludes that the Appellants have failed to establish, on the balance of probabilities, that in approving Glooscap's project, Council failed to reasonably carry out the intent of the MPS with respect to such matters as incompatibility and buffering.

Should the Board reduce the Area of Land Rezoned by Council?

[247] MPS 3.7.8.3(d)) says that Council should only rezone:

> …sufficient land to accommodate the proposal.

[248] Council re-zoned all of Glooscap's property to C11. Should the Board uphold this, or re-zone something less than the entire subject property?

[249] Glooscap's proposal includes three phases, which will occur on the same property, but in adjoining sections. The County re-zoned all of Glooscap's property to C11, rather than just the Phase I part. Glooscap intends to proceed with Phase I now, and Phases II and III later.

[250] In appropriate circumstances, the *Act* allows the Board to, in effect, approve, but vary, a decision by Council. Does compliance with the MPS requirement that Council rezone only sufficient land to accommodate the proposal mean that the Board should vary Council's decision so that only the property needed for Phase I is re-zoned?

[251] The Board has reflected on this point at length, but has eventually decided to answer this question "no," meaning that the Board upholds re-zoning of the entire property.

[252] In considering this question, the Board did note several factors which might support the idea that the Board should not approve the rezoning of the entire property.

[253] For example, the evidence of the County itself was that, while all activities contemplated in Phase I can be done with C11 zoning, as amended, not all activities in later phases can be done without further amendments to the planning documents.

[254] The Board does not consider that the evidence and submissions before it, from any of the parties, make it entirely clear just what activities would, or would not, be possible under the present rules. Certainly, restaurants and a hotel, two uses planned for Phase II, are specifically permitted in C11.

[255] Further, in her Response Report to Mr. Jensen's Report, Ms. Jennings was, at certain points, at least impliedly critical of Mr. Jensen for having assumed that the proposal that was before Council was for "the full build out" of Glooscap's vision. Instead, she said that "the main focus" was on Phase I (which she described as a gas station, convenience store and coffee outlet), while "acknowledging" that Glooscap wanted "to expand on these uses" later.

[256] However, the Board notes that her Report, and the discussions at Council, discussed the full range of intended activities for Phases I, II and III.

[257] In deciding that Council's decision to rezone the entire property should be upheld, the Board considered a number of factors. The property is of a size, location and configuration that fits Glooscap's proposed project, and is consistent, in the Board's view with the purpose of C11 zoning as that is set out in the MPS and LUB. It is clear that Council has decided it wants to see a highway commercial service centre set up at Exit 8A, extending over the entire property, and the C11 Zone is the appropriate zoning to facilitate that development.

[258] While the uses permissible under C11 may not be extensive enough to include everything that Glooscap has been thinking of doing in all three phases, C11 as it presently stands does nevertheless allow a wide variety of uses, which could be placed anywhere on the property.

[259] Exactly what kinds of development are eventually to occur on the subject property is not a matter which is determined simply by deciding to re-zone the property from F1 to C11. Even if some of the uses Glooscap is thinking about at present in relation to Phases II and III are not presently possible within that zoning, other uses are. Glooscap's plans may evolve, and if the County considers any new proposals suitable for issuance of a development permit or permits, the project, as modified, can proceed.

[260] In deciding to uphold Council's decision in its entirety, the Board was also conscious of the importance attached by the Court of Appeal to paying deference to a decision of Council which reasonably complies with an MPS.

[261] The Board sees Council's rezoning the entire subject property as a pragmatic interpretation of the MPS, in the light of the particular circumstances that apply in this case. As the Court of Appeal remarked in *Heritage Trust 1994:*

> . . . 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…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.

Conclusion with Respect to Issues 1 and 2

[262] For the reasons outlined above, the Board finds, on the balance of probabilities, that the Appellants did not succeed in establishing that Council's decision to rezone the subject property from F1 to C11 or to expand the scope of C11 to include additional uses failed to carry out the intent of the MPS.

