DECISION **2019 NSUARB 9**
M08591

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

-and-

IN THE MATTER OF AN APPEAL by **ROY MACINNIS, MAUREEN CAMPBELL, DAVID MOFFATT, DEBRA MOFFATT, ED MACINTYRE, ANN MACINTYRE AND HELEN DOHERTY** of a decision of Cape Breton Regional Municipality to amend the Land Use By-law by rezoning properties to Big Pond Campground (BPC) Zone at Big Pond Centre, Cape Breton County, Nova Scotia

BEFORE:	Roland A. Deveau, Q.C., Vice Chair David J. Almon, LL.B., Member Roberta J. Clarke, Q.C., Member
APPELLANTS:	**ROY MACINNIS et al.** Jim MacDonald Roy MacInnis Debra Moffatt
RESPONDENT:	**CAPE BRETON REGIONAL MUNICIPALITY** Demetri Kachafanas, LL.B. Colin Fraser, LL.B.
DEVELOPER:	**CHRIS SKIDMORE** Chris Conohan, LL.B.
HEARING DATES:	July 4-6, September 25, 2018
FINAL SUBMISSIONS:	November 23, 2018
DECISION DATE:	January 22, 2019
DECISION:	**Appeal is allowed.**

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I. INTRODUCTION

[1] This is a Decision of the Nova Scotia Utility and Review Board (Board) respecting an appeal under the *Municipal Government Act,* S.N.S. 1998, c. 18, as amended (*MGA* or *Act*), by Roy MacInnis, Maureen Campbell, David Moffatt, Debra Moffatt, Ed MacIntyre, Ann MacIntyre and Helen Doherty (Appellants) from a decision of Council for the Cape Breton Regional Municipality (CBRM or Municipality), which approved an amendment to the Land Use By-law (LUB) by rezoning properties from Rural CBRM (RCB) Zone to Big Pond Campground (BPC) Zone, located at Big Pond Centre, Nova Scotia.

[2] The present rezoning (i.e., LUB amendment) is sought by Chris Skidmore (Developer or Applicant) in anticipation of the development of a Recreational Vehicle (RV) Campground at Big Pond Centre. The proposed site occupies approximately 103 acres and is located on portions of four separate lot parcels situated on both sides of the East Bay Highway, at Big Pond Centre.

[3] As noted in a report prepared by CBRM Planning Staff, it is the Developer's intention to develop the campground in phases, according to an overall concept plan. The first phase, which is the subject of this appeal, proposed a maximum of 211 serviced RV sites (Phase 1). Phase 2 and Phase 3 have the potential to include an additional 330 RV sites with 64 tenting sites. Phase 1 is separated from Phases 2 and 3 by the East Bay Highway, being located on the north side of the East Bay Highway, adjacent to the Bras d'Or Lakes.

[4] In total, the original rezoning application (on both sides of the East Bay Highway) proposed 541 RV sites, 64 tenting sites, and a variety of amenities, which the Staff Report indicates could include:

- Office for administration
- Convenience store
- Liquor store
- Restaurant
- Propane depot
- Recreational activities (such as ziplines, mini golf, mountain bike trails, water play area, ATV trails, snowmobile trails, cross country ski trails/snowshoeing, and hiking and walking trails)
- Amphitheatre

[5] The application seeks to amend the LUB by creating a site specific, use specific, zone under the LUB by deleting the Rural CBRM Zone on the entire property and replacing it with the Big Pond Campground Zone. This appeal only relates to Phase 1 on the north side of East Bay Highway. The new Zone would allow a development permit to be issued for a campground use, as well as all uses currently permitted in the Rural CBRM Zone. The development would be subject to various land use requirements outlined in the LUB amendment, as discussed in greater detail later in this Decision.

[6] As described in the testimony of the Appellants' witnesses at the hearing, in letters of comment, and confirmed during the Board's site visit, the proposed RV campground development is to be situated along the shores of the Bras d'Or, at Lochmore Harbour. The location is characterized by the geographic features of a "barachois" formed by a peninsula jutting out from the shoreline and enclosing a relatively shallow body of water between the main shoreline and a narrow beach on the Bras d'Or. The area is frequented by various species of birds, fish, and animal wildlife. The surrounding community of Big Pond Centre is rural in character and contains a mix of year-round and seasonal homes and cottages, along with some farm activities.

[7] CBRM Council approved Phase 1 of the rezoning application at a Special Meeting of Council on March 7, 2018, respecting the lands on the north side (on the Bras d'Or Lake side) of the East Bay Highway.

[8] The Appellants filed their Notice of Appeal with the Board on March 23, 2018, setting out a number of grounds of appeal.

II. HISTORY OF PROCEEDINGS

[9] The Developer originally filed an application with the CBRM in October, 2017 to rezone the subject property from Rural CBRM Zone to Big Pond Campground Zone. The application requested that parcels of land on both sides of the East Bay Highway at Big Pond Centre be rezoned.

[10] The CBRM Planning Department undertook a review of the rezoning application, which included requests for information and comments from numerous area residents, including a number of the Appellants. A report prepared by Karen Neville, dated February 15, 2018 (Staff Report), concluded that a decision by Council to approve the rezoning on the north side (or on the Bras d'Or Lake side) of the East Bay Highway could be "defended" under the Municipal Planning Strategy (MPS), but expressed concerns about the rezoning on the south side of the Highway. Thus, she recommended that only Phase 1 of the rezoning application be approved by Council. Her Staff Report concluded:

> Given the content of the Municipal Planning Strategy and the above evaluation, a decision of Council to approve the development in its entirety in compliance with advertised Amending By-law found in Attachment H can be defended. However, staff is recommending that Council approve the zone amendment only for Phase 1 of the proposed development (Amending By-law I).

> Part 2, Policy 17e. of the Municipal Planning Strategy states that if zone provisions cannot be established that provide reasonable protection to residential development the application can be denied. Given the low lying topography and screening provisions, Phase 1 of the campground located on the North side of the highway (i.e. the lake side of the highway) will likely not be seen at all unless you actually enter the site. The same may not be true for Phase 2 and 3 (i.e. South side of the highway) given its steep topography (Attachment J). In addition, while the scale of a recreational vehicle in comparison to a dwelling is not an issue, the total number of campsites being proposed for the entire development is significant when compared to the surrounding community. That being said, the total number of campsites in Phase 1 is comparable to those found in the nearby Ben Eoin Campground Beach and Picnic Park. Also, approving Phase 1 of the proposed development does not prevent Council from considering an amendment in the future for Phases 2 and 3.
>
> [Exhibit M-8, Tab 6, p. 47]

[11] CBRM Council held a public hearing on February 20, 2018. Several members of the public attended the hearing and made presentations. In addition, numerous letters of comment were filed with CBRM, the majority of which opposed the rezoning application. The CBRM Planning Department issued a second memo (Supplemental Staff Report), dated February 23, 2018, addressing some of the specific concerns heard at the February 20th hearing.

[12] Consideration of the rezoning application was brought forward to a meeting of Council on February 27, 2018, but was deferred to March 7, 2018, to allow CBRM staff to provide an opinion addressing any duty upon the Municipality to consult Aboriginal groups respecting the project. It was CBRM's conclusion that it was not required to consult with Aboriginal groups about the application. Planning staff noted there is no specific direction in the *MGA* that municipalities have a specific responsibility to consult with First Nations for a zoning amendment application. Further, they advised they had contacted the Nova Scotia Office of Aboriginal Affairs, which stated it is not normally their practice to take a position on an application for a municipal zoning amendment.

[13] CBRM Council considered the rezoning application at a Special Meeting of Council on March 7, 2018. Council approved Phase 1 of the zoning amendment

application to permit a campground, as recommended in the Staff Report of February 15, 2018. The approval by Council was not unanimous, with the motion carried by a vote of 7 to 6.

[14] The Appellants filed their Notice of Appeal with the Board on March 23, 2018, alleging that Council's decision did not reasonably comply with the intent of the MPS in several respects. The hearing on the merits was preceded by a number of preliminary motions and rulings by the Board, including evidentiary rulings. The Board ruled that three grounds of appeal should be struck as being outside the scope of the Board's jurisdiction. As a result, the grounds of appeal to be considered in this matter are as follows:

1. MPS Policy 17(E) - CBRM planners and the CBRM Council failed to adequately evaluate the proposed zoning amendment from the perspective of:
    - Visual Compatibility;
    - Dust or fumes emanating from the site;
    - Traffic attracted to, and leading from, the site; and
    - Noise emanating from the development.
2. Policy 13.A on page 5.14 of the MPS which states in part that;
    "Amusement Parks ... are only promoted in:
    - in sale/service business sectors centered on a level 2 road (refer to charts on page 7.3 and 7.4); or
    - in rural communities with extensive setback and buffering provisions whereby a combination of distance, topography, and vegetation will protect residential development."

    The Appellants say that the application to Council by the developer (which is attached as Schedule "C") called for the property in question to use for "recreational activities (Adventure Park)". In Council's decision it failed to take in consideration that the application contained a provision for an Adventure Park and based its decision on an application for a RV Park only.

    The Appellants contend that if Council had known or understood that the true intent of the application was for an Adventure Park, it would either have rejected the application or required "more extensive setback and buffering provisions" as required by Policy 13.A.

3. Council and it's planners failed to take into consideration the policy provision stated on pages 5.11 and 5.12 of the Municipal Planning Strategy which reads in part as follows:

> "...Swimming and bathing beaches aren't manufactured. Only the right combination of sand and accessible water make a successful beach..." and
>
> "Outdoor recreational facilities that encourage boisterous behaviour (*e.g. amusement parks*), are inherently loud (*e.g. race tracks for motorized vehicles*), and/or pose a danger to surrounding development if not properly sited (*e.g. shooting range*) present their own unique set of land use conflicts.
>
> The boisterous atmosphere encouraged at amusement parks and the scale of the activity makes such facilities a potentially obnoxious type of development. While such facilities do capitalize on the growing tourism industry, studies conducted on behalf of Tourism Cape Breton suggest the type of tourists attracted to Cape Breton do not frequent such venues. As well, rural Cape Breton communities along the Bras D'Or Lakes, the Atlantic and the Mira River have long been attractions as 'cottage country' and rural Cape Breton is also being touted as a retirement destination. The placid atmosphere expected from such commitments can be adversely affected by a poorly sited amusement park. If not located along sectors of Level 1 or 2 regional rural routes (*refer to Charts on pages 7.3 and 7.4*) with a large % of business development, they are to be channeled to rural locations with extensive setbacks and buffering provisions whereby a combination of distance, topography, and vegetation will protect residential development."

...

6. Planning and development did not properly identify relevant agricultural land, as per provincial statement of interest. These measures were not adequately considered by Council. Planning documents must address the protection of agricultural land. Measures that should be considered include:

> (a) giving priority to uses such as agricultural, agricultural related and uses which do not eliminated [sic] the possibility of using the land for agricultural purposes in the future. Non-agricultural uses should be balanced against the need to preserve agricultural land.

...

8. The Appellants say that Council's rezoning decision will adversely affect the value and/or reasonable enjoyment of our properties and those of our surrounding neighbors. The Appellants say that the MPS was meant to respect and maintain the quality of life in our rural community and Council's decision to allow this rezoning amendment is therefore contrary to the intent and purpose of the MPS.

9. Such other grounds of appeal as may be appropriate. [Emphasis in original]

[Exhibit M-1, pp. 7-8]

[15] The Board's hearing was held July 4-6, and September 25, 2018, at the Holiday Inn, in Sydney, Nova Scotia. The Appellants were represented at the hearing by their agent Jim MacDonald, and the Appellants Roy MacInnis and Debra Moffatt. Demetri

Kachafanas, LL.B., and Colin Fraser, LL.B., acted as counsel for CBRM, while Chris Conohan, LL.B., represented the Developer.

[16] An evening session was held on July 4, 2018, with eight members of the public making presentations to the Board.

[17] The Board also received 42 letters of comment from members of the public, of which 39 were opposed to the rezoning.

[18] The Board conducted a site visit on September 24, 2018, accompanied by the parties.

[19] Following the conclusion of the hearing, the parties filed written submissions with the Board. The final submission was filed on November 23, 2018.

III. ISSUE

[20] The issue to be determined in this Decision is whether the decision of CBRM Council approving the LUB amendment failed to reasonably carry out the intent of the MPS.

[21] For the reasons described below, the Board concludes that Council's decision did not reasonably carry out the intent of the MPS. Thus, the appeal is allowed.

IV. EVIDENCE

(i) Evidence of the Appellants

[22] The Appellants called 16 witnesses at the hearing including Ivan Doncaster, Roy Gerard MacInnis, Rita Christine Morley-MacDonald, Carl Francis MacIntyre, Rod Beresford, Gertrude Anne MacIntyre, Anne Catherine MacIntyre, Mary Paula MacInnis,

Frances Maureen Campbell, John Robert MacDonald, Edwin Alexander MacIntyre, Michael James Britten, Helen Marie Doherty, Gordon Peter Sutherland, Debra Anne Moffatt and David Sydney Moffatt. Most of them expressed similar beliefs about visual compatibility, dust, fumes, traffic and noise and the effects the proposed development will have on their community.

[23] The following is a brief summary of the testimony of the Appellants' witnesses.

[24] Ivan Doncaster resides in East Bay and is the Councillor for Big Pond and echoed the views of many of his constituents, testifying that if the development is approved, traffic will increase, the quality of life, water table, and the ecosystem will be compromised.

[25] Roy MacInnis resides on East Bay Highway, Big Pond Centre. His 130-year-old house is on the south side of the Highway, approximately 75 metres from the proposed development, while his barn, on the north side of the road, is probably 15 metres from the proposed development. On the north side he owns approximately 17 acres, one acre of which is cultivated for gardens, and contains a hoop house.

[26] His niece, Rita Morley-MacDonald, resides in Johnstown, west of Big Pond Centre.

[27] Both Mr. MacInnis and Ms. Morley-MacDonald are organic farmers, producing vegetables and free-range chicken eggs, which they sell to the public. They have plans to add cows to the operation, as well as bees for honey production, and fruit trees.

[28] In their testimony they expressed unease that the proposed development may destroy the potential for organic farming because of its proximity to their operation. They also testified of their concerns about air-borne pollutants from an excessive number of vehicles, smoke and fumes from campfires and barbeques, exhaust from maintenance equipment, sewage treatment processes and precipitation run-off containing pollutants. In addition to the noise, Mr. MacInnis voiced concerns about how many trees will be left on the proposed site, affecting his visual compatibility.

[29] Carl MacIntyre resides in Big Pond Centre and has great concerns that the proposed development will affect pedestrian and vehicular safety, as it is on a short, straight stretch bounded by a blind curve on one end and a blind hill on the other end.

[30] Rod Beresford, a Ph.D. candidate in Biology, teaches at Cape Breton University, working on shellfish disease and, specifically, oyster parasites presently in the Bras d'Or Lakes. He testified that he has an oyster lease on the barachois pond, known as Lochmore Harbour. The proposed development calls for the importation of sand along 305 metres of shoreline which could affect the oysters:

> **A.** … It starts to smother things that live on the bottom whether you know it's oysters, crab, shrimp, things like that, mussels. … the next thing you know they smother, …
>
> [Transcript, July 4, 2018, p. 114]

[31] With the addition of high-density housing from the RVs to the area, he testified that this could create a heavy strain on the volunteer fire department. Access and egress on the narrow roadway could add to the risks. It could compromise the fire department's ability to manage fires. Containment of any fire could be difficult.

[32] Dr. Gertrude MacIntyre resides on East Bay Highway, Big Pond Centre, southwest of the proposed development. She is a writer, teacher and lecturer in

community economic development. She testified she moved to Big Pond four decades ago because of the serenity, pastoral setting and natural environment. She testified that the proposed RV Park is about business development. There was no community development – involving residents and the decisions that affect them. She testified that it was her hope that "our municipalities protect that environment for us."

[33] Anne MacIntyre lives next door to the Roy MacInnis property, on East Bay Highway in Big Pond Centre. She operated a bed & breakfast for 15 years. The Big Pond Concert was held on her property for almost 50 years. For many of those years, the weather was very dry and one of her big concerns was for forest fires. That remains a concern for her with the proposed development.

