PROVINCE OF NEW BRUNSWICK
ASSESSMENT AND PLANNING APPEAL BOARD
REGION SEVEN

BETWEEN:

Liane Thibodeau, Vernon Esliger, Christine Esliger, Royden Brien, Doreen Stack, Joseph Stack, Joseph Aicker, Mary Jo Boyce, Susan Calvin, Rob Moir, Georgia Rondos, Edward Shedd, Susan Shed, Catherine Anne Walton, Sandra Wood, Wayne Roberts, William Gould, Jean MacDonald and Elizabeth Baxter,

Appellants

- and –

Royal District Planning Commission,

Respondent

- and –

Evergreen Homesites Inc.,

Third Party

Board: Scott R. MacGregor, Chairman
Pauline Cosgrove
Elva Sullivan

Appearances: For the Appellant: Liane Thibodeau for herself, Vernon Esliger, Christine Esliger, Joseph Stack and Sandra Wood

The Remainder of the
Appellants on their own behalf

For the Respondent: Patty McIntrick

For the Third Party: Matthew Hayes, Esq.

DECISION

This hearing comes before the Board as a result of a Notices of Appeal filed by the Appellants, dated September 27, 28, 29 and 30th, 2010 wherein the Appellants appeal the decision by the Respondent to approve certain public streets and private accesses, and accept the results of a comprehensive water supply assessment for a proposed subdivision off Route 845 in the Parish of Kingston, described as PID 30268312.

The hearing took place on February 1, 2011 and March 8, 2011 at Saint John, New Brunswick and after hearing from the parties and upon due deliberation, the Board made the following decision.

FACTS:

The Board admitted the following documents as Exhibits, which became part of the hearing record.

Exhibit	A-1	Liane Thibodeau Notice of Appeal, dated September 30, 2010
Exhibit	A-2	Vernon Esliger Notice of Appeal, dated September 29, 2010
Exhibit	A-3	Royden Brien Notice of Appeal, dated September 28, 2010
Exhibit	A-4	Doreen Stack Notice of Appeal, dated September 27, 2010

Exhibit A-5 Joseph Stack Notice of Appeal, dated September 27, 2010

Exhibit A-6 Joseph Aicker Notice of Appeal, dated September 30, 2010

Exhibit A-7 Mary Jo Boyce Notice of Appeal, dated September 27, 2010

Exhibit A-8 Susan Calvin Notice of Appeal, dated September 28, 2010

Exhibit A-9 Christine Esliger Notice of Appeal, dated September 29, 2010

Exhibit A-10 Rob Moir Notice of Appeal, dated September 30, 2010

Exhibit A-11 Georgia Rondos Notice of Appeal, dated September 27, 2010

Exhibit A-12 Susan Shedd and Edward Shedd Notice of Appeal, dated September 27, 2010

Exhibit A-13 Catherine Walton Notice of Appeal, dated September 27, 2010

Exhibit A-14 Sandra Wood Notice of Appeal, dated September 27, 2010

Exhibit A-15 Wayne Roberts Notice of Appeal, dated September 28, 2010

Exhibit A-16 William Gould Notice of Appeal, dated September 28, 2010

Exhibit A-17 Jean McDonald Notice of Appeal, dated September 27, 2010

Exhibit A-18 Elizabeth Baxter Notice of Appeal, dated September 28, 2010

Exhibit A-19 Department of Natural Resources Bedrock Mapping

Exhibit A-20 Descriptive Legend for Ex. A-19

Exhibit A-21 Photographs of rock face from Kennebecasis River

Exhibit	A-22	Report from Mark Connell, dated September 29, 2010
Exhibit	A-23	Space allocation for 48 housing units
Exhibit	A-24	Extract from *Designing Healthy Cities*
Exhibit	A-25	Submission of Wayne Roberts
Exhibit	A-26	Submission of William Gould
Exhibit	A-27	Submission of Rob Moir
Exhibit	A-28	Submission of Edward Shedd
Exhibit	A-29	Photographs of flooded area
Exhibit	A-30	Submission of Susan Calvin
Exhibit	A-31	Correspondence from Nason to the Board dated October 11, 2010
Exhibit	A-32	Correspondence from Dr. Melanie Hicks to the Board dated October 23, 2010
Exhibit	A-33	Submission of Christine & Vernon Esliger
Exhibit	A-34	Information concerning Clifton Royal Alpacas
Exhibit	A-35	Photographs of Route 845 (to the ferry)
Exhibit	A-36	Submission of Elizabeth Baxter
Exhibit	A-37	Clifton Rocks "Topographical Map"
Exhibit	A-38	Photographs of the Clifton Rocks area
Exhibit	A-39	Boyce photographs – Kennebecasis River
Exhibit	A-40	Submission of Liane Thibodeau
Exhibit	A-41	Space Allocation (Dr. Aicker)
Exhibit	A-42	Photographs of bald eagles and bird's nest

