

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 06, 2017

CASE NO.: PL150313

PROCEEDING COMMENCED UNDER subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Burleigh Bay Corporation
Subject: Proposed Plan of Subdivision - Failure of the County of Peterborough to make a decision
Purpose: To permit a 60 unit waterfront vacant plan of condominium together with common elements
Property Address/Description: Part Of Lots 3, 4, 5 And 6 Concessions I and II
Municipality: Township of North Kawartha
Municipality File No.: 15CD-03001
OMB Case No.: PL150313
OMB File No.: PL150313
OMB Case Name: Burleigh Bay Corporation v. North Kawartha (Township)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Burleigh Bay Corporation
Subject: Application to amend Zoning By-law No. 66-1996 - Refusal or neglect of the Township of North Kawartha to make a decision
Existing Zoning: Rural Zone
Proposed Zoning: Shoreline Residential Exception Eleven (SRE-11) Zone; Special Community Facility (SCF) Zone; Shoreline Natural Environment (SNE) Zone; Special Major Recreation Open Space (SOS) Zone; Limited Institutional (LI) Zone and Environmental Constraint One (EC-1) Zone
Purpose: To permit 60 single detached residential units, to recognize the proposed vacant land condominium development and to provide special regulation for controlling development and the protection of wetland features
Property Address/Description: Part Of Lots 3, 4, 5 And 6 Concessions I and II
Municipality: Township of North Kawartha
Municipality File No.: NK02-06P

OMB Case No.: PL150313
 OMB File No.: PL150323

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Burleigh Bay Corporation
 Subject: Request to amend the Official Plan - Failure of the Township of North Kawartha to adopt the requested amendment

Existing Designation: Rural Zone
 Proposed Designated: Restricted Shoreline Residential; Restricted Recreation-Open Space; Private Community Facility; Shoreline Conservation and Provincially Significant Fraser Property Wetland Complex

Purpose: To establish a Burleigh Bay Corporation Special Policy Area to facilitate the proposed 60 single detached residential units

Property Address/Description: Part Of Lots 3, 4, 5 And 6 Concessions I and II
 Municipality: Township of North Kawartha
 Approval Authority File No.: NK02-06P
 OMB Case No.: PL150313
 OMB File No.: PL150322

Heard: September 13-16, 19-23, 26-30 and October 3, 2016 in the Township of North Kawartha; and October 4-11, 2016 at Curve Lake First Nation Reserve No. 35.

APPEARANCES:

Parties

Burleigh Bay Corporation

Township of North Kawartha

Friends of the Fraser Wetlands Inc.

Curve Lake First Nation

Counsel

Jonathan Wigley
 John Nehmetallah (Student-at-law)

John Ewart

David Donnelly
 Anne Sabourin

David Donnelly
 Anne Sabourin
 Kristina Matveev (Student-at law)

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE BOARD

INTRODUCTION

[1] The matter before the Board is a dispute relating to a proposed development on a 273 hectare site with approximately 6.2 kilometres of lakeshore frontage on the North Shore of Stony Lake (also known as Stoney Lake), (the “Site” or the “BBC Lands”) within the Township of North Kawartha (the “Township”) and the County of Peterborough (the “County”).

[2] The project has been in the planning stages in varied forms for many years, first with prior owners, and eventually the current owner of the Site, the Applicant, Burleigh Bay Corporation (“BBC”). The first applications for amendment to the Official Plan and the Township’s Zoning By-law were made in November of 2002, almost 14 years before this hearing began, and the application for a residential plan of vacant land condominium was submitted to the County in May of 2003.

[3] Revisions to the applications were made in October and November of 2012, and the applications were then, as asserted by BBC, “resubmitted” at that time. Notwithstanding the position taken by BBC, with the delays and the amendments to the Development, the application process was essentially begun anew with new and updated reports and further public consultation. Changes to the final form of the proposed Development continued to the point of the hearing of the Appeals by the Board.

[4] The proposed project as it is now presented to the Board would see the implementation of Plan of Condominium with 58 building lots which would include a network of roads, private driveways, private septic systems, storm water infrastructure, various related improvements and maintenance areas, and living and recreational units for maintenance personnel and BBC owners and guests. Also integrated into the project are a number of common core areas (“Core Area(s)”) including the primary lakeside recreational area (Core Area 1) in a sheltered area of the lakeshore adjacent to two islands, which would include a clubhouse, tennis courts, swimming pool, parking,

beach and a 72 slip marina within a designated lake lot. Collectively, all aspects of the project will be referred to as the “Development”.