Evidence of Mr. Jensen: Credibility

[263] Mr. Jensen's written and oral evidence about the interpretation of the Municipal Planning Strategy was the subject of extensive cross-examination by Counsel

for the County and Counsel for Glooscap. In their written and oral submissions, both Counsel in effect urged the Board to reject most, if not all, of the arguments put forward by Mr. Jensen.

[264] The Board, having considered all of the evidence, has concluded that, in general, it agrees.

[265] In the considered judgment of the Board, Mr. Jensen's approach to the interpretation of planning documents in general, and municipal planning strategies in particular, is, in very significant ways, inconsistent with the direction given by the Court of Appeal with respect to the interpretation of such documents.

[266] Mr. Jensen's Report is detailed, and touches on a wide range of different issues, using a variety of arguments, as does his oral evidence. In originally preparing this decision, the Board thought it appropriate to deal with each of these arguments. Ultimately, however, it has chosen to illustrate its reasons for giving little weight to the bulk of his opinions by referring to only a few representative examples, rather than assembling an exhaustive catalogue, and critique, of each argument he put forward.

[267] Before exploring these examples, and some of the criticisms by opposing counsel of them, the Board will refer once again to an earlier part of the decision, in which the Board summarized the direction given by the Court of Appeal, in various decisions over the years, with respect to the interpretation of municipal planning strategies and land-use by-laws. The Board will not repeat that summary here, but just note once again one or two key principles.

[268] The Court has repeatedly recognized that ascertaining the intent of an MPS is inherently "a very difficult task." In carrying out that task, the Court has also repeatedly

said that no policy or group of policies should be read in a vacuum – all policies must be read in the context of the MPS as a whole [see, for example, *Heritage Trust 1994,* paragraph 100].

[269] Mr. Jensen's approach can be fairly said to be exactly the opposite, a point remarked on more than once by counsel for the County and Glooscap. In Mr. Jensen's defence, however, the Board notes that his mistaken approach is hardly new: as but one example, the Court of Appeal was critical of the Heritage Trust organization almost a quarter of a century ago for focusing in a planning appeal exclusively on the provisions of an MPS which emphasized heritage, while ignoring all the others.

[270] The Board will note first a particularly pithy summary appearing in one of the written briefs submitted by Counsel for Glooscap, in which he asserts that a "main contention" of Mr. Jensen's Report:

> …is that the *general goals of the MPS trump the specific exceptions* in the document. The logical conclusion of this line of thinking is that exceptions to the general goals are never valid… [Emphasis added]

The Board considers this to be a fair, and accurate, description of a major deficiency of Mr. Jensen's approach. Mr. Jensen does indeed say that the MPS' general goals, or policies, trump (i.e., justify ignoring) specific exceptions, even though both are part of the MPS.

[271] The Board turns now to one or two examples of the general provisions in the MPS which were emphasized and relied upon by Mr. Jensen, and examples of exceptions to those general provisions which he regarded as not being valid.

[272] One example of such a general goal relied on by Mr. Jensen is found in the introduction to MPS Policy 3.1 ("Resource and Rural Development Districts"), which says in its first sentence:

> Of *overriding importance* in planning for the rural areas is the protection and enhancement of the County's natural resources. [Emphasis added]

[273] A second example of such a general goal appears in MPS 3.3.2.2, which states:

> 3.3.2.2 Council intends to give *precedence* to uses related to forest harvesting and reforestation operations, forestry industries and related land uses, over all other permitted land uses in the Forestry Districts. [Emphasis added]

[274] Throughout his evidence, Mr. Jensen relied on the above, and other similar, provisions. He repeatedly referred to such things as the "overriding importance" and "precedence" given to resource development generally, and forestry activities in particular, in the MPS.

[275] The extraordinary consequences which he sees flowing from such language cannot be overemphasized.