Exhibit	A-43	E-mail from Joanne Glynn (DOE) to Thibodeau, dated August 16, 2010
Exhibit	A-44	E-mail from Alan Kerr to Thibodeau, dated February 12, 2009
Exhibit	A-45	Photographs of well drilling site road
Exhibit	A-46	Geological Maps of Kingston Peninsula
Exhibit	A-47	Preliminary Report – Geology of the Kingston Peninsula
Exhibit	A-48	EIA Regulations
Exhibit	A-49	Long Island View Estates Information
Exhibit	A-50	Gregory's Point Information
Exhibit	A-51	Listings of waterfront properties in Greater Saint John and Kingston Peninsula
Exhibit	R-1	Royal District Planning Commission Submission, dated October 27, 2010
Exhibit	R-2	Notes of Karen Neville
Exhibit	R-3	Development Statistics – Kingston Peninsula
Exhibit	T/P-1	Redacted correspondence dated April 29, 2010 from Minister of Natural Resources
Exhibit	T/P-2	Aerial Plan of Kingston Peninsula
Exhibit	T/P-3	Curriculum Vitae of Matthew Alexander
Exhibit	T/P-4	Executive Summary for Comprehensive Water Study, July, 2010

The Third Party is the owner of a parcel of land on the southeast side of the Kingston Peninsula as shown on page 181 of Ex. R-1 outlined in red, and known as PID 30267686.

It was the intent of the Third Party to develop the property as a residential subdivision, and so began the process to obtain the necessary approval to carry this through.

The land lies within an area to which the *Provincial Subdivision Regulation – Community Planning Act* applies, and this makes provision for subdivision requirements:

STREETS

5(1) In a proposed subdivision, unless otherwise approved by the Minister of Transportation,

(a) every street shall have a width of twenty metres,

(b) a cul-de-sac shall not exceed one hundred and eighty meters in length and shall terminate with a circular area having a radius of eighteen metres, and

(c) no street shall have a gradient in excess of eight per cent.

5(2) Where entry will be gained to a proposed subdivision by means of an existing street or other access, by whomever owned, the person seeking approval of the plan of such subdivision shall make provision to bring the existing access to the same standards as is required for streets within the proposed subdivision.

5(3) Reserve strips abutting a street in a proposed subdivision are prohibited, except where such strips are vested in the Crown, a municipal or a rural community.

5(4) In arriving at a decision regarding a recommendation with respect to the location of streets in a proposed subdivision, the commission shall give consideration to

(a) the topography of the land,

(b) the provision of lots suitable for the intended use,

(c) street intersections and interceptions being as nearly as possible at right angles,

(d) the provision of convenient access to the proposed subdivision and to lots within it and

(e) the convenient further subdividing of the land or adjoining land.

2001-90; 2005-34

LOTS, BLOCKS AND OTHER PARCELS

6(1) Every lot, block and other parcel of land in a proposed subdivision shall abut

(a) a street owned by the Crown, or

(b) such other access as may be approved by the commission as being advisable for the development of land.

6(2) Where a proposed subdivision is to be serviced by both a water system for public use and a sewer system for public use, every lot or other parcel of land therein shall have and contain

(a) a width of at least eighteen metres

(b) a depth of at least thirty metres, and

(c) an area of at least five hundred and forty square metres.

6(3) Where a proposed subdivision is to be serviced by a sewer system for use by not by a water system for public use, every lot or other parcel of land therein shall have and contain

(a) a width of at least twenty-three metres,

(b) a depth of at least thirty metres, and

(c) an area of at least six hundred and ninety square metres.

