DECISION **2013 NSUARB 175**
M05602

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

- and -

IN THE MATTER OF APPEALS by Friends of South Canoe Lake and **Richburg LP Management Inc.** and **Homburg Land Bank Corporation Limited** of a decision of Chester Municipal Council dated March 14, 2013 which approved Development Agreements with **Nova Scotia Power Incorporated, Minas Basin Pulp and Power Limited and Oxford Frozen Foods Limited** for the construction and operation of a 102 megawatt wind energy facility on lands in the South Canoe Lake area, near New Russell and New Ross

BEFORE:	Wayne D. Cochrane, Q.C.
APPELLANTS:	**FRIENDS OF SOUTH CANOE LAKE** Emery F. Peters
	RICHBURG LP MANAGEMENT INC. AND HOMBURG LAND BANK CORPORATION LIMITED Michael J. O'Hara
APPLICANTS:	**NOVA SCOTIA POWER INC.** **MINAS BASIN PULP AND POWER LIMITED** **OXFORD FROZEN FOODS LIMITED** Robert G. Grant, Q.C. Jeffrey D. Waugh
RESPONDENT:	**MUNICIPALITY of the DISTRICT of CHESTER** Samuel R. Lamey, Q.C.
PRELIMINARY HEARING DATE:	**May 16, 2013**
HEARING DATES:	**May 30 and 31, 2013 and June 2, 3, 4 and 5, 2013**
SITE VISIT:	**August 13, 2013**
DECISION DATE:	**September 5, 2013**
DECISION:	**Appeals Dismissed**

TABLE OF CONTENTS

APPENDICES

1.0 INTRODUCTION

[1] The Council for the Municipality of the District of Chester approved development agreements with Nova Scotia Power Inc., Minas Basin Pulp and Power Ltd., and Oxford Frozen Foods Ltd. (the “wind farm developers”) permitting the construction of a wind farm, which (if built) would be the biggest ever in Nova Scotia. Covering over 7,500 acres, it would contain 34 wind turbines, each standing about 489 feet tall. The wind farm would be capable of generating 102 megawatts, enough power to serve about 32,000 houses.

[2] The project would employ about 5 fulltime workers once fully operational, perhaps involve as many as twenty times that number during construction, and pay about $660,000 in property taxes annually to the Municipality.

[3] Council’s approval of the wind farm project under the *Municipal Government Act* came eight months after the Provincial Government had – through its Minister of the Environment - approved it under the *Environment Act.*

[4] Some of the owners of cottages and houses in the area of the proposed wind farm (called the “Friends of South Canoe Lake”) appealed Council’s decision to the Nova Scotia Utility and Review Board. Soon after, Richburg LP Management Inc. and Homburg Land Bank Corporation Ltd., two companies involved in the ownership and operation of a nearby golf course (which are part of a larger conglomerate, and both of which the Board will refer to in this decision as simply “Homburg”), also appealed.

[5] A significant part of the dispute between the appellants (Friends of South Canoe Lake, and Homburg) and the wind farm developers centres upon the issue of setback and the related issue of sound. The Municipal Planning Strategy and the Land

Use By-law do not contain specific direction on setback or sound, but the development agreements contain specific requirements for each.

[6] The development agreements provide for a setback of 1,200 metres from residential buildings. For all other purposes, the minimum setback is 200 metres from third-party boundaries (i.e., the boundaries of land owned by persons not involved in the wind farm project). With respect to sound, the development agreements set a maximum loudness (measured in decibels, or dBA) of 40 dBA.

[7] The appellants' concerns about the wind farm include: its effects on the visual appearance of the area, with a loss of a sense of rural isolation; reductions in property values; a reduced ability to develop their properties further (the latter being a particular concern of Homburg); and health (a particular concern of Friends of South Canoe Lake).

[8] The depth of community interest is reflected in part in the very large numbers of people who participated in the various stages of the review of the project by the Municipality, as well as the number of people who attended the Board's preliminary hearing and hearing on the merits. The differences of opinion about the project are intense, Friends of South Canoe Lake seeing the dispute as "ripping this community apart."

2.0 ISSUE

[9] There is one principal issue in this proceeding:

Have the appellants shown, on the balance of probabilities, that the decision by the Council of the Municipality of the District of Chester to enter into these Development Agreements fails to reasonably carry out the intent of the Municipal Planning Strategy?

For reasons discussed below, the Board finds the answer to this question to be "no," meaning that the Council's decision is upheld. The Board accordingly dismisses the Appeal.

[10] This decision also contains a brief summary (in Appendix "B") relating to one aspect of a preliminary hearing held by the Board on May 16, 2013. The preliminary hearing dealt with a number of different matters, including admissibility of evidence, the standing of the appellants, and grounds of appeal. In the main, these were disposed of orally by the Board during the preliminary hearing; some were dealt with in a subsequent Order, issued May 23, 2013 (a copy of which is included in Appendix "B").

3.0 WITNESSES CALLED BY VARIOUS PARTIES IN THIS PROCEEDING

3.1 Witnesses Called by the Appellant, Friends of South Canoe Lake

3.1.1 Wayne Edgar and Pamela Swainson

[11] Wayne Edgar and Pamela Swainson testified about their experiences with a wind turbine project located about 2.5 kilometres from their farm, which is in northwestern Nova Scotia. In addition to some farming, they have a variety of interests, Ms. Swainson, for example, being a stargazer and a painter. In her evidence, she said that she "never expected" the amount of impact the wind farm has had upon her, referring to it as "stressful." She said that the "sound was more of an issue" than she had expected, although the effects vary depending upon weather conditions, including

wind direction. Mr. Edgar's evidence included reference to sleep disturbances arising from wind turbine sounds that can last for hours.

3.1.2 David McCall

[12] In essence the Board ruled Mr. McCall's proposed evidence to be inadmissible for the purposes of the proceeding. He is the spouse of Megan Davies, who did give evidence; their house is near the proposed wind farm site.

3.1.3 Nance Ackerman

[13] Ms. Ackerman often uses the cottage of her mother, who also testified in this proceeding. The proposed wind turbine project would be located 1.5 kilometres from the cottage. She described herself as a journalist, a filmmaker, and an environmentalist. She testified to having experienced extremely unpleasant sensations when visiting a house located 1,100 metres from a 30 MW wind turbine site in Digby Neck, Nova Scotia. These lasted until she had driven 8 km away.

3.1.4 Pamela Ackerman

[14] She referred to her family having owned property in the South Canoe Lake area for three generations, and to having a concern for "a way of life" in the area, which she described as "stunningly beautiful."

[15] In her view, the people who wrote the Municipal Planning Strategy were thinking of a more minor industrial installation, such as an incinerator, not a 7,500 acre wind farm.

[16] She said that the residents had asked for further setbacks, but she felt that they had been poorly treated, and that the wind farm supporters had not "given an inch."

3.1.5 Winfried Viebahn

[17] Mr. Viebahn, a native of Germany, has lived at Leminster, near the site of the proposed wind farm, since 2009, having previously lived in the Yarmouth area. He recalls wind projects in Germany in the 1980's. He told the Board of difficulties he has encountered in selling his Leminster property since the announcement of the wind farm, which he attributes to the negative effects of such projects upon property values and marketability.

3.1.6 Megan Davies

[18] Ms. Davies and David McCall live in a house which would be 1.4613 kilometres from the nearest wind turbine if the proposed project is built. She has been active in monitoring the wind turbine developers' application to the Municipality, almost from the beginning. The Board perceived her as sharing the same sense of dissatisfaction as expressed by other witnesses for Friends of South Canoe. Among other things, they perceive governments (both Provincial and Municipal) as unresponsive to their concerns, and more attentive to the possible effects of the proposed wind farm upon wildlife, such as moose, than upon the citizens.

3.1.7 Robert A. Merrick

[19] Mr. Merrick and his family have a deep passion for conservation, and for the area around the proposed South Canoe wind farm. They love the quiet and darkness of the place at night, and the presence of wildlife, and feel that placing the wind farm in the area amounts to "walking on the citizens."

3.1.8 Susan Deal

[20] Throughout the hearing on the merits, Ms. Deal assisted Mr. Peters in the presentation of the case on behalf of Friends of South Canoe Lake. She lives on one of

the highest elevations near the site. She, like other members of Friends of South Canoe, was unhappy with the process which led to the Municipality's approval of the project, seeing it as one in which the concerns of people in the area of the project were not "acknowledged." She saw her attempts to be involved as being "shut down" and said that, in her view, people in the area "…really have not been consulted."

3.2 Witnesses Called by the Appellant Homburg

3.2.1 Frank W. Matheson

[21] Since 1985, Mr. Matheson has held senior management positions in various Homburg corporate holdings. Two of his roles have included Vice-President, and President, of the two Homburg companies which are appellants in this proceeding.

[22] In 2004, he was involved in Homburg's purchase of the golf course property which is located near the proposed wind farm site. He has been involved with the operation of the golf course, in varying degrees, in the years since.

[23] He gave evidence with respect to the past and present operations of the golf course, and Homburg's future plans for it.

3.2.2 Andrew Eisner

[24] A person with lengthy professional experience in golf courses around the Maritimes, Mr. Eisner has been General Manager of Homburg's golf course since May 1, 2012, and gave evidence about its operations.

3.2.3 Douglas B. Foster

[25] Mr. Foster was qualified as a Land Use Planner capable of giving evidence on the subject of the intent of the Municipal Planning Strategy and the extent to which Council's decision complies with the intent of the MPS.

[26] He has a bachelor's degree in environmental studies, and an Honours degree in urban and regional planning from the University of Waterloo. He is a member of the Canadian Institute of Planners, having served two years on its National Council, and was past President of the Atlantic Planners Institute.

[27] Mr. Foster has had more than 40 years of experience in the planning field, including in Ontario, Prince Edward Island and Nova Scotia. From 1979 until the 1990's, he was the Executive Director of the Cape Breton Metro Planning Commission, and thereafter served as the Director of Planning for the newly created Regional Municipality of Cape Breton, retiring in 2012.

3.3 Witnesses called by the Respondent Municipality

3.3.1 Tara Maguire

[28] Ms. Maguire was qualified as an expert witness to give opinion evidence on planning matters in general, and in particular the Land Use By-law and Municipal Planning Strategy for the Municipality of the District of Chester.

[29] She holds a bachelor of environmental studies, a diploma in land information technology, and is enrolled in a master of planning programme. Under cross-examination by Mr. O'Hara, she acknowledged that she is not a licensed professional planner, nor is she a full member of the Canadian Institute of Planners.

[30] Since around 1999, she has worked in planning related roles in Mahone Bay and East Hants, as well as in Michigan. She is the Director of Community Development for the Municipality of the District of Chester, and was the author of planning reports presented to the Municipal Planning Advisory Committee (or PAC), and to Municipal Council itself.

3.4 Witnesses Called by the Respondent Wind Farm Developers (Nova Scotia Power Inc., Minas Basin Pulp and Power Ltd. and Oxford Frozen Foods Ltd.)

3.4.1 John Woods

[31] Mr. Woods is the Vice President of Energy Development for Minas Basin Pulp and Power Ltd. A professional engineer and former Dartmouth City Councillor, he testified about the evolution of the South Canoe wind farm project over a period of years.

3.4.2 Melanie Smith

[32] Ms. Smith was qualified as an expert witness to provide opinion evidence on environmental science and consulting, including environmental assessments.

[33] She has a BSc (Honours) in environmental science, and a master's in environmental studies, which she received in 2004.

[34] Ms. Smith is an environmental specialist with Strum Consulting. She had a key role in the preparation of materials pertaining to the "Environmental Assessment Registration Document for the South Canoe Wind Power Project," which ultimately led to the approval by the Minister of the Environment of the project in the summer of 2012. The Registration Document is found in full in the Appeal Record filed by the Municipality in this proceeding.

[35] On May 17, 2013, she (along with another of Strum's consultants) prepared an updated report on sound and shadow flicker modeling for the South Canoe Wind Project, which was filed as an exhibit with the Board, and about which she testified extensively at the Board hearing.

3.4.3 Kate Greene

[36] Ms. Greene was qualified as expert to provide opinion evidence as a land use planner in the fields of urban and rural planning and, in particular, with respect to land use issues pertaining to wind energy projects, considerations for planners in the review and analysis of projects, and the interpretation of planning documents such as municipal planning strategies, land use by-laws and subdivision by-laws.

[37] She has a master's degree in urban and rural planning, is a licensed planner in the Licensed Professional Planner's Association of Nova Scotia, and is a Professional Planner Member of the Canadian Institute of Planners. She currently sits on the National Council of the Canadian Institute of Planners, and is President - elect of the Atlantic Planners Institute.

[38] She has worked in the planning field since 2004, and has had significant experience in wind energy matters, including studies, wind turbine by-law development, and projects, in, variously, Nova Scotia, New Brunswick, and Prince Edward Island.

[39] Her expert's report was, at least in part, intended as a rebuttal of the report filed by Mr. Foster. The Board attributed significant weight to her evidence.

4.0 FACTS

[40] Up until 2003, the Municipality of the District of Chester did not regulate land use throughout most of the Municipality. In that year, however, Council decided to implement a basic level of land use control, called the "General Basic Zone." This zone applies to all land in the District of Chester which is not subject to some other designation in the MPS. These other designations include such things as single unit residential areas, low density residential areas, rural residential areas, rural mixed-use areas, etc.

[41] The wind farm which is the subject of this proceeding would be in the General Basic Zone.

[42] Prior to the adoption of the General Basic Zone, a large wind farm of the type proposed here would have been allowed “as of right.” This means that no approval (apart from such things as obtaining a building permit) for the project would have been needed; in particular, no Council approval would have been required.

[43] The General Basic Zone provides only limited land use controls, and permits a significant range of developments to be carried out on an “as of right” basis. These include such things as mink farms, commercial trucking, and industrial establishments occupying less than 30,000 square feet.

[44] However, certain other uses, including a large wind turbine project of the type which is the subject of this appeal, can only occur in the General Basic Zone through the use of development agreements.