[276] The following quotation from his written report is illustrative. According to him, these general policies mean that only agricultural or forestry uses are permissible in the forestry district:

> The site is located in the rural Forestry District. *I cannot conclude upon reading the overall MPS concept…that any land uses other than those directly related to or supportive of agriculture or forestry respectively would be permissible in those areas.*

[277] As another example, he told the Board that:

> …even if some other provisions in the MPS seem to permit a land use, the overriding principle is that *only resource-related land uses should be approvable*. [emphasis added]

[278] The Board notes his statement that "some other provisions in the MPS seem to permit" a land use other than forestry in, for example, an F1 zone. As the Board has discussed earlier in this decision, clauses in the County's MPS expressly *do* permit such uses in land zoned F1. They don't just *seem* to permit such uses, as Mr. Jensen claimed.

[279] His attitude towards such clauses is that the language of the general clauses upon which he relies must, as he puts it, “prevail” over them. To put it another way, such clauses are to be ignored. This attitude is not one which the Board merely infers from his evidence – it is one which he expressly stated, and more than once. For example, Mr. Jensen says that:

> The intent of the Kings County MPS is clear: the explanatory language and the key policies speak to a principle that *must prevail over all other policy statements*. [Emphasis added]

[280] It is useful to look at a few major MPS provisions which are examples of ones which he says his general clauses “prevail” over.

[281] One is MPS 3.3.2.3, which lists thirteen separate activities to which F1 property can be rezoned, including Rural Commercial, C9, and, of course, the Highway Commercial Zone, C11, which is the subject of this appeal. The presence of this detailed provision is not, however, a matter of any consequence for Mr. Jensen.

[282] Another provision which was an object of Mr. Jensen’s disdain was MPS 3.7.8.3 (also referred to by the Board above, at paragraph 190. It will be recalled that this provision specifically refers to the possibility of rezoning land from F1 to C11 on property adjacent to interchanges on Highway 101.

[283] Related to carrying out a rezoning from F1 to C11, we find in MPS 6.2.2.1, the general section relating to any amendments of the Land-Use By-Law, that Council has set out a number of criteria for LUB amendments. A key criterion in it, discussed at length elsewhere in this decision, relates to incompatibility with adjacent uses when considering a rezoning from F1 to C11. This clearly contemplates that such rezoning can occur, but that the possible consequences must be considered first.

[284] On a plain reading of these provisions of the MPS, it is crystal clear – at least in the respectful opinion of the Board – that the Forestry District is not the untouchable and sacrosanct thing Mr. Jensen believes it to be.

[285] To the contrary: the MPS says land in the Forestry District can be re-zoned. Council has expressly given itself the authority to rezone property from F1 to zones which have no resource, forestry or agriculture connection at all. And one of those zones, of course, is C11, the one sought by Glooscap.

[286] In essence, however, Mr. Jensen simply does not agree that such re-zoning is permissible. Among numerous criticisms of MPS 3.7.8.3, he seems to simply say that it's wrong in principle. For example, in a remarkable assertion, he claimed that it:

> …ignores the broader intent of the MPS.

[287] In the view of the Board, the Court of Appeal's approach to interpretation of an MPS is clear: "exception" provisions like MPS 3.7.8.3 are as much a part of the MPS as are the MPS provisions containing the general statements like MPS 3.1 or MPS 3.3.2.2 upon which Mr.Jensen relied so heavily.

[288] As such, MPS 3.7.8.3 cannot be said to *ignore* an intent of the MPS – instead, since it is part of the MPS, it is one of the statements that *shapes* its intent.

[289] Mr. Jensen, however, does not see it that way. Instead of deducing the overall intent of the MPS by looking at all the provisions (including both the general language referring to the importance of forestry, and the specific exceptions permiting non-forestry uses in a forestry area), he says that the general provisions are so strong that the specific provisions, such as MPS 3.7.8.3, allowing rezoning to C11, are in general, simply to be ignored.