6(4) Where a proposed subdivision is not to be serviced by a sewer system for public use, every lot or other parcel of land therein shall have and contain

(a) a width of at least fifty-four metres,

(b) a depth of at least thirty-eight metres, and

(c) an area of at least four thousand square metres.

6(5) Subject to subsection (6), a block shall not exceed two hundred and forty metres or be less than one hundred and twenty metres in length and shall have a depth of at least two lots.

6(6) Where a proposed subdivision plan lays out a series of crescents and cul-de-sacs, a block may exceed two hundred and forty metres in length if pedestrian walkways are provided in the number, location and width considered necessary by the commission to provide access or circulation to schools, libraries, playgrounds or similar facilities.

6(7) Where a building used for residential purposes is located on a lot meeting the requirements of subsection (2), the lot may be subdivided along any party wall of the building.

83-135; 99-65; 2001-90

APPROVAL OF A SUBDIVISION PLAN

7(1) Subject to subsection (2), the development officer may approve a subdivision plan.

7(2) The development officer shall not approve a subdivision plan if, in his opinion and in the opinion of the commission,

(a) the land is not reasonably suited or cannot be economically suited to the purpose for which it is intended or may not reasonably be expected to be used for that purpose within a reasonable time after the plan is approved, or

(b) the proposed manner of subdividing will prejudice the possibility of further subdividing the land or the convenient subdividing of adjoining land.

7(3) An approval under subsection (1) shall not constitute a warranty or representation that the land is suited or can economically be suited to the purpose for which it is intended and, without restricting the generality of the foregoing, shall not constitute a warranty or representation that the land is suitable or can economically be made suitable for any manner of on-site sewage disposal.

The Third Party met with the staff of the Royal District Planning Commission, (the "RDPC") which body has regulatory authority for the area, and made various proposals and staff made counter-proposals and suggestions regarding a proposed 48 lot subdivision.

Karen Neville, a planner/development officer with the RDPC testified that in April of 2010 the first tentative plan was submitted by Hughes Surveys on behalf of the Third

Party. This was duly forwarded to the Department of Transportation ("DOT") for their input and comments, as is the normal practice.

DOT replied that a revised plan would have to be submitted as there were not 2 accesses to the public highway.

As a result of a second tentative plan being submitted and further discussions with DOT, the surveyor and the Third Party, a final "tentative plan" was submitted to the RDPC (Item "F" of Ex. R-1).

Throughout this process, Ms. Neville is in consultation with other government departments. She had been to the site and could confirm as others had observed, that there was a "wetlands area" present.

On May 14, 2010 she writes to Joanne Glym at the Department of Environment ("DOE") requesting comments on water supply and wetland issues.

At the same time, the opinion of the Department of Health ("DOH") is requested on the subdivision plan, which would not be serviced by a public sewer system.

On June 21, 2010 the DOH replies that they have approved the site for on-site septic systems. For reasons unclear, the approval is for 41 lots, although the assessment report which is item "U" in Ex. R-1 states clearly that "all" of the lots are acceptable.

On June 29, 2010, Reed Hentze of the DOE advises Joanne Glym that he approves of the mapping of the wetland area and approval of the subdivision under the *Watercourse and Wetland Alterations Regulation* ("WAWA"), providing the 30 metre buffer along the Kennebecasis River, missing from the plan at the time, is shown.

In the intervening period, the Comprehensive Water Supply Assessment ("CWSA") prepared by Fundy Engineering had been reviewed by Dr. Gerard Souma at DOE, and he required further data to complete his review.

On August 9, 2010 Dr. Souma reports that the Fundy Engineering Report which he had questions about had been "…. entirely revised by Fundy Engineering in response to some clarification asked by NBDENV."

The summary of this correspondence from Dr. Souma indicates there is sufficient quantity of water for the development to proceed.

As to quality, he wrote:

> *"Water quality from the on-site wells that were sampled indicated exceedances for iron, manganese, ph, lead, barium and turbidity and standard treatment methods are available for these parameters. Water quality data from desktop analysis includes the potential for CDWQ exceedances for arsenic, which is health parameter that would require water treatment in order for the water to be considered potable. If development proceeds, all new wells should be thoroughly developed, disinfected and tested for general chemistry, trace metals and microbiology before being used by homeowners. This will determine if any specific parameters may require water treatments.*

> *If development of this subdivision proceeds, potential homeowners should be made aware of the possibility of low yielding wells and the potential need for water treatment so they can consider the costs involved."*

On August 30, 2010, the DOT advised Ms. Neville that the proposed intersections on the tentative plan were acceptable.