[45] In May 2004, Homburg acquired the Sherwood Golf and Country Club, which had been in operation for some years previous. Since that time, the evidence put forward at this hearing by Homburg’s Counsel indicates that it has invested more than $8 million in capital improvements. These included, initially, renovations to the club house. They later included: improvements to the fairways and greens; new irrigation systems for the entire golf course (powerful enough, according to Mr. Matheson, who testified on behalf of Homburg to support an additional golf course in the northern part of the property, a subject dealt with below); a recreation centre; a helicopter pad; 13 chalet units; a house specifically for the use of Richard Homburg, the principal of the Homburg group, and other amenities.

[46] The Board concludes from the evidence before it that a significant amount of clear cutting exists on the Homburg property, not very far from the perimeter of the golf course itself. However, through judicious landscaping (including retention, and development, of a protective screen of trees around the golf course), Homburg has successfully created a sort of “bubble” giving those on the course the illusion of being in solid woodland which extends away indefinitely. The Board infers that Homburg fears the development of the proposed wind farm would, among other things, destroy this illusion, which it sees as particularly important to its European customers.

[47] For the purposes of this decision, Homburg’s present property in the area can be divided, very roughly, into two parts: the southern part, which contains the golf course and related developments; and the northern part, which is entirely undeveloped, and is the portion closest to the site of the proposed wind farm.

[48] It is wind turbine #34 which causes Homburg the most distress. It is the closest to its property.

[49] It would be 1,542 metres from the northern boundary of the golf course. This is greater than the 1.2 kilometre setback which the development agreements provide for residential buildings; it is more than seven times greater than the 200 metre setback provided in the development agreements from third-party boundaries.

[50] Wind turbine #34 would be 2,378 metres from the chalets in the southeastern corner of the golf course, and Mr. Homburg’s house. This corner is the most distant of the Homburg lands from the proposed site of the wind farm. A distance of 2,378 metres is nearly double the minimum setback of 1.2 kilometres from residences permitted under the development agreements.

[51] With respect to the northern, undeveloped, part of Homburg's property, wind turbine #34 would be 645 metres from the boundary. This is more than triple the minimum setback allowable under the development agreements.

[52] Nevertheless, it is clear from the evidence – and indeed acknowledged by the wind farm developers and the Municipality – that the proposed wind farm would be audible, and, in part, visible, from the Homburg property. For example, under at least certain wind conditions, it would be audible anywhere on the Homburg property, including the chalets and Mr. Homburg's house in the southeastern corner of the property.

[53] Today, the golf course employs about 25 seasonal and year-round employees, with a payroll of over $450,000, and provides property taxes of about $72,000 per year.

[54] In marketing the golf course, Homburg has relied to a considerable degree on its rural setting. One of Homburg's intentions has been to attract visitors from the European market.

[55] Particularly in its early years, and continuing through to present times, the golf course operated in a relatively private sort of fashion. For example, it was not until 2012 that Homburg permitted members of the general public to play at all; moreover, it seems that when the decision to allow people to pay green fees and play was made, this use was limited to a couple of days a week.

[56] Homburg has also recently expanded the range of commercial activities at the golf course to include corporate retreats, weddings, and so called "play and stay" packages (combining golfing with overnight stays in one of the chalets).

[57] Homburg tried to buy the property adjoining the east side of the golf course, but was unsuccessful. The possible future development of the undeveloped northern portion of its lands was the subject of some dispute in this proceeding (discussed further in the “Analysis and Findings” part, below).

[58] Adoption by the Federal Government of emission guidelines was one of the factors leading to evaluations (by various parties) of wind turbine sites around Nova Scotia between 2004 and 2007. Some of these evaluations involved Mr. Woods, Minas Basin’s Vice President of Energy Development, who gave evidence to the Board.

[59] In May of 2004 a meteorological tower, almost 160 feet tall, was installed at the South Canoe site to collect data about its wind potential. In the ensuing years, meteorological evaluations of the area continued with increasing intensity.

[60] The South Canoe site is significantly less windy than certain other places in the Province, such as, for example, Cheticamp, in Cape Breton. It appears that only in recent years has development of wind turbine technology progressed to the point where electricity can be generated economically on less windy sites such as South Canoe.

[61] Increasing discussions of the possibility of wind farms led to municipalities becoming interested in learning more about the subject. In January 2008, Jacques Whitford (a firm of environmental engineering, scientific, and management consultants) produced a lengthy report entitled “Model Wind Turbine By-laws and Best Practices for Nova Scotia Municipalities.” This report resulted from a contract with, principally, the Union of Nova Scotia Municipalities, together with the Nova Scotia Department of

Energy, Service Nova Scotia and Municipal Relations, and Halifax Regional Municipality.

[62] The purpose of the Jacques Whitford study was to provide Municipalities with:

> …science based information on best practices guidelines and model wind turbine bylaws that will aid them in decision making.

[63] The report included a lengthy examination of the potential impacts of wind energy generation, with a series of short briefs on a wide variety of topics, including: aviation safety; birds and bats; blade throw; erosion; fire; ice throw; noise and infra sound; oil spills; property values; shadow flicker; structural failure; telecommunications and electromagnetic interference; traffic and roads; vegetation and habitat and visual impact.

[64] As the Board notes subsequently in this decision, this report was included in the large quantity of material submitted to Council by its planning staff in 2012-13. It was frequently referred to during Council's considerations of the development agreements which are the subject of this appeal.

[65] With respect to property values, the Jacques Whitford report says that "…there is little evidence to either verify or refute…" public concerns that wind farms will decrease neighbouring property values. The report remarks:

> …there was found to be no documented evidence that wind turbines – even large scale wind turbines – have ever lowered values for surrounding properties.

[66] This reference is the first, among many, of divergent expressions of opinion about the possible effects of wind farms upon market values which were heard by Council.

[67] The report also contains an extensive discussion of “separation distances and setbacks.” The report notes that the term “setback” is commonly used in the construction industry to mean the distance between a property line and a building; “separation distance” is commonly used to describe the distance between separate structures, with respect to concerns such as noise levels, safety, etc.

[68] The report says, however, that the majority of the literature and regulations on wind farms use the term “setback” to describe both the usual technical definition, and all other separation considerations. In this decision, the Board will (as, it perceived, did all the parties in this proceeding) use the term “setback” in this way.

[69] The report notes that there is significant variation in Nova Scotia, and across Canada, in the nature, and complexity, of setback requirements for wind turbine developments. The distances specified, if any, for setbacks vary. Further, just what the setbacks may relate to varies as well – for example, setbacks in some municipalities may relate simply to property lines, while other setbacks relate to the distance from dwellings, or the distance from roads, or from environmentally sensitive areas or natural features, such as bodies of water.

[70] It is common as well to draw a distinction between setbacks for small wind turbines and setbacks for large wind farms, such as that proposed here.

[71] Just how much variation can occur with respect to setbacks, even within one province such as Nova Scotia, is illustrated, in the Board’s view, by the submission of Counsel for the Municipality on closing summations. He pointed out that in Cape Breton Regional Municipality, where Mr. Foster (the expert who testified on behalf of Homburg) was, until recently, in charge of planning, wind turbines can occur as of right,

rather than only by way of development agreements. Furthermore, shorter setbacks than those proposed in the development agreements in the present proceeding would apply (a point acknowledged by Mr. Foster on cross-examination, who said that he thought the CBRM rules should be changed).

[72] The evaluations of the South Canoe Lake area as a possible site for a wind turbine project were continuing throughout this period. For example, in February 2010, a 315 foot meteorological tower was installed to permit the gathering of still more wind data.

[73] Increasing interest in, and controversy about, wind farms led to more governmental reviews in Canada. In 2010, the Chief Medical Officer of Health for Ontario published a report entitled, "The Health Impact of Wind Turbines." This report, referred to during Council's consideration of the South Canoe proposal, says in part:

> …low frequency sound and infrasound from current generation upwind model turbines are well below the pressure sound levels at which known health effects occur. Further, there is no scientific evidence to date that vibration from low frequency wind turbine noise causes adverse health effects.

[74] A related document (which was also later considered by Council) was also generated by the Ontario Agency for Health and Protection and Promotion. It contains a table of noise level limits found in Canada, none of which are lower (i.e., quieter) than 40 dBA, the limit proposed for the South Canoe wind farm; some places permit higher levels in certain circumstances (up to 45 in Quebec and 53 in Ontario).

[75] The report, in essence, indicates no health concerns with wind farms, saying, for example, that there is:

> No evidence of noise induced health effects at levels emitted by wind turbines…

[76] In January 2012, the wind farm developers made a presentation to Council about their project.

[77] They indicated that wind farm developments such as this one are in part driven by the requirements which the Provincial Government has imposed with respect to renewable electricity generation. A large project of this type could help the Province reach the 2015 renewable electricity targets which it has set for itself.

[78] The developers told Council about the expected increase in municipal revenue ($660,000 in property taxes) from the project, and outlined the environmental assessment review and monitoring which would occur.

[79] They also reported on the steps they were already taking to contact people in the community about the proposed wind farm. The first “open house” had already been scheduled for early February.

[80] A few months later, on May 17, 2012, a team of consultants engaged by the wind farm developers finished the Environmental Assessment Registration Document for the South Canoe wind farm, which was submitted to the Minister of the Environment. The Minister’s approval is a necessary precondition before Council can consider agreeing (under the Chester MPS and LUB) to development agreements like this.

[81] The Registration Document contains literally dozens of separate parts, each produced by various different consultants, having different qualifications. The document is long (approximately 750 pages); even the table of contents is lengthy, approaching five pages of single spaced type. This document was subsequently submitted to Council, and referred to frequently by it prior to deciding to approve the development agreements.

[82] Its major sections include the following: biophysical environment and effects management (which includes references to fish and fish habitat; wetlands; vegetation; fauna, including mammals, birds, and insects); socio-economic conditions and effects management (which includes such things as land values, recreation and tourism, human health); “other considerations” (which includes such things as predicted visual and acoustic impact); public consultation (which includes a lengthy outline of the consultation approach undertaken by the wind farm developers); “follow-up measures” (which include a reference to future monitoring).

[83] Section 2.3 of the Registration Document, entitled “Adjacent Properties,” shows the following land uses in the adjacent or adjoining properties: residential (43%); undeveloped resource land (26%); commercial (13%); mixed-use (15%) and unclassified (3%). The commercial properties in the area are referred to as largely forested areas owned by Bowater Mersey Paper Ltd., Atlantic Star Forestry and Nova Scotia Power Inc. No reference is made to Homburg.

[84] One of the key parts of the Environmental Assessment Registration Document is the report on the results of a “sound model” created by Strum Consulting. This model included inputs such as residential locations, topography, turbine locations, and turbine size and sound power data. The model predicted that the sound from the wind turbines would not exceed 40 dBA at the exterior of any residence. This is said to be the equivalent to a quiet library.

[85] The model predicted a sound level of approximately 35 dBA for the Homburg golf course area.

[86] This report was updated by Strum in May 2013, in a supplementary report which was prepared as an exhibit for the Board, and is discussed further below, under "Analysis and Findings."

[87] The Registration Document explores in detail a variety of sound related issues. Two of these are the inter-related concepts of loudness of sound (measured, as the Board has previously noted, using decibels, or dBA) and setbacks (the distance from a wind turbine to a so-called "receptor," such as a house).

[88] Thus, the Registration Document contains information both on predictions of the loudness of sounds, and proposals with respect to the amount of setback.

[89] Having first noted the absence of specific sound guidelines for wind farms in Nova Scotia, the Registration Document says that the developers accordingly used the Ontario Ministry of the Environment's publication, "Noise Guidelines for Wind Farms," dated October 2008. The Ontario guideline specifies 40 dBA. For South Canoe, all receptors but one were predicted to stay within the 40 dBA guideline; the one which did not, which had a level of 41 dBA, was owned by a property owner who, in effect, agreed to this level.

[90] The thrust of the Environmental Assessment Registration Document with respect to sound is, in the Board's view, accurately summed up in the following quotation:

> Most authorities agree, however,…that there is currently no evidence to suggest that sound emitted from wind turbines has any direct health effects to those exposed to it.

[91] The Registration Document, however, is careful to note that the National Research Council, in 2007, remarked that:

> …the effects of certain types of noise, especially low frequency vibrations which may even be inaudible, are poorly understood…

[92] The Environmental Assessment Registration Document has this to say about property values:

> …few peer-reviewed, comprehensive, and statistically rigorous studies have been conducted on the effect of wind developments on property values, signaling a need for more research on the topic.
>
> One study looking at wind development proximity and property values shows that before Project approval, property values decreased as a result of fear of unknown effects – this is known as *anticipation stigma.* However, once operational, property values rebounded...
>
> Ultimately, each wind development is different, making it difficult to accurately predict effects on property values for those residing near the South Canoe Wind Project. Nonetheless, a large 1,200m buffer from turbine to dwelling should assist in mitigating effects on property values. Comparing buffer sizes, HRM passed a by-law on August 16, 2011 requiring all wind turbines be at least 1 km from a residential dwelling (upgraded from 550 m). The 1.2 km setback is the largest proposed buffer from resident to turbine of any wind project currently with an Environmental Assessment published on the Nova Scotia Environment website. [Emphasis in original]

[93] In July 2012, the Minister of the Environment approved the project. His approval was subject to conditions which included a number of additional studies, monitoring programmes, plans and approvals.

[94] The Minister's approval letter, issued pursuant to the *Environment Act*, states, in part, that he is:

> …satisfied that any *adverse effects* or significant or environmental effects of the undertaking can be adequately mitigated through compliance with the attached terms and conditions. [Emphasis added]

[95] The Board notes that the term "adverse effects" has a specific definition in the *Environment Act*, which includes reference to health:

> (c) "adverse effect" means an effect that impairs or damages the environment or changes the environment in a manner that negatively affects aspects of human health;

[96] The following month, in August, the wind farm developers signed a power purchase agreement with Nova Scotia Power.