[5] The appeals before the Board were initiated by BBC as a result of the failure of the Township and the County to make decisions regarding BBC’s planning applications which were as follows:

1. BBC made application under s. 17, 21 and 22 of the *Planning Act* (“Act”) for an amendment to the relevant Township Official Plan (“Township OP”) for the Development. The Township OP amendments would change the Site from Rural to six alternate designations in areas related to the spatial layout of the Plan, being: Restricted Shoreline Residential; Recreation-Open Space; Shoreline Conservation and Provincially Significant Fraser Property Wetland Complex. A Burleigh Bay Corporation Special Policy Area would be created.
2. An application under s. 34 of the Act was made for the necessary amendments to the Zoning By-law (“ZBL”) which zoned the Site as Rural. (When the application was first made in 2002 the applicable ZBL was By-law No. 66-1996, and the current ZBL is By-law No. 26-2013). The amendments would provide for Shoreline Residential Exception Eleven (SRE011); Special Community Facility (SCF Zone); Shoreline Natural Environment (SNE) Zone; Special Major Recreation Open Space (SOS) Zone; Limited Institutional (LI) Zone; and Environmental Constraint One (EC-1) Zone special community designations and create a special policy area.
3. BBC’s underlying plan of condominium application to the County requested approval of the Draft Plan of Vacant Land Condominium (the “Plan”) under s. 51 of the Act initially for 60 Development lots. This was subsequently altered to the revised form of the Plan containing 58 lots as presented to the Board.

[6] Subsequently, Municipal Council for the Township formally considered the applications and, by Resolution dated May 26, 2015, directed the municipal solicitor to

oppose the appeals filed by BBC as being in the best interests of the Municipality. The Township accordingly appears before the Board in opposition to the applications.

[7] In addition to the appellant BBC, and the Township, the other two Parties identified and recognized at the Pre-hearing conferences were Friends of the Fraser Wetlands Inc. (“FFW”) and Curve Lake First Nation (“Curve Lake”). The County elected not to appear at the hearing. FFW and Curve Lake were represented by the same counsel but as noted herein, although both Parties were in agreement on many issues, their respective interests and the evidence led on the different issues was not combined and the Board received independent evidence and closing submissions from each Party.

[8] The broad question to be decided by the Board is whether the Development, either in its proposed, or an alternative form, represents good planning. In that regard the Board must decide whether the Development is consistent with the 2014 Provincial Policy Statement (the “PPS”); as may be applicable, is in conformity with County Official Plan (“County OP”) and conforms to the policy regime of the Township OP; is compatible with the adjacent land uses; and will allow for the conservation of the natural and cultural heritage features of the subject Site and adjacent lands. There are two related planning issues. The first question is what should be considered by the Board (and the application of the Clergy Principle) due to the changes in the OPs that have occurred over the rather significant length of time that has elapsed since the first applications were filed by BBC. The second issue is whether the test to be applied in considering the PPS is “have regard to” as contained in the earlier version of the *Planning Act* and PPS or “consistent with”, as it currently exists within the *Act* and the PPS. The specific issues before the Board are outlined in more detail below.

[9] The Board heard evidence on all issues and planning concerns but the two primary areas of dispute relate to: (a) environmental and natural heritage concerns, primarily as expressed and advocated by FFW; and (b) archaeological and cultural heritage concerns relating to First Nations archaeological sites and artifacts, primarily as raised and argued by Curve Lake. The 19-day hearing drew a consistently large

contingent of concerned local residents of the Stony Lake area as led by the FFW and there was also significant public interest from the member residents of Curve Lake.

PRELIMINARY MATTERS – PARTICIPANTS, VENUE AND FIRST NATIONS OATH

[10] Before delving into an analysis of the issues and evidence it is necessary to address a number of preliminary matters and motions considered and determined by the Board at the outset of the hearing.

Participants

[11] Notwithstanding the fact that the Participants and Parties for this hearing had already been predetermined by the Board in the course of the three Pre-hearing conferences, in the weeks prior to the hearing the Board was contacted by three additional First Nation entities who advised that they would be requesting status before the Board as Parties or alternatively, as Participants. Upon further inquiry at the commencement of this hearing Alderville First Nation confirmed that it was not seeking formal status but wished to formally support Curve Lake's position in the proceeding. The Hiawatha First Nation and the Mississaugas of Scugog Island First Nation advised the Board that they were content to seek Participant status. The Parties did not object and accordingly these two additional First Nations were granted Participant status, with the direction from the Board that they provide written witness statements to the Board prior to 2 p.m. on Friday, September 16, 2016, consistent with the requirement imposed upon the other recognized Participants. This was done.

[12] The Board had the benefit of the prior organization and collective efforts on the part of the numerous Participants identified in the Procedural Order issued by Board such that the number of Participants testifying to the Board was reduced to twelve, with representatives presenting a common statement on behalf of the others. One other additional Participant was confirmed. The list of persons and the associations and entities granted status as Participants in the hearing are listed in Attachment 1 to this decision.

Venue

[13] The Board heard a preliminary motion from Curve Lake requesting a partial change of venue. This issue had been raised at a prior Pre-hearing conference. The motion requested that the latter portion of the hearing relating to the archaeological and cultural evidence to be introduced by Curve Lake be relocated to the Curve Lake First Nation Reserve. Submissions were provided by the Parties primarily related to the balance of convenience. The request by Curve Lake was also based upon the submission that various directives from the courts, and in particular the Federal Court, emphasized the importance of sensitivity to the interests of First Nations and that the interests of Curve Lake should be accommodated to allow for elders and other residents of their community to hear the evidence on their Reserve lands. One Curve Lake witness also had medical issues that restricted travel.