As set out in the *Provincial Subdivision Regulation*, the subdivision would need the approval of the members of the RDPC.

Ms. Neville prepared a Subdivision Report (the "Staff Report") dated September 21, 2010 and in evidence as Item "DD" in Ex. R-1, for use by the commission members, as is normal procedure.

This detailed report gave background to the application for approval of the tentative plan and the acceptance of the water supply assessment. It also set out the legislative provisions in play and made a recommendation.

In this case, the recommendation was to accept the result of the water supply assessment and approve the proposed public streets and private access, subject to conditions.

At the RDPC meeting on September 21, 2010, the Minutes of which are found at Item HH of Ex. R-1, a motion was passed to accept the recommendation of Ms. Neville:

- *The Planning Commission accept the results of the comprehensive water supply assessment prepared by Fundy Engineering to permit the development of the proposed subdivision*

    - *Based upon the Department of Environments concerns a disclosure statement should be placed on the face to the subdivision plan and in the deed/transfers to the new owners to address the subdivision water quality.*

- *The planning commission approve the location of the proposed public street Starboard Way, Port Way, Mainsall Way, Longboat Way, and Navigate Way, along with proposed private access Clifton Rocks*

    - *Clifton Rocks must be constructed to the minimum standards for the construction of private roads as per Appendix 2 of the Royal District Planning Commission Lot Creation on Private Roads Policy*
    - *The applicant must create a legal agreement of the ownership and maintenance to the private access.*
    - *The applicant must have a stormwater management plan to address the stormwater running off of lots 39, 40 and 41 and the private access.*

It is from this decision that the Appellants now appeal.

DECISION:

By way of preliminary matters, and as is the practice of this Board, the Appellant was questioned as to the statutory provisions relied upon in bringing the appeal before the Board. This is done to establish both the procedure to be followed in light of the provisions of section 7 of the *Provincial Planning Appeal Board Regulation*, and also to ensure a valid basis for appeal is not defeated through technical irregularity.

It was the advice of the Appellants that the appeals would go forward both on the grounds of "misapplication" and "special or unreasonable hardship".

As with any administrative tribunal, this Board is a creature of the legislature and as such has only as much authority as the legislation provides.

In the instant case, this matter comes before the Board pursuant to Sec. 86(2) of the *Community Planning Act* which provides:

> 86(2) Subject to subsection (3), any person including the Director may appeal to the Board if he alleges that
>
> (b) the approval of another person's regional or other development or the granting of a permit under this Act to such person
>
> (i) resulted from misapplication of this Act or a by-law or regulation hereunder, or
>
> (ii) would cause the person so alleging special or unreasonable hardship by reason of the effect of the proposed regional or other development on his land, building or structure;

The evidence before this Board is that the Respondent approved the development proposal of the Third Party.

The Board therefore has jurisdiction to hear these appeals under Sec. 86(2)(b)(i) and 86(2)(b)(ii).

Sec. 86(2)(b)(i) – Misapplication

Of the appeals filed, some alleged "special or unreasonable hardship" under Sec. 86(2)(b)(ii) and some alleged "misapplication" under Sec. 86(2)(b)(i), and some raised both grounds of appeal.

Since "misapplication" does not relate to an individual property but rather to a collective concern in this case, the Board will address these allegations on that basis.

These Appellants have argued there has been a misapplication by the RDPC, pursuant to Sex. 86(2)(b)(i), the wording of that section having been set out *infra*.