[97] On August 30th, Susan Deal (who later gave evidence before the Board, and assisted Mr. Peters in his presentation of Friends of South Canoe Lake's case at

the hearing on the merits) made a presentation to Council. She raised a number of points, including her view that the proposed South Canoe wind farm would infringe on the environment, and expressed concern about the location of her house in relation to the proposed wind turbine towers.

[98] The Municipality knew the wind farm developers would very soon apply for Council approval. In anticipation of that, Council at the end of August asked its CAO, Erin Beaudin, to gather data on current set back requirements in other geographic jurisdictions, including European countries. Council had a particular interest in the setback requirements for European countries, where wind farms are more prevalent and have had a longer history.

[99] She supplied a memorandum to Council on the topic a week later. She reviewed setback distances in Europe, the United States, Canada, and Nova Scotia. In general, the Board considers that the setbacks eventually approved by the Municipality provided (with few exceptions) setbacks equal to or greater than those appearing in her memorandum.

[100] On October 15, 2012, the wind farm developers submitted their applications for a 102 megawatt wind farm.

[101] On January 17, 2013, Tara Maguire, the Director of Community Development, prepared a report which she addressed to the Municipal Planning Advisory Committee.

[102] In the Board's judgment, the report, in effect, supported approval of the wind farm.

[103] The report provided a history of the project; summarized the approval by the Minister of the Environment; and outlined the provisions of the MPS which Ms. Maguire thought applicable.

[104] She also described the ownership of the properties upon which the project is proposed to be built.

[105] In most instances, development agreements are concluded with the owner of a property, but the situation in the present proceeding is somewhat different. The three wind farm developers (Minas Basin, Nova Scotia Power and Oxford) do not own, at least directly, the lands in question. Instead, the lands would be leased from their actual owners (none of whom took an active role in the present proceeding), with the wind farm developers constructing and operating the wind farm turbines on the lessors' lands. This may create unusual challenges in terms of the drafting of the development agreements, and associated documentation. However, nothing in the evidence or submissions caused the Board to conclude that these differences have any relevance to the issue which the Board must determine on this appeal (i.e., whether Council's approval fails to reasonably carry out the intent of the MPS).

[106] Ms. Maguire noted as well concerns raised by the Department of Natural Resources about the possible impact of the wind farm on the moose population. She suggested that these concerns might mean that some turbine locations would have to be changed; ultimately, such a change did occur.

[107] In describing the conditions of the proposed site and the surrounding land used, Ms. Maguire's report said that the subject property consists of mixed forest, some

of which has been logged. With respect to the neighbouring land uses, she described them as:

> …primarily forestry and Christmas tree farming, and both cottages and permanent residents.

[108] As with other reports made by planning staff to Council, Ms. Maguire made no reference to Homburg and its golf course in the text of her report (although the Board does note that the words “golf course” appear, in very small print, in the key to one of the maps, entitled “Final Turbine Layout,” attached to her report).

[109] The May 17 2012 Environmental Assessment Registration Document contains a section entitled “Recreation and Tourism,” which specifically identifies a number of recreational facilities and organizations in the area, including a provincial park, the Ross Farm Museum, and a number of others. It also contains quantitative data on tourism (measured in terms of people travelling to the area who stop or stay).

[110] Like the Maguire report, however, it makes no reference to Homburg’s golf course.

[111] Such omissions were noted, and criticized, by Counsel for Homburg repeatedly in the course of the proceeding. He stressed Homburg’s view that the Municipality had ignored the golf course, and focused entirely on residential concerns.

[112] In broad terms, the process Council now embarked on, in dealing with the development agreement applications, necessarily followed the structure required by the applicable legislation, including the *Municipal Government Act*, and the MPS and LUB. These steps included such things as meetings of the Planning Advisory Committee, public hearings by Council, and Council’s meeting on the matter and ultimate decision.

[113] The basic steps followed by Council, then, were standard ones. In the judgment of the Board, however, the length and intensity of Council's review were extraordinary.

[114] The review extended over a number of months and included a long series of meetings, lengthy discussions, visits by at least some Councillors to existing wind farms (in places as far away as Digby and Amherst), and visits to the proposed wind farm site.

[115] The review also included what can only be called (within the context of municipal planning matters, at least) a huge quantity of documentation.

[116] With respect to the latter point, the Board notes that the Appeal Record filed by the Municipality was 3,255 pages long. This exceeds, by some orders of magnitude, any other Appeal Record which the Board has encountered or of which it is aware. In some considerable part, its length reflects the large number of documents, and the length of some of those documents, which were submitted by or on behalf of various interested persons. These included not simply the wind farm developers, but also residents, and other persons with an interest in the application.

[117] On January 21, 2013, the Planning Advisory Committee met at Forest Heights Community School. This meeting of the PAC was relatively well attended (as were, the Board concludes, other public information meetings held by the wind farm developers). Indeed, Ms. Maguire testified that the PAC meeting was held at the school because a large attendance was expected.

[118] She also noted that, while PAC meetings are usually open to the public, members of the public commonly do not get to speak. This time members of the public were permitted to speak, and a number did so.

[119] When PAC met, they already had before them Ms. Maguire's report of January 17, 2013. She reviewed the general criteria for development agreements, making specific reference to MPS Policy 7.8.2, and also reviewed the criteria established by the Municipality for industrial development.

[120] She also reviewed the matter of setbacks in some detail. Ms. Maguire told the PAC that there were no established setbacks for wind turbines at either the provincial or municipal levels. At the time of her presentation, the residential setback proposed by the wind farm developers (and, in essence, agreed to by planning staff) was 1,200 metres. The setback from third-party lot lines, however, was only 165 metres. This was subsequently increased by Council to 200 metres.

[121] Ms. Maguire's presentation also indicated that a range of other options with respect to setback were available for consideration by Council. Among others, these included:

- a "basic" setback equal to the combined height of the tower and blade, which would be, she said, 150 metres;
- a setback equal to the tower and blade height, plus 10% (which yielded the 165 metre third-party setback originally proposed);
- or any other reasonable setback of Council's choosing.

[122] She also reviewed sample setback criteria and documentation from Ontario, Massachusetts, the Canadian Wind Energy Association, the Municipality of

Kings County, the Municipality of Cumberland County, the Municipality of Antigonish County, Colchester County, and Health Canada (referred to further below).

[123] The meeting was also told that, while the wind farm would require aviation lighting to comply with Transport Canada's requirements, not all the turbine towers would have to be equipped with such lighting. Further, the aviation lighting on the towers would be red in colour, rather than white, as red was regarded as less intrusive.

[124] On January 24th, three days after the meeting of the PAC, Council itself met, and discussed at length the PAC's meeting at Forest Heights Community School.

[125] Both low frequency sound and infrasound (topics of particular concern to Friends of South Canoe Lake in this proceeding) were referred to. The PAC received summaries of material on these two topics, as appearing in: a 2012 document entitled "Wind Turbine Health Impact Study," prepared for the Massachusetts Department of Environmental Protection and the Massachusetts Department of Public Health; a 2012 Kings County document, entitled "Health and Safety Impacts from Large-Scale Wind Turbines"; and the 2010 Ontario Chief Medical Officer of Health's Report, "Potential Health Impact of Wind Turbines."

[126] The PAC also received summaries of the material appearing in the Environmental Assessment Registration Document of May 17, 2012. This document contains significant material specifically relating to sound. It will be recalled that this was the document considered by the Minister of the Environment prior to his approving the project.

[127] The January 24th presentation to the PAC, subsequently seen by Council, also included (in addition to material respecting the effects of sound), information on

property values. Council was told that the Municipality of Argyle had reviewed property assessments over an eight year period for 49 properties located within 400 metres of the Pubnico Point wind farm; according to the staff presentation:

> In all instances property assessment has continued to increase over time.

[128] The January 24th presentation also referred to studies of the possible effects on property values of wind farms in the United States and the United Kingdom, which found:

> …there is no evidence to suggest that property values in the vicinity of wind turbines are in any way lower compared to other regions without wind turbines…

The presentation goes on to note that:

> there are reports that property values did decrease during the time of construction and initial installation but that those reversed after two years.

[129] In late January 2013, Ms. Maguire mailed out meeting notices. These related to what was called a "Public Information Session – Open house" to be held in the Chester Municipal Council Chambers, in early February, and a public hearing to be held at Forest Heights Community School, closer to the project site, in late February.

[130] The notices were different in form from those commonly used in municipal planning matters. Counsel for the Municipality suggested, and the Board agrees, that these notices were an attempt by Council to try to attract as much attention as possible to the wind turbine proposal, and to inform people how they could learn more about it, and how they could participate in the application process.

[131] For example, the notice has a large banner headline running across the top, saying:

> We Want to Hear from You – South Canoe Wind Energy Project.

It invites people to “mail us, phone us, email us” and gives information as to how to do this. Under the heading “How Can I Get More Information?” it refers to the open house and the public hearing.

[132] Counsel for the Municipality also pointed out to the Board that Council expanded the notice area from the usual 500 metres to 2 kilometres. This again illustrated, he suggested, how seriously Council had taken the issue, and how careful it was to take extra steps to ensure the public’s awareness.

[133] The Board notes as well that an expanded notice area of two kilometres is recommended in the 2008 Jacques Whitford report. That report states:

> There have been documented cases of public complaints from residents living 1.5 kilometres away. Notifying neighbours up to 2 kilometres takes into consideration all potential residents that may be affected by a wind turbine development.

[134] Council’s records show (and Homburg does not deny) that notices of these meetings were mailed to Homburg. Homburg acknowledges that the address to which the notices were mailed was correct.

[135] Some of the people who eventually formed Friends of South Canoe Lake submitted documents on the subject of sound to Council. According to evidence and submissions before the Board, these were found in the course of internet searches. Two examples of such documents are: “*Infrasound from Wind Turbines Could Affect Humans*”, Alec N. Salt and James A. Kaltenbach, Bulletin and Science Technology & Society 2011, 31: 296; and “*Properly Interpreting the Epidemiologic Evidence About the Health Effects of Industrial Wind Turbines on Nearby Residents,*” Carl V. Phillips.

[136] As the Board indicates at various points in this decision, the conclusions drawn from the literature cited by the Municipality’s planners, and by the experts retained by the wind farm developers (information which was principally drawn from

governments in North America, Australia and Europe) point to no scientific basis for health concerns relating to the operation of wind farms.

[137] In contrast, the articles found and submitted by opponents of the wind farm do point to serious health concerns. As but one example, the first sentence of the Phillips article reads as follows:

> There is overwhelming evidence that wind turbines cause serious health problems in nearby residents . . .

[138] These two articles, and others of similar import submitted by Friends of South Canoe Lake, were seen and discussed by members of Council. For example, on January 28, 2013, Councillor Connors (the Councillor for New Ross, District 6, and who was eventually the lone Councillor voting against the wind farm) provided hard copies of the two articles to her fellow Councillors.

[139] In the course of the proceedings before the Board, the appellants attempted to have various documents, including the articles by Salt and Kaltenbach, and Phillips, admitted before the Board as - the Board concluded – what amounted to expert evidence. For reasons discussed at length in the Board's oral reasons given in the preliminary hearing of May 16th (and touched on elsewhere in this decision), the Board declined to do so. Nevertheless, the documents – as part of the Municipality's Appeal Record - necessarily remained in evidence before the Board.

[140] At a meeting on January 31, 2013, Councillor Connors asked, in effect, that the process "be slowed down." The minutes make reference once again to wildlife, with Councillor Connors asking that Deputy Warden Shatford's comment be included in the minutes:

> "as the developers are prepared to give consideration to moving the turbines identified as part of the moose migration routes, can consideration then not be given to the idea around moving the turbines of concern to the people?"

[141] On February 1st, Erin Beaudin, the Municipality's CAO, wrote to the Project Manager for South Canoe. Her letter refers to Council's meeting of January 31st and to the forthcoming public hearing. She raises a number of points about which she asks for further information, on behalf of Council. Among other things, the letter asks about, or otherwise refers to:

- infrasound and low frequency sounds;
- the developers' rationale for the proposed setbacks;
- project viability, if existing turbines closest to occupied dwellings were to be relocated;
- the relocation of a turbine in response to wildlife migration concerns, and questions whether there was any potential for the relocation of those "causing the greatest degree of community concerns."

[142] On February 2nd, Health Canada issued documentation in connection with a study which it proposes to carry out on wind turbines and health. The document describing the forthcoming study contained references to the health effects of wind turbines being "poorly understood," the effects of infra sound (sound below 20 hertz) being "not well understood," and indicated an intention to create new scientific evidence "that will help inform decisions and policies" about wind turbines in Canada.

[143] This document was read with concern by at least some of the persons who ultimately, as part of Friends of South Canoe Lake, appealed Council's decision.

[144] Between February 5th and 13th, the wind farm developers polled public attitudes with respect to wind turbines in the area of the Municipality. The polling was carried out by Corporate Research Associates, and consisted of three hundred telephone interviews with residents in the area surrounding the proposed wind farm development. About 10% of the sample was within ten kilometres of the project site and

one third was less than twenty kilometres from it. All respondents were in the areas of the Municipal Districts of Chester and West Hants (the latter being a Municipality bordering the proposed project site).

[145] The results of the survey were submitted to Council. Of those polled, 57% said they "completely" supported the project, and 30% "mostly" did. Of the 6% who either "mostly" or "completely" opposed it, the reasons given included that the location was too close to the population and that it might have negative effects on people's health.

[146] On February 11th, a public information open house was held in the Chester Municipal Council Chambers. Notice of this meeting was given by, among other things, a newspaper advertisement of the type described earlier (i.e., "We Want to Hear from You!"). About 60 people attended, an "extremely unusual" number of people according to Ms. Maguire, who says that typically two to three people, and sometimes no one, attend such sessions.

[147] A map circulated by Ms. Maguire, on February 11, 2013, shows the location of the 10 closest wind turbines to dwellings.