[34] Paula MacInnis resides in Bedford, Nova Scotia, and is part-owner of the family home on East Bay Highway, in Big Pond, which includes the property adjacent to the proposed development. Her evidence centered on the size and scope of the development and her dealings with planners and councillors, noting that she had multiple meetings with Ms. Neville and Mr. Gillis. She also testified that she took a petition to residents, residing approximately four kilometres in each direction, from the proposed development.

[35] Maureen Campbell, Roy MacInnis' sister, resides on East Bay Highway, Big Pond Centre. Her family home borders on the proposed development. She is a letter carrier with Canada Post and frequently travels the roads. She spoke of her concerns about traffic, the hazards of driving on a narrow, two-way rural road, speeding and passing. Regarding visual compatibility, Ms. Campbell said that the project development "does not fit." She also expressed concerns about the effect the proposed development

would have on Saint Mary's Cemetery which is to the immediate west of the proposed site. She described it as sacred ground which will be interfered with by the proposed development, approximately 10 metres from the cemetery.

[36] John MacDonald resides in Big Pond Centre. His concerns are with the visual effect and noise. He testified that "visually…most of what you see in rural Big Pond is green. …It's green fields and green trees…and different greens...," contrasting that scene with a playland, floating on the water, which he described, understatedly, as "visually bright." He also expressed concern about noise. When various events are held at Eskasoni First Nation which is some four to five miles across the lake, he testified that he can actually hear noise drifting across the water. He could also hear noise from the Big Pond Concert, half a mile away. The proposed development will increase the noise in the community.

[37] Edwin MacIntyre resides on East Bay Highway, Big Pond Centre, approximately 180 metres northeast of the proposed development. He is concerned with the density that will end up on the 23-acre site which is "way out of whack" with the surrounding community. He has concerns with visual compatibility, suggesting that spruce or evergreens would have to be planted along the border, and there are voids all along the line, adding that "the trailers will be visible, from all sides and visible from the water."

[38] He testified that when he looks out his window, westward, he can see past Roy MacInnis' property and the Flo Sampson property, site of the proposed development. If the development is approved, he stated he will have to look at trailers all day, every day.

[39] Mr. MacIntyre expressed concerns about the increased noise from the proposed development, also noting that he can hear the music and drums from Eskasoni First Nation, five to six miles away across the Bras d'Or. He testified that he is concerned about the "streets" in the campground, which would have to be illuminated, and which would create a glow and would be "like living next door to a shopping centre." He likened the proposed development to "dumping a little city or town into a small community."

[40] Heading northeast, approximately 475 metres from the proposed development, on East Bay Highway, is the six-residence subdivision of Concert Lane, Big Pond, which runs perpendicular from East Bay Highway, north, to a point overlooking Lochmore Harbour.

[41] Michael Britten, a chemical engineer, resides on Concert Lane, and his property affords a view of the barachois. He is a retired federal government employee and retired Chief of the Big Pond Volunteer Fire Department. Also, he had been the program coordinator for the cleanup of the Sydney Tar Ponds.

[42] His shoreline property, with wharf, is about 500 metres from the proposed development and one kilometre across the barachois from the Sutherland and Moffatt properties. Alluding to its muddy bottom covered with shells and eel grass, he testified that Lochmore Harbour is "not the Bras d'Or Lakes and it is not a beach," although he and his family, with proper footwear, swim in it. He testified the water levels have been high in the pond and in the last couple of years the shoreline has been flooded. He is concerned about increased boat activity on the water with swimmers and snorkelers; boating incidents with increased water traffic; and, the difficulty responding to medical or fire emergencies to and from the proposed development.

[43] The mitigation efforts with respect to noise by the proposed development does not provide Mr. Britten “reasonable” protection. While there are “forests” in some areas, he can hear sounds very clearly from the Moffatt and Sutherland properties. He testified that if the mitigation measures do not reasonably protect his interests, then he does not feel that those measures provide reasonable protection.

[44] Helen Doherty is a neighbour of Mr. Britten on Concert Lane. Like Mr. Britten, her property is contiguous with the barachois. She testified that the proposed development is not visually compatible with the surrounding area, nor is it visually compatible, both from the water and from the land. Lochmore Harbour is her home and she tolerates the slimy bottom, the eel grass and the jelly fish stings. She testified that in the spring it is a very placid and quiet environment. Her reasonable enjoyment of her property will be greatly affected by the proposed development, and she will not hear things as clearly, and she will not be able enjoy the darkness of the night sky. She testified that, presently, she can hear conversations on the Harbour from people in boats. She testified that with increased boating and swimming activity on the barachois, noise levels will escalate noticeably.

[45] Finally, she testified that the proposed development does not fit with her lifestyle nor does it fit with Big Pond.

[46] Approximately 1.2 kilometres west of Concert Lane on East Bay Highway, and directly across from Rita’s Tea Room, is a small subdivision on the north side of the East Bay Highway, comprising four houses on Mie Mestreech Road and one house on Alden Lane. The properties of Gordon Sutherland and Debra and David Moffatt face the barachois and have an unobstructed view of the proposed development from their

respective properties. As noted later under the Letters of Comment section, Drs. Debbie and Russ Gowan also own a seasonal cottage on the barachois, which borders the proposed campground site. The Board panel members walked and observed the Sutherland and Moffatt properties and view planes overlooking the barachois, which is described later in this Decision, under Site Visit.

[47] Gordon Sutherland resides on Mie Mestreech Road, in a house situated on Lochmore Harbour.

[48] He reckons his property is approximately 150 to 200 metres directly across the barachois from the proposed development. He testified that even with a screen of about 500 metres of natural tree growth it, essentially, filters none of the traffic noise from the East Bay Highway. Even though he is some distance from his neighbours, he hears lawn mowers and chain saws, albeit infrequently. He testified that he saw nothing in the LUB to mitigate the noise, adding that a three, ten or 20-metre buffer, will do nothing to shield any noise.

[49] He has observed a lot of change to the biology of the barachois over the years: increased eel grass bending out over the surface of the pond, and the water is becoming muddier and murkier.

[50] The site of RVs opposite his property would be very “troublesome” to him.

[51] Mr. Sutherland was asked how the proposed development would affect the value of his property and he responded:

> **A.** Well like I say I got up this morning at five-thirty and watched the sun rise over the pond and not a ripple on it. It was absolutely still. Watched four families of geese paddle around the thing.
>
> Those geese won't be there if there's 211 people living on the shoreline adjacent to them.
>
> [Transcript, July 5, 2018, p. 492]

[52] Mr. Sutherland concluded his testimony by saying:

> **A.** I guess you know one of my concerns with this whole project is the -- what I feel is the lack of planning, the changes in the plan as it went along, somebody else referred this morning to the plan being 211 sites then it was 605 sites, now it's back down to 211 sites.
>
> There's been -- I just don't feel -- have any confidence that the -- if what we see on paper and in pictures is going to be realized or how it's going to be realized.
>
> The brochure says -- I think is very misleading because it refers to a thousand feet of sandy beach, significant open spaces for communal gatherings, the natural condition of the land, the clusters of RV sites to promote a feeling of community.
>
> If you look at the diagram there are no clusters. It's one big cluster. There's no natural habitat. Every tree looks like a little piece of popcorn. There is no natural vegetation left there. And I wonder how the Land Use By-law is going to be enforced.
>
> Who's going to enforce it, when I look out my window and that opaque screen which is advertised is no longer there and all I see is a wall of trailers who do I call?
>
> Do I call the planning department?
>
> [Transcript, July 5, 2018, pp. 493-494]

[53] Debra Moffatt and her husband, David Moffatt, have lived on Mie Mestreech Road for 12 years, in a large log home, which they built. The Bras d'Or is on one side of the property and the sheltered barachois is on the other side. It is private, isolated and quiet. Ms. Moffatt testified that they have a view of the water from every window in the house. She enjoys walking the trails on their property and spends a lot of time on the barachois side of the house, because it is sheltered. She loves bird watching, particularly observing eagles and loons and listening to their distinctive calls.

[54] From the shoreline of her property, there is nothing impeding her view of the proposed development across the barachois. From her upstairs bedrooms, she testified she has a very clear view of the proposed development. She can clearly see Flo Sampson's house, on the site of the proposed development, from her property.

[55] Ms. Moffatt testified on how the development will impact her, and her husband's day-to-day life:

> **A.** I think it -- so I said we're outside people. So the summer is hard on me because I'm the kind of person that thinks you need to be outdoors from sun up to sunset and I -- and so it's a long day.
>
> So I am outside every chance I get if it's not pouring rain. And in the summertime, in shoulder seasons and even in the winter my windows are open to let the fresh air through.
>
> We do not have air conditioning in the house. So that's the air that we get. So with no -- what I really want to impress upon people is that there is nothing between our property and this proposed development.
>
> And as much as there may be trees on the shoreline of that development and sparse trees on the shoreline of mine once I am sitting on the shoreline of the pond and once all of the campers are on the shoreline of that park there is absolutely nothing between us but a small amount of space.
>
> So I am going to see them and they are going to see me so I can only imagine my privacy will be completely eradicated. I've said I love to photograph the pond. And that view of that park is the -- will now be the backdrop to that photography.
>
> Right now it is a stand of trees and Flo's house in the picture. And that's okay but as I said it's a sloping landscape. Trailers are going to be in the backdrop of all of those pictures.
>
> The moon rises, the full moon rises right over that property. And I also like to go out at night and photograph it. And it will be I can only imagine completely lost in the glow of light coming from that campground.
>
> There's just nothing to -- there's no screen between us. There's no buffer between us and one cannot be placed there unless you're going to put something in the middle of that pond. [Emphasis added]
>
> [Transcript, July 6, 2018, pp. 753-755]

[56] Ms. Moffatt also testified that she is concerned with the nuisance to the pond that might be caused by the proposed development. She likened the pond to a backdrop of her property, but not a place to go swimming or playing in the water, which was the same concern of some of the other witnesses who testified.

[57] Ms. Moffatt testified that she availed herself of every opportunity to speak with the planners and council members to express her concerns about the proposed development:

> **A.** …So I sent out a personal invitation to each of the councillors that they come to our property so that I could show them and give them a first hand view of what my experience would be.
>
> And I got two responses to that email but no one came.
>
> [Transcript, July 6, 2018, p. 771]

[58] Ms. Moffatt testified that the noise and the visual impact, i.e., being able to clearly see the proposed development from her property, are going to have a huge impact, as the only reason she is there in the first place, is for the privacy, noting that:

> **A.** …And I look to the future and I say well if I cannot tolerate it and the complaint system does not work then I will be forced to move and then I will be faced with the fact that who am I going to sell my house to because who's going to want to move into my shoes at that point.
>
> [Transcript, July 6, 2018, p. 773]

[59] Ms. Moffatt testified that Ms. Neville did not visit her property to observe what the proposed development would look like from her property, or how it would affect her, Mr. Moffatt and Mr. Sutherland.

[60] When asked by the Board if she thought there was reasonable protection to residential development in proximity to the proposed development with respect to her property and the Sutherland property, she offered the following:

> **A.** Absolutely not.
>
> **Q.** (Almon) Why not?
>
> **A.** Because there -- because the feature of this property is the water. You wouldn't put a campground on the side -- no I shouldn't say you wouldn't -- I wouldn't expect it to be a popular idea to put a campground on the side of route 4 with no beneficial feature that you're focusing your activities and whatever.
>
> So it is the water view and it is the water activities. I understand ATV'ing and whatnot will also be -- is also something that's promoted but it's undeniably, it's on the shore of the Bras D'Or -- it's on the Barachois Pond of the Bras D'Or Lakes.

So, it is the water feature that is going to be the focus of this park. The amphitheatre has been put down by the waterside. If it -- if the waterside was not important -- anyway given that all of the activity is going to be down on the shore -- forgive me I should say all -- you can only appreciate that a lot of the activity is going to be down on the shoreline and in the water.

That massive floating park has become sort of the signatory picture in all of the newspaper clippings for this park. It's certainly what people are identifying with.

Can you imagine sitting on my shore in a chair beside me and that water park, that floating water feature is out in the water. And it has to be out in deeper water so it can't be sitting tied next to the shore.

It needs to be well out into the pond. So now it is much closer to me and there is nothing between me and that water park. That 66-foot buffer zone on the shoreline of that park will screen them from me more than it will screen me from them.

[Transcript, July 6, 2018, pp. 783-785]

[61] It was Ms. Moffatt's evidence that no number of trees, vegetation and shrubs would be a sufficient buffer zone to shield against noise or mitigate for visual compatibility:

Q. (The Chair) Just so I'm clear Ms. Moffatt, when you're talking about noise and visual compatibility, and being -- having reasonable protection from that you're not just talking about the activities on the water?

You're also talking about the activities on the campground, correct?

A. It will be all of it. There will be -- there's a -- as I said I've lived in RV parks, it is constant maintenance. The lawnmower, ride on tractors, leaf blowers, whipper snippers, everything will add together and there is no way to mitigate that sound from travelling.

I'm not an expert but you've heard Mr. Sutherland say I can hear the highway. I can hear the dogs bark. I know the sound is going to travel through those trees no matter how thick that treed buffer zone is going to be.

So every sound that's going on in that RV park will add up together and it will be in my ears and it will be in my ears from first thing in the morning until the campfires go out at midnight.

It -- you know when -- until the security within the park shuts whatever the ---

Q. And you're talking about noise but you're also talking about visual compatibility? Again, not just what's happening in the pond but also from the campground?

A. The sloping landscape from my point of view they will not be able to hide the trailers.

Q. (Almon) There's no trees or shrubs or vegetation that can do that in your mind?

A. NO. Actually ---

Q. (Almon) Because the applicant intends to address that by -- as written in the report – by planting additional trees, shrubs and other vegetation throughout the project area.

A. So ---

Q. (Almon) Is there any amount of trees, vegetation, shrubs that can give you some type of satisfaction for visual compatibility?

A. Mr. Sutherland alluded to that when he - when Mr. Sutherland talked about the parks that he preferred to camp in and he said they were Federal and Provincial, and I don't know if you are campers at all but those campgrounds are heavily treed and the trailers themselves are screened from each other.

So what's being proposed for this park is a tree here okay and this is the 66 foot wide tree buffer that would be between myself and the property. And as the property slopes up the trailers that are here might be behind that tree.

But the trailers that are here are going to need much taller trees in order to screen them. So the sloping landscape makes that single tree line difficult. So if you plant trees all around every single trailer or a large number of the trailers then you're screening them visually.

But you're not screening them auditorily. Does that answer your question?

Q. (Almon) Thank you.

Q. (The Chair) And when -- just for the purposes of the transcript when you say here and here you were describing a process of the trailers being situated higher up on the hill as you're approaching the highway?

And the difficulties you have of screening from your view ---

A. The higher land.

Q. --- the higher the trailers are up on the hill?

A. Right.

Q. Okay.

A. And to call it a hill, it is a sloping landscape. I don't want to be thought of as exaggerating this thing into a cliff. It's sloping. It's not flat. So if it were flat then a complete border of trees around the park might screen them visually.

But it's not flat. [Emphasis added]

[Transcript, July 6, 2018, pp. 786-789]

[62] David Moffatt holds an MSc in Audiology and was a hearing specialist for 30 years. No attempt was made prior to or during the hearing to qualify him as an expert witness (which would have, among other things, involved filing a report from him, as well

as an outline of his experience). Nevertheless, counsel led evidence from him on matters relating to ambient sound levels or surrounding sound levels, which he described as "very, very low." He testified:

> **A.** …As has been offered by several of the other witnesses you can hear the Big Pond concert when it was going on. The sounds of the birds very easily heard. Because the background levels are in my you know personal experience having been living there for a period of time that makes it easier to hear noises that come from farther distances than you would have experienced if you're, for example, when I lived in the city.
>
> [Transcript, July 6, 2018, p. 799]

[63] Mr. Moffatt described the lay of the land, noting that he has hiked the hills and paddled a kayak on the water, noticing that sound travels quite readily across the water, but also because of the topography of the land.