It is clear the Board has legislative authority to examine how planning officials reach their decisions. In *Acadian Peninsula District Planning Commission and Robert Branch v. New Brunswick Provincial Planning Appeal Board and Fernande Dugas*, (1997) 184 N.B.R. (2d) 241, at page 268, Deschênes, J. had this to say about the issue of a planning commission which had interpreted how to measure the height of a fence:

> "As we saw earlier, the APDPC granted the building permit based on its interpretation of the municipal bylaw and of certain provisions of the *Act*. Consequently, the Appeal Board had to decide whether or not the APDPC had misinterpreted these provisions and if the permit had been granted as a result of "misapplication" of the *Act* or a municipal by-law. In my view, this duty lies at the heart of the Appeal Board's jurisdiction since this is specifically the mandate the Legislature had given the Board. In short, it is for the Appeal Board to resolve these questions because the Legislature had asked it to."

Furthermore, the role and authority of this Board was examined in the appeal of that case to the New Brunswick Court of Appeal, reported as *Acadian Peninsula District Planning Commission and Doctor Robert Branch v. The New Brunswick Provincial Planning Appeal Board and Fernande Dugas*, (1998) 190 N.B.R. (2d) 137. At page 152 of that decision, Bastarache, J. A. (as he then was) stated:

> "….the jurisdiction of an administrative tribunal extends to questions of law, and in particular to the interpretation of its enabling legislation and related statutes. This is all the more obvious in the case of a specialized tribunal like the Provincial Board, whose specific mandate is to interpret and apply the *Act* and the bylaws adopted thereunder."

The procedure to be followed when the basis for appeal is **misapplication** is set out in Sec. 7 of Regulation 84-59 to the *Community Planning Act*:

> 7. The onus of supporting an appeal shall be upon the person appealing in the case only of his appeal falling within subparagraph 86(2)(a)(ii), (b)(ii) or (c)(ii) of the Act.

These subsections relate to appeals which are based upon hardship and will be addressed later in this decision.

The responsibility therefore to make the case that there has not been any misapplication, falls upon the Respondent.

It has been alleged that the RDPC misapplied the *Community Planning Act* (the "*Act*") because there was no notice given of the meeting at which the approval of this development was to be discussed and voted upon. These allegations were raised in the Notice of Appeal, and also at the hearing.

Neither the *Act* nor any regulations to it require that any such notice be given, and this was made clear by the Board at this hearing.

This argument cannot succeed and is not the basis for a successful appeal.

It is the responsibility of the members of the RDPC to determine whether or not a subdivision should be approved. In doing so, the members shall give consideration to Sec. 5(4) of the *Provincial Building Regulation*, and also Sec. 7(2) of the same regulation.

In addition, the RDPC has adopted *Water Supply Assessment Guidelines* ("WSAG") that apply to the provision of potable water to subdivisions serviced by individual private wells, which would be the case in this proposed development.

It is the responsibility of the RDPC staff to ensure that there is sufficient information in the hands of the commission members when they must make their decisions.

It is acknowledged that Ms. Neville made an erroneous choice of nomenclature in describing the bedrock geology of the site. We find this to be a minor matter, as Dr. Matthew Alexander, the testimony of whom we shall discuss later and is clearly an expert in this field, told the Board that no matter what you called this bedrock geology, it's a hard, fractured bedrock with varying depths of surface soil, and common to southwest New Brunswick.

Changing the name would not affect any recommendations on water supply or source, or suitability.

What Ms. Neville did do correctly was consult, as she is expected to do, with government departments who have responsibility for various components of the proposed development, and which have the resources and expertise to advise on just those areas.

This included the DOT, DOH and DOE, and we would note that the Staff Report she prepared is an accurate reflection of those opinions and illustrates that all due diligence was carried out by those departments, and that the reports indicate the search for the background information upon which to base the conclusions was thorough, and does not, as the Appellants have alleged, point to inaccuracies or incomplete information.

The Appellants have argued that somehow seeking the opinion of these departments was an abdication of the RDPC's responsibility. Nothing could be more wrong; the RDPC did exactly what it is supposed to do and it is unreasonable to suggest the RDPC have on staff, people with the expertise that exists in these government departments.

Several issues were discussed at length, including much evidence of the "mound" septic systems. This was of very little relevance, other than to inform, because the DOH had approved the site for this type of septic system and, at this stage, would be the only type of approval the RDPC would need to have.

A similar problem arose with the discussion of the water availability at the site. What must be kept in mind is that the DOE, at the end of a complicated process which sent Dr. Souma back to Fundy Engineering for more information, signed off on the water issue.