[148] One of the existing dwellings was slightly under the 1.2 kilometres limited established in the development agreement. Ironically, perhaps, this was a cottage owned by the Annapolis Group Inc., a subsidiary of Minas Basin, one of the wind farm developers. When GPS information indicated that the cottage was inside the 1.2 kilometres limit, the developers' project team told the Municipality that they would move the cottage outside the boundary.

[149] All other dwellings shown on the map range from a minimum of 1.28 kilometres to a maximum of 1.74 kilometres.

[150] Among those attending the February 11th public information open house was Ronald LeBlanc, the Superintendent of the Sherwood Golf Course. In a conversation with representatives of the wind farm developers, he asked about the proximity of the proposed wind farm to the golf course, as well as information on sound modeling, and visual assessments completed for the project.

[151] On February 19th, Mary Frances Lynch, who was in charge of communications for the wind farm developers, sent a letter to Mr. LeBlanc and to Andrew Eisner (Mr. Eisner as noted earlier, is on the staff of Homburg, but did not, he later testified, himself see this letter until the Board hearing).

[152] She attached to the letter detailed maps showing locations of specific turbines, and the distances from various parts of Homburg's property, including the golf course, to the wind farm.

[153] Also included in the attachments to Ms. Lynch's letter was material on sound modeling and monitoring, together with material on the visual assessment. With respect to the latter, she said that no photo montage was taken along Sherwood Road, where the golf course is, "since the visual impact was deemed to be minimal from this area." She provided photographs from an alternative site, stating its location.

[154] The Board concludes from the evidence before it that, while Ms. Lynch expressly invited Homburg to "contact me with any questions," Homburg did not respond to her at all.

[155] On February 14, 2013, Melanie Smith and Shawn Duncan of Strum Consulting sent a document entitled “Infrasound Literature Review” to Ms. Lynch. It was passed along to Chester’s planning staff, seen by Council, and forms part of the Appeal Record.

[156] The Literature Review appears to have been conducted in a professional manner, and recounts Strum’s conclusions about what the scientific literature says are the health effects of sound (and in particular, infrasound) generated by wind turbines.

[157] Infrasound, as the term was used in the course of the present proceedings, relates to very low frequency sound (typically 1-20 Hz), below the frequency which human ears can normally hear. One of the concerns which has troubled Friends of South Canoe Lake is the possibility of health effects of wind turbine sounds, including infrasound. Some of the literature which they gathered (such as the two articles referred to earlier in this decision, at paragraph 136) says that sound may, or does, present a health risk.

[158] In contrast, the sources referred to in the Strum Literature Review (the principal focus of which is infrasound), say (in essence) that sound, and in particular, infrasound, does not present a health risk.

[159] In reaching this conclusion, Strum refers to a number of different studies, done in a variety of countries, including Australia, the United States (Massachusetts) and Canada (Ontario and Nova Scotia).

[160] Perhaps typical of the conclusions reached in these studies is the following statement from the 2012 report by the Massachusetts Department of

Environmental Protection, done in collaboration with the Massachusetts Department of Public Health (referred to above). That report concluded that:

> Measured levels of infrasound produced by modern upwind wind turbines at distances as close as 68 metres are well below that required for non-auditory perception…the weight of the evidence suggests no association between noise from wind turbines and measures of psychological distress or mental health problems. (Ellen Bogan et al. 2012).

[161] Counsel for the wind farm developers led, on direct evidence, a significant amount of testimony from Ms. Smith with respect to the Strum Literature Review. In closing summations, on questioning from the Board, he asked, in effect, that the Board accord something approaching the weight of expert evidence to the Strum Literature Review. Having reflected on the point, the Board has decided not to do so. For convenience, it will give its reasons here, rather than in the "Analysis and Findings" part.

[162] Ms. Smith, who testified on behalf of the wind farm developers, was qualified by the Board as an expert witness to provide opinion evidence on environmental science and consulting, including environmental assessments.

[163] Her evidence included, for example, testimony about her May 17, 2013 report (which she wrote with Shawn Duncan) on the prediction of sound levels which would occur at various points around the wind turbine project. As discussed later in this decision, the Board had no difficulty in accepting her evidence on this, and has accorded significant weight to it.

[164] However, Counsel for the wind farm developers had not asked that she be qualified as an expert on the effects of sound upon human health, and the Board does not consider that the evidence before the Board indicates that she is, or even claims to be.

[165] Having considered the submissions of various Counsel, the Board has concluded that – taking into account the Board's rules with respect to opinion evidence, and the Board's rejection at the May 16th preliminary hearing of a large quantity of documentation which the appellants wished entered as expert evidence – the Strum Literature Review does not meet the test for expert evidence before the Board.

[166] Accordingly, the Board has given no more weight to it than to the other documents (including those submitted by the appellants), which formed part of the Appeal Record, but which did not meet the test for expert evidence.

[167] If the Board should be found to have erred in reaching this conclusion, it makes the following alternative finding: if, hypothetically, the Board were to have found Strum's Literature Review to be admissible as expert evidence, that evidence would have been consistent with the Board's conclusion that Council's decision to enter into the development agreements reasonably carries out the intent of the MPS.

[168] Council's public hearing commenced at Forest Heights Community School on the evening of February 21st. Because of the large number of people attending (100 to 150 people), it was extended to a second night, March 4th.

[169] In total, the public hearing involved eight hours of Council time, which Ms. Maguire (in her oral testimony to the Board) described as "extremely unusual."

[170] On February 26th, between the first and second sessions of Council's public hearing, Ms. Maguire provided Council with additional data. This was principally focused upon the setback issue, and included: detailed mapping, with the location of the turbines; a table entitled "Large Scale Wind Projects of Nova Scotia," which compared

eight such wind farms; and a table entitled “Sampling of Setbacks for Large Scale Wind (NS Municipality),” which summarized setback requirements in fourteen Municipalities.

[171] On March 5th, the day after the second of Council’s public hearings, Ms. Maguire prepared a supplementary report for the use of Council. It includes her comments on the intent of the MPS, with specific reference to such things as the General Basic Zone and the 2008 Jacques Whitford report with respect to setbacks.

[172] She commented on the General Basic Zone, saying that it:

> …is rural in nature. It has been submitted by some that, for them, rural equates to pastoral and idyllic lifestyles, but rural areas, as is the case with the General Basic Zone, often consist of a wide variety of unregulated land uses. Traditionally, these land uses include agriculture, forestry, mining and other resource intensive uses.
>
> By and large, these uses are unregulated, but policy 7.8.1 establishes Council’s intention to regulate certain ‘disruptive land uses’ including those subject to regulation under the Environment Act. Further, policy 7.8.2 establishes Council’s intention to allow uses which require an environmental assessment under the “Environmental Assessment Regulations” to be permitted in the General Basic zone subject to a development agreement in accordance with Policies 8.0.4 and 8.0.5.

[173] She gave a number of examples of setbacks within the Province and elsewhere, as researched by planning staff, noting the wide ranges in the setbacks. She referred at some length to the Jacques Whitford Report with respect to setbacks:

> The report explains that numerous experts and stakeholders have come to different conclusions on what an appropriate setback or allowable noise level may be, with some experts suggesting that need for larger separation distances of between 1.6 and 2.2 kilometres. The report goes on to explain that there is a “…lack of peer-reviewed research that can defensibly support the larger end of these separation distances as being necessary to meet acceptable health of quality of life standards.” However, it also states that there is a lack of broadly accepted research to prove that smaller setbacks will avoid health and noise impacts, and that shorter setbacks will almost certainly not eliminate controversy.
>
> With regard to a separation distance approach, the report concludes that “…the overview of jurisdictions across Canada, the United States, in Europe and beyond indicates that with a few exceptions, the preponderance of jurisdictions that have established setback distance have decided that distances 1000 metres or less, with most at 700 metres or less, or 3 to 4 times overall turbine height, are satisfactory.” (Jacques Whitford, 2008, 23)

[174] She also pointed to recent setback examples in Nova Scotia. She referred to setback requirements in Pictou, Antigonish, Cumberland, Colchester, Digby, Argyle, Cape Breton Regional Municipality, and Halifax.

[175] The setbacks ranged principally between 600 metres to 1,000 metres, but Point Tupper has a 2 kilometre setback located in, she says, "…an area which [is] used for heavy industrial purposes." Glen Dhu, located in both Pictou and Antigonish County, has a 1.44 kilometre setback from dwellings that are not located on the subject property, and 1.12 kilometre setback from dwellings on the subject property. She says that the Glen Dhu setbacks were originally to be 600 metres from a property boundary, but were increased "voluntarily" in response to public comments.

[176] She also included a detailed summary of decibel regulations and setback distances in Europe and the United States. All of the limits are equalled or bettered by the Chester requirements. The only exception to this statement is the French standard, which (unlike others referred to in evidence before the Board), relates to the increase in sound levels caused by wind turbines over the background levels. This approach is so different from those generally used elsewhere that it is not easily comparable, at least with the evidence before the Board.

[177] The report notes that individual jurisdictions sometimes have varying acceptable levels of sound. Germany, for example, sets standards ranging from 35 to 70 dBA at night, with 45 to 70 dBA during the day. The Netherlands allows 40 dBA at night but 50 dBA during the day, with part of the standard relating to how windy it is.

[178] This was one of the documents discussed by Council when it met on March 14th to meet and vote on the project.

[179] On March 7th (three days after the second, and final, session of the public hearing held by Council), Michael J. O'Hara (the Counsel for Homburg in the present proceeding) wrote a letter to Ms. Lynch of South Canoe Wind Farm.

[180] The Board notes that, at the Board hearing, Mr. Matheson (an executive officer of Homburg) said he had never seen Mr. O'Hara's letter prior to giving evidence at the hearing.

[181] In his letter, Mr. O'Hara said:

> …we've only been made aware of this project in approximately the past week, and have therefore not had a sufficient time frame to discuss this with you or to conduct as much investigation as we would deem appropriate or necessary.

While the letter, then, says that Homburg had "only been made aware" of the wind farm proposal in "approximately the past week," it is clear from the evidence that this is incorrect. Homburg had (well before the previous week) received written notices of the proposal, and had also attended at least one public meeting.

[182] With respect to the matter of notices, Homburg had received (at least a month before, and no later than the end of January) more than one notice by mail. The notices informed the recipients about opportunities for concerned persons to learn more about the project, and to express their views (such as the public information session or at the public hearing).

[183] Further, at least one representative of Homburg had attended the February 11th public information session, had requested information from the wind farm developers, and had received a detailed documentary reply a little over a week later. That reply had been addressed not just to Mr. LeBlanc, but also to Mr. Eisner of Homburg, although the latter said he did not see it until the day of the Board hearing.

[184] Council had held the first session of its public hearing on February 21st, an event which was widely publicized. The second session of Council's public hearing happened, as the Board has already indicated, on March 4th.

[185] Homburg was certainly in attendance at the second session, if not the first, but it made no oral or written presentations to Council at the session, much less did it express any objections to the wind farm.

[186] Mr. Matheson, who testified on behalf of Homburg, was cross-examined upon this point. He said merely that Homburg "chose not" to present to Council.

[187] On March 14th, Council met to discuss, and finally vote on, the wind farm. The meeting was widely publicized, and about 60 people were present in the public gallery, including representatives of print and electronic media.

[188] The discussion which led up to the vote was a lengthy one.

[189] Council referred to documentation from its planning staff on the intent of the MPS, with specific reference to such things as the General Basic Zone and the 2008 Jacques Whitford Report regarding setbacks.

[190] Council also heard that the developers had communicated with planning staff late on March 13th, to say that four turbines (numbers 22, 23, 28 and 29) had been moved, at the request of the Province. The reason was to protect a wildlife corridor. Councillor Connors once again raised the question of whether as much concern was being directed towards people as towards animals.

[191] There followed a lengthy and detailed discussion, which resulted in eleven pages of single spaced minutes. Councillors discussed the MPS, talked about sound

levels, referred to the health issues which had been raised (including the Health Canada Project), and discussed the type of monitoring which would be available.

[192] They also recounted the results of visits to wind farms in Digby and Amherst. Deputy Warden Shatford said he visited Amherst and knocked on:

> …"ten doors of homes in close proximity"; "the person at the first home indicated their living room faced the turbine 600 metres; she had no concerns and was surprised at the question. Six homes (650-700m) had no issues other than one that had shadow flicker but the sun shone directly in the window and they would normally close the curtains. The remaining homes (1000+ m) also had no issues. One woman indicated that she was excited that there were 30 more being built. He wished he had had more time at the Digby project."

[193] Council had a mass of documentation before it. Councillor Veinotte referred to there being:

> …many scientific studies that conflict…even when the 2014 [Health Canada] study is complete, he feels there will still be conflicting results.

[194] While Council considered deferring the question, it decided not to. In a recorded vote, a motion to approve the development agreements was passed, with only Councillor Connors opposed.

[195] The Board notes in passing that there appears to be a typographical error in the agreements, in the form in which they were approved; the word "ensure" appears at Section 11.2, but the intended word is most likely (in the opinion of the Board) "enure."

[196] On April 1st, Friends of South Canoe Lake filed a Notice of Appeal of Council's decision with the Board; on April 3rd, Homburg followed.

[197] Both Notices of Appeal allege that Council's decision failed to reasonably carry out the intent of the Municipal Planning Strategy. The Board will not repeat here

the details of those grounds; some of them were reviewed at length in the course of the May 16th preliminary hearing.

4.1 Site Visit

[198] Following its usual practice, the Board conducted a site visit, on Tuesday, August 13, 2013, after the conclusion of the hearing on the merits. The Board indicated to parties during the hearing that they could, if they wished, be present during the visit, but they need not feel obliged to do so.

[199] Subsequent to the conclusion of the hearing on the merits, a number of concerns were expressed with respect to how the site visit should be conducted. Discussion of these was extended, intermittently, over a period of weeks.

[200] Some of the differences of opinion related to objections by Friends of South Canoe Lake to the presence of any representative of the wind farm developers during the visit. At one point, they also argued that the site visit should only occur if the Board were to arrange for a sound simulation of the wind farm, at the site itself.