[64] Mr. Moffatt was asked how he saw the potential development disrupting his peaceful enjoyment of his property to which he responded:

> **A.** Well the development as I understand it it's got many features that are proposed that are noise generators and given that and a number of campers and the outdoor types of activities I believe that because we're accustomed to a relatively quiet environment that this possibility of new noise, new sounds would take away from our peaceful enjoyment of our property.
>
> [Transcript, July 6, 2018, p. 809]

[65] He added:

> **A.** Well with the introduction of large groups of people in the RV park for example and the activities that would be going on I would expect there would be much more noise that would be carried across the pond.
>
> And that these would be going on all day possibly every day.
>
> **Q.** And the -- any particulars in terms of living things, non-living things?
>
> **A.** I'm sorry.
>
> **Q.** Any particulars you might like to offer with respect to either living things or non-living things producing noise?
>
> **A.** Well there'd be the campers for one thing.
>
> **Q.** Yes.
>
> **A.** Then there'd be the lawn care equipment that would be going on again because it's a large development with landscaping that would have to be maintained. There'd be all

of the other amenities. We're talking about the amphitheatre, splash pad, there'd be the fire pits, there'd be you know groups of people that would be congregating.

I'm sure they'd be enjoying beverages and having parties, etc. And those are all sounds that would be readily heard.

[Transcript, July 6, 2018, pp. 810-811]

[66] Regarding the visual impact he testified:

A. ...for me personally looking across the pond and seeing the landscape there now is something that has drawn us there and I believe that with the introduction of such a development that's being put forward here that it would be very significant in that it would change the viewing plane and that would take away from the enjoyment of the property.

[Transcript, July 6, 2018, p. 810]

[67] In his concluding testimony, Mr. Moffatt testified:

A. ...The development of this large RV park will concentrate all of these activities into a very small space and that will give for as many as 800 campers to use these amenities at any give[n] time.

These noise producing activities are an integral part of the proposed RV park and form part of the application that council had to consider when addressing the zoning amendment.

Any and all noise created by the campground activities alone will be added to the noise from the amenities that are allowed as a right and these sounds will be cumulative.

Cumulative is defined in the Oxford Dictionary as increasing or increased in quantity, degree or force by successive addition. I submit that council by allowing the campground to be added to all the outdoor recreational activities outlined in the proposed development plan failed to carry out the intent of the MPS outlined in 17(e) with respect to noise. [Emphasis added]

[Transcript, July 6, 2018, pp. 816-817]

(ii) **Evidence of CBRM**

[68] The Municipality called two witnesses at the hearing. Karen Neville is a Planner for CBRM and Malcolm Gillis is a Senior Planner. They were both qualified by the Board to testify as experts, able to provide opinion evidence on matters related to municipal planning, including matters related specifically to the CBRM MPS and LUB.

[69] Ms. Neville authored the primary Staff Report, dated February 15, 2018, in which she recommended to Council that it approve the zone amendment for Phase 1 of

the proposed development for 211 campsites on the north side of the East Bay Highway. Notwithstanding that recommendation, Ms. Neville also indicated to Council in the Staff Report that approval of the development in its entirety could be defended under the MPS (i.e., an additional 330 RV sites and 64 tenting sites located on the inland south side of the East Bay Highway). She determined that the central issue in the application was whether it met the requirements of Policy 17.e of Part 2 in the MPS. She concluded in her Report:

> Part 2, Policy 17e. of the Municipal Planning Strategy states that if zone provisions cannot be established that provide reasonable protection to residential development the application can be denied. Given the low lying topography and screening provisions, Phase 1 of the campground located on the North side of the highway (i.e. the lake side of the highway) will likely not be seen at all unless you actually enter the site. The same may not be true for Phase 2 and 3 (i.e. South side of the highway) given its steep topography (Attachment J). In addition, while the scale of a recreational vehicle in comparison to a dwelling is not an issue, the total number of campsites being proposed for the entire development is significant when compared to the surrounding community. That being said, the total number of campsites in Phase 1 is comparable to those found in the nearby Ben Eoin Campground Beach and Picnic Park. Also, approving Phase 1 of the proposed development does not prevent Council from considering an amendment in the future for Phases 2 and 3.
>
> [Exhibit M-8, Tab 6, p. 9]

[70] Among the factors she considered was a comparison of the proposed RV campground with other campgrounds in CBRM.

[71] Following the public hearing before Council on February 20, 2018, Council requested Planning Staff to respond to a number of comments received from the public. Ms. Neville and Mr. Gillis jointly drafted responses to a variety of issues raised during the public hearing and provided a Memo dated February 23, 2018, to CBRM Council [Exhibit M-8, Tab 7].

[72] In her testimony at the Board hearing, Ms. Neville testified about the process used to consider the Developer's application throughout the winter of 2017/2018, leading to the primary Staff Report dated February 15, 2018, as well as the Memo she

co-authored with Mr. Gillis. Her discussion of the policy issues raised under the MPS by this application are canvassed elsewhere in this Decision.

[73] Mr. Gillis also testified at the Board hearing. He indicated that he was a resource person for Ms. Neville as she prepared her primary Staff Report. Further, he confirmed that he co-authored the supplementary Memo of February 23, 2018, with Ms. Neville. However, the Board observes that he did not file an expert's report in this appeal, and did not provide an opinion on whether Council's decision reasonably carried out the intent of the MPS.

[74] Much of Mr. Gillis' testimony at the hearing dealt with the issue related to agricultural lands, which is canvassed elsewhere in this Decision.

[75] Ms. Neville confirmed that the only view of the neighbourhood she took was a visit to the location with Mr. Gillis in February 2018 (after the completion of her February 15th Staff Report, but before completion of the February 23rd Memo). They parked at the cemetery on the East Bay Highway, next to the proposed campground, and walked down the property to the shoreline. She confirmed that they did not view the proposed development from the opposite side of the barachois pond, from the properties of the Sutherlands or the Moffatts.

(iii) **Evidence of the Developer**

[76] The Developer did not testify, nor did he call any witnesses, at the Board's hearing.

(iv) **Evening Session/Letters of Comment**

(A) Letters of Comment

[77] Interested persons were invited in the advertisement of the Notice of Hearing for this matter to submit letters of comment to the Board by June 13, 2018. The Board received 42 letters of comment, some of which came from persons who were either parties to the appeal, witnesses at the hearing, or speakers in the evening session.

[78] From the 42 letters, several themes emerged. Only three of the writers supported the decision to approve the zoning amendment; each of them considered that the campground development would be good for economic development by providing jobs, enhancing tourism options, and economic spin-off for the area. One of those writers said that there is a demand for campgrounds in the general area, and noted that the lots would be larger, and the proposed season would be longer. That writer also noted that campgrounds were normally family-oriented with appropriate rules that mean noise is not an issue.

[79] Of the remaining 39 writers, all were opposed to the campground development, and Council's decision to amend the zoning by-law. They represented year-round residents of Big Pond Centre, summer residents of the area, and tourists who had visited. Many of the writers had reviewed the provisions of the MPS and referred to them in their comments. Their main concerns may be described as:

- The increase in noise, traffic and fumes which would disrupt the rural environment due to inadequate, or insufficient, protection or buffering;
- Traffic volumes and congestion resulting in potential for accidents;
- Potential impact to the water supply;
- Visual, in particular, and general incompatibility with the rural landscape;
- Creation of urban density in a rural community due to the size and scale of the proposed activities;
- Impact on the farming activity in the community;

- Impact on wildlife;
- Impact on the environment of Lochmore Harbour and its ecosystem, and the lack of any environmental assessment;
- Impact on property values.

[80] The Board notes that a letter of comment provided during CBRM's public hearing process was filed by the Gowans, who own a cottage located on Lochmore Harbour, adjacent to the proposed campground. In a letter contained in the Appeal Record, Drs. Debbie and Russ Gowan offered the following comments to CBRM:

> Debbie and I have a wonderful cottage on Big Pond. Despite our busy medical practises, we make a seven-hour journey there about a half-dozen times per year. It's peaceful, it's serene. It's our "home away from home". Our property borders on the proposed RV park development of Mr. Chris Skidmore and company. Needless to say, we find this development very disconcerting. …
>
> Big Pond has a unique habitat. Would the proposed land development add toxins to the Pond? There is no doubt that it would. It seems inconceivable that the residue from so many RV's would not eventually leach into the lake despite the best of efforts to prevent this. Unfortunately, Big Pond has very little ability to flush toxins from its' waters. It has a rudimentary connection with Bras D'or Lake which is slowly closing in. In the past, the opening to the Pond has had to be dredged to allow passage of water vessels. In its' present state we are having difficulty even getting our sea kayaks through this narrow shallow passage. Adding a beach and a dock for motorized watercrafts (as this development proposes) to Big Pond would further contribute toxins to this delicate eco-system. This bird sanctuary that we all respect and admire would inevitably be permanently destroyed. This would also undermine the slow recovery of the oyster beds in Big Pond which once provided income for several local residents. Are the proposed developers naïve to the fact that the Pond has a very shallow muddy bottom in the area that they propose to make the beach, water slide and dock? No one would ever even wade in these waters let alone swim. Although it is environmentally restricted, I can't imagine how they could put a sandy beach in this area.
>
> Would this proposed development affect the traffic safety on Route 4? I can't imagine a worse place to put the entrance of this development. Picture this: you have slow-moving RV vehicles, many of them owned by non-residents who don't know the highway, entering, exiting and crossing a site with a multitude of young children, positioned on a significant curve in the highway.
>
> Debbie and I journey to our cottage in Big Pond several times a year. The peacefulness and serenity it affords is therapeutic. This will be immeasurably tarnished if this development proposal is approved. We find it inconceivable that the Departments of Environment and Transport haven't evaluated this project prior to it going to vote by Council. We can't imagine the disgust and anger that our neighbours and friends who are permanent residents of Big Pond feel. None of us are against the economic development that such a project may bring in the short and long term to Cape Breton. But tor God's sake, please develop it somewhere else where its effects will be mitigated.
>
> [Exhibit M-3, p. 214]

(B) Evening Session Speakers

[81] An evening session was held on July 4, 2018, at the Holiday Inn in Sydney. In response to the Notice of Hearing, 12 persons asked to speak at this session; however, one of them was a witness at the hearing, and two withdrew requests to speak. One person did not appear at the evening session, leaving the Board to hear from eight members of the public. Some of the speakers were seasonal residents of the Big Pond area, and others resided elsewhere, but were familiar with the location.

[82] The Board notes that six of the speakers focused on the lack of visual compatibility with the rural character of the area and the existing land uses. Several mentioned the negative impacts of noise, dust and fumes, particularly on the adjacent organic farm operation. They did not believe the proposed buffers were sufficient to mitigate the effects. Others suggested that Council had ignored the wishes of the public in approving the zone amendment and had acted inconsistently with decisions regarding other applications related to RVs.

[83] The Board also heard from Derek Luffingham, the operator of a campground in Whycocomagh, Victoria County, who said that campgrounds were "wildly underutilized in Cape Breton". He was particularly concerned that the size and configuration of the RV lots in the proposed campground did not meet "Code" requirements.

[84] The Board also heard from Dr. Bruce Hatcher, a marine ecologist and oceanographer at Cape Breton University who spoke about his sampling work in Lochmore Harbour. He described concerns about the nature of the barachois, and the impact of required sewage treatment on the lake and lagoon system, noting that a section

of the MPS addresses protection of the drainage basin of the Bras d'Or Lake from pollution.

(v) **Site Visit**

[85] The Board conducted a site visit on the afternoon of Monday, September 24, 2018, accompanied by a representative of each party. The Board outlined in advance the locations it wished to view, as follows:

> 1) Roy MacInnis property - both sides of the road. The Board would like to follow the boundary with the subject property below Mr. MacInnis' barn adjacent to the vegetable gardens.
>
> 2) Subject property of the proposed development. The Board's observations would generally be taken from the open field below Mrs. Sampson's dwelling. The Board will take a brief view of the subject property across the highway.
>
> 3) The cemetery.
>
> 4) Gordon Sutherland property, including general view from dwelling and from the shoreline of the barachois.
>
> 5) David and Debra Moffatt property, including general view from dwelling and from the shoreline of the barachois.
>
> 6) Provided it is accessible, the general view from the initial part of the outer rocky sand bar of the barachois, near the Moffatt property.
>
> 7) General view from Concert Lane, including in the vicinity of Michael Britten and/or Helen Doherty properties, including view from the shoreline of barachois on or near Concert Lane, if accessible.
>
> 8) Ed MacIntyre property, including confirmation of location of former Big Pond Music Festival.
>
> 9) Please note that the Board will also take a general view of the area by car along the East Bay Highway.
>
> [Board letter, September 14, 2018, pp. 1-2]

[86] The Board's site visit highlighted the following points.

[87] The community of Big Pond Centre, in the vicinity of the proposed campground, is characterized by its topography of moderately sloped lands which run

from steep hills inland, on the south of the East Bay Highway, down across the Highway and leading to the waters of the Bras d'Or Lakes to the north. The community is rural in character and contains a mix of year-round and seasonal homes and cottages along the East Bay Highway, and some along the Bras d'Or.

[88] It is important to note that in the immediate vicinity of Phase 1 of the proposed campground (on the north side of the East Bay Highway leading down to the water), the shoreline is separated from the larger Bras d'Or Lakes by a relatively shallow barachois, named Lochmore Harbour, which is separated from the Bras d'Or by a sand bar or narrow rocky beach forming the barachois. The proposed campground is located near the western edge of the barachois approximately 200 metres from the residential property owned by the Sutherlands on Mie Mestreech Road. The barachois extends roughly a kilometre to the East, past where Concert Lane runs down from the East Bay Highway to the shore (i.e., in the vicinity of the Michael Britten and Helen Doherty residential properties). The Britten property is about 500 metres from the proposed campground. A map showing the general area is shown in the following Figure 1:

[The remainder of this space is intentionally left blank.]

Figure 1

[Exhibit M-6, Tab 2, p. 4]

[89] There are three residential properties located on the barachois whose owners have opposed the rezoning application. These three properties are located on Mie Mestreech Road, which is accessed directly across from Rita's Tea Room, on the East Bay Highway, and leads down the hill towards Lochmore Harbour. The Gowan, Sutherland and Moffatt properties are waterfront properties located on the barachois created by Lochmore Harbour. Of significant note, for the purposes of this appeal, these three properties either abut the subject on the barachois (i.e., Gowan), or are situated across the water from the proposed campground site (i.e., Sutherland and Moffatt). The Sutherland and Moffatt homes are located directly across the water from the campground site. The Sutherland property is about 150 to 200 metres across the water from the proposed campground site. The Moffatt property is further away from the campground site compared to the Sutherland property. The Moffatt property borders both the barachois, as well as the waters of the Bras d'Or. The Moffatt lands run to the start of the narrow sand bar forming the barachois.

[90] During its site visit, the Board took a view of the proposed campground from the Sutherland and Moffatt properties, looking south across the barachois, and observed the upward sloping lands leading up to, and beyond, the East Bay Highway, to the steep hilled landscape framing the community of Big Pond Centre from high above. From this vantage point, there is a clear view of the entire sloped area of the proposed campground site across the barachois. The Board observed the sloping character of the landscape located up from the barachois to the East Bay Highway. From the Sutherland and Moffatt properties, the Board had an unimpeded view of most of the proposed campground location. As noted by Ms. Moffatt, the Board could observe the Sampson dwelling located

on the proposed campground site and the surrounding open field. Consistent with the testimony of Mr. Sutherland and Ms. Moffatt, any vegetation along the shoreline of the proposed campground provided only very minimal blockage of the landscape extending beyond it.

V. SCOPE OF BOARD'S REVIEW

(i) Case Law

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

[92] The appeal involves the decision of Council approving the LUB amendment to rezone the subject lands from RCB Zone to BPC Zone.

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

> **s. 250 (1)** An aggrieved person or an applicant may only appeal
> **(a)** an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy;

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

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

[95] Thus, the Board must not interfere with the decision of Council unless it determines that Council's approval does not reasonably carry out the intent of the MPS. The burden of proof is on the Appellants to establish, on a balance of probabilities, that

in the words of s. 251(2), "... the decision of council...does not reasonably carry out the intent of the municipal planning strategy."

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

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

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

[99] In reviewing a decision of the municipal council to enter into a development agreement the Board, by reason of **s. 78(6)** of the **Planning Act**, cannot interfere with the decision if it is reasonably consistent with the intent of the municipal planning strategy. A plan is the framework within which municipal councils make decisions. The Board is reviewing a particular decision; it does not interpret the relevant policies or bylaws in a vacuum. *In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal council interpreted and applied the policies in a manner that the language of the policies can reasonably bear*. This court, on an appeal from a decision of the Board for alleged errors of interpretation, should apply the same test. This is implicit in the scheme of the **Planning Act** and the review process established for appeals from decisions of municipal councils respecting development agreements. There may be more than one meaning that a policy is reasonably capable of bearing. This is such a case. In my opinion the **Planning Act** dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. The Board should not be confined to looking at the words of the Policy in isolation but should consider the scheme of the relevant legislation and policies that impact on the decision... This approach to interpretation is consistent with the intent of the **Planning Act** to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions...