Presumably, this is because there had been compliance with the WSAG, and that Fundy Engineering had completed the comprehensive water supply assessment report as it mandates. It must also be kept in mind what the RDPC may do, as set out in Policy 5(e) of the WSAG.

> 5(e) Not approve the development if there are significant concerns on the site or the immediately surrounding area, which cannot be satisfactorily alleviated or mitigated.

Based upon this policy, there is nothing in Dr. Souma's correspondence of August 9, 2010 which would lead a reasonable person to conclude there were any "significant concerns", let alone concerns which could not be alleviated or mitigated.

Richard Turner of Hughes Surveys told the Board that his company had been responsible for preparing the tentative subdivision plan before the commission members. It had

been a work-in-progress involving surveyors and engineers, and the developer and DOT to not only comply with DOT requirements but also cause as little damage and to have to move as little material as possible.

For example, he explained the roadways were designed to go around rock outcroppings as much as possible rather than blasting through.

In those instances where it was necessary to "cut" the terrain, he testified the material created would be used as "fill" in creating the roadways.

This, he said, is both easier and less costly, and creates less need for hauling material to and from the site.

Again, all of this is very informative, but as far as the process to be followed by the commission members is concerned, DOT had approved the points of access and street layout.

The Board heard extensive evidence from Matthew Alexander, on behalf of the Third Party. He is the holder of a PhD in Civil Engineering and is the Senior Environmental Scientist/Hydrogiologist with Fundy Engineering. He prepared the comprehensive Water Supply Source Assessment ("WSSA") report for the Third Party that was used by DOE in the consideration for approval of the development.

He has extensive experience in water supply, and wetland assessment and delineation. The Board found his evidence to not only be knowledgeable and credible, but given in such a manner that everyone could understand it.

He clarified the issue of the bedrock geology. No matter what you labelled it, it was a hard fractured rock that was suitable for a proposed subdivision. There was sufficient water and great care is taken to design storm water runoff systems to address those issues.

The wetland area had been carefully measured and the appropriate buffer in place.

He was very familiar with the site and opined that the mound septic systems would be suitable there, but noted each septic system would have to be designed and approved by DOH when a home was constructed.

He also told the Board that strictly enforced regulations maintained separation between wells and septic systems, and the lots in the proposed subdivision were more then large enough to ensure this separation.

Again, his evidence was more for information and clarification purposes, as the RDPC would have had before it the report of Dr. Souma when it made its decision, and was clearly entitled to act upon it.

May of the Appellants had made reference to the blasting to be required, and the noise and damage that it would cause.

The evidence was not in support of any of these allegations.

Dr. Alexander told the Board that there should not be much need for blasting because the roads had been designed to, as much as possible go around rock outcroppings rather than through them.

He had been actively involved in projects where blasting had occurred. The noise was described as a muffled "thump" and that was about it.

Mr. Peacock, who has extensive experience in the construction business in the Saint John area where blasting is often employed, used the same terms to describe the blast. He noted the process is strictly controlled, and he expected there to be only 5 or 6 blasts in Phase I of the development, and a few more in Phase II.

He told the Board that the heavy rock made the blast fairly easy to control.

We are satisfied that after 2 days of hearing evidence and viewing plans and photographs that we have a better understanding of the site terrain. As Dr. Alexander and Mr. Peacock, the developer, have stated, this is much like a lot of the terrain in southwestern New Brunswick. It is a hard rock covered with anywhere from a few inches of soil, to a few feet.

It does not just slope sharply downhill from the road to the river, as some of the Appellants' photographs from the river portrayed. It rises from the roadway until it levels off to rolling terrain, including the wetland, and then begins to slope toward the river.

We have no doubt the commission members were fully aware of the topography when they made their decision, and we find there is nothing to suggest any sort of "misapplication" by them in finding this site is reasonably suited for the intended purpose.

Indeed, in the face of the various approvals from the government departments whose opinion Ms. Neville had solicited, it would have been unusual that they find otherwise.

The *Provincial Subdivision Regulation* however goes beyond the requirement that the RDPC find the lands "reasonably suited" for the intended purposes.

It must also determine whether or not the land "…. cannot be economically suited…" for its intended purpose.

The Board heard a lot of opinion from the Appellants that this development would never work, that people would not move to the area because of the long commute, that smaller attempts at development in the area had failed, etc.