[290] On cross-examination, Counsel for the County asked Mr. Jensen if, given his views, MPS 3.7.8.3 could be made to work at all. While the Board did not see his answers as entirely clear, the following is an excerpt:

> Q: . . . I'm asking you, is there any way to interpret this section, 3.7.8.3, so as to allow it to permit the section to operate in the way in which is apparently intended to?
>
> A: …it is not possible.

[291] Any doubt on the part of the Board as to his meaning was removed in another part of his testimony. In what the Board saw as a particularly illuminating climax to a productive cross-examination, Counsel for the County asked Mr. Jensen if he was asserting that MPS provision 3.7.8.3:

> Is inoperative.

Mr. Jensen replied:

> That's my opinion, yes.

[292] Viewed in contrast to the Court of Appeal's direction with respect to the proper approach to the interpretation of an MPS – such as, for example, that all the provisions of an MPS must be read together as a whole – Mr. Mr. Jensen's reply might perhaps reasonably be described as astonishing.

[293] Ultimately, the Board found itself driven, reluctantly, to the conclusion that Mr. Jensen wants to apply the policies that he likes, and to disregard the ones he doesn't, and wants the Board to do the same thing.

[294] In the view of the Board, this approach entirely ignores the direction given by the Court of Appeal over many decades of the effect of the provisions found in the *Municipal Government Act*.

[295] Later, Mr. Jensen did manage to acknowledge that he might, in rare circumstances, be comfortable with rezoning a property from F1 to C11, but only if it was:

> …a worked-out gravel pit or something like that…a site utterly devoid of field and forest potential.

This claim may be seen as consistent with the assertion in his written report that:

> …the only non-resource developments that fit in the Forestry District are those that are clearly minor in size…

[296] Ms. Jennings, in her evidence, asserted – correctly, in the Board's view – that Mr. Jensen's claims on this point are simply not supported by any policies found within the MPS.

[297] For the reasons outlined above, the Board has chosen to give relatively little weight to Mr. Jensen's evidence in relation to the proper interpretation of the County's Municipal Planning Strategy.

Issue 3: Have the Appellants established on the balance of probabilities that Council's decision to rezone the subject property from F1 to C11, and to expand the scope of C11, is not consistent with the Provincial Statement of Interest in Agricultural Lands?

[298] One of the grounds referred to in the Appellants' Notice of Appeal was that Council's decision:

> …offends the Provincial Statement of Interest in Agricultural Lands as the lands in question have significant and valuable agricultural potential.

[299] There are two aspects to this part.

[300] The first is whether or not the Appellants have standing to base an appeal upon alleged inconsistency with the Statement of Provincial Interest Regarding Agricultural Land.

[301] The second aspect is whether, if the Appellants have such standing, they have established that the rezoning fails to be consistent with the Statement of Provincial Interest.

[302] With respect to the first aspect, the only arguments which the Board has before it come from a written submission by Counsel for Glooscap. His arguments on the point were extensive, and essentially asserted that Appellants such as the Miners have no standing to argue that a decision by a municipal council is not consistent with the Provincial Statement of Interest in Agricultural Lands.

[303] Counsel for the Respondent County provided written submissions to the Board on October 13, 2015, with respect to the Provincial Statement of Interest in Agricultural Lands. However, he did not do so with respect to the first aspect (whether the Appellants have standing to raise the issue at all), but only with respect to the second aspect.

[304] Counsel for the Appellants provided no written brief to the Board on either aspect.

[305] As a further complication, Counsel for Glooscap and for the County both restricted their written submissions of October 2015 to the issue of rezoning from F1 to C11. This was consistent with their argument (ultimately rejected by the Board) that the appeal should properly involve only the rezoning from F1 to C11, and not include the amendments relating to C11.

[306] The Board, then, has before it only the submission of Counsel for Glooscap with respect to whether or not the Appellants should have standing – it has no written

submission from the Appellants at all, expressing whatever contrary arguments their Counsel might think appropriate.