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

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

[164] The **Planning Act** imposes on municipalities the primary responsibility in planning matters. The **Act** gives the municipal council the authority to enter into development by contract which permits developments that do not comply with all the municipal bylaws (**s.55** of the **Act**). In keeping with the intent that municipalities have primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (**s.78** of the **Act**). Planning policies address a multitude of planning considerations some of which are in conflict. Most striking are those that relate to economics versus heritage preservation. Planning decisions often involve compromises and choices between competing policies. Such decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decisions...Neither the Board nor this court should embark on their review duties in a narrow legalistic manner as that would be contrary to the intent of the planning legislation. Policies are to be interpreted reasonably so as to give effect to their intent; there is not necessarily one correct interpretation. This is implicit in the scheme of the **Planning Act** and in particular in the limitation on the Board's power to interfere with a decision of a municipal council to enter into development agreements...

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

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

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

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

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

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

[102] *Archibald* indicates that the impact of the MPS as an interpretive tool to "elicit meaning from ambiguity" is more pronounced when the MPS and LUB are enacted concurrently. In this case, while there have been some amendments to the LUB, the LUB provisions which give rise to interpretation issues were enacted at the same time as the MPS.

[103] While the Court decisions cited above primarily deal with development agreements, the principles outlined by the Court of Appeal apply equally to rezoning applications.

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

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

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

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

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

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

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

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

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

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

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

(ii) Applicable Principles of Statutory Interpretation

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

supported, such as the "equitable construction approach", the “plain meaning rule”, and the “golden rule”.

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

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

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

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

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

> **9(1)** The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> **9(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and
(g) the history of legislation on the subject.

VI. MPS AND LUB IN THIS APPEAL

[115] The subject lands are presently zoned Rural CBRM Zone in the LUB.

[116] This zone allows a broad range of recreational uses, but not racetracks or campgrounds (unless they are existing, as listed):

- **recreational – only the following**
  - all except racetracks for motor vehicles and campgrounds (existing campgrounds are listed as permitted below)
  - existing campground at PID# 15330996, 15330947, 15701568, 15331036, 15331028, and 15330947 (6136 – 6140 East Bay Highway, Ben Eoin)
  - existing campground at PID # 15072598 (10 Johnson Road Extension, Little Bras D'Or)
  - existing campground at PID# 15270234 (5781 Union Highway)
  - existing campground at PID # 15354285 (5785-5789 Highway 22, Catalone)
  - existing campground at PID # 15841273 (3241 Grand Mira North Road, Sandfield)
  - existing campground at PID# 15542848 (168 Waterpark Drive, Marion Bridge)

[Exhibit M-4, p. 122]

[117] The LUB defines a campground as follows:

> **Campground** means a recreational business establishment, which is licenced under the *Tourist Accommodations Act and Regulations*, where designated spaces/plots are provided for tents, and recreational vehicles for overnight accommodation or seasonal accommodations and where the accessory uses could include an administrative office, assembly hall, convenience store, swimming pool, and recreational facilities. A campground provides sanitary and waste disposal facilities, laundry facilities.
>
> [Exhibit M-4, p. 239]

[118] A recreational vehicle is defined as follows in the LUB:

> **Recreational Vehicle** means a vehicle designed for travel on public streets/roads for purposes of short term occupancy to be used for travel, recreation and vacation:
> - providing kitchen, sanitary and living accommodations;
> - capable of either being towed behind a motor vehicle or self-propelled; and/or
> - with a maximum width of 8.5 feet; and
> - which is constructed to a C.S.A. standard.
>
> [Exhibit M-4, p. 253]

[119] The LUB also provides the following definitions related to recreational use and recreational business establishment:

> **Recreational use** means a place designed and equipped for the playing of sports and leisure activities. Recreational uses may include, but are not limited to, arenas, bowling alleys, campgrounds, fitness centers, recreational instruction, golf courses, picnic parks, playing fields, public gardens, boardwalks, walking/bicycle trails, racetracks, shooting ranges, tennis courts.
>
> **Recreational business establishment** means a business open to the general public offering recreational facilities which enable persons to perform strenuous physical activities for a fee either in the form of a pay-for-use terms or annual membership and shall include both indoor and outdoor recreational establishments.
>
> - indoor recreational business establishments may include (but not be limited to) fitness centre, bowling alleys, skating rinks, racquet clubs, rock climbing, and swimming pools, but do not include arcades.
> - outdoor recreational business establishments may include (but not be limited to) golf courses, ski resorts, tennis clubs, water parks, racetracks, equestrian trails, driving ranges, and amusement parks.
>
> [Exhibit M-4, p. 253]

[120] The Developer's rezoning application was considered by Council under Part 2, Policy 17.e of the MPS, which provides:

> 17.e Unless there is specific policy direction regarding a type and scale of business development elsewhere in this Municipal Planning Strategy, it shall be a policy of Council to permit all other business developments not allowed by policy statements elsewhere in this Part throughout rural CBRM by zoning amendment, except in neighbourhoods subject to Policy 18 of this Part and planned residential subdivisions.
>
> A site specific, use specific, zone shall be considered for each zoning amendment application. The purpose of the zone shall be to ensure:
>
> - the site itself;
> - the site plan; and
> - management of the business development,
>
> mitigate any adverse affects the development will have on low density residential development in proximity. If zone provisions cannot be established that provide reasonable protection to residential development in proximity, the application shall be denied. More specifically, this means evaluating the proposal from the perspective of:
>
> - visual compatibility;
> - dust or fumes emanating from the site;
> - traffic attracted to, and leading from, the site; and
> - noise emanating from the development.
>
> [Exhibit M-5, p. 2.28]

[121] Policy 18 referenced above, which relates to the Rural Country Estate (RCE) Zone, does not apply in this matter.

[122] The above policy direction in the CBRM MPS requires that a site specific/use specific zone be created in such applications.

VII. ANALYSIS AND FINDINGS

[123] The Appellants raised three principal grounds of appeal in support of their view that Council's decision did not reasonably comply with the MPS. The Board will review these grounds, in turn.

(A) Agricultural Land – Statement of Provincial Interest

[124] The Appellants' Notice of Appeal stated:

> 6. Planning and development did not properly identify relevant agricultural land, as per provincial statement of interest. These measures were not adequately considered by Council. Planning documents must address the protection of agricultural land. Measures that should be considered include:
>
> > (a) giving priority to uses such as agricultural, agricultural related and uses which do not eliminated [sic] the possibility of using the land for agricultural purposes in the future. Non-agricultural uses should be balanced against the need to preserve agricultural land.

[125] In response to the Respondent's motion to strike this ground of appeal, among others, the Board stated in a Decision letter dated June 15, 2018:

> The Board considers that it would be premature to strike this ground of appeal. The Board considers that it must hear evidence and submissions in order to decide whether this is a ground on which the Appellants can appeal, and if so, how the decision of Council to amend the LUB and re-zone the subject property may, or may not, reasonably carry out the intent of the MPS. Accordingly, the Board will permit the Appellants (and the other parties) to lead evidence on this ground of appeal, and the Board will ultimately decide if it is a valid ground of appeal and if so, whether the decision of Council accords with the Statement of Provincial Interest.

[126] The Board heard evidence from Roy MacInnis and Rita Morley-MacDonald on behalf of the Appellants regarding agricultural land use in Big Pond Centre. Ms. Neville and Mr. Gillis also testified about this issue and addressed the Statement of Provincial

Interest (SPI) Regarding Agricultural Land as it applied to the Applicant's proposed development.

[127] Mr. MacInnis testified that he and his niece, Ms. Morley-MacDonald, are carrying on organic farming on about one acre of his property which is immediately to the northeast of the subject property. Ms. Morley-MacDonald explained the plans to expand production, as the smaller garden was a test project. They grow vegetables in gardens and hoop houses, and raise free-range chickens, selling the vegetables and eggs. Mr. MacInnis intends to raise a small herd of cows there. He also has hay on the lower section of his property.

[128] Ms. Morley-MacDonald has done an apprenticeship program for small-scale market farming. She is planning to obtain certification of the farming operation as organic, because no pesticides or herbicides have been used there. She said she is concerned that obtaining and maintaining this certification may be in doubt because of the intensive and accumulated uses of the campground. She is presently focussed on the vegetable production and has sold their produce at various farm markets. She is also developing a community supported agriculture delivery system. Ms. Morley-MacDonald also testified about plans to start honey production, and plant fruit trees.

[129] Mr. MacInnis said that mapping which had been provided to the Planning Department showed that a small area of his property and the adjacent subject have Class 3 soils. Thus, they are suitable for agriculture. In the past he had grown and cut hay on about five and a half acres of the subject property which he said was all that he could farm there. He confirmed on cross-examination that there is only one other farming operation in the general area of the proposed campground.

[130] Mr. MacInnis expressed concern about how close the campground development would be to his farm, saying the fumes from "…fire pits, barbecues, exhaust" would affect his vegetables. He was also concerned that any fire pits would be a fire hazard close to the hay barn. Additionally, he said that noises from the campground could affect the chickens. He also said that noise from the farm operations could cause issues for the campers.

[131] Ms. Morley-MacDonald is also concerned about pollution from sources in the proposed campground negatively affecting the vegetable crops, both in the air and the soil, as well as the noise impact on the chickens which might affect their egg production.

[132] Ms. Neville testified that as a result of comments at the public hearing, she looked at the Canada Land Inventory map in the CBRM planning office. She said this identified most of the subject property as having Class 7 soils, with some Class 3 soils, and the opposite for Mr. MacInnis's property. Ms. Neville said that Class 7 is "the lowest class of soil" in the Land Inventory System. She said that while the LUB references agricultural land, it does not do so by soil class. She also testified that the MPS has policies which refer to agricultural uses which are recognized and supported; however, she said there is no specific policy which "…hinders non-agricultural use in agricultural areas."

[133] Mr. Gillis testified that the MPS was adopted after the Statement of Provincial Interest on agricultural lands. He considers that the MPS is consistent with the Statement. He noted that Policies 1.a and 1.d of Part 6 of the MPS provide that all types of agricultural development are permitted in the rural areas of CBRM, and that Council

does not regulate non-agricultural development in rural areas to foster development of the agricultural industry. Mr. Gillis said on cross-examination that planning strategies across the province vary widely in policy directives on agricultural development, depending on the importance of agriculture in the region. He said that the industry did not need to be protected in the CBRM in the same way as in Kings County, for example.

[134] Mr. Gillis did not dispute Mr. MacInnis' statement that he farmed his own property and the proposed campground lands, regardless of any soil classification; however, he considered this irrelevant because there is no policy in the CBRM MPS that protects lands with certain soil classifications "…exclusively for agricultural development."

[135] The Appellants submitted that the amendment to the LUB re-zoning the subject property did not take into account the provisions of the SPI on agricultural lands. They said that the SPI recognizes the need to protect both land which is actively farmed, and land which has agricultural potential. They said that Mr. MacInnis is actively farming his property, and thus it should be protected from potential conflict resulting from the proposed development. Further, they stated the evidence showed, based on Mr. MacInnis's testimony, that the subject property has agricultural potential.

[136] The CBRM maintained the position it had raised in the motion to strike this ground of appeal, i.e., that only the Provincial Director of Planning could rely on it in an appeal. Further, the CBRM said that the MPS takes a permissive approach to agriculture throughout the rural areas of the Municipality, with one exception, being the Point Edward Peninsula area which is at considerable distance from the subject. It submitted that the SPI does not require it to protect all land with agricultural potential.

[137] In addition, the CBRM said that the fact, as confirmed by Mr. Gillis, that the Province had approved the MPS, which contains Policies 1.a, and 1.d, in Part 6, means that the Board can infer that it is reasonably consistent with the SPI on agricultural land.

[138] Counsel for the Applicant Developer adopted the submissions of the CBRM on this issue.

Findings

[139] The *MGA* includes Schedule B which contains SPIs regarding, *inter alia,* agricultural land. The introduction states they:

> ...are intended to serve as guiding principles to help Provincial Government departments, municipalities and individuals in making decisions regarding land use. They are supportive of the principles of sustainable development.
>
> 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.

[140] Agricultural land means, as set out in Schedule B:

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

[141] The SPI Regarding Agricultural Land follows:

> **GOAL**
>
> To protect agricultural land for the development of a viable and sustainable agriculture and food industry.
>
> **BASIS**
>
> The preservation of agricultural land is important to the future of Nova Scotians.
>
> Agricultural land is being lost to non-agricultural development.
>
> There are land-use conflicts between agricultural and non-agricultural land uses.

APPLICATION

This statement applies to all active agricultural land and land with agricultural potential in the Province.

PROVISIONS

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

2. Planning documents must address the protection of agricultural land. Measures that should be considered include:

(a) giving priority to uses such as agricultural, agricultural related and uses which do not eliminate the possibility of using the land for agricultural purposes in the future. Non-agricultural uses should be balanced against the need to preserve agricultural land;

(b) limiting the number of lots. Too many lots may encourage non-agricultural development. The minimum size of lots and density of development should be balanced against the need to preserve agricultural land;

(c) setting out separation distances between agricultural and new non-agricultural development to reduce land-use conflicts;

(d) measures to reduce topsoil removal on lands with the highest agricultural value.

3. Existing land-use patterns, economic conditions and the location and size of agricultural holdings means not all areas can be protected for food production, e.g., when agricultural land is located within an urban area. In these cases, planning documents must address the reasons why agriculture lands cannot be protected for agricultural use. Where possible, non-agricultural development should be directed to the lands with the lowest agricultural value. [Emphasis added]

[142] Under the provisions of s. 194(5) of the *MGA*, the SPI set out in Schedule B are given the status of regulations. Pursuant to s. 198(1) of the *Act*, planning documents, which include municipal planning strategies and land use by-laws, and amendments to both, if adopted after the adoption of a statement of provincial interest "shall be reasonably consistent with the statement."

[143] Part 6 of the CBRM MPS contains a discussion of agriculture as one of the primary industries in the Municipality. According to the preamble of Part 6, the agricultural industry in CBRM is presently relatively small scale, with some exceptions. Mainly it involves cultivation of the soil, and the type of soil according to the Canada Land Inventory

classification influences where agriculture may be successfully carried out. The preamble states that only about 25% of CBRM's land mass is made up of either Class 2 or Class 3 soils, with the majority being Class 3.

[144] The preamble to the agricultural policies sets out reasons why the MPS "...does not implement land use policy regulating other types of development to sustain the agricultural industry in the CBRM." The reasons include the lack of Class 2 and 3 soils under cultivation, and the lack of any pressure from urban and suburban growth. Further, the preamble indicates that the MPS does not contain land use policies which would regulate agricultural activity to protect other land use types. However, there is some recognition of the potential for conflict between agricultural and other land uses, but CBRM appears to leave this to regulation of nuisances.

[145] The specific policies which apply to this appeal are Part 6, Policy 1.a and 1.d:

> 1.a It shall be a policy of Council to permit all types of agricultural development throughout the rural areas of the Regional Municipality including livestock operations that utilize acreage cultivated for feed crops and pasture, except in the public water supply watersheds. The construction of buildings and structures to house and/or impound agricultural animals, and all ancillary structures, shall be prohibited within public water supply watersheds. The non-conforming status of any such existing buildings shall be relaxed to permit their extension, enlargement, alteration, or reconstruction.
>
> ...
>
> 1.d It shall be a policy of Council ***not*** to regulate non-agricultural development in rural areas solely to foster the development of the agricultural industry. [Emphasis added]
>
> [Exhibit M-5, pp. 6.4-6.5]

[146] Prior to the zoning amendment which is the subject of this appeal, the property was zoned Rural CBRM, which permits all agricultural uses. Part 98 of the LUB defines agriculture and related terms.

[147] The Board observes that s. 247(1) of the *Act* permits an aggrieved person to appeal the approval of an amendment to an LUB. Under s. 250(1), an aggrieved person may do so only on the grounds that "…the decision of council does not reasonably carry out the intent" of the MPS. Further, an MPS is part of "planning documents" as defined in s. 190(n) and must be reasonably consistent with a SPI under s. 198(1). In addition, s. 213(c) states that MPS policies are to be reasonably consistent with SPIs.