[201] Ultimately, the Board conducted the visit in the company of two representatives of the parties (one from the wind farm developers, and one from Friends of South Canoe Lake).

[202] In the course of the visit, the Board saw a number of locations in and around the area of the proposed wind farm, including, among others:

- New Russell Road;
- Sherwood Road;
- Highway 114 (north of the Sherwood Road, along the Card Lake area);
- certain cottage roads;

- the golf course (including the exteriors of the clubhouse, chalets and the Homburg house);
- a portion of the undeveloped timberlands in the northern part of Homburg's properties;
- one of the tall towers used for wind measurements.

5.0 ANALYSIS AND FINDINGS

5.1 Burden of Proof

[203] As in appeals generally, the Board considers that the burden of proof in this appeal rested with the appellants.

5.1.1 Standard of Proof

[204] The standard of proof which the Board has applied is that of the balance of probabilities.

5.1.2 Applicable Principles of Statutory Interpretation

[205] The Board considers that the liberal and purposive approach to statutory interpretation applies in this proceeding. See, for example: *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board), (1994)* N.S.J. 50 ("*Heritage Trust (1994)"); MacDonald v. Halifax Investments*, *(1997)* 162 N.S.R. (2d) 214 (SC).

5.1.3 The Board's Fact Finding Role

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

> …embark upon a thorough fact-finding mission to determine the exact nature of the proposal in the context of the applicable MPS and corresponding by-laws… [Para 51, per MacDonald, C.J.N.S.].

5.1.4 Town Council as the "primary authority" under the *Municipal Government Act*.

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

> [46] I believe Council and not the Board to be the primary decision maker when it comes to this type of planning issue . . .
>
> [47] …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 ... This decision fell within Council's discretion, provided it reasonably reflected the intent of the MPS. As elected officials, their decisions must be respected...

5.1.5 The Board's Limited Authority on Planning Appeals

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

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

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

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

[210] Thus, the Board must not interfere with a decision of a council to enter into a development agreement unless it determines that the decision does not reasonably

carry out the intent of the MPS. As the Board has noted, the burden of proof is on an appellant to establish this.

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

> [99] In reviewing a decision of the municipal Council to enter into a development agreement the Board, by reason of s. 789(6) of the *Planning Act,* cannot interfere with the decision if it is reasonably consistent with the intent of the municipal planning strategy. A plan is the framework within which municipal Councils make decisions. The Board is reviewing a particular decision; it does not interpret the relevant policies or bylaws in a vacuum. In my opinion the proper approach of the Board to the interpretation of planning policies is to ascertain if the municipal Council interpreted and applied the policies in a manner that the language of the policies can reasonably bear. This court, on an appeal from a decision of the Board for alleged errors of interpretation, should apply the same test. This is implicit in the scheme of the *Planning Act* and the review process established for appeals from decisions of municipal Councils respecting development agreements. There may be more than one meaning that a policy is reasonably capable of bearing. This is such a case. In my opinion the *Planning Act* dictates that a pragmatic approach, rather than a strict literal approach to interpretation, is the correct approach. The Board should not be confined to looking at the words of the Policy in isolation but should consider the scheme of the relevant legislation and policies that impact on the decision…
>
> This approach to interpretation is consistent with the intent of the *Planning Act* to make municipalities primarily responsible for planning; that purpose could be frustrated if the municipalities are not accorded the necessary latitude in planning decisions...
>
> [100] Ascertaining the intent of a municipal planning strategy is inherently a very difficult task. Presumably that is why the Legislature limited the scope of the Board's review of enacting s. 78(6) of the *Planning Act.* The various policies set out in the Plan must be interpreted as part of the whole Plan. The Board, in its interpretation of various policies, must be guided, of course by the words used in the policies. The words ought to be given a liberal and purposive interpretation rather than a restrictive literal interpretation because the policies are intended to provide a framework in which development decisions are to be made. The Plan must be made to work. A narrow legalistic approach to the meaning of policies would not be consistent with the overall objective of the municipal planning strategy. The *Planning Act* and the policies which permit developments by agreement that do not comply with all the policies and by-laws of a municipality are recognition that municipal Councils must have the scope for decision-making so long as the decisions are reasonably consistent with the intent of the plan. Very often ascertaining the intent of a policy can be achieved by considering the problem that policy was intended to resolve.

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

> [163] The *Planning Act* imposes on municipalities the primary responsibility in planning matters. The Act gives the municipal Council the authority to enter into development by contract which permits developments that do not comply with all the municipal bylaws (s. 55 of the Act). In keeping with the intent that municipalities have primary responsibility in planning matters, the Legislature has permitted only a limited appeal from their decisions (s. 78 of the Act). Planning policies address a multitude of planning considerations some of which are in conflict. Most striking are those that relate to economics versus heritage preservation. Planning decisions often involve compromises and choices between competing policies. Such decisions are best left to elected representatives who have the responsibility to weigh the competing interests and factors that impact on such decision…
>
> 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 effects 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…

5.1.6 Summary of Planning Law in *Archibald*

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

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

5.2 Review of Certain MPS Provisions

[214] The Board will now turn to a discussion of certain specific provisions in the MPS. These are quoted at greater length in Appendix "A" to this decision.

[215] While the Board is providing separate discussions of these provisions, it is doing so as a matter of convenience - arising in part from the fact that the various parties presented much of their arguments and evidence as being directed specifically to one or another of these provisions. The Board remains conscious of the principle stated by the Court of Appeal in *Heritage Trust (1994)*, and repeated in subsequent decisions by that Court, that:

> …various policies set out in the plan must be interpreted as part of the whole plan.

[216] Accordingly, the Board does not consider that these provisions are independent of one another. There is significant overlap among them. Further, the Board considers that, in deciding whether Council's decision cannot reasonably be said to be consistent with the MPS, one must ultimately look at all of these provisions, and all of the provisions of the MPS, together, in the context of the wind farm project which is proposed in this proceeding.

5.3 MPS Policy 6.1

[217] As the Board has already noted, it was not until 2003 that Council decided to adopt (through the General Basic Zone) limited land use controls which apply in the area in which the subject property is located.

[218] The introduction to MPS Policy 6.1 recounts this background. In the view of the Board, Policy 6 (and, in particular, 6.1) can be seen as setting part of the broad context against which the MPS provisions dealing specifically with development agreements may be evaluated.

[219] Referring to the adoption of "basic land use controls," Policy 6.1 has seven subsections, several of which were referred to with some frequency in the course of this proceeding.

5.4 MPS Policies 6.1.1 and 6.1.2

> 6.1.1 It is the policy of Council to refrain from imposing detailed land use control through a Land Use By-law on any part of the District unless that part of the District specifically requests Council for land use control that is more restrictive than the general basic zoning in place throughout the District.
>
> 6.1.2 Notwithstanding Policy 6.1.1, Council may apply the appropriate provisions of the Planning Strategy and the Land Use By-law on its own initiative where Council deems that such land use control is in the best interests of the community and of the Municipality.

[220] In the view of the Board, one reasonable interpretation of the planning strategy (and one urged by the Municipality and the wind farm developers in this proceeding) is that it points to what the Board will call a “minimalist” form of land use control within the subject area.

[221] Indeed, the minimalist idea appears not just implicitly, but explicitly, in the MPS, which contains reference to controlling land use and development to the “minimum extent necessary.” Just what the appropriate “minimum” would be was, of course, the subject of intense dispute within this proceeding.

[222] MPS Policy 6.1.1 states Council’s policy of refraining from “detailed land use control” in any part of the Municipality, unless that part asks for more restrictive controls. Ms. Greene, the planner testifying on behalf of the respondent developers, says that the MPS places an “onus” on the citizens to tell Council if they want more restrictive land use control than the general basic zoning which is already in place. The Board thinks that a reasonable interpretation.

[223] This idea is explicitly repeated in the introduction to MPS Policy 7.0 (“Land Use By-law”), which says:

> As stated in Policy 6.1.1, Council does not intend to apply very restrictive and detailed zoning in any area unless the residents of the area request it.

[224] The Board notes that MPS Policy 6.1.2 does leave open the possibility that Council could “on its own initiative” decide more restrictive land use controls are needed.

5.5 MPS Policy 6.1.3 and 6.1.4

> 6.1.3 It is the intention of Council to control land use and developments in a manner that will *minimize conflicts* between land uses and in a manner that is compatible with the existing pattern of land use in the District of Chester. [Emphasis added]

> 6.1.4 It is the intention of Council to control land use and development to the *minimum extent necessary* to ensure that major developments are compatible with existing land use and with the intent of the Municipal Planning Strategy. [Emphasis added]

[225] The Board has just referred to MPS provisions which say that (unless asked to do so) Council intends to avoid imposing "detailed land use control" (MPS Policy 6.1.1), or "very restrictive and detailed zoning" (MPS Policy 7.0).

[226] One finds this theme repeated again in MPS Policy 6.1.4, which refers to controls occurring "to the minimum extent necessary," while ensuring compatibility.

[227] Policy 6.1.3 uses the idea of minimizing in a different way. It makes reference to Council intending to control land use and developments so as to "minimize conflicts between land uses."

[228] Referring to Homburg's golf course operation, Mr. Foster asserted, in effect, that the level of protection which it should receive should equal, or even exceed – from certain perspectives, at least - that accorded to residential properties.

[229] For example, he advocated a setback for Homburg's golf course property of 1,200 metres, the same setback applied to residential buildings.

[230] The Board notes, however, that the 1,200 metre residential setback applies to the buildings themselves, not to the boundaries of the lots upon which the buildings stand. Therefore, in arguing that a 1,200 metre setback should apply to the boundary of the Homburg lands, Mr. Foster may, in the view of the Board, be reasonably seen as arguing for a more stringent level of protection for golf courses than for residential properties.

[231] The Board considers it need not (given the burden of proof in an appeal such as this) find Mr. Foster's position on this point to be an unreasonable one; however, it does conclude that an opposite approach (one which sees the MPS as

according equal or greater weight to residential properties, in comparison to golf course fairways) is at least equally consistent with the intent of the MPS.

[232] The Board turns now to the concept of “existing uses”, which formed an important part of the arguments advanced by Mr. Foster.

[233] Existing uses, in the view of the Board, can be seen as explicitly part of MPS Policy 6.1.4 (with its reference to “existing land use”) and of MPS Policy 6.1.3 (with its reference to the “existing pattern of land use”).

[234] Mr. Foster, in his evidence, refers to MPS Policy 6.1.3, including its reference to the “existing pattern of land use.” Looking at Homburg’s present situation, one sees two entirely different patterns of use, one for the southern portion (the golf course), and one for the northern portion (timberland, some of which is clear cut and some not).

[235] The Board, at certain points at least, saw Mr. Foster as arguing (expressly or impliedly) that a possible future land use (such as the golf course Homburg told the Board it wants to develop on the northern part of its property) should be treated as if it were an “existing use” within the meaning of MPS Policy 6.1.4.

[236] At present, as the Board has noted, the northern part of the property is not a golf course and is not zoned for commercial operation, i.e., it would have to be rezoned before one could attempt to establish a golf course there.

[237] Counsel for the wind farm developers argued that Mr. Foster was, in effect, attempting to distort the references to “existing use” in the MPS to include Homburg’s situation.

[238] With particular reference to MPS Policy 6.1.4, he further argued that Mr. Foster was trying to "torture" Homburg's possible northern expansion into the protections of the MPS.

[239] In the Board's judgment, it need not find Mr. Foster's broad interpretation of the word "existing" is, in the context of this MPS, an unreasonable one – or that it amounts to an attempt to torture a meaning from the MPS.

[240] However, the Board does find that the opposite interpretation (i.e., that the term "existing" in the MPS simply means something already in existence) is one which reasonably carries out the intent of the MPS. Such an interpretation is consistent with, and supports, the decision made by Council to approve the development agreements.

5.6 MPS Policy 8.0.5 b) and MPS Policy 8.0.5.c)

> 8.0.5 - Commercial, industrial or institutional developments may be permitted by development agreement, where provided for by specific policies elsewhere in this Municipal Planning Strategy, in accordance with the Planning Act and provided Council is satisfied that:
>
> b) the development shall not generate emissions such as noise, dust, radiation, odours, liquids or light to the air, water, or ground so as to create a recognized health or safety hazard, and that the impact of such emissions on the development potential and value of properties in the vicinity has been minimized.
>
> c) subject to the physical characteristics of the site, the development shall achieve optimum separation from adjacent properties which are not in commercial or industrial use, and screening in the form of fences, vegetation, or berms as appropriate shall be constructed or installed wherever possible in order to minimize impact on the abutting uses.

[241] While (at the preliminary hearing on May 16th) Counsel for the wind farm developers initially seemed to take a somewhat different interpretation of MPS Policy 8.0.5 b), the Board considers that ultimately all parties (and the Board) saw the provision in much the same way.

[242] Following this approach, MPS Policy 8.0.5.b) has two principal aspects (or "arms," or "baskets", the latter two metaphors being used at various points in the proceeding).

[243] The first aspect is arguably absolute, in that it prohibits creating a "recognized health or safety hazard" from emissions from the wind farm.

[244] The second aspect is relative, in that it refers to minimizing the impact of emissions which are present, but not so severe as to constitute a health or safety hazard upon development potential and property values. This second aspect of MPS Policy 8.0.5.b) relates as well to MPS Policy 8.0.5.c).

5.6.1 The First Aspect: Recognized Health or Safety Hazards

[245] This aspect relates, specifically, to the requirement in MPS Policy 8.0.5.b) that Council satisfy itself that the wind farm project will:

> …not generate emissions such as noise, dust, radiation, odours, liquids or light to the air, water, or ground so as to create a recognized health or safety hazard…

[246] The emissions which were principally in dispute in this proceeding were noise and light. The Board considers that one reasonable interpretation of this part of MPS Policy 8.0.5 b) - and one which is consistent with the decision reached by Council to approve the development agreements - is that it is, in effect, an absolute prohibition of emissions which create "a recognized health or safety hazard." Indeed, the Board considered that there was little, if any, dispute among the parties on this point.