[307] Given the Board's view of the proper disposition of this appeal overall (and, in particular, the Board's view with respect to the second aspect of the Statement of Provincial Interest ground, which is discussed below) the Board has concluded that it would be better to leave the question of standing to some future appeal proceeding (one in which all counsel, and most particularly counsel arguing in favour of appellants such as the Miners having standing to raise the Provincial Statement as a ground, provide substantive submissions to the Board).

[308] Accordingly, the Board has decided to deal with the first aspect (whether the Appellants do have standing) by assuming – purely hypothetically, and simply for the purposes of this proceeding – that they do have such standing.

[309] The Board accordingly turns to the second aspect: have the Appellants established that Council's decision to rezone the subject property from F1 to C11, and to make amendments to the LUB relating to C11, is not "reasonably consistent" with the Statement of Provincial Interest Regarding Agricultural Land? In the view of the Board, the answer to this question is "no."

[310] For purposes of dealing with the second aspect, the Board has assumed the test to be as found in s. 250(4) and s. 252 (1) of the *Municipal Government Act*, both of which make reference to a decision by Council which is:

> …not reasonably consistent with the Statement of Provincial Interest…

[311] This phrase is not exactly the same as the phrase found elsewhere in the *Municipal Government Act,* or in the *Halifax Regional Municipality Charter,* which (as

referred to in relation to issues 1 and 2 in this proceeding), refers to a decision by a municipal council which:

> …does not reasonably carry out the intent…

of the MPS.

[312] For the purposes of this decision, the Board has assumed that the test of being "reasonably consistent" with the Statement of Provincial Interest is one which can be evaluated using the same principles developed by the Court of Appeal in relation to whether or not a decision by a council fails "to reasonably carry out the intent" of an MPS.

[313] The Statement of Provincial Interest Regarding Agricultural Land is one of a half dozen such statements of provincial interest, made by regulation under the *Municipal Government Act,* Nova Scotia Regulation 101/2001 and Nova Scotia Regulation 272/2013 (the others relate to drinking water, flood risk areas, infrastructure, housing, and the development of the Nova Centre).

[314] All of these statements of provincial interest are subject to one main introductory section, as well as a definitions provision.

[315] The introduction is four paragraphs long and affirms that it is "important" that decisions about land and water be made "carefully," saying that:

> …ill advised land use can have serious consequences…

[316] However, the introduction goes on to say the statements provide "guidance," and not "rigid" standards. The second paragraph says, among other things, that statements of provincial interest are to:

> …serve as *guiding principles* to help…municipalities and individuals in making decisions regarding land use. They are supportive of the *principles of sustainable development*. [Emphasis added]

[317] The introduction goes on to say, in two concluding paragraphs:

> Development undertaken by the Province and Municipalities should be reasonably consistent with the statements.
>
> As the statements are general in nature, *they provide guidance, rather than rigid standards.* They reflect the diversity found in the Province and do not take into account all local situations. They must be applied with common sense. Thoughtful, innovative and creative application is encouraged. [Emphasis added]

[318] The general language (including the words italicized by the Board in the passage above) found in the introduction to the Regulations is consistent with language appearing in a document referred to by Counsel for the County in a written submission. That document, produced by the Provincial Government, is entitled the "Local Government Resource Handbook," Part V of which contains references to the effect of provincial statements of interest. It says that Provincial "municipal planning documents" (including municipal planning strategies and land-use by-laws – s. 196) must be "reasonably consistent" with statements of provincial interest. The handbook goes on to say that:

> …municipalities must take reasonable steps to apply the relevant statements to the local situation when preparing or amending planning documents.
>
> The statements do not provide rigid standards…local circumstances and informed, thoughtful decision making will dictate how the statements should be applied and hence the form of development or resource use which should take precedence.

[319] Having referred to this consistency between the language of the Regulation, and the language found in the local government resource handbook, the Board has decided to give no weight to the language of the handbook. That language is not embodied in legislation, nor is it part of an expert report prepared by a witness available for cross-examination, nor is it a test which has been stated by the Court of Appeal.