[148] Counsel for CBRM argued that the Board does not have jurisdiction to consider the ground of appeal which says that the amendment of the LUB is not consistent with the SPI, in this case, relying on s. 250(4) of the *Act,* to restrict such an appeal only to the Director. The Board does not agree with this interpretation; instead the Board sees s. 250(4) as limiting the grounds on which the Director may appeal a decision of a municipal council, which refer to an SPI.

[149] The Board observes that Schedule B of the *Act,* which includes the Statements of Provincial Interest, provides that the statements are "to provide guidance" and that local situations must be considered. The provisions of Section 2(a) of this SPI refer to a balance between non-agricultural uses and the need to preserve agricultural land. Section 2(c) refers to the use of separation distances to reduce conflicts.

[150] Section 3 suggests "non-agricultural development should be directed to the lands with the lower agricultural value." The Board accepts that Ms. Neville looked at the Canada Land Inventory mapping and satisfied herself on the soil classifications for both the subject property and the MacInnis property. She said that most of the subject was Class 7 which is the lowest such value. There was no evidence of any present or, indeed, future expressed intent to use the subject for agricultural purposes.

[151] The Board notes that the MPS policies 1.a and 1.d in Part 6 address agricultural land, and demonstrate conclusions reached by CBRM Council that agricultural uses in rural areas need not be restricted, and further, except for one area, need not be protected.

[152] Further, in the Board's view, the concerns raised by Mr. MacInnis and Ms. Morley-MacDonald about the uses of the proposed campground lands flow from the same considerations outlined in Policy 17.e, Part 2, which are addressed elsewhere in this Decision.

[153] The Board understands the concerns raised by the Appellants about the protection of agricultural land; however, in the Board's view, the time to raise the concerns about greater protection was at the time of adoption of the MPS and the original LUB, which would normally occur after public consultation. This appeal is about a specific amendment to the LUB rather than a challenge to MPS policy provisions.

[154] The Board finds that, while the Appellants are entitled to raise the ground of appeal, it is not persuaded on the evidence, that the policies of the MPS are inconsistent with the SPI on Agricultural Land. Therefore, the Board concludes Council's decision to amend the LUB, does not fail to carry out the intent of the MPS in this regard.

(B) Amusement Park and Recreational Facilities

[155] In their submissions, the Appellants submitted that CBRM Council did not adequately evaluate the LUB amendment proposal with respect to recreation policies under Part 5 of the MPS, which is entitled "Recreation" and includes a section entitled "Land Use (Zoning) Issues".

[156] The Appellants alleged that this issue arose in this matter when the Applicant Developer filed with the CBRM Planning Department an undated document entitled Nova Scotia RV Park: Application Submission (Record of Appeal, Table of Contents, 1). Under the heading "Recreational Facilities (Adventure Park)", eight potential recreational facilities were listed for this development, including a zip-line, ATV trails, snowmobile trails, and a water play area. The Appellants suggested that an amphitheatre, which is listed as a separate use from the above recreational facilities, would facilitate music festivals and other events. The Appellants also noted that Ms. Neville's Staff Report to Council listed additional potential recreational facilities, such as a spray pad, a swimming pool, fire pits, horseshoe pits, a play area, a floating slide, a floating boat dock, a basketball court, and a beach area.

[157] Indeed, the approved zone provisions themselves allow trails, wharves, boat ramps, fishery uses, and parks on public lands within the 20 metre buffer from the ordinary high water mark, let alone on the remainder of the site.

[158] Ms. Neville did not identify statements and policies from Part 5 of the MPS (Recreation) in her Staff Report. She testified that she did not advise Council of Mr. Skidmore's plans to put an adventure park in the BPC zone because the term "adventure park" is not used in the MPS [Transcript, pp. 619 – 620]. The Appellants submitted that Ms. Neville did not inform Council that the proposed recreational uses could conflict with the intent of the MPS.

[159] In his Post Hearing Submission, counsel for CBRM stated:

> 26. The mere use of the term "adventure park" by the Applicant is not sufficient to place the proposed development within the category of "amusement park". It was the opinion of Ms. Neville and Mr. Gillis that the Applicant's proposal would not fall within the definition of an "amusement park". The proposal does not include mechanically or electrically operated rides. Furthermore, all of the recreational uses being

proposed by the Applicant, other than use as a campground, are permitted as of right in the RCB zone and would not have required a by-law amendment.

[CBRM Post Hearing Submission, November 16, 2018, p. 9]

Findings

[160] Part 5, Policy 13.a, reads as follows:

> 13.a Amusement parks and racetracks for animals, or vehicles hauled by animals, are only permitted:
>
> - in sales/service business sectors centered on a Level 1 or 2 road (*refer to Charts on pages 7.3 and 7.4*); or
>
> - in rural communities with extensive setback and buffering provisions whereby a combination of distance, topography, and vegetation will protect residential development. [Emphasis added]
>
> [Exhibit M-5, p. 5.14]

[161] As noted by Ms. Neville, the term "amusement park" or "adventure park" is not defined in the MPS. However, the term "amusement park" is a defined term in the LUB, which was adopted concurrently with the MPS. It is defined as follows:

> **Amusement park** means an entertainment business offering recreational activities, mechanically or electrically operated rides, and ancillary activities to the general public for a fee.
>
> [Exhibit M-4, p. 236]

[162] The Board observes that, except for amusement parks, other recreational facilities or uses are permitted as of right in the Rural CBRM Zone. Further, as noted later in this Decision, many recreational uses comprise valid accessory uses within a campground (i.e., as outlined in the LUB definition of campground).

[163] In the Board's view, Ms. Neville's opinion that the proposal is not an amusement park, because it does not include mechanically or electrically operated rides, was a reasonable conclusion.

[164] Part 5, Policy 13.a applies only to amusement parks, not to recreational facilities or uses.

[165] Moreover, the Board considers that Ms. Neville, and CBRM Council, acted in a manner which was reasonably consistent with the MPS when they treated the proposal as a campground, rather than as an amusement park. Council had before it evidence of the various recreational uses being considered by the Developer. To the extent that Council could reasonably conclude that the proposal did not constitute an amusement park, as defined in the LUB, Council could appropriately treat the matter as an LUB amendment application for a campground. In so doing, Council would have been aware of the recreational uses that are valid accessory uses for a campground (as defined in the LUB).

[166] Finally, the Board considers that this ground of appeal should be considered in the context of the new Zone provisions which were approved by Council in relation to the Developer's application. As noted by Mr. Kachafanas, in his Post Hearing Submission, the zoning amendment approved by Council was more limited in scope than the Developer's full proposal. The zoning amendment only encompassed the properties intended for Phase 1 of the development, and only contemplated the accessory uses normally attributed to a campground. The only permitted land use that was approved by Council, beyond what is already permitted as of right in the Rural CBRM Zone, was a campground. An amusement park, as defined in the LUB, is not contemplated under the approved LUB amendment.

[167] Having reviewed the evidence and the submissions of the parties, the Board concludes that Council's approval of the LUB amendment did reasonably carry out the intent of the MPS, as it relates to recreational facilities or uses.

(C) Policy 17.e, Part 2 of the MPS

(a) Intent of Policy 17.e

[168] This appeal involved CBRM Council's review of the Developer's proposed rezoning under Part 2, Policy 17.e, of the MPS. Council was required to review the application under this Policy because there is no other specific policy direction in the MPS which allows for campgrounds in the Rural CBRM Zone. The text of Policy 17.e bears repeating:

> 17.e Unless there is specific policy direction regarding a type and scale of business development elsewhere in this Municipal Planning Strategy, it shall be a policy of Council to permit all other business developments not allowed by policy statements elsewhere in this Part throughout rural CBRM by zoning amendment, except in neighbourhoods subject to Policy 18 of this Part and planned residential subdivisions.
>
> A site specific, use specific, zone shall be considered for each zoning amendment application. The purpose of the zone shall be to ensure:
> - the site itself;
> - the site plan; and
> - management of the business development,
>
> mitigate any adverse affects the development will have on low density residential development in proximity. If zone provisions cannot be established that provide reasonable protection to residential development in proximity, the application shall be denied. More specifically, this means evaluating the proposal from the perspective of:
> - visual compatibility;
> - dust or fumes emanating from the site;
> - traffic attracted to, and leading from, the site; and
> - noise emanating from the development. [Emphasis added]
>
> [Exhibit M-5, p. 2.28]

[169] While the Board is mindful that any municipal council decision must be assessed in the context of the MPS as a whole, Policy 17.e was the focus of a majority

of the evidence during the hearing because it provides the only means for the Developer's rezoning application to be considered under the MPS.

[170] Ms. Neville, CBRM's planner, acknowledged that the interpretation of Policy 17.e was the central issue in this appeal.

[171] While this Policy will be canvassed in further detail below, it is noteworthy that Policy 17.e contemplates "a site specific, use specific, zone" for zoning amendments that are not otherwise allowed by policy statements elsewhere in this part of the MPS (i.e., in relation to the Rural CBRM Zone). Thus, with respect to the consideration of amendments related to racetracks or campgrounds that do not already exist within this Zone, any zoning amendment application must be considered based on the criteria in 17.e.

[172] In accordance with the express terms of Policy 17.e, the purpose of any site specific, use specific, zone must be to ensure that (1) the site itself; (2) the site plan; and (3) the management of the business development: "mitigate any adverse affects the development will have on low density residential development in proximity".

[173] However, Policy 17.e then states that if zone provisions cannot be established that provide "reasonable protection to residential development in proximity, the application shall be denied". [Emphasis added]

[174] Finally, Policy 17.e states that in assessing whether zone provisions provide reasonable protection to a residential development in proximity, the proposal is to be evaluated from the perspective of the following four criteria:

- visual compatibility;
- dust or fumes emanating from the site;

- traffic attracted to, and leading from, the site; and
- noise emanating from the development.

(b) Factual context for applying Policy 17.e

[175] Following the guidance of the Court of Appeal in *Archibald,* the Board must undertake a thorough factual analysis of the proposal in the context of the MPS. In the present instance, the proposal is the rezoning application itself. The Developer's proposed development is not before the Board. Thus, in the Board's view, the factual analysis in this matter requires the Board to take into account the zone provisions in the proposed zoning amendment, together with the proposed location of the campground development, and the nearby residential properties. Policy 17.e itself specifically identifies "residential development in proximity".

[176] With respect to the proposed zone itself, the application is for a rezoning to permit a campground on the site. The term "campground" is defined in the LUB as follows:

> **Campground** means a recreational business establishment, which is licenced under the *Tourist Accommodations Act and Regulations*, where designated spaces/plots are provided for tents, and recreational vehicles for overnight accommodation or seasonal accommodations and where the accessory uses could include an administrative office, assembly hall, convenience store, swimming pool, and recreational facilities. A campground provides sanitary and waste disposal facilities, laundry facilities. [Emphasis added]
>
> [Exhibit M-4, p. 239]

[177] The Staff Report noted that the development could include a variety of amenities, such as

- Office for administration
- Convenience store
- Liquor store
- Restaurant

- Propane depot
- Recreational activities (such as ziplines, mini golf, mountain bike trails, water play area, ATV trails, snowmobile trails, cross country ski trails/snowshoeing, and hiking and walking trails)
- Amphitheatre

[178] During her testimony at the hearing, Ms. Neville provided her opinion that each of these additional amenities could exist "as-of-right" on the site within the Rural CBRM Zone. Therefore, in assessing the rezoning application, she did not consider any impact from these amenities on "residential development in proximity". The Board notes such amenities are valid "accessory uses" of a campground under the LUB.

[179] It is noted that the Developer did not testify at the hearing and provided no further context in relation to the proposed development. While the Planner, Ms. Neville, noted that no formal application had been filed in relation to the development (which the Board accepts would not occur until a development permit is required under a properly constituted zone), there is no other information available to the Board to ascertain the nature of uses that would be permitted on the site, except for that allowed under the definition of "Campground" in the LUB, including the named accessory uses, and any specific requirements noted by Council in the newly approved Big Pond Campground Zone.

[180] As a result, the Board considers that the campground use to be assessed under Policy 17.e in this appeal, contemplates 211 campsites under Phase 1 of the development on the north side of the Highway (as outlined in the proposed zone provisions), including the various potential amenities which a campground could properly contain as valid accessory uses under the LUB, including an office for administration, convenience store, liquor store, propane depot, amphitheatre, and various recreational facilities listed in the application and the LUB. The new zone provisions do not distinguish

between tenting sites and RV sites (i.e., the LUB amendment approved by Council also adopts a new definition of "campsite", which means either a tenting site or an RV site). Accordingly, the campground could contain up to 211 RV sites.

[181] The clear intent outlined in Policy 17.e is to take into account the residential properties in proximity to the development in terms of setting the context for the consideration of this application by Council. The Board considers that this thorough factual analysis of the site itself, and its surroundings, is required by the express terms of Policy 17.e in that Council was required to consider whether zone provisions could be established that would "provide reasonable protection to residential development in proximity". This is especially so where the proposed zoning amendment must relate to a "site specific, use specific, zone" under the Policy. The Board infers that this direction exists in the MPS because racetracks or campgrounds are intensive uses which potentially can have a significant impact on surrounding residential properties.

[182] The Board had the benefit of receiving very detailed evidence with respect to the general area surrounding the proposed campground site, as well as the character of residential uses in proximity to the proposed site. As noted earlier in this Decision, such evidence included *viva voce* testimony by various residents in the area who live very near, or in proximity to, the proposed campground location, as well as various pictures and maps tendered in evidence, together with the benefit of observing such residential properties and the proposed development location on the Board's site visit.

[183] Having reviewed the factual context for the application, including both the nature of the proposed campground zone itself, as well as the nature and character of

residential development in the vicinity of the proposed development, the Board now turns to Council's decision under Policy 17.e.

(c) Planner's interpretation of the test under Policy 17.e

[184] The Board notes that unlike many staff reports provided by planners in other appeals heard by the Board with respect to other municipalities across the province, inexplicably, CBRM's planners did not provide a copy of the actual text of Policy 17.e to Council, either within the Staff Report itself, or as an appendix to the Report. As such, there is no evidence on the record that CBRM's Council had before it the actual wording of Policy 17.e when it considered the Developer's zoning amendment application.

[185] The Board notes that CBRM's Staff Report to Council contained, on its very face, a description of the test under Policy 17.e that was wrong in a few important respects.

[186] First, Ms. Neville indicated to Council in her Staff Report that:

> Part 2, Policy 17e. of the Municipal Planning Strategy states that if zone provisions cannot be established that provide reasonable protection to residential development the application <u>can</u> be denied. … [Emphasis added]
>
> [Exhibit M-8, Tab 6, p. 9]

[187] In fact, the Policy actually states that where reasonable protection cannot be provided, the application <u>must</u> be denied.

[188] She acknowledged this discrepancy in questioning by the Board:

> **Q.** (The Chair) … Going to the last page of your report. In the second paragraph under your recommendation it says:
>
> > "Policy 17(e) of the municipal planning strategy states that if zone provisions cannot be established that provide reasonable protection to residential development, the application can be denied."
>
> That's not what the policy says, is it?

A. The policy says:

> "If zone provisions cannot be established to provide reasonable protection to the residential development in proximity, the application shall be denied."

Q. Correct. That's not what your report says, though, is it?

A. It says "can be denied" as opposed to "shall".

Q. Right.

A. Right.

Q. There's a difference there, isn't there?

A. Right. Yes. Well, "shall" means do not and "can" means not necessarily.

Q. Right. So, the policy says:

> "If the zone provisions cannot be established that provide the responsible protection, the application shall [or must] be denied."

A. Right.

Q. There's no choice for Council.

A. Right.

Q. So, the way you've outlined it, to me if I read it, it gives me the impression that I can deny it but I can also allow it. So, isn't there a difference there in terms of how Council would have -- it's a different perspective on the question, though, isn't it, on the test to be applied under 17(e)?

A. When you look at the -- just prior to the recommendation it does outline the options for Council, so it says that Council can approve the amendment as presented by the Applicant, can approve the development based on more restrictive standards and approve the development in its entirety or only a phase of the development, and in reference to the presentation it was indicated to Council that they can, or they could, reject the application if they felt it didn't meet those standards, yes.

Q. Right. But those are the options? It doesn't express the view, though, does it, that if the -- if zone provisions cannot be established that provide reasonable protection that the application has to be denied, must be denied?