[247] One of the issues raised at the preliminary hearing by Counsel for the wind farm developers was his assertion, in essence, that the approval by the Minister of the Environment on July 13, 2012, be regarded, in certain ways at least, as conclusive on this point. While the Board disposed of this matter orally, and at some length, in the

May 16th preliminary hearing, it will for the purposes of clarity refer, relatively briefly, to this issue here as well.

[248] In his letter, the Minister had stated, with respect to the proposed wind farm, that he was:

> …satisfied that any adverse effects or significant environmental effects of the undertaking can be adequately mitigated through compliance with the attached terms and conditions.

[249] Among other things, Counsel for the wind farm developers asked the Board to rule inadmissible any evidence intended to "contest" the Minister's determination that any adverse effects or significant environmental effects from the wind farm could be adequately mitigated through compliance with the terms and conditions of approval.

[250] He also asked that the Board rule inadmissible any evidence that tended "to question the entitlement" of the Municipality to rely upon the environmental approval of the Minister.

[251] In its submissions to the Board (both at the preliminary hearing and the hearing on the merits), Homburg took the opposite view.

[252] For example, instead of seeing the Minister's opinions as determinative, Homburg's expert, Mr. Foster, said (at the hearing on the merits) that the Municipality had relied too heavily upon them.

[253] He noted that the Environmental Assessment Registration Document occupies at least a third of the Municipality's Appeal Record, and that this document was similarly emphasized in Ms. Greene's expert report.

[254] He further noted that the Municipality, in its development agreements, included a recitation of the Minister's decision approving the project, and required

compliance with the terms and conditions of the Minister's approval, particularly with respect to noise and shadow flicker: see clauses 3.1 b) i and ii.

[255] Mr. Foster argued that the Department of the Environment had jurisdiction over environmental issues, but not over land use:

> …the Development Agreement Process is separate and parallel to the Environmental Assessment. One is not a substitute for the other, nor is either a subservient process to the other.

[256] Counsel for the wind farm developers referred the Board to the Court of Appeal's decision in *Bennett v. Kynock* (1994), 131 NSR, (2D), 334. In that decision, the court remarked:

> The legislation of this Province puts the primary responsibility from 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. *[Underlined emphasis in original]*

[257] In its decisions since *Kynock,* the Board has been, and remains, very mindful of the Court of Appeal's direction, which it has repeatedly cited in placing heavy emphasis upon the role of the Minister of the Environment. In the present proceeding, the Board has no wish to, expressly or impliedly, in any way modify that position. For present purposes, however, the Board thinks it relevant to note that, while *Kynock* points to the Province's legislation as placing the "primary" responsibility for environmental issues upon the Minister, it also specifically recognizes that Municipalities may "have regard" for the environment as well.

[258] In essence, the Board ruled that it saw the Minister's approval, and the Environmental Assessment Registration Document which led up to it, as very significant pieces of evidence before the Board. However, the Board concluded that it was not willing (as Counsel for the respondents wished it to) to foreclose any possibility that the

appellants could call expert evidence at the hearing on the merits which might relate to a matter, or matters, addressed by the Minister of the Environment.

[259] In the event, however, neither Friends of South Canoe Lake nor Homburg submitted any such evidence during the hearing on the merits: more particularly, they did not call any experts to give evidence relating to sound, light, or health. The only expert witness from whom the Board heard on behalf of the appellants was Mr. Foster, who is not an engineer or scientist, but a planner.

[260] Given the lack of such evidence, the Board need not, and accordingly will not, in this decision indulge in speculation as to just where a proper line might be drawn (if any there need, or should, be) between the jurisdiction of the Minister of the Environment and that of a municipal council in dealing with land use issues having an environmental aspect.

[261] In the circumstances of the present proceeding, the Board has no difficulty whatsoever in concluding that the Minister's approval (and the associated information upon which he relied), was something upon which it was reasonable - in the circumstances of this present proceeding - for Council to give great weight, in deciding that the first aspect of MPS Policy 8.0.5 b) had been met.

[262] In the Board's judgment, the thrust of the Minister's approval is entirely in support of the view that MPS Policy 8.0.5. b) has been met.

5.6.2 The Second Aspect: Minimizing Impact

[263] Under this second aspect of MPS Policy 8.0.5 b), Council must be satisfied that the impact of emissions such as sound and light on two things (development potential and the value of properties) has been minimized.

[264] This aspect was a matter emphasized heavily by both Friends of South Canoe Lake and Homburg.

[265] Homburg placed particular emphasis on the concept of development potential of its properties. As the Board has previously noted, it suggested that Council had placed all, or at least a disproportionate amount, of its focus upon residential properties, and had given little, if any, weight to the possible effects of the wind farm upon Homburg's property.

[266] Mr. Matheson, the Homburg officer who testified at the hearing, expressed the view that the potential for expanding the Homburg property to include an additional golf course on the northern property, with chalets, would be "nullified" because of the proposed siting of the turbines. He saw this as affecting Homburg's future use of the lands, and also the market value.

[267] The Board saw Homburg as asserting, at various points in its evidence and submissions, that the northern part of its property would be developed as an additional 18 hole golf course (making a total of 36 holes, taking into account the existing course), together with the possibility of additional chalets being constructed in the area.

[268] Having reviewed all the evidence, however, the Board concludes, on the balance of probabilities, that there have been, at best, only limited discussions within Homburg of the possibility of expanding the golf course.

[269] The limited nature of such discussions, even within the company, is, the Board considers, underscored when one looks at Mr. O'Hara's March 7th letter to the Municipality. This letter (which, it will be recalled, was sent to the Municipality after the

conclusion of the second session of Council's public hearing) describes Homburg's "current planning" for its property.

[270] The letter makes no reference of any kind to even the possibility of expanding the golf course into the northern portion. The letter refers only to increasing the number of chalets, saying in effect, that this increase might occur within the existing golf course, or in the northern portion.

[271] The Board finds that there is insufficient evidence before it to support a conclusion, on the balance of probabilities, that there is any real likelihood that the northern part of the property would be developed into an additional golf course, even in the medium-term, much less the short-term.

[272] In this context, the Board notes that access to the northern part of the property remains, even as of the date of the hearing, extremely limited. Only a rough track exists, and the Board concluded that it is inadequate to gain practical access to a significant part of the northern portion. Mr. Foster was only able to visit that area on foot, rather than by driving all the way along an actual roadway. Further, Mr. Eisner, the General Manager for the golf course, since the spring of 2012, has himself never visited all of the northern portion, and referred in his evidence to difficulties in access.

[273] Further, the Board considers that the evidence before it does not indicate that Homburg has consulted a golf course architect; indeed, the evidence does not support any finding that any design for an expanded golf course exists at all, even in rough form.

[274] The Board saw Mr. Matheson as, in part, linking the potential for development of an additional 18 holes on the northern portion to recovery of the

international economy, particularly in Europe, from which Homburg has hoped to draw customers to Sherwood.

[275] Additionally, Homburg has only recently begun opening the existing 18 hole course to the public, and then in a limited sort of way – such as two days a week.

[276] Finally, Counsel for the wind farm developers, in closing summation, pointed to Homburg never having referred to expansion plans for the golf course until the appeal before the Board. Homburg's sudden claim to have made such plans was, he suggested, something which had:

> …only appeared as a matter of convenience…

[277] In the Board's view, it need make no finding on this assertion. Nevertheless, the Board has no difficulty in finding that - whatever the plans Homburg may actually have in mind for the northern part of the property - they can fairly be regarded as, at best, embryonic.

[278] Turning now to the possible effect of a wind farm development on property values, the Board has before it the material which was filed with Council, and which forms part of the Appeal Record. For example, the Environmental Assessment Registration Document of May 17, 2012 itself contains a reference to property values, and specifically identifies "decreased property values near operational wind farm" as a "potential" effect of the project. It refers to possible methods to mitigate this effect, and states as a "residual effect" a "potential decrease in property values", with the "significance" of the residual effects being "low."

[279] No expert witness was called by the Municipality or the wind farm developers who could give evidence with respect to possible effects upon market value.

[280] Likewise, no such evidence was called by the appellants, although the appellants did make clear to the Board their concerns about the possible effects upon property value. For example, Friends of South Canoe Lake called Winfried Viebahn, who told of his difficulties in selling his current property, which he attributed to market concerns about the possibility of a wind farm being built in the area.

[281] For its part, Homburg filed a letter with the Board signed by a person who is a qualified appraiser (an AACI), but who did not testify. In the view of the Board, the letter identifies nothing more than a "potential" for wind farms to have a negative or adverse effect upon property value, with the appraiser then saying that the potential of such impact would have to be "quantified." The letter makes no reference to his having conducted such quantification work, or to his having reviewed such work by others. Accordingly - quite apart from the issue of its admissibility under the Board's expert evidence rules - the Board sees the letter as having no significant probative value.

5.7 MPS Policy 8.0.5 c)

> That when considering amendments to the Land Use By-law and in considering development agreements, in addition to all other criteria as set out in the various policies of this Planning Strategy, Council shall be satisfied that:
>
> 8.0.5 c) subject to the physical characteristics of the site, the development shall achieve *optimum separation from adjacent properties which are not in commercial or industrial use*, and screening in the form of fences, vegetation, or berms as appropriate shall be constructed or installed wherever possible in order to minimize impact on the abutting uses. [emphasis added]

[282] The Board will first note that the term "adjacent" is not defined in the MPS. In the context of municipal planning strategies, the Board has previously concluded that "adjacent" can be taken as meaning properties that are "close to" or "near" to one another, but that they need not necessarily touch: see, for example, *Re Federation of Nova Scotian Heritage*, 2005 NSUARB 105 [para. 255]. The Board concluded from his

evidence that Mr. Foster, impliedly at least, saw Homburg's northern property as undoubtedly adjacent to the wind farm, and its golf course as well. For the purposes of this discussion, the Board will assume, without finding, that this is the case.

[283] That being said, the Board observes that Policy 8.0.5 c), in its express language, has a relatively narrow scope: it does not apply to separation of a project such as the proposed wind farm from *all* adjacent properties, but only from those adjacent properties which are *not* in commercial or industrial use. As the Board has noted repeatedly elsewhere, a golf course is, under the MPS and LUB, a commercial or industrial use.

[284] Mr. Foster, however, omitted this distinction in his report. In his report, he "particularly" draws the attention of the Board to Policy 8.0.5.c), and claims this provision to have been:

> …designed to achieve optimum separation from adjacent properties."

He makes no mention of the requirement that the adjacent properties not be in commercial or industrial use.

[285] For this reason, Counsel for the wind farm developers asserted that Mr. Foster's claim that MPS Policy 8.0.5.c) provided protection for the golf course was "dead wrong", and cross-examined him on this point.

[286] As the Board saw it, Mr. Foster did not deny having omitted reference to the requirement that the adjacent properties not be commercial or industrial if the protection afforded in MPS 8.0.5 c) is to apply.

[287] Instead, he seemed to suggest that the golf course - while it is a commercial or industrial use, under the MPS and LUB - has elements that are "special."

The Board inferred from his evidence that he regarded this as a justification for giving the golf course different treatment from other commercial and industrial uses.

[288] Once again, the Board need not find that Mr. Foster's argument is an unreasonable one. However, the Board does find that the opposite interpretation – that MPS Policy 8.0.5.c) only protects properties not in commercial or industrial use – is an approach reasonably consistent with the intent of the MPS, and supports the decision made by Council to approve the development agreements.

5.7.1 Shadow Flicker

[289] Shadow flicker is the phenomenon that can occur with wind turbines when the sun, rotating blades, and houses line up on the same axis, causing moving shadows which "flicker" with the turn of the blades. As with setbacks, the limits adopted in various jurisdictions with respect to shadow flicker vary significantly.

[290] The Environmental Assessment Registration Document (which led to the Minister's approval in July of 2012) contains an analysis of potential shadow impacts. According to a later report from Strum Consulting (dated May 17th, written by Melanie Smith and Shawn Duncan, on behalf of the wind farm developers, and filed with the Board), the Environmental Assessment Registration Document "conservatively" assumed that shadow impacts would extend up to two kilometres from a proposed turbine. In the circumstances of this project, that was satisfactory from the point of view of the Department of the Environment.

[291] Subsequent analysis by Strum, however (as recounted in its May 17th report), showed that the actual shadows would be significantly shorter. In reaching this conclusion, Strum again used a conservative, or "worst case" scenario, which involved: constant sunshine during daylight hours; turbines constantly operational; turbine blades

oriented perpendicular to the line between the sun and the “receptor” (such as a house); no intervening obstructions; windows of the receptors (such as a house) oriented towards the turbines.

[292] According to the May 17th report, the actual shadow length (as explained by Ms. Smith in her testimony), shows a maximum shadow length of 1.114 kilometres, rather than the 2 kilometres previously assumed.

[293] All relevant points (including all appellant addresses, and also including all other existing “receptors”) are located outside the shadow zone of any turbine.

[294] The evidence presented to the Board on shadow flicker was fairly detailed, including differing types of flicker limits adopted by various jurisdictions. Taking into account all the evidence, however (particularly the size of the shadow zone), the Board sees no reason for it to explore this evidence further in this decision.

[295] The Board concludes that it sees nothing in the evidence before it with respect to shadow flicker which points to Council’s decision to enter into the development agreements as failing to reasonably carry out the intent of the MPS.

5.7.2 Sound Level

[296] The Environmental Assessment Registration Document submitted by the proponents’ of the project to the Minister of the Environment freely acknowledges that the wind farm, if built, will expose people in the area to sounds. Instead, it proposes certain measures to “*mitigate”* (i.e., reduce the effects of) those sounds, rather than to *eliminate* them.

[297] The mechanical operation of the turbines themselves generates some noise, but modern designs have eliminated much of this. However, the interaction of

the turbine blades with the air must always lead, unavoidably, to the creation of some sound.