[320] What land does the Statement of Provincial Interest Regarding Agricultural Land apply to? It applies, according to the "application" part of the Statement:

> …active agricultural land and land with agricultural potential in the Province.

[321] A definition section which applies to all the Statements (not just the agricultural one) says:

> Agricultural land means active farmland and lands with agricultural potential as defined by the Canada Land Inventory as Class 2, 3 and 4 in active agricultural areas, speciality croplands and dykeland suitable for commercial agricultural operations as identified by the Department of Agriculture.

[322] For the purposes of the present appeal, the Board sees no need for it to attempt to parse the exact possible meaning of these two references to agricultural land. Instead, it considers that for the purposes of the present decision it will simply ask itself the following two questions which relate to the two passages just quoted. First, is the subject property "active farmland" within the meaning of the *Regulations*? Second, is it "land with agricultural potential?"

[323] With respect to the first question (whether the subject property is "active agricultural land") the Board, having considered all the legislative criteria, and the evidence before it, concludes, on the balance of probabilities, that it clearly is not.

[324] As a preliminary point, the Board notes that paragraph one of the Statement of Provincial Interest Regarding Agricultural Land says that:

> Planning documents must identify agricultural lands within the planning area.

[325] The subject property, as well as the land of the Appellants, is within a Forestry District, not an Agricultural District. The subject property, as well as that of the Appellants, and other neighbouring properties, are all zoned Forestry F1. The nearest lands zoned Agricultural are, it seems, almost 3 km away near Avonport.

[326] The sole exception to F1 zoning in the area is the parcel of land on the other side of Highway 101 (away from the subject property, and the property of the Miners), which is zoned Recreational Open Space.

[327] As noted, the property has been covered almost entirely with timber until recently. The Board turns now to the question of whether the subject property is "land with agricultural potential." This term is not defined in the Regulations.

[328] In the view of the Board, a reasonable argument can be made that practically any land could be seen as having "agricultural potential." As but one example, major irrigation systems have been installed, at great expense, in some parts of the world on what were previously arid lands, turning the lands into productive sources of agricultural crops.

[329] Nevertheless, the Board has, after considering all of the evidence, in the light of the *Regulations*, concluded that the agricultural potential of the subject property is relatively limited.

[330] It has reached this conclusion for a variety of reasons which the Board will now briefly summarize. Among other things these concerns relate to such things as the slope of the property, its problems with the soil, and poor drainage.

[331] One of the principal sources of information before the Board with respect to the agricultural potential of the subject property is the report produced by Mr. Keys, as well as his oral evidence, and related documentation filed as exhibits with the Board.

[332] Mr. Keys' Report is detailed. The Board saw Glooscap and the County as generally not disputing factual assertions contained in Mr. Keys' Report – such as his measurement of the percent slope of particular parts of the property, or measurements of soil depth.

[333] The classification system principally relied upon by Mr. Keys in reviewing the property is that which is referred to in the definition of "Agricultural Land" which

appears in the *Regulations.* It will be recalled that it refers to the Canada Land Inventory Classification System, and refers to "Class 2, 3 and 4, Land in Active Agricultural Areas."

[334] The Board has found that the subject property is not active agricultural land, but has instead been almost entirely timbered, until relatively recently. Nevertheless, the classification system has, the Board finds from the evidence before it, relevance with respect to reviewing the subject property with respect to its agricultural potential. Counsel for Glooscap and for the County both referred to the classifications assigned by Mr. Keys to particular parts of the property, and gave their views as to the significance of those classificaitons.

[335] The definition of agricultural land which appears in the statements of provincial interest (quoted above, at paragraph 321) refers to:

> …Class 2, 3 and Class 4 in active agricultural areas, speciality croplands and dykelands suitable for commercial agricultural operations as identified by the Department of Agriculture.