A. Right. Um-hmm.

Q. And I bring you back to the test -- or the phrase that you used on a number of occasions, that the policy said "mitigate" not "eliminate".

A. Um-hmm.

Q. But really at the end of the day it's to reasonably mitigate, and if you cannot do so then it must be denied. So, it's not just a matter of how much you mitigate, it must be reasonably mitigated, isn't that the case?

A. That's the wording in the policy.

Q. There's a distinction there.

A. That's the wording in the policy.

[Transcript, September 25, 2018, pp. 938-941]

[189] Ms. Neville's Staff Report also incorrectly described the test in two other ways. The Board refers to her Report's further description of the test under Policy 17.e near the beginning of her Report:

> **What Council has to Consider**
> Part 2, Policy 17e. of the Municipal Planning Strategy states that a site specific/use specific zone should be created that ensures the site itself, the site plan, and management of the business development will mitigate any adverse effects on low density residential development in the vicinity. … [Emphasis added]
>
> [Exhibit M-8, Tab 6, p. 2]

[190] Ms. Neville's above description of the test was further repeated verbatim (minus the heading) on the fifth page of her Report [Exhibit M-8, Tab 6, p. 5].

[191] Ms. Neville's own interpretation of Policy 17.e appeared, at the hearing, to focus on the mitigation of any adverse effects, without regard to the reasonableness of such measures. Throughout the hearing, in numerous responses to cross-examination by the Appellants, and in questions by the Board, Ms. Neville repeated her view that the test was to "mitigate, not eliminate". She repeated this interpretation of the test on several occasions during the hearing:

> **A.** It's -- it falls under part 2, policy 17(e) of the Planning Strategy. So it has four criteria that council is to look at and they're to look at these criterias and ways to mitigate how this development would affect surrounding areas.
>
> So it's not to say that the policy doesn't say eliminate, it says to mitigate. So looking at those four criterias with regards to manners to mitigate the four issues raised.
>
> [Transcript, July 5, 2018, pp. 517-518]

A. And again policy 17(e) does not say eliminate but rather mitigate. And my recommendation was to include buffers and the retention of vegetation in an attempt to mitigate the RV's.

[Transcript, July 5, 2018, p. 591]

A. Again policy 17(e) doesn't say eliminate bur rather mitigate. So the recommendation in the amending By-law has provisions to address buffering and the retention of vegetation.

Q. Okay. And in terms of mitigate, mitigate meaning to reduce but it's -- is it not fair to say that it's -- mitigation should be done to such an extent that it's reasonable so as to prevent the aggrieved parties from enjoying their properties?

A. Again the policy simply says mitigate and visual compatibility. It doesn't provide parameters on which the planner to make -- it doesn't have that ---

Q. So you're suggesting there's no direction from the MPS with respect to the degree to which it mitigates?

A. It simply says that it's to mitigate and to visual compatibility and in my recommendation I do have items to address how I feel it would be mitigated. [Emphasis added]

[Transcript, July 5, 2018, pp. 593-594]

[192] On this latter statement by Ms. Neville, the Board observes that Policy 17.e does, indeed, provide parameters on which to base the adequacy of the mitigation measures. In terms of the nature of the buffers along the property boundaries, Ms. Neville testified on cross-examination:

Q. Okay. When you say barrier, a barrier can impede but do you mean a barrier such that you can't see through?

A. It's supposed to be opaque.

Q. No I'm just –

A. So not clearly see through.

Q. Not clearly see through. So it could be somewhat see through but not clearly see through.

A. Correct.

Q. Okay. Not see through. Okay. …would noise pass through if there's something that's a little bit see through would you consider that noise might pass through it?

> **A.** Again when we look at policy 17(e) it's referencing mitigate not eliminate so sounds can travel through yes. [Emphasis added]
>
> [Transcript, July 6, 2018, p. 671]

[193] Again, above, Ms. Neville focused on her "mitigate/not eliminate" exercise, to the exclusion of a determination of the reasonableness of such mitigation.

[194] In the view of the Board, Ms. Neville's above elaboration of the test in her Report incorrectly described the nature of the test to be applied by CBRM Council. Her description of the test under Policy 17.e, to the effect that the zone "mitigate, not eliminate" any adverse affects on residential development, and her opinion that the new zone should be created to ensure that such adverse affects are mitigated (not eliminated), is not consistent with the actual wording in Policy 17.e. She ignored the requirement to provide reasonable protection. Indeed, in the Board's view, the plain words of Policy 17.e require that if zone provisions cannot be established that "provide reasonable protection to residential development in proximity", the application must be denied.

[195] Thus, under the Policy, a site specific, use specific, zone shall be created where zone provisions can be established that "provide reasonable protection to residential development in proximity". If such zone provisions cannot be established to fulfill that purpose, the application shall be denied. The test is not that the zone should be created, but rather that it shall be created in order to fulfill the purpose set out in the Policy of reasonably mitigating any adverse affects.

[196] It is simply not enough to "mitigate" any adverse affects. Policy 17.e requires that zone provisions must "provide reasonable protection to residential development in proximity". Otherwise, the application must be denied. In the Board's

view, mere mitigation is not sufficient if there is no reasonable protection to residential development in proximity.

[197] Indeed, as noted in Policy 17.e itself, where zone provisions cannot be established that provide reasonable protection to residential property in proximity, the application "shall be denied" [Emphasis added]. In setting out the test under Policy 17.e as she did, Ms. Neville advised Council that where such reasonable protection could not be established, the application could, but was not required, to be denied. Her advice to Council on this point was not consistent with the Policy.

[198] Further, as noted earlier in this Decision, the Developer's application listed a number of additional amenities to be offered at the proposed campground. The Board observes that most of these amenities are also identified as valid "accessory uses" in the definition of a campground under the LUB, including, specifically, an administrative office, assembly hall, convenience store, swimming pool, and, importantly, recreational facilities. The recreational facilities could include a variety of uses identified in the application.

[199] In Ms. Neville's opinion, each of these additional amenities could exist "as-of-right" on the site within the Rural CBRM Zone. As a result, in assessing the rezoning application, she did not consider any impact from these amenities on "residential development in proximity". Rather, Ms. Neville only considered the campground use, itself, in assessing the potential impact on the "residential development in proximity", without regard to accessory uses.

[200] In the Board's view, this was not a reasonable interpretation of the MPS, or of the LUB. With respect to the LUB amendment considered under the MPS, the accessory uses would be there by reason of the existence of the campground. In the

Board's view, a proposed campground development, as contemplated under the LUB, should be assessed as it relates to its potential impact on "residential development in proximity".

[201] Accordingly, the Board concludes that Ms. Neville should have considered the potential impact arising from the cumulative effect of the campground and all of the accessory uses, including the various recreational amenities. In failing to do this, the Board finds that her interpretation on this point is not reasonably consistent with the intent of the MPS.

[202] Further, in cross-examination by Mr. MacDonald, the Appellants' agent, Ms. Neville was asked about a similar rezoning application in 2015 under Policy 17.e respecting a proposed use at 17 Point Aconi Road, in Bras d'Or, located in another part of CBRM. The application in that matter did not relate to an RV campground, but related to a business owner who wanted to store some of his RV inventory on his property. There was no building proposed with the storage, and no sales, repair or servicing of the RVs.

[203] Ms. Neville was cross-examined on her staff report in the Point Aconi Road matter [Exhibit M-13], in which she recommended to Council that the rezoning be denied. In reaching that conclusion, she applied the identical test under Policy 17.e, and made three significant observations: (1) the proposed use would be in a predominantly low density residential area; (2) the proposed storage use would be visible from some of the neighbouring residential dwellings, despite the fact that the subject property did have a tree line along some of its boundaries; and (3) she opined that the lack of opposition from persons in the neighbourhood would support the application's approval.

[204] The Board accepts the submission of the Appellants that Ms. Neville's analysis on Point Aconi Road is inconsistent with her analysis in the present appeal relating to Big Pond. It could be argued that the three reasons outlined by Ms. Neville in the former matter would provide even stronger support for denying the zoning amendment in the present Big Pond matter. In light of this inconsistency, the Board assigns less weight to her opinion in this appeal.

[205] Also, the Board considers that Ms. Neville misapprehended the scope of CBRM's jurisdiction over land-use regulation in and around the shoreline, including artificial structures jutting into the water. In her testimony, she repeated on several occasions how CBRM did not have any jurisdiction over the Developer's proposed activities on the water. However, the Board notes, to the extent that such activities could be launched from the campground site, such activities are subject to CBRM's jurisdiction in terms of its authority over land-use regulation, including consideration of this application for an LUB amendment and subsequent by-law enforcement.

[206] In this respect, the Board refers to s. 355 of the *Municipal Government Act*:

> **Structures within municipal boundaries**
> **355** All docks, quays, wharves, slips, breakwaters and other structures connected with the shore of any part of a municipality are within the boundaries of the municipality.

[207] Thus, as it relates to the recreational uses proposed by the Developer on or adjacent to the shoreline on such artificial structures, any reasonable protection from adverse affects attributable to such uses should have been considered under Policy 17.e in relation to residential properties in proximity. Ms. Neville disregarded or downplayed any such potential impacts as being beyond the Municipality's jurisdiction. In so doing, this causes the Board to again attribute less weight to her opinion evidence.

[208] To the extent that Council relied upon the expression of the test under Policy 17.e, as described by Ms. Neville in the Staff Report, the Board finds, on the balance of probabilities, that Council relied on an interpretation of the test which was wrong and was not based on an interpretation that the language of the Policy could reasonably bear. Accordingly, to the extent it relied on Ms. Neville's interpretation of Policy 17.e, Council's decision approving the zoning amendment did not reasonably carry out the intent of the MPS.

[209] While the Board has found that CBRM Council's decision, to the extent that it relied on the Staff Report, did not reasonably comply with the intent of the MPS, that does not conclude the matter. In the circumstances, the Board must go further and determine whether Council's decision could be based on another interpretation that the MPS can reasonably bear, such that it could be found that its decision does reasonably comply with the intent of the MPS: see *United Gulf Developments Limited (Re)*, 2008 NSUARB 167, upheld on appeal at 2009 NSCA 78, paras. 72-73.

(d) "Reasonable protection to residential development in proximity"

[210] As noted earlier in this Decision, Policy 17.e states that in assessing whether zone provisions provide reasonable protection to a residential development in proximity, the proposal is to be evaluated against the following criteria:

- traffic attracted to, and leading from, the site;
- dust or fumes emanating from the site;
- visual compatibility; and
- noise emanating from the development.

[211] The Board will review each of these criteria, in turn.

(i) **Traffic**

[212] The Appellants identified a ground of appeal respecting their concerns that the proposed campground could create traffic safety issues along the East Bay Highway.

[213] Witnesses and letters of comment in the hearing noted the narrow Highway, a blind curve on one side of the site and a blind hill on the other. They also noted safety concerns related to pedestrians, including campers, crossing the Highway from Phase 1 on the north of the Highway to the proposed recreational uses contemplated for the south of the Highway in later Phases of the development.

[214] Policy 17.e provides that the rezoning must be assessed to provide reasonable protection to residential properties in proximity in relation to:

- traffic attracted to, and leading from, the site;

[Exhibit M-1, p. 7]

[215] In her Staff Report, Ms. Neville stated as follows in relation to traffic:

> 3. Traffic attracted to, and leading from, the site
>
> The East Bay Highway (Route 4) is a Level 1 regional route in the CBRM public street/road hierarchy and is a limited access highway leading to the Canso Causeway. The volume of motor vehicle traffic emanating from the proposed development will be low in comparison to the volume of traffic traversing the East Bay Highway already. That being said, because the East Bay Highway is a Provincially owned road, access locations will need to be approved by Department of Transportation and Infrastructural Renewal (TIR). Both Planning and Development Department staff and TIR staff have raised concerns regarding the movement of people from one side of the East Bay Highway to the other. TIR expects this issue to be addressed in the required traffic impact study.
>
> [Exhibit M-8, Tab 6, p. 6]

[216] The Board is satisfied that Planning staff and Council have adequately reviewed the proposed LUB amendment in relation to traffic issues. It was noted by Ms. Neville in her Report that any incremental traffic volume fell well within the capacity of the

East Bay Highway. Moreover, as noted by Ms. Neville in her evidence, CBRM is permitted to defer to the provincial Department of Transportation and Infrastructure Renewal on issues related to highway access and crossings.

[217] As a result, the Board finds that, in relation to traffic issues, Council's decision is reasonably consistent with the intent of the MPS.

(ii) **Dust or Fumes**

[218] The Appellants also raised concerns in relation to the impact on nearby residential properties with respect to dust or fumes emanating from the proposed campground. They identified concerns in relation to exhaust fumes and dust from RVs entering or leaving the campground, emissions from generators, or smoke from individual campfires or bonfires.

[219] Again, Policy 17.e requires that the LUB amendment be assessed in relation to the impact on residential properties from dust or fumes emanating from the site.

[220] Ms. Neville testified that this criteria had been addressed by means of the proposed vegetation buffer and setback along the campground's boundaries with residential properties. Further, Section 6(b) of the proposed LUB amendment provides that parking areas and internal driveways be treated in order to prevent the raising of dust and loose particles.

[221] Having reviewed the evidence, the Board is not convinced, on the balance of probabilities, that the Appellants have shown that Council's decision was not

reasonably consistent with the intent of the MPS, in relation to dust or fumes emanating from the site.

(iii) **Environmental Concerns**

[222] The Board observes that a number of witnesses at the hearing raised environmental issues related to the potential impact of stormwater drainage and sewage treatment on the waters of the barachois located at the foot of the proposed campground. Similar concerns were expressed in the letters of comment and in comments from members of the public during the evening session.

[223] In a preliminary hearing in advance of the hearing, the Board advised the Appellants that it did not have the jurisdiction under the *Municipal Government Act* to address environmental issues in this appeal.

[224] The Board stated as follows in *Fryday et al. v. Halifax Regional Municipality*, 2007 NSUARB 97, with regards to environmental matters:

> [139] Municipal planning and development often involve environment related issues. In *Kynock*, *supra*, where the Court of Appeal restored a municipality's decision to approve a quarry, the Court held that the Board has a limited jurisdiction over environmental issues. Hallett, J.A., stated at paragraph 34:
>
> > The members of the Utility and Review Board do not have expertise in environmental matters. The Legislature did not see fit to deal with environmental matters in the *Planning Act* but did see fit to do so under the environmental legislation. The environmental legislation provides for public participation in reviews conducted by the Environmental Control Council although a public hearing is not mandatory for a quarry development such as this which is under 10 acres. The legislation of this Province puts the primary responsibility for matters affecting the environment with the Minister of the Environment, not with municipalities, municipal councils nor with the Nova Scotia Utility and Review Board. That is not to say municipalities shall not have regard for the environment in their planning policies, only that the primary responsibility for the environment is with the Minister of the Environment.
>
> [140] In *Williams Lake Conservation Co. v. Kimberly-Lloyd Developments*, [2004] NSUARB 109, the Board dismissed an appeal from a council's decision to approve a

rezoning application for a housing development. With respect to environmental issues, it stated:

> [163] The Board is satisfied that the environmental issues were addressed by planning staff in their report to Council. Further, it observes that municipal officials can rely on the appropriate governmental authorities to monitor the construction and ongoing operation of municipal or private systems, including sewer or wastewater management systems, as noted by the Nova Scotia Court of Appeal in *Kynock*, at paragraphs 41 to 43. Indeed, as noted by Hallett, J.A., in paragraph 34 of *Kynock*, it is provincial environment officials, rather than municipalities, who have primary responsibility for protection of the environment. Thus, municipalities must defer to provincial authorities to ensure compliance with the *Environment Act*, S.N.S. 1994-95, c.1, in providing such systems are adequate for protection of the public.
>
> [164] Some witnesses also raised concerns about compliance with municipal and provincial regulations or bylaws respecting environmental, sewage and wastewater issues. Such enforcement issues are not within the jurisdiction conferred upon the Board by the Legislature and should be addressed in the appropriate forum, see *Lutz v. Municipality of the County of Kings*, [2003] NSCA 26, paragraphs 54 and 58.

[225] For greater certainty, the Board adopts the above passage in relation to this appeal and confirms it does not have the jurisdiction to address environmental issues in this matter. The Board has not considered any environmental matters whatsoever in the disposition of this appeal.

(iv) **Visual Compatibility and Noise**

[226] As noted earlier in this Decision, the Court of Appeal in *Archibald* identified the importance of the Board undertaking a thorough fact-finding exercise to assess the context of an application in relation to the MPS.