[298] The Board concluded from the evidence before it that the sound concerns of the appellants in this proceeding related to the view that such sounds may be harmful to one's health and that they may also be irritating or annoying.

[299] The Environmental Assessment Registration Document includes the 2007 report by Canada's National Research Council, which says, in part, that people's perception of noise can be related to "…their tolerance for particular noise types". The report says that the "annoyance" caused to listeners is a product of both objective acoustic properties of the sound, and the attitude of the person listening to it.

[300] The Board concluded from the evidence before it that the Municipality had, in effect, decided to control or mitigate the effects of sound through two principal methods, one being a limitation on sound levels, and the other being setback distances. The Board refers to the latter subject, setbacks, at various points in this decision.

[301] With respect to sound levels, the standard which - in effect - applies is 40 dBA, as measured at the exterior of a residence at night. Remarkably, however, it appears from all the evidence (principally from Ms. Smith) before the Board that this is not a legislated standard in Nova Scotia.

[302] 40 dBA is a *de facto* standard, but is not found in any regulations or other legislation administered by the Department of the Environment. Further, it is not prescribed in the *Municipal Government Act,* or the MPS and LUB.

[303] Instead, it seems that the 40 dBA standard is simply one which the Nova Scotia Department of Environment has chosen, as a matter of practice, to use, without formally adopting it in the form of a regulation, or other legislation.

[304] While the department has not chosen to legislate the 40 dBA requirement, it has included it as a requirement of the Minister's July 2012 approval of the South Canoe Wind Farm Project. As such, the Board concludes – and it saw all parties as accepting – that the 40 dBA limit is one which is binding upon the wind farm developers in this proceeding.

[305] A somewhat vexing question arises in relation to the term "qualified receptor," a term contained in the development agreements. The measurement of sound is done in relation to so-called "receptors", which may be (for example) a house, or (as a further example) simply a designated point on a vacant lot of land. Section 3.1. b) i and ii say that sound is to be measured:

> …relative to *qualified receptors* as prescribed by the Nova Scotia Department of the Environment in the Environmental Assessment Approval… [Emphasis added]

However the Environmental Assessment Approval of July 13, 2012 contains no reference to "qualified receptors"; in fact, it contains no reference even to the term "receptor." Neither does the letter from the Minister of the Environment of the same date. Further, the Environmental Assessment Registration Document does not (insofar as the Board is aware) contain any reference to the term "qualified receptor."

[306] Further, this term is undefined, in the development agreements or - according to the evidence before the Board - anywhere else in Nova Scotia's legislation.

[307] Additionally, the evidence before the Board does not point to its being a "term of art" for which there is an agreed meaning amongst experts and practitioners in the field generally.

[308] Expert testimony before the Board suggests – but does not say for certain – that the term was simply informally adopted from Ontario by the Nova Scotia Department of the Environment.

[309] In short, the references to the term "qualified receptor" in the documentation before the Board might fairly be described as, to a degree, inconsistent and incomplete. Further, that some ambiguity may arise from this state of affairs cannot, in the Board's view, be denied.

[310] However, the Board has concluded that this does not mean that Council's decision fails to reasonably carry out the intent of the MPS.

[311] The principal reason for the Board's conclusion on this point, is that – whatever the term "qualified receptor" is actually intended to mean – the location of the various "receptors" which were actually used in the evaluation of the proposal, and would be used with respect to the future monitoring of it, if it is built, are specifically identified as known locations in the documentation for the project. Given that their identities and locations are known, the Board considers that any ambiguity in the meaning of "qualified receptor" is, for the purposes of this proceeding at least, irrelevant.

[312] The Board turns now to the Strum predictions of sound levels for the proposed wind farm. As the Board has previously noted, Strum created a computer-based model of the topography in which the wind turbine project is proposed to be

located, and then, using specialized software, predicted the sound levels which would occur at various points in the surrounding area, including at various residences.

[313] Ms. Smith (who testified on behalf of Strum) pointed to an approach taken in Strum's report to sound prediction which was (like its approach to shadow flicker) arguably a conservative one.

[314] The software used by Strum to carry out the sound modeling is an established software package. Ms. Smith said that the software's accuracy has been measured over the years by comparing the actual results of projects after they were built with the values which had been previously predicted. She said that there is an "impressive" correlation: the margin of error for such computer models is on the order of 2-3 dBA, which (she and Mr. Peters seemed to agree) would be about 5-7%.

[315] Further, Ms. Smith said that when the software errs, it generally does so in the direction of "over-prediction," i.e., it predicts louder sounds than actually occur. She suggested that this, once again, was consistent with Strum's conservative approach.

[316] None of this evidence was rebutted by the appellants.

[317] In her evidence, Ms. Smith pointed to several items as being consistent with what she described as the conservative approach taken by Strum with respect to sound prediction:

- in carrying out sound modeling, the Strum study treated all existing structures as if they were residences, whether they were or not;
- in carrying out the modeling, all receptors were assumed to be downwind from the sound source;

- she noted that some jurisdictions allow more sound if there is already in existence more background noise. The latter is considered by some to "mask" the effects of a new sound source, such as a wind turbine, and to justify louder turbine sounds. For example, in Ontario, if there are higher winds, more than 40 dBA may be allowed. The Strum model, however, does not take this approach, which is, once again, conservative.

[318] Strum's May 17, 2013 updated sound modeling report can be seen as pointing to performance equal to or better than that which had been predicted in the Environmental Assessment Registration Document in 2012.

[319] Fourteen vacant lots, all of them zoned Provincial Forest, Commercial Forest or Resource Forest, do have sound pressure levels exceeding 40 dBA. According to the model, the sound pressure levels will not exceed 40 dBA at any "existing receptor", including those corresponding to appellant addresses. The predicted range is 27.5 – 38.7 dBA.

[320] Of the existing receptors, 86% are predicted by the updated model to have sound levels below 35 dBA. This is a better performance than was predicted in the Environmental Assessment Registration Document, which used the figure of 79%.

[321] Predicted noise levels of properties for the appellants, or persons associated with them, are as follows: for the Ackerman property, 36.3 dBA; for the Emery Peters property, 27.5 dBA; for the Megan Davies/David McCall property, 34.5 dBA; for the Susan Deal/Steven Porter property, 34.5 dBA; for the Viebahn property, 32.7 dBA; for the Merrick property, 29 dBA; and for Homburg's golf course, 30.7 dBA.

[322] The Board does note that, as Ms. Smith testified, a small sliver of the northern edge of the Homburg's undeveloped timberlands touches a 40 dBA zone.

[323] As the Board has already noted, the appellants did not file any evidence from sound experts of their own. The expert evidence before the Board, then, is solely that of Strum, on whose behalf Ms. Smith testified at the Board hearing.

[324] In the course of an extensive cross-examination by the appellants, she freely acknowledged that:

- the wind turbine specifications used for the purposes of the sound modeling relate to a similar turbine, but not the identical turbine (a more recent model) which is to be used;
- the vegetation assumed in the model is a mixed use ground cover, including some clear areas and some wooded, but she was unaware of whether any distinction was drawn in the model between hard wood and evergreen trees;
- the model ignores the existence of a lake in the area;
- the model assumes the wind turbines in use would be properly functioning, i.e., would not be generating additional mechanical sounds because of deterioration;
- no actual sound monitoring has been done at the site, i.e., no simulation of turbine sounds at the proposed tower locations, and measurement of sound in the surrounding area, has occurred. Ms. Smith testified that she is unaware of such testing ever being done for projects of this type.

[325] The Board saw her answers to the above questions to be clear and direct. They were consistent in all material ways with the Strum report, and with the factual

circumstances of the wind farm as a whole as disclosed to the Board by all of the evidence before it.

[326] The Board saw nothing arising from her cross-examination which caused the Board to lose any significant confidence in her evidence, or the conclusions drawn in it with respect to predicted noise levels. The Board attributes considerable weight to this evidence.

5.8 Alleged Lack of Information on Existing Land Use

[327] As a final point, the Board now turns to what it saw as a key theme (indeed, perhaps *the* key theme) of Mr. Foster's criticism of the Municipality in this proceeding: what he regarded as the poor and inadequate nature of the information available to Council with respect to existing land uses. He pointed to the quality of the mapping which was used by the planning staff as being lower than it could, and should, have been. He pointed also to the lack of a detailed inventory of uses being available to Council in making its decision. Indeed, he pointed to the MPS itself as appearing to have been created without the benefit of an existing land use map.

[328] The Board will briefly note here that, at times, the arguments put forward by Mr. Foster seemed to the Board to be perilously close to suggesting that the Board had jurisdiction to reverse a decision by Council, because of an inadequate process followed by Council.

[329] In the view of the Board, the *Municipal Government Act* (viewed in the light of the direction given to the Board by the Court of Appeal in various decisions over the years) makes it clear that the Board has no such jurisdiction.

[330] Nevertheless, a key point of Mr. Foster's argument is that Council reached its decision to approve the development agreements without adequate knowledge of what the neighbouring properties and their uses were.

[331] In reply, Ms. Maguire says that Councillors know the area, and accordingly the use of less detailed mapping than that advocated by Mr. Foster was of no consequence.

[332] Ms. Green the planner retained by the wind farm developers, agrees with Ms. Maguire, and disagrees with Mr. Foster. Ms. Greene said that the failure of Ms. Maguire to include an existing land use map in the materials supplied to Council was not, in her view, a failure to reasonably carry out the intent of the MPS.

[333] She considered the detailed land mapping could "help" or be an "aid" for Council in its decision-making, but that it was not necessary.

[334] The Board thinks it of relevance to this point to note – as Counsel for the wind farm developers pointed out – that Section 227 of the *Municipal Government Act* says that a development agreement "may" include plans or maps. In other words, the *Act* allows for such plans or maps, but does not require them.

[335] While it may well be, as Mr. Foster asserted, that "it is good practice" to include such things as an existing land use map, the failure to do so is not, in the Board's judgment, something which fails to reasonably carry out the intent of the MPS.

[336] Even if such detailed mapping (and related photography) had been used, the Board remains unpersuaded, on the balance of probabilities, that Council would have learned any significant additional information as a result. Indeed, the Board considers that, at the conclusion of Mr. Foster's lengthy testimony with respect to the

purported inadequacy of the mapping and other information used by Council, it too was left unaware of any critical piece of information which more detailed mapping would have supplied.

[337] The Board sees no reason to imagine that higher resolution photography of the type advocated by Mr. Foster (as well as the other mapping and inventory information which he suggested should have occurred) would, somehow or other, have led Council to a different conclusion.

[338] At best, Council would simply have had sharper pictures of Homburg's forest lands and of its golf course, but Council already knew that both existed.

[339] The Board concludes that nothing in Mr. Foster's concerns about the adequacy of land use information before Council suggests that Council's decision in any way failed to reasonably carry out the intent of the MPS.

6.0 SUMMARY AND CONCLUSIONS

[340] In an appeal of this type, the burden of proof is on the appellants (Friends of South Canoe Lake and Homburg) to show that the Municipal Council, in deciding to enter into development agreements approving the South Canoe wind farm, failed to reasonably carry out the intent of the MPS. In the judgment of the Board, the appellants have failed to satisfy this burden.

[341] An important part of the evidence submitted on behalf of the appellants is that of Mr. Foster, who gave evidence on behalf of Homburg. He testified that Council's decision fails to reasonably carry out the intent of the MPS.

[342] With respect, the Board has concluded that it prefers the evidence to the contrary. That evidence includes the reports of the Municipal planning staff, who supported the proposed wind farm as reasonably carrying out the intent of the MPS.

[343] It also includes the evidence of Ms. Greene, who gave evidence on behalf of the wind farm developers, and who testified that Council's decision does reasonably carry out the intent of the MPS. Having reviewed all the evidence, the Board, in general, agrees with her conclusions, as well as the reasoning by which she supports them.

[344] The Board will here touch only briefly on a few of the applicable provisions in the MPS which had led the Board to this finding.

[345] Under MPS Policy 6.1.3, Council intends to control land use in a way that minimizes conflicts and is compatible with the existing pattern of land use.

[346] The task of minimizing conflicts (as referred to in 6.1.3) is - as Mr. Foster himself acknowledged with admirable forthrightness in his testimony - a "value laden" one. In other words, it is exactly the sort of question which the Court of Appeal has repeatedly said is generally suitable for resolution by municipal councils.

[347] The zoning which applies to the area proposed for the wind farm is the "General Basic Zone." This Zone is the minimal level of land use control applicable in the Municipality. The Zone came into existence in 2003; prior to that date, no land use controls existed at all for the area in which the wind farm is proposed, and it could have been built on the subject property as of right.

[348] MPS Policy 6.1.1 states that it is Council's policy to "refrain from imposing detailed land use control" in the General Basic Zone. A wide range of uses can still

occur as a matter of right in the Zone, including such often controversial ones as mink farms.

[349] Large wind farms such as the one which is the subject of this appeal are specifically contemplated as possible land uses in the General Basic Zone.

[350] However, they are not permitted as of right, but only with the agreement of Council. Council's approval must take the form of a development agreement, which prescribes the terms and conditions to be met for the establishment and operation of the facility: MPS Policy 8.0.5.

[351] Council's approval can only occur after a lengthy process, involving a number of steps (including public consultation) prescribed in the MPS, LUB, and *Municipal Government Act*.

[352] In considering the possibility of entering into a development agreement, the MPS requires that Council satisfy itself that the wind farm will not generate light or noise (among other things) that will create a recognized health or safety hazard: MPS Policy 8.0.5.b). In the view of the Board, the evidence before it does not support a conclusion that Council's decision fails to reasonably carry out the intent of this provision.

[353] It cannot be doubted, however, that Friends of South Canoe Lake expressed strong concerns to the Board (and, previously, to Council) with respect to these matters, particularly relating to health. Nevertheless, neither they nor Homburg presented expert evidence to show that, on the balance of probabilities, such health or safety hazards would be created.

[354] The wind farm developers and the Municipality, on the other hand, point to the fact that the Provincial Minister of the Environment (whose responsibilities include, in effect, protection of “human health” from projects such as wind farms) himself approved the project, and did so before Council did.