There were real estate listings regarding existing homes for sale (on the argument, we gather, that a person could buy something similar, closer to Saint John).

Ms. Neville produce statistics pointing to a fairly high level of development activity, although there was detail lacking as to whether these were in regard to a few large projects, or many small ones.

We are not of the opinion that Sec. 7(2) of the *Provincial Subdivision Regulation*, which makes reference to economic suitability, could even reasonably be construed such as to compel a local planning commission to initiate a development study or economic feasibility study upon an application for a subdivision plan.

By definition, these are in rural areas of New Brunswick and the commission members would only have to consider whether or not land in question has some very obvious higher and better use than that proposed, and which would also accommodate the wishes of the developer.

These commissions would only be expected to make the most cursory examination of the economic aspect as no one could project the financial success or failure of a land development project which is likely to take several years to reach potential.

We note that not only is this framed in the legislation as a negative proposition (the planning commission must find the lands are <u>not</u> economically suited), but Sec. 7(3) makes it clear that the approval of the subdivision is <u>not</u> a warranty or representation that the lands in question actually can be economically suited for the intended purpose.

In this case, there was no evidence before the RDPC that these lands are not economically suited for their intended use, and we have no reason to believe the commission members have misapplied the *Act* or any regulations thereunder in granting the approvals they did.

There has also been considerable talk of the presence of bald eagle nests on the site. The commission members had no evidence before them that this was the case.

Although we have the greatest respect for the concerns raised by the Appellants as regards the process throughout the decision to grant the approvals which lead to these appeals, it is the decision of the Board that there has not been any misapplication by the RDPC as set out in the *Act*, and all of the Appeals are dismissed as regards this ground of appeal.

Sec. 86(2)(b)(ii) – Special or Unreasonable Hardship

Several of the Appellants alleged the appeals should be granted on the basis of Sec. 86(2)(b)(ii) of the *Act* in that the approval….

> *(ii) Would cause the person so alleging special or unreasonable hardship by reason of the effect of the proposed regional or other development on his land, building or structure.*

We will try our best to address each of these individually, but would be remiss not to point out that *Act* requires that the hardship be to the "*land, building or structure*" of the person making the allegations.

There has been a significant body of jurisprudence established by the Provincial Planning Appeal Board on what is commonly referred to as "hardship".

Chamberlain v. Planning Advisory Committee – City of Bathurst [1974] 16 P.P.A.B.D. has often been cited by the Provincial Planning Appeal Board as setting down an appropriate test in determining whether or not there is a special or unreasonable hardship.

This test is cited with approval by this Board as being defined as:

> **some trial, oppression or need, or something hard to bear, different from that which is usual or ordinary or that is not based on or in accordance with reason or sound judgement.**

The Provincial Planning Appeal Board has subsequently added to this test the restriction that it only apply to an Appellant who stands before the Board an innocent victim of circumstances beyond his/her control and not of his/her making which are causing him/her the special or unreasonable hardship. It has also held that evidence of mere inconvenience or the preference by the developer of one development option over other viable development options does not bring the appellant within the parameters of the term special or unreasonable hardship.

This refinement of the test is in all respects, approved of and will be applied by this Board.

Wayne Roberts marked the location of his residence on the tentative subdivision at the request of the Board. It is near the Kennebecasis River, but a considerable distance from the closest lots (43 and 44). He was concerned that the septic systems would (or could) leak and this effluent would run downhill to affect his property.

Putting aside the fact that any fluid that comes off this property would ever reach Mr. Robert's property because of the strict roadway construction specifications and storm runoff plans, there is no evidence to conclude the proposed septic systems are going to malfunction.

Indeed, by all accounts, the mound systems are state-of-the-art and while there is never any guarantee that some act of God may occur that might affect these systems, the evidence presented by Mr. Roberts does not rise to the standard of "special or unreasonable hardship" as set out in the *Act* and recognized by the Board.

His Appeal is therefore dismissed.

William Gould had concerns similar to these of Mr. Roberts. He fears that a heavy rain will wash down the "mountain" and damage his property and affect his own septic system.

Again, the Board has heard extensive evidence on the provisions for septic systems and storm water runoff and there is no evidence to support the allegations of special or unreasonable hardship.