[227] The Board considers that the words of Policy 17.e require that Council's decision must take account of the unique characteristics of the location of the proposed campground zone, vis-à-vis the residential properties in its proximity. While all zoning amendment applications must be considered on their own facts, that is even more so in the present appeal where Policy 17.e requires that a site specific, use specific, zone be

created. The Board finds that such policy direction is clearly intended to require Council to take account of the unique characteristics of a site, of the proposed use, and of the residential properties in its proximity.

[228] Various provisions were included in the LUB amendment to address protection for residential properties in the vicinity of the proposed campground site, in relation to visual compatibility, dust or fumes emanating from the site, and noise emanating from the site. These protections were generally comprised of some form of buffer, setback or screening between the proposed campground (and accessory uses), and residential properties in the vicinity. Such measures included:

Section 3 Campsite Development Standards

a. Tenting sites must have a minimum area of 111.5 m^2 (1202ft^2)

b. Recreational vehicle sites must have a minimum area of 223 m^2 (2400ft^2)

c. The maximum number of campsites is 211.

d. No tenting site or recreational vehicle site shall be located closer than 10 metres (33 feet) from any property boundary, except for a property boundary along the Bras d'Or Lakes where no tenting site or recreational vehicle site shall be located closer than 20 metres (66 feet) to the ordinary high water mark of the Bras d'Or Lakes as identified on a legal survey.

e. Campsites shall be screened (as defined by the By-law) from a public street/road or adjacent properties by. an opaque vegetative, topographic screen (berm), opaque fence, building or combination thereof.

Section 4 Buffer Area and Watercourse Setback

a. A landscaped buffer area not less than 10 metres (33 feet) wide adjacent to side property boundaries shall be retained where it exists at the time of application for a Development Permit and where no such not landscape buffer exists, the applicant shall plant vegetation. No activity or use shall be permitted within this landscaped buffer except for walkways and trails not exceeding 3 metres in width.

b. No development permit shall be issued for any development within 20 metres (66 feet) of the ordinary high water mark of the Bras d'Or Lakes as identified on a legal survey.

c. Within the required buffer pursuant to clause (b), activity shall be limited to the placement of one accessory structure not exceeding a footprint of 9.3m^2 (100ft^2), fences, boardwalks, walkways and trails not exceeding 3 metres in width, wharfs, boat ramps, marine dependent uses, fishery uses, conservation uses, parks on

public lands, historic sites and monuments, wastewater, storm and water infrastructure, and water control structures;

d. Any buffering or screening pursuant to clauses (a) and (b), shall be properly maintained by the owner, and not allowed to fall into disrepair or become unsightly.

Section 5 Landscaping

a. In addition to the buffer area required in Section 4 and screening provisions in Section 3, all existing significant vegetation shall be retained except where its removal is necessary for the construction of the development; and

b. All exposed ground on the site not occupied by a building, a campsite, or the parking area shall comply with the definition of this By-law for landscaped open area.

Section 6 Parking Area and Internal Driveway

a. Each campsite shall contain one conveniently located parking space adjacent to the internal driveway network.

b. Parking areas and internal driveways shall be treated so as to prevent the raising of dust and loose particles.

Section 7 Lighting

Any lights used to illuminate common spaces, parking lots/areas, and/or the internal driveway network shall be so arranged as to divert the light away from streets, adjacent lot parcels and buildings.

[Staff Report, Attachment I, Exhibit M-8, pp. 1-2]

[229] The LUB amendment approved in this appeal would also add the following definition of "campsite" in the LUB:

> "Campsite" means a part of a recreational business establishment (e.g. campground) designed for the exclusive use of guests in a camping unit (e.g. recreational vehicles or tents).

[230] The Board considers that a number of the above measures in the LUB amendment could provide some protection to some residential properties in proximity to the proposed campground site.

[231] In terms of neighbouring properties, Section 3(d) of the LUB amendment requires that any tenting site or recreational vehicle site be located no closer than 10 metres (33 feet) from any property boundary. Moreover, under Section 4(a), a

landscaped buffer area not less than 10 metres (33 feet) wide shall be retained adjacent to abutting property boundaries where such landscaped buffer exists at the time of an application for a development permit and where no such landscaped buffer exists, the Developer shall plant vegetation. No activity or use shall be permitted within this landscaped buffer except for walkways and trails not exceeding three metres in width.

[232] Further, the LUB amendment requires campsites to be screened (as defined by the LUB) from a public street/road or adjacent properties by an opaque vegetative, topographic screen (berm), opaque fence, building or combination thereof.

[233] In the vicinity of the shoreline, Section 3(d) states that no tenting site or recreational vehicle site shall be located closer than 20 metres (66 feet) to the ordinary high water mark. Further, no development permit shall be issued for any development within 20 metres (66 feet) of the ordinary high water mark. However, within this latter buffer, activity shall be limited to the placement of one accessory structure not exceeding a footprint of 9.3m^2 (100ft^2), as well as such amenities as fences, boardwalks, walkways and trails not exceeding three metres in width, wharves, boat ramps, marine dependent uses, and parks on public lands.

[234] The Board observes that a number of Appellants and numerous other local residents opposing the proposed campground reside in various locations surrounding the subject site. Roy MacInnis, for example, owns the farm land directly abutting the campground site on the East Bay Highway. He lives across from the proposed campground, on the opposite side of the East Bay Highway. Other Appellants, like Maureen Campbell and Edwin and Anne MacIntyre, do not live adjacent to the site, but live in proximity to the site and may be variably impacted by visual compatibility, noise,

dust or fumes emanating from the site. Others, like Helen Doherty, and Michael Britten, live further away from the site on Concert Lane, but may be impacted by noise from the campground and the activity on Lochmore Harbour related to the campground.

[235] Still others will be directly impacted because they are located on the barachois below the campground, on the waters of Lochmore Harbour.

[236] In addressing the zone provisions contained in the LUB amendment approved by Council, the Board notes that a number of zone provisions, in the form of buffers, setbacks, screening or other site requirements, will provide varying protection from the campground upon different properties in proximity to the site.

[237] To be clear, the Board is satisfied that some of the zone provisions approved by Council do provide reasonable protection to some of the residential properties in proximity. For example, while residents like Roy MacInnis, Maureen Campbell and Mr. and Ms. MacIntyre no doubt feel that the minimum 10 metre landscaped buffer between the campsites and Roy MacInnis' eastern boundary is not sufficient, the Board observes that it could be argued such a buffer does provide reasonable protection in relation to the visual compatibility of the site with their properties.

[238] Moreover, the distance of the campground site to properties owned by Ms. Doherty or Mr. Britten (both located on Concert Lane), separated by both distance and vegetation from the subject site, could be considered to have reasonable protection from the site in terms of visual compatibility, and dust or fumes emanating from the site.

[239] However, the Board considers that there are other residential properties which are more directly impacted by the proposed campground site, for which there are no zone provisions that provide any reasonable protection whatsoever from the adverse

affects related to the campground. In the Board's view, the residential properties falling within the latter category are those of the Gowans, the Sutherlands, and the Moffatts, that are located on the barachois of Lochmore Harbour.

[240] While the new LUB amendment has provided zone provisions which could be argued provide reasonable protection for properties on the East Bay Highway or Concert Lane, there are no such provisions that serve to provide any reasonable protection to those on Lochmore Harbour. It is not a reasonable interpretation of Policy 17.e that Council need only provide protection to some properties and not to others. In the Board's opinion, such reasonable protection must be provided under Policy 17.e to any properties in proximity that might be impacted, particularly those that may be impacted more significantly and in closer proximity to the proposed campground.

[241] In this respect, it appears to the Board that Ms. Neville failed to apply her own measure of proximity to the facts of this case. In response to questions from the Board, she said:

> **Q.** (Clarke) So, I'm wondering -- in part you talked about there being screens from the adjacent property, and the by-law -- or the policy in the MPS talks about properties in proximity, and I'd like to hear your thoughts on what "adjacent property" means and what "proximity" means from your planning perspective.
>
> **A.** Sure. So, with regards to "adjacent", my perspective on that is that they're sharing a property line, so that they are immediately adjacent, they are sharing a property line. "In proximity" means that they're in the general area.
>
> **Q.** So, the general area of this particular development, what did you consider that to be?
>
> **A.** So, looking at -- if you look at my report, when doing an evaluation of the site I did a radius of a 600-foot buffer around the property and looked at the land uses that were in place on those properties.
>
> **Q.** Why did you choose a 600-foot buffer?
>
> **A.** With -- if you look at the current zone that's in effect, it does have a range of buffers that are applied to various uses, and I just -- there is one for -- in relation to heavy equipment depots and it's a 300-foot setback. So, when I applied the 300-foot setback I didn't feel that it covered enough of the area, so I doubled it to 600.

Q. Did you give any consideration to whether the area should be bigger than 600 or broader than 600?

A. No. That was the range that I chose to look at.

Q. And did you have any other reason to choose that?

A. No.

Q. Nothing that was suggested to you or from other matters that you'd looked at?

A. No. Well, again, having discussions with Director Gillis, I did indicate to him that that was the range that I was looking at, he indicated that he also thought it was adequate.

[Transcript, September 25, 2018, pp. 912-914]

[242] The Board observes that the Gowan property is located directly adjacent to the proposed campground on the barachois, and the Sutherland property is located between 150 and 200 metres away, across the barachois. In the Board's view, these two properties, at least, are in proximity to the subject lands (i.e., and within the 600 feet identified by Ms. Neville), and this likely extends to the Moffatt property as well.

[243] In this matter, the Board considers that Council's decision does not reasonably comply with the MPS in that it totally ignores any impact whatsoever the proposed campground would have on the residential properties situated below it, directly across the barachois, on Lochmore Harbour.

[244] As noted earlier in this Decision, the factual context in this matter, including the topography of the neighborhood, the geographic features of the land and water, and the relative location of the proposed campground and residential properties in proximity to it, provide to this site and its surroundings a unique character that must be taken into account when assessing the application of Policy 17.e.

[245] The Board made the following observations during its site visit.

[246] First, the proposed campground lies on the north side of the East Bay Highway, stretching from the Highway down to the barachois, of Lochmore Harbour,

which is adjacent to the waters of the Bras d'Or (separated only by the gravel sand bar forming the barachois).

[247] Second, the topography of the general area features steep to moderately sloped lands starting above the East Bay Highway and leading down to Lochmore Harbour and the residential properties located on the barachois.

[248] Third, there are three residential waterfront properties located on the barachois created by Lochmore Harbour whose owners have opposed the rezoning application. Two of these properties are located on Mie Mestreech Road, which is accessed directly across from Rita's Tea Room on the East Bay Highway. The road leads down the hill towards Lochmore Harbour, and the greater Bras d'Or beyond it. The third property is on Alden Lane which runs from Mie Mestreech Road toward the proposed campground site. Of significant note, for the purposes of this appeal, these properties are situated across the water from the proposed campground site, with the Gowan property being beside the campground, while the Sutherland and Moffatt homes are located directly across the water from the site.

[249] In his testimony, Mr. Sutherland estimated that his property is about 150 to 200 metres across the water from the proposed campground site. This is consistent with the Board's observations during its site visit. The Gowan property is somewhat closer to the proposed campground, while the Moffatt property is further away from the campground site as compared to the Sutherland property. The Moffatts have a clear view of the entire sloped area of the proposed campground site across the pond, leading up the hill to the East Bay Highway further up the slope from their vantage point. The

Sutherlands have a similar view, except an upper portion of the campground site in the vicinity of East Bay Highway, which is obstructed by trees.

[250] Mr. Sutherland and Ms. Moffatt both testified that the proposed buffer and screening in the LUB amendment, including the 20 metre setback from the ordinary high water mark, would provide no protection to their properties located across the barachois from the proposed campground site. The Board accepts their testimony on this point.

[251] The Board considers that Ms. Neville was primarily concerned with the mitigation of visual compatibility and noise issues from the point of view of abutting properties or other properties on the East Bay Highway, without regard to the residential properties located on the barachois. Ms. Neville appeared to say as much on a few occasions in her testimony. In her Staff Report, she recommended Phase 1 of the application on the basis of the 10 metre buffer along the abutting properties:

> … Given the low lying topography and screening provisions, Phase I of the campground located on the North side of the highway … will likely not be seen at all unless you actually enter the site. …
>
> [Exhibit M-8, Tab 6, p. 8]

[252] However, in her Staff Report and in her testimony, she made no direct reference to the properties located on the barachois until she was specifically referred to them by Mr. MacDonald in cross-examination, or in questioning by the Board. When so directed, she referred to the setback of 20 metres along the ordinary high water mark, and the retention of vegetation on the site, but acknowledged this would provide only partial protection:

> Q. (Chair) So, it's your view that the buffering along the water would buffer the Moffatts and the Sutherlands from the RV vehicles on the entire site?
>
> A. Not in their entirety. You would still see some of the vehicles, yes.
>
> [Transcript, September 25, 2018, p. 943]

[253] As noted above, the Board accepts the testimony of Mr. Sutherland and Ms. Moffatt on this point. The buffer along the abutting properties, and the setback from the ordinary high water mark, would provide very little protection, if any, to the residential properties on the barachois. This is consistent with the site visit taken by the Board at the Sutherland and Moffatt properties. As they noted, the setback from the ordinary high water mark would do nothing to shield the presence of RVs and campsites on the majority of the campground further up the slope, extending to the East Bay Highway. The Board notes on this point that Ms. Moffatt (and the Board) could observe Ms. Sampson's dwelling on the proposed campground property. Further, there is a rather large open field on the proposed site. Both of these features (which the Board observed on its site visit), can be observed on Figure 1 included earlier in this Decision.

[254] Also, the Board notes that the campsite screening provisions, included in Section 3(e) of the LUB amendment, refer to screening from the public road (i.e., East Bay Highway) or adjacent properties. Given the topography, the Board doubts whether any practical screening could even be done at all from residential properties on the barachois, considering the size of RVs and the slope of the property down to the water.

Findings

[255] Having had the benefit of hearing all the testimony at the hearing and observing the location in person, the Board finds that there are absolutely no zone provisions in the proposed Big Pond Campground Zone that will provide any reasonable protection, or indeed any protection at all, to the properties located adjacent to, or across, the barachois, most notably the Gowan, Sutherland and Moffatt residential properties,

with respect to visual compatibility and noise. In the Board's opinion, the zone provisions in the LUB amendment will be ineffective.

[256] In terms of visual compatibility, the proposed 20 metre setback from the ordinary high water mark, the retention of vegetation by the shoreline and elsewhere on the site, as well as the screening of campsites, will offer no practical protection to the Gowan, Sutherland or Moffatt properties. Given the topography of the entire area and the higher elevation of the campground site (relative to the properties on the barachois), the residents located on the barachois will be able to observe most, if not all, of the proposed campground and recreational uses being carried out on the subject lands. This is especially so when one considers the potentially imposing nature of up to 211 RVs parked on the hill up from the barachois. Further, any activity on the shoreline, including on any docks or quays, will not be obstructed at all, including for the Gowans who are directly adjacent to the campground's shoreline and the recreational uses launched from there.

[257] In terms of evaluating visual compatibility, Ms. Neville conducted research on existing campgrounds in the CBRM, as well as others in the province and across Canada. In particular, she compared the various densities of campsites prescribed in other campgrounds (on a per hectare basis), and she compared the various buffer, minimum lot size, and setback requirements in each.

[258] In the Board's view, Ms. Neville's approach of comparing the subject application to other campgrounds raises a number of concerns. First, in relation to the existing campgrounds in CBRM, she acknowledged that they all pre-dated the MPS and, further, that there may not have been a policy similar to Policy 17.e that would have

applied at the time of the development of those campgrounds. Second, the reliance on requirements for other campgrounds, including those across Canada, without investigating the planning policy context for such sites (if any), ignores the specific policy direction in this matter, i.e., whether there is reasonable protection for residential properties in proximity with respect to adverse affects from the development. This approach ignores an evaluation of the unique characteristics of the subject site and nearby properties.

[259] In terms of noise, given the lack of any practical buffer, the properties on the barachois will be subjected to all regular noise and sound emanating from the campground, including from accessory uses directly related to a campground. Moreover, any sound from the shoreline, docks or quays will also be unimpeded.