[355] The wind farm developers and the Municipality also rely, in part, upon the evidence of experts with respect to the expected loudness of the wind farm in the area around it. Those experts provided written reports, and oral testimony, to the Board. The Board found this evidence credible, and accords significant weight to it.

[356] The Provincial Department of the Environment does not have legislation which sets maximum sound levels. However, as a matter of practice, it will not approve projects of this type if sound levels would exceed 40 dBA as measured at the outside of residential buildings in the area.

[357] The unrebutted expert evidence presented to the Board (and to Council) is that the project will comply with the 40 dBA limit.

[358] The MPS also requires Council to satisfy itself that the effect of sound and light (among other things) generated by the wind farm upon the development potential and value of properties in the vicinity be minimized: MPS Policy 8.0.5 b).

[359] The Board sees nothing in the evidence before it which suggests that Council’s decision failed to carry out the intent of the MPS in this regard.

[360] The Board thinks it appropriate to repeat here an excerpt from *Heritage Trust (1994)*, which it quoted earlier in this decision, at paragraph 212:

> 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 a decision….

Perhaps unconsciously echoing this theme, Mr. Foster, in referring to one of the responsibilities of Council under the MPS, remarked that the work of Councillors is:

> . . . clearly a balancing act . . .

[361] The Board considers that in the present proceeding, as much as any planning appeal it has previously seen, a wide range of the "competing interests" and "competing policies" referred to by the Court is starkly in evidence.

[362] The Councillors repeatedly reviewed the policies of the MPS in evaluating the proposal. It is clear that the Councillors were acutely conscious of the fears of residents with respect to possible effects upon their property values and their health, and took painstaking efforts to inform themselves on these topics. They were also aware (as is the Board) of the presence of Homburg's property, with its golf course and associated amenities, near the proposed wind farm site.

[363] Other interests which Council took into account in reaching its decision included:

- the Provincial Government's emphasis on the increased use of renewable energy;
- the Provincial Government's emphasis on wildlife protection; and
- the need to maintain or increase municipal tax revenues.

[364] While it is not relevant to the Board's decision on this appeal, the Board notes as a matter of interest that the review by Council which led to its decision was extraordinarily lengthy and detailed. Councillors' activities included such things as repeated and lengthy discussions (including with staff, with the public, and with the wind farm developers), and visits to existing wind farms.

[365] By the time their review was finished, and their decision made, the Councillors had received (and generated) a staggering volume of documentation – ultimately more than 3,200 pages.

[366] Council in this case had the onerous task of fulfilling the duty stated by the Court in *Heritage Trust (1994)* – that of weighing many competing interests, and, ultimately, deciding whether to approve the biggest wind farm in the history of the Province.

[367] They did decide to approve it. The Board sees nothing in the evidence before it which establishes that their decision failed to reasonably carry out the intent of the MPS.

[368] The appeals are dismissed.

[369] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 5th day of September, 2013

Wayne D. Cochrane

APPENDIX "A"

EXCERPTS FROM MUNICIPAL PLANNING STRATEGY FOR THE MUNICIPALITY OF THE DISTRICT OF CHESTER

MPS POLICIES

6.1 INTENT

In 1995-96 Council had requests from five separate areas for municipal control over land use. Instead of adopting five separate By-laws, Council agreed to draft a By-law which would contain all the necessary elements, but would be applied only in those areas which requested it. In addition, in 2002, in response to a request for land use control at Mill Cove Park, Council agreed to amend the Municipal Planning Strategy and Land Use By-law to incorporate specific policies and by-law provisions tailored to the development issues and opportunities at Mill Cove Park. In 2003, Council responded to pressures throughout the Municipality by adopting basic land use controls which apply throughout the whole Municipality. The following policies express Council's policies for the control of land use within the District of Chester:

6.1.1 It is the policy of Council to refrain from imposing detailed land use control through a Land Use By-law on any part of the District unless that part of the District specifically requests Council for land use control that is more restrictive than the General Basic zoning in place throughout the District.

6.1.2 Notwithstanding Policy 6.1.1, Council may apply the appropriate provisions of the Planning Strategy and the Land Use By-law on its own initiative where Council deems that such land use control is in the best interests of the community and of the Municipality.

6.1.3 It is the intention of Council to control land use and developments in a manner that will minimize conflicts between land uses and in a manner that is compatible with the existing pattern of land use in the District of Chester.

6.1.4 It is the intention of Council to control land use and development to the minimum extent necessary to ensure that major developments are compatible with existing land use and with the intent of the Municipal Planning Strategy.

6.1.5 It is the intention of Council to control land use and development in a manner which is compatible with the adequate provision of public services.

6.1.6 It is the intention of Council to encourage land use and development in a manner that will preserve, enhance, and protect the natural environment and the living environment of the District of Chester.

6.1.7 It is the intention of Council to encourage land use and development at Mill Cove Park in a manner that will preserve, enhance, and protect the natural environment and the living environment as well as encourage the specific residential, commercial, and institutional development potentials unique to that area.

7.0 LAND USE BY-LAW

The Land Use By-law establishes zones which vary in the amount of restriction they place on the use of land. As stated in Policy 6.1.1, Council does not intend to apply very restrictive and detailed zoning in any area unless the residents of the area request it. However, council has established a basic level of zoning throughout the District of Chester. In addition to this general zone, this Municipal Planning Strategy defines specific unique zones for the Mill Cove Park area and four other specific zones which apply in various parts of the District…

7.8 GENERAL LAND USE

Most areas in the District of Chester have not asked Council to review the land use patterns in their area and provide specific detailed zoning. In these areas, Council intends to regulate those very large or potentially disruptive industrial developments which require an environmental assessment in accordance with the "Environmental Assessment Regulations" under the Environment Act. In those areas, Council also intends to regulate certain disruptive land uses, including those subject to regulation under the Environment Act and others identified by community groups.

To carry out this intention Council adopts the following policies:

7.8.1 All areas of the District of Chester which are not subject to other designations in this Municipal Planning Strategy are designated as "General Land Use" areas within which the land uses which are regulated are those land uses which require an environmental assessment under the "Environmental Assessment Regulations" as well as certain other major disruptive land uses and to establish in the Land Use By-law a corresponding General Basic Zone.

7.8.2 Within the General Basic Zone established by Policy 7.8.1, those land use which require an environmental assessment under the "Environmental Assessment Regulations" and those certain land uses contained in a Schedule to the Land Use By-law based on the Provincial "Activities Designation Regulations" are permitted only by Development Agreement in accordance with Policies 7.8.5, 8.0.4 and 8.0.5.

8.0.4

8.0.4 That when considering amendments to the Land Use By-law and in considering development agreements, in addition to all other criteria as set out in the various policies of this Planning Strategy, Council shall be satisfied that:

a) the proposal conforms to the intent of the Municipal Planning Strategy.

b) the proposal conforms to the applicable requirements of all Municipal By-laws, except where the application is for a development agreement when the Land Use By-law requirements need not be satisfied.

c) the proposal is not premature or inappropriate due to:
i) financial ability of the Municipality to absorb costs related to the development;
ii) adequacy of Municipal services;
iii) the adequacy of physical site conditions for on-site services;
iv) creation or worsening of a pollution problem including soil erosion and siltation;
v) adequacy of storm drainage and effects of alteration to drainage patterns including potential for creation of a flooding problem;
vi) adequacy and proximity of school, recreation, emergency services, and other community facilities;

vii) adequacy of street networks, on-site traffic circulation and site access regarding congestion, traffic hazards and emergency access, including fire vehicles;
ix) adequacy of on-site water supply for domestic consumption and for fire-fighting purposes;
x) inadequate separation from watercourses or inadequate separation from the ocean shoreline;
xi) proximity to areas of high archeological potential as identified on provincial government mapping

d) the development site is suitable regarding grades, soils, geological conditions, location of watercourses, flooding, marshes, bogs, swamps, and susceptibility to natural or man-made hazards.
e) all other matters of planning concern have been addressed.

8.0.5

8.0.5 Commercial, industrial or institutional developments may be permitted by development agreement, where provided for by specific policies elsewhere in this Municipal Planning Strategy, in accordance with the Planning Act and provided Council is satisfied that:

b) the development shall not generate emissions such as noise, dust, radiation, odours, liquids or light to the air, water, or ground so as to create a recognized health or safety hazard, and that the impact of such emissions on the development potential and value of properties in the vicinity has been minimized;

c) subject to the physical characteristics of the site, the development shall achieve optimum separation from adjacent properties which are not in commercial or industrial use, and screening in the form of fences, vegetation, or berms as appropriate shall be constructed or installed wherever possible in order to minimize impact on the abutting uses;

APPENDIX "B"

Preliminary Hearing – May 16, 2013

Standing Issue

[1] Both respondents (i.e., the Municipality and the wind farm developers) argued at length to the Board that Friends of South Canoe Lake and Homburg should not be granted standing as appellants. With respect to the matter of standing, the Board (in an order dated May 23, 2013, copy below), granted standing to both appellants. It said its written reasons would be included in the decision on the merits, unless any party requested that the Board render an earlier decision.

[2] At the conclusion of the hearing on the merits, Counsel for both respondents indicated that they would not require the Board's reasons for having granted standing to the appellants.

[3] However, the appellants subsequently asked that the Board provide reasons for its granting standing.

[4] In the circumstances, the Board has decided to make only brief reference to the reasons for its decision.

[5] In the course of the Board`s preliminary hearing on the matter, it heard submissions from all parties with respect to the significance of various decisions on standing by the Court of Appeal, the Supreme Court of Canada, and by the Board itself.

[6] The Board itself remarked toward the end of the preliminary hearing that it considered itself guided principally by the decisions of the Court of Appeal, and by the Supreme Court of Canada.

[7] The Board's ultimate decision to grant standing to Friends of South Canoe Lake and Homburg was based upon its interpretation of those cases. These included British Columbia Development Corporation v. Friedmann (Ombudsman), [1984] 2 SCR 447. In Friedmann, Mr. Justice Dickson, as he then was, defined "aggrieved person" as follows:

> I would hold that a party is aggrieved or may be aggrieved whenever he genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests, whether or not a legal right is called into question.

[8] Having weighed all of the evidence, as well as the case law, the Board satisfied itself that, on the balance of probabilities, Friends of South Canoe Lake and Homburg met the test appearing in the case law, and, in particular, the test stated in Friedman.

[9] Given that the finding by the Board was contrary to the interests of the Municipality and the wind farm developers, but they have nevertheless indicated that they do

not need reasons from the Board on the point, the Board considers it need not explore this issue further.

Order, May 23, 2013

IN THE MATTER OF THE MUNICIPAL GOVERNMENT ACT

-and-

IN THE MATTER OF AN APPEAL by Friends of South Canoe Lake ("Friends"), Richburg LP Management Inc. and Homburg Land Bank Corporation Limited (together, "Homburg") of a decision of Chester Municipal Council which approved Development Agreements with Nova Scotia Power Incorporated, Minas Basin Pulp and Power Limited and Oxford Frozen Foods Limited (together, "Developers") for the construction and operation of a 102 megawatt wind energy facility on lands in the South Canoe Lake area, near New Russell and New Ross

BEFORE: Wayne D. Cochrane, Q.C., Member

ORDER

WHEREAS the Friends and Homburg have both filed appeals to a decision by the Council approving development agreements with the Developers;

AND WHEREAS the Developers and the Municipality have applied to the Board for an order striking the Friends and Homburg as Appellants, on the grounds that they, in their opinion, are not "aggrieved persons" within the meaning of the *Municipal Government Act;*

AND WHEREAS the Municipality, supported by the Developers, has also asserted that the grounds of appeal put forward by the Friends, in their notice of appeal, are not adequate;

AND WHEREAS on May 16, 2013 the Board heard submissions on these and other issues (dealt with orally on that day) on behalf of all the parties in this proceeding;

THE BOARD finds as follows:

1 Aggrieved Persons Issue: Friends and Homburg

Having considered the submissions of the parties (including relevant case law, legislation, and evidence filed to the present date), the Board finds the Friends to meet the definition of "aggrieved person" under Section 191(a) of the *Municipal Government Act.*

The Board likewise finds Homburg to meet the definition of aggrieved person.

2 Grounds of Appeal Issue: Friends Only

The grounds of appeal put forward by Homburg were unchallenged by the Municipality or the Developers, and the Board has found (above) that Homburg has aggrieved person status. Accordingly, a hearing on the merits will (absent a successful appeal of the Board's decisions herein) proceed no matter what the Board decides on this second issue.

The Municipality challenged the grounds of appeal put forward by the Friends, and was supported in its argument by the Developers.

While the Board agrees that the grounds advanced by the Friends (who are self-represented, i.e., do not have a lawyer) are not perfectly framed, it has concluded that sufficient substance is contained within them to, in the circumstances of this proceeding, support their appeal. In particular, the Board considers that the Friends' identification of MPS Policy 8.0.5 b), in the context of minimization of emissions from the proposed development, is, in itself, adequate as a ground. The Board also considers that the oral and other submissions by the Friends, apart from the grounds stated in their notice of appeal, have provided significant fuller disclosure of concerns they wish to advance in this appeal.

The Board notes as well that Rule 8 of the Board's *Municipal Government Act Rules* permits amendment of documentation (including notices of appeal), with leave of the Board, thus permitting the deletion or amendment of grounds should that appear appropriate to the Board. At this time, in the circumstances of this proceeding, the Board sees no practical need for any such amendment.

The Board's reasons in full for these findings (on both aggrieved person status and grounds of appeal) will be included in the written decision to be rendered by the Board after the conclusion of the hearing on the merits; however, should a party or parties wish the Board's written reasons prior to the hearing on the merits, that wish may be communicated to the Clerk, and the Board will issue a written decision.

THE BOARD THEREFORE ORDERS that the hearing on the merits proceed, commencing on May 30, 2013.

DATED at Halifax, Nova Scotia, this 23rd day of May, 2013.

_____
Clerk of the Board