His Appeal must also be dismissed.

Elizabeth Baxter lives on Route 845 and testified to her concerns that there would be an increase in traffic as a result of the development of the subjection, and the additional traffic from residents.

She feared for the safety of the children who travelled on the school buses on this secondary road.

While we don't doubt the passion of Ms. Baxter's concerns, the reality is that there is no connection between these and the affect the proposed development may have on her lands, buildings and structures.

As such, the Appeal must fail in its allegations of special or unreasonable test as they do not comply with the requirements of the *Act*.

Vernon and Christine Esliger live on Williams Road, about 3/4 kilometres from the subdivision site. They raise alpacas and are concerned that the blasting known to be necessary during the construction phase will affect their animals.

There was placed in evidence a letter from Dr. Melanie Hicks, a veterinarian and alpaca breeder from Moncton who shared Ms. Esliger's concerns if there were explosive blasting of rock at the site.

We have had no opportunity to question Dr. Hicks, nor has counsel for the Third Party. We do not know if she has ever been to the Esliger property or is aware of the distance and trees which separate these properties.

We do not know whether she is aware that the alpaca farm is across the road from the government garage which generates, according to Ms. Esliger, "a lot of noise."

The local firehall is also there, and Ms. Esliger acknowledged there is a lot of activity in the area from snowmobiles and hunters shooting rifles.

Dr. Hicks did not hear the evidence of those with experience in blasting that the residual noise is a "thump" sound, and that the blasts are strictly controlled and there will only be several of them.

Considering all of this, and Dr. Hicks' opinion that the "…… heavy construction involving loud noises in close proximity to the Clifton Royal Alpaca Farm may cause stress in the alpacas……", it would be impossible to conclude that these allegations meet the test for a special or unreasonable hardship to the lands, buildings or structures of the Esligers.

These appeals are also therefore dismissed.

Susan Calvin lives on Moss Glen Shore Road, and the property is shown on Ex. T/P-2. This is a long way from the subject and equally important is that the effects Ms. Calvin described that affected her property were from operations on land that lie between her property and Route 845, and are not connected to the proposed site.

Ms. Calvin told the Board she rents two cottages at this location, and people come there to enjoy the peace and quiet. She is concerned the basting and construction will destroy this, and have a negative impact on her business.

We have no evidence that what Ms. Calvin alleges is more than conjecture. We have heard from people with experience in blasting that the noise is minimal and we have serious doubts that the sound described would even be heard from the Calvin property.

There is no evidence to substantiate her allegations that storm water from this site will find its way over to her property. In fact, all of the evidence is to the contrary.

There would never be any development in this province if the Board found that such speculation, and unsupported evidence of "hardship" could be the basis for overturning decisions made by local planning commissions which, after all, are charged with planning in their areas.

It is our decision that these allegations do not rise to the level to be found to be a "special or unreasonable hardship", and this appeal is also therefore dismissed.

Although Mary Jo Boyce did not allege "hardship" in her appeal, she made reference in her testimony of the effects of the proposed development. It was noted she does not live on the Kingston Peninsula, but has a proprietary interest in land at Mathers Island, in the middle of the Kennebecasis River, opposite the peninsula.

We do not doubt the sincerity of Ms. Boyce's concerns, but her complaint that her view of the peninsula from the island would be affected is not even close to the standards imposed to find "special or unreasonable hardship". Similarly, although everyone shares the concerns about the health of the Kennebecasis River, there is no evidence that the proposed subdivision will have a negative effect on the river, and of course the question would still remain whether Ms. Boyce can allege "hardship" if there were to be damage done to the river and if this constitutes damage to her lands, buildings or structures.

This is a moot point however, as there is no evidence to support the allegations made by Ms. Boyce, and her appeal is also therefore dismissed.

We appreciate all the time, passion and effort made by the Appellants. We are confident they have had every opportunity to express to the Board their concerns and have had, by any standard, a full and fair hearing.

The reality is however that they have not been able to provide sufficient evidence to warrant the granting of any of these appeals, and they are all dismissed as to the grounds alleged.

Dated at Fredericton, New Brunswick this 14th day of March, 2011.

_____

Scott R. MacGregor
Chairman
Assessment and Planning Appeal Board