[336] The Board sees an ambiguity in looking at the language "Class 2, 3 and Class 4 in active agricultural areas." It is possible that it is an attempt to refer to Classes 2, 3 and 4 "in active agricultural areas." It is also possible it is an attempt to restrict the application of the regulation where Class 4 land is present, to just Class 4 land located in active agricultural areas. Using this interpretation, the presence of Class 4 land would not be relevant, in the present circumstances, since the land is not located in an active agricultural area.

[337] Again, in the circumstances of this decision, the Board has decided to leave that issue unresolved, and will simply assume that not just land which falls in Classes 2 and 3, but land in Class 4 as well, may be considered to have agricultural potential.

[338] The CLI Classification System takes into account not just such things as soil conditions and slope, but also climate. Because of climate problems, the highest CLI class applicable to land in Nova Scotia is Class 2.

[339] Only Classes 1 to 4 are considered capable of sustained crop production, with management requirements increasing and crop options decreasing as one moves from Class 1 through to Class 4.

[340] Classes 5 and 6 are regarded as capable only of pasture (improved, and wild, respectively). Class 7 is land regarded as incapable to sustaining agricultural use of any kind.

[341] As noted, the definition of “agricultural land” in the Statement of Provincial Interest refers only to Classes 2, 3 and 4 – Classes 5, 6 and 7 are therefore excluded from the Statement of Provincial Interest. About 17.7% of the land on the subject property is Class 5 or worse: Class 5T (9.4%) and Class 7X (8.3%).

[342] The letter “T,” as used in the CLI classification system, refers to difficulties arising from topography. In the context of the subject property, “T” identifies slope as a problem with the subject property.

[343] The letter “X” refers to land which has been excavated and is not available for an agricultural purpose at all.

[344] As noted, Class 4 is the worst of the classes under the classification system which is regarded as capable of sustained crop production.

[345] More than half (52.1%) of the subject property is Class 4: 46.9% of it is 4T and 5.2% of it is 4TW. The letter “W” refers to lands having problems with drainage.

Thus, the 5.2% of the property which is 4TW has problems with slope and problems with drainage.

[346] The Board concludes that slope is a problem for a very significant part of the subject property.

[347] Some of the property is merely gently sloping – for example, the part of the property which runs along a ridgeline within the property. However, slopes north of that ridgeline are generally on the order of 5% to 10%. The most common slope is 9% to 15%, and parts of the western section of the subject property have a slope which regularly exceeds 15%.

[348] The best land on the subject property is Class 3. Only 30.2% of the subject property is in this class, but even this land is not without problems. It is classed 3DT, with the "T" once again referring to problems with slope. The "D" designation refers to undesirable soil problems, which include undesirable soil structure, low permeability and restricted rooting dept.

[349] The reference to rooting depth relates to the shallowness of topsoil before impermeable subsoil is encountered. Mr. Keys' measurements were consistent with those found in a soil review in 1989, which indicated that the depth of the majority of the property to impermeable subsoil was only 40-45 cm.

[350] Mr. Keys was at some pains to point out – and neither Glooscap nor the County disputed – that the CLI Classification System is one which relates principally to common cultivated row crops. He argued that, rather than considering only such crops, one could turn, in an effort to develop the subject property for an agricultural purpose, to orchards and vineyards instead. For these, he maintained, at least "some" of the sloping

and soil drainage problems which present challenges for cultivated row crops might “even be desirable.”

[351] Using this approach, which essentially discounted issues relating to slope and rooting depth, he argued that there became a “potential” for 77.1% of the property to be regarded as Class 3.

[352] As noted, Mr. Keys himself identified issues with the subject property which include slope, drainage, and soil problems. In addition to these three items, however, the Board notes that the Statement of Provincial Interest makes reference to other factors to be taken into account.

[353] These include “existing land-use patterns” and “size of agricultural holdings.” With respect to this, the statement says that:

> …not all areas can be protected for food production…

even where land which is indisputably agricultural is present.