[260] The Board heard evidence at the hearing of how various sounds from the community are heard throughout the area, especially by residents of the properties on the barachois. The Big Pond Festival, which occurred only once per year, was heard throughout the community. The concert stage was located much further afield than the proposed campground. Numerous witnesses also mentioned how the music and drums of Eskasoni First Nation can be heard from a distance of five or six miles across East Bay during the summer.

[261] However, even more normal or modest noise could be heard from a distance across this sloped landscape. Mr. Sutherland testified about hearing traffic along the East Bay Highway, even though he is already buffered by 500 feet of tree growth in some areas. He said he hears lawn mowers of his neighbours in the community. Ms. Moffatt can hear dogs bark in the community.

[262] In terms of assessing noise, Ms. Neville canvassed police reports respecting noise complaints from the existing campgrounds in CBRM. She noted that three noise complaints were filed in 2015-2017.

[263] In relation to noise, specifically, the review of police reports for other existing campgrounds in CBRM, without an assessment of the site specific characteristics of the subject campground and surrounding properties, does not address the policy direction in Policy 17.e of the MPS. Further, as noted earlier in this Decision, the Board determined that it is not reasonably consistent with the intent of the MPS to only take account of noise emanating from the campground use itself, without considering the cumulative impact of all noise coming from the site as a result of other valid accessory uses, as expressly contained in the LUB definition of "Campground".

[264] The Board accepts the evidence of Mr. Sutherland, Mr. Moffatt, and Ms. Moffatt, and concludes, that the residential properties on the barachois will have no protection from any noise emanating from the site, including from along its shoreline.

[265] In making these findings on visual compatibility and noise, the Board is mindful of the MPS as a whole and the fact that numerous uses can already exist "as of right" in the Rural CBRM Zone. While Big Pond Centre is generally a quiet rural community, that is not a barrier to the introduction of more intensive uses, including some commercial or industrial uses. However, campgrounds are not permitted "as of right" and any proposed development must be assessed against Policy 17.e. Taking all the evidence and the MPS into account, the Board finds that the zone provisions approved by Council would not offer any reasonable protection to the Gowan, Sutherland and

Moffatt properties from the effects of a 211 site campground, at least in terms of the impact of visual compatibility and noise.

[266] The Board notes that neither the planners, nor any Council members, accepted the Appellants' invitation to view the proposed development site from the Sutherland and Moffatt properties, at the bottom of the barachois. If they had taken a view from this vantage point, they would have observed the sloping topography above (where the campground is proposed to be located), relative to these residential properties below.

[267] Taking into account all of the above, the Board finds that, in terms of visual compatibility and noise, the proposed campground zone provisions would provide no protection whatsoever to the properties located below it on Lochmore Harbour (i.e., on the barachois), including the residential homes of the Gowans, Sutherlands and the Moffatts. There are no zone provisions that would provide any protection measures, let alone reasonable ones, for these properties located in proximity to the campground.

(a) No competing or conflicting policies

[268] In his Post Hearing Submission, Mr. Kachafanas, counsel for CBRM, attempted to portray the task before CBRM Council as one requiring a balancing of competing policy choices under the MPS. He cited a number of case authorities for the proposition that it is Council who must balance such competing or conflicting policies, not the Board. Mr. Kachafanas quoted the following passage from the Nova Scotia Court of Appeal in *Archibald*:

> **(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. … [Emphasis added]
>
> [*Archibald*, para. 24]

[269] Mr. Kachafanas also cited *Tsimiklis* in support of his submission:

> [24] A review of the MPS confirms, as one would surmise, that many of the policies are, to use the words of Hallett, J.A. in *Heritage Trust*, supra, at para 100 "inherently in conflict". The Board recognized this in its decision. The MPS recognises a number of competing interests necessarily involved in the creation of a workable planning regime and, of necessity, Council must have considerable latitude in striking a balance among those interests in making a planning decision.
>
> …
>
> [64] As I have already pointed out, planning decisions often involve compromises and choices between competing policies which are best made by the elected representatives, so long as they are reasonably consistent with the intent of the MPS. To my mind, read against these policies Council's decision here is reasonably consistent with that intent. [Emphasis added]
>
> [*Tsimiklis*, paras. 24 and 64]

[270] Turning to the MPS at issue in the present appeal, counsel for CBRM characterized Council's task as one involving the exercise of its sole discretion in weighing competing policy options in the MPS:

> 16. Council's decision in this matter was by nature a decision involving exercise of their discretion and judgment, and required Council to weigh between conflicting intentions expressed in the MPS. The conflicting intentions of the MPS are clearly encapsulated in policy 2.17(E) of the MPS. Rural areas encompass a broad range of uses, both business and residential. The policy of CBRM is to permit business developments in rural areas, but only so long as reasonable protections can be afforded to nearby residential properties. In an application of this nature, Council is necessarily required to compromise and attempt to strike a balance between the interests of business developers and the interests of residential property owners. [Emphasis added]
>
> [CBRM Post Hearing Submission, November 16, 2018, p. 7]

[271] Mr. Kachafanas would give Council an unchallenged discretion in determining what is reasonable:

> 21. The MPS does not require that a rural business development have no adverse effects whatsoever on nearby residential properties. It requires only that any such adverse effects be mitigated. The question of what constitutes "reasonable protection" or sufficient

> mitigation of adverse effects is necessarily a judgment to be made by Council at its own discretion. It is entitled to deference and is not to be lightly set aside. It is similar to the determination of "undue impact" that was noted to be within the discretion of Council in *Archibald*.
>
> 22. Policy 2.17(e) is a broadly worded policy that provides Council with very wide discretion, and necessarily requires Council to consider a range of factors and exercise its own judgment on the evidence before it. The Board does not have jurisdiction to ask whether, in its view, it would have provided greater protections to residential properties, or whether the residents of the area are satisfied with the degree of mitigation provided. Issues of whether the campground proposed by the Applicant is an appropriate development or one that should be approved are also issues that are outside the Board's jurisdiction. The determination of what zoning provisions are sufficient to provide reasonable protection to nearby residential property owners is squarely within the jurisdiction of Council. … [Emphasis added]
>
> [CBRM Post Hearing Submission, November 16, 2018, p. 8]

[272] Similarly, Mr. Conohan, counsel for the Developer, noted Council's primary role in weighing conflicting policy choices:

> 5. That the Applicant [Developer] also concurs and relies upon the case of ***Midtown Tavern & Grill Ltd. V. Nova Scotia (Utility and Review Board), 2006 NSCA 115 (CanLII)*** where the Nova Scotia Court of Appeal held that the Municipal Council is to be the primary decision maker, and its decision is entitled to deference when being reviewed.
>
> 6. The Applicant [Developer] also concurs and relies upon the case of ***Tsimiklis v. Halifax (Regional Municipality), 2003 NSCA 30 (CanLII)*** where, as referred to paragraph 14 of the Respondent's Submissions, it was held by the Court of Appeal that where a Municipal Planning Strategy may contain conflicting policies it is Council who is to make the decision between those conflicting interests so long as such decisions are reasonably consistent with the intent of the Municipal Planning Strategy. [Emphasis added]
>
> [Developer Post Hearing Submission, November 16, 2018, p. 2]

[273] With respect, the decision to be made by CBRM Council in this instance did not involve a balancing of competing policy choices.

[274] The case authorities cited by Mr. Kachafanas are, indeed, correct as they relate to Council being the appropriate entity to make compromises of conflicting policy intentions found in an MPS, an exercise which must properly attract great deference from the Board. While the Board remains mindful of the direction from the Courts, it is the Board's view that the circumstances in this appeal do not raise issues of competing or

conflicting policy choices. The direction in Policy 17.e is clear and straightforward, and needs to be reasonably applied by Council.

[275] Further, while CBRM Council must be accorded deference in its consideration and interpretation of the MPS, the exercise of that function does not attract an unfettered power to do as it chooses, without due regard to the wording of the applicable policy, the MPS as a whole, and the principles of interpretation. Council, as a decision-maker, is subject to the rule of law, as is the Board. Accordingly, where Council has overstepped its authority, the Board is bound under s. 251(2) of the *Municipal Government Act* to reverse that decision. The Board notes that the limits on Council's authority have been highlighted by the Court of Appeal, including in the very passages cited above by CBRM in *Archibald* and *Tsimiklis*:

> **(7)** … The Board's statutory mandate remains to determine whether the Council's decision reasonably carries out the intent of the MPS. … This deference to Council's difficult choices between conflicting policies is not a license for Council to make ad hoc decisions unguided by principle. As Justice Cromwell said, the "purpose of the MPS is not to confer authority on Council but to provide policy guidance on how Council's authority should be exercised" (*Lewis v. North West Community Council of HRM*, 2001 NSCA 98 (CanLii), ¶ 19). So, if the MPS' intent is ascertainable, there is no deep shade for Council to illuminate, and the Board is unconstrained in determining whether the Council's decision reasonably bears that intent. [Emphasis added]
>
> [*Archibald*, para. 24]

> [64] … planning decisions often involve compromises and choices between competing policies which are best made by the elected representatives, so long as they are reasonably consistent with the intent of the MPS. … [Emphasis added]
>
> [*Tsimiklis*, para. 64]

[276] While Council's decision in the present instance did not involve a balancing of conflicting policy options, the limits on Council's authority similarly apply where the MPS provides a clear policy direction to Council. Where Council fails to follow that clear policy direction, the Board is required to intervene under s. 251(2).

(b) Council's consideration of the public's concerns

[277] Counsel for CBRM and the Developer argued a further point, namely that Council is deemed to have considered all the concerns identified by the public, and the exercise of its discretion cannot be challenged. However, in this regard, the Board finds that Council's authority is exceeded when its decision does not reasonably carry out the intent of the MPS.

[278] In his cross-examination of the Appellants during the hearing, and in his Post Hearing Submission, Mr. Conohan, counsel for the Developer, highlighted the fact that the Appellants repeatedly made known their concerns to the CBRM Planning Department and to CBRM Council throughout this matter:

> 13. It should also be noted that consistently within the scope of this hearing the Appellants and their witnesses repeatedly, upon cross-examination, confirmed that the issues that they were raising at the Nova Scotia Utility and Review Board Hearing in this matter had been brought to the attention of Council and to the Planning Department of the Cape Breton Regional Municipality prior to Council's vote.
>
> 14. In short, all the issues that they were raising within the scope of this proceeding had been previously raised with the Planning Department, had been considered, and had not changed the Planning Department's recommendation. These same issues again were raised when they spoke to Council members and to Council directly as a body and Council still voted to accept the recommendation of its Planning Department.
>
> 15. It is respectfully submitted that deference should be paid to the decision of Council in that regard and in that context.
>
> [Developer Post Hearing Submission, November 16, 2018, p. 3]

[279] Mr. Kachafanas, in his Post Hearing Submission, raised the same point:

> …Furthermore, [the Appellants] have produced no evidence that had not been previously presented to Council by the Appellants or others. The voluminous documentary record of this proceeding clearly establishes that the concerns of the Appellants had been made known to Council prior to their decision. Every witness called by the Appellants acknowledged on cross-examination that they had been given ample opportunity to make submissions to Council during the course of the proceedings, and that they either had done so, or relied on others to do so for them.
>
> [CBRM Post Hearing Submission, November 16, 2018, p. 17]

[280] In effect, what both Mr. Kachafanas and Mr. Conohan are asserting is that once the Appellants' concerns have been raised with CBRM, both the planning staff and Council are deemed to have considered those comments and the exercise of Council's discretion cannot be challenged.

[281] However, in the Board's opinion, CBRM Council is not entitled to simply listen to all the comments during its planning process and then decide to ignore such evidence and do as it chooses without regard to clear policy direction contained in the MPS. Rather, CBRM is required to apply the policy in a manner that would reasonably carry out the intent of the MPS.

(c) Disposition of the appeal

[282] While the use of a term such as "reasonable protection" in the MPS does confer an element of discretion to Council to determine what is "reasonable" in the circumstances, Council's discretion must be guided by principle. Council's determination of what it considers to be "reasonable" must hold up to an objective review in the circumstances in each case. In this matter, the Board has determined for the above reasons that Council's view of "reasonable protection" was not reasonable, which was the central issue in this appeal. This is not a case of the Board substituting its own opinion; it is a case of Council making a decision that did not reasonably carry out the intent of the MPS, and of the Board applying the proper test under s. 251(2) of the *MGA*: see *United Gulf*, para. 74.

[283] The present appeal involves a case where Council interpreted a policy in a manner which is not reasonable, on its face, because it failed to carry out the clear

direction set out in the Policy itself, i.e., that the zone provisions provide reasonable protection to residential development in proximity. There is no other materially relevant policy in the MPS that Council had to apply in its consideration of this central issue.

[284] In absolutely failing to provide any protection to the Gowan, Sutherland and Moffatt residential properties in proximity (i.e., those located directly across the barachois from the proposed campground site, and in the Gowans' case, located directly adjacent to the subject), the Board concludes that Council's decision does not reasonably comply with the intent of the MPS.

[285] Accordingly, the appeal is allowed.

(D) Other Grounds

[286] The primary grounds of appeal canvassed during the hearing have been addressed above in the Board's Decision. As a result, given the Board's finding on the ground relating to Policy 17.e, the central issue in this appeal, it is not necessary to consider other grounds raised by the Appellants.

VIII. CONCLUSION

[287] Having reviewed all of the evidence and the law, the Board is satisfied that the Appellants have discharged the burden of showing, on the balance of probabilities, that the decision of CBRM Council approving the rezoning did not reasonably carry out the intent of the MPS.

[288] Accordingly, the appeal is allowed.

IX. SUMMARY

[288] This is a Decision of the Board with respect to an appeal by the Appellants under the *Municipal Government Act* from a decision of CBRM Council, which approved an amendment to the LUB by rezoning properties from Rural CBRM Zone to Big Pond Campground Zone, located at Big Pond Centre, Nova Scotia.

[289] The rezoning (i.e., LUB amendment) is sought by the Developer in anticipation of the development of a Recreational Vehicle Campground at Big Pond Centre. The first phase, which is the subject of this appeal, proposed a maximum of 211 serviced RV sites (Phase 1). Phase 2 and Phase 3 have the potential to include an additional 330 RV sites with 64 tenting sites. Phase 1 is separated from Phases 2 and 3 by the East Bay Highway, being located on the north side of the East Bay Highway, adjacent to the Bras d'Or Lakes.

[290] Under s. 251(2) of the *Municipal Government Act*, the Board must determine whether the decision of CBRM Council approving the LUB amendment failed to reasonably carry out the intent of the MPS.

[291] The central issue in this appeal involved CBRM Council's review of the Developer's proposed rezoning under Part 2, Policy 17.e, of the MPS, the policy which allows for campgrounds in the Rural CBRM Zone.

[292] Policy 17.e states that in assessing whether zone provisions provide reasonable protection to a residential development in proximity, the proposal is to be evaluated from the perspective of the following four criteria:

- visual compatibility;
- dust or fumes emanating from the site;
- traffic attracted to, and leading from, the site; and

- noise emanating from the development.

[294] Taking into account all of the evidence, the Board finds that, in terms of visual compatibility and noise, the zone provisions in the proposed Big Pond Campground Zone approved by Council would provide no protection whatsoever to the properties located below it on Lochmore Harbour (i.e., on the barachois), including the residential properties of the Gowans, Sutherlands and the Moffatts. There are no zone provisions that would provide any protection measures, let alone reasonable ones, for these properties located in proximity to the campground. In the Board's opinion, the zone provisions in the LUB amendment will be ineffective.

[295] Given the topography of the entire area and the higher elevation of the campground site (relative to the properties on the barachois), the residents located on the barachois will be able to observe most, if not all, of the proposed campground and recreational uses being carried out on the subject lands. This is especially so when one considers the potentially imposing nature of up to 211 RVs parked on the hill up from the barachois.

[296] Policy 17.e states that where the zone provisions do not provide reasonable protection to residential development in proximity, the application shall be denied.

[297] Therefore, the Board concludes that Council's decision does not reasonably comply with the intent of the MPS.

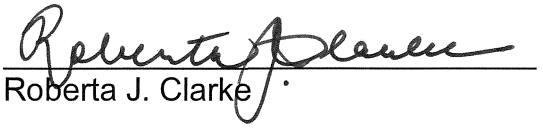
[298] Accordingly, the appeal is allowed.

[299] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 22nd day of January, 2019.

Roland A. Deveau

David J. Almon



Roberta J. Clarke