[354] As the Board has already noted, the area is not in an agricultural district. Further, the subject property itself has simply been covered with timber.

[355] With respect to the reference in the Statement of Provincial Interest to “existing land-use patterns,” the Board considers that surely the most significant land-use pattern affecting the subject property is Highway 101 itself, with its large associated interchange at Exit 8A, which the subject property directly abuts.

[356] Given the proximity of the subject property to Highway 101 and its exit ramps, its relatively small size (about 25-27 acres), and the fact that there has been no history of agricultural activity on the subject property, the Board does not consider it has

evidence before it to persuade it that it would make economic sense to embark on a whole new agricultural enterprise, such as a vineyard or apple orchard, on it.

[357] Lastly, in considering an allegation that Council's approval of the Glooscap project is inconsistent with the Statement of Provincial Interest Regarding Agricultural Land, the Board thinks it at least worthy of note that this statement is part of Regulations made under the *Municipal Government Act* – the same *Act* to which changes to a municipality's MPS and LUB are subject. Likewise, any changes to the Municipal Planning Strategy and Land-Use By-Law are also subject to the *Municipal Government Act.*

[358] Accordingly, the Board thinks it reasonable to take into account the explicit recognition in the Municipal Planning Strategy of the possibility of rezoning land from Forestry F1 to Commercial C11 at interchanges on Highway 101 in Kings County.

[359] The provisions in the MPS permitting rezoning land at an interchange, such as Exit 8A, from F1 to C11, were in existence long before Glooscap made its application – and could not have come into existence if the Minister responsible for the *Municipal Government Act* had any objection to them.

[360] The reason is that, under the *Act,* the responsible minister has, in effect, the power to veto changes to planning documents made by municipalities. The minister did not exercise that power when the County decided to include in its MPS the possibility of rezoning property from F1 to C11.

[361] Likewise, the existing provisions of the MPS and LUB describing the uses which are possible in a C11 Zone could not have come into force if the responsible Minister had objected to them. The Board thinks a reasonable inference to be drawn from

the Minister's effective approval of the possibility of rezoning from F1 to C11, and the commercial uses possible in C11 up to 2015, is that the Minister saw them as reasonably consistent with the Statement of Provincial Interest Regarding Agricultural Land.

[362] The proposed changes relating to the C11 Zone which expand the uses possible under C11 (as that zone existed at least until 2015) were, of course, appealed by the Miners before they could be submitted to the Minister for scrutiny, so no implied approval by the Minister of the amendments relating to C11 exists.

[363] The Board sees these amendments as expanding the uses which are possible in the C11 Zone, but not changing the fundamental nature of the type of uses which the C11 Zone already permitted.

[364] In short, the Board is faced here with about 27 acres of land that has until very recently been almost entirely timbered except for where a house and garage have been standing. The land is wedged against a superhighway on one side, a local road on the other, and an exit ramp on a third side.

[365] Significant parts of it are steep, or badly drained, or have soil problems, or a combination of some or all of these.

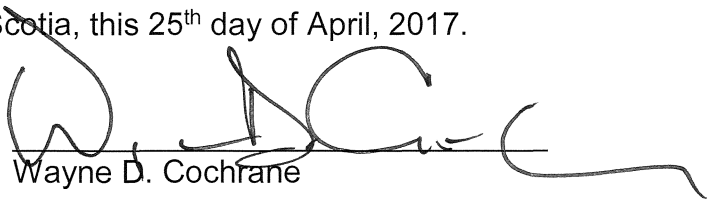
[366] Whether the Board is considering the matter of rezoning the subject property from F1 to C11, or the amendments relating to the C11 Zone which Council has approved, the Board sees nothing in the evidence which persuades it that Council's decisions can properly be seen as failing to be reasonably consistent with the Statement of Provincial Interest Regarding Agricultural Land.

V ORDER

[367] The Appellants' appeal is dismissed.

[368] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 25th day of April, 2017.



Wayne D. Cochrane