[14] Notwithstanding the Board's usual policies and practice that hearings be held at a convenient location within the subject municipality's boundaries as selected by that municipality, the Board was not opposed to this request. However there was still some concern regarding issues of inconvenience and possible prejudice to the other local residents and members of the public and, as well, the possible impact that such a relocation might have on the scheduling and order of presentation of BBC's witnesses. FFW supported Curve Lake's request to hear a portion of the evidence on the Curve Lake First Nation Reserve. Other than the concerns that the orderly presentation of the evidence might be affected, neither the Township, nor BBC, objected strenuously to the partial relocation of the hearing.

[15] After hearing submissions the Board found the division of the hearing between the two venues to be appropriate and convenient under the circumstances and ordered that the archaeological and cultural heritage witnesses presented by Curve Lake would be heard on the Reserve in the last week of the hearing, but that the archaeological evidence of BBC would be presented as part of its case at the municipal hearing location. The Parties agreed that closing arguments would follow the evidence heard on the Curve Lake Reserve in order to avoid the necessity of again relocating the conclusion of the hearing. In the end, the logistics of the hearing, including the site visit

by the Board, were accomplished, and with the appreciation of the Board, was without incident and conducted with great efficiency due to the cooperation of all Parties, the planners, and the municipal and Curve Lake staff.

First Nations Oath

[16] One other practical issue arose in the course of the hearing. Due to the participation of Curve Lake as a Party, and the intended presentation of their evidence, it was apparent at the outset of the hearing that a number of First Nations witnesses would be testifying before the Board. Cognizant of the fact that the Federal Court and the Ontario Superior Court of Justice have recently recognized the importance of permitting First Nations individuals to swear an oath sensitive to their spiritual and cultural beliefs and, in anticipation of such witnesses attending the hearing, the Board reviewed the appropriate oath to be administered to accommodate First Nations' witnesses. The oath was accordingly administered to a number of the Curve Lake witnesses, who provided the traditional eagle feather held by them as they testified.

[17] For clarity and future use, appended to this Decision as Attachment 2, is the form of oath which the Board, and other tribunals of ELTO, now formally adopts as being available for those First Nations witnesses wishing to be sworn in this manner.

CONTEXT – THE COMMONALITY OF WATER IN THE EVIDENCE AND ISSUES

[18] Identifying the context of a proposed Development is always important in the analysis of the evidence, but in this case, due to the evidence received by the Board in this hearing, it is necessary to address a number of matters of context beyond what is ordinarily prefaced in regards to geographic and planning context. In these appeals there are a number of contextual realities which relate, in various ways, to water and it would not be an overstatement to say that the prime element of “water” is a significant commonality that could be seen to be flowing through much of the issues and evidence in this hearing.

[19] This water-related context is of significance because of the extent to which the PPS contains a number of key policies relating directly, or indirectly, to water, which are

further reflected in the County OP. In the PPS this includes the primary policy relating to “Water Resources” (s. 2.2) but, as well, “Sewage, Water and Stormwater Services” (s. 1.6.6), and provincially identified Significant Wetlands in “Natural Heritage” features and areas of the Province (s. 2.1). These provincial policies relating to water are accordingly of some significance in the consideration and analysis of the evidence and issues before this Board.

Stony Lake

[20] Stony Lake is regarded as a beautiful, and in some respects, unique, body of water located at the eastern end of the Kawartha Lakes system in Ontario’s cottage country. The lake is also part of the Trent-Severn Waterway system designated as a National Historic Site under the jurisdiction of Parks Canada. It is not disputed that Stony Lake itself, and the existence of this undeveloped 6.2 kilometre shoreline Site motivated the concept and form of the proposed Development as a waterfront condominium subdivision of recreational properties and the subject matter of the Development applications brought before the Township and County.

Provincially Significant Wetlands

[21] The proximity of the Development to, and the interspersing of the Lots and the communal elements of the Development in and around, two important water habitats—the Provincially Significant Wetlands (“PSW”) known as the Fraser Provincially Significant Wetlands Complex (“Fraser PSW Complex”) and the Fairy Lake Wetland Complex (“Fairy Lake PSW Complex”)—has been a significant focus of the evidence in this hearing and one of the most relevant contextual elements for consideration by the Board. Specifically the Board must address the impact of the proposed Development on these integral and adjacent PSW habitats as provided for in the PPS. The more detailed contextual aspects of the PSWs are addressed separately below.

Water-Based Wildlife and Plants

[22] A multitude of animal, amphibious, bird and plant species are all connected to these water habitats in, and around, the Site. Some of these species are species at risk, including the apparently shy Blanding Turtle, about which a sizeable portion of the evidence has been devoted. Additionally, the waters of West Bay, recognized to be Muskellunge spawning waters, are to be almost completely surrounded by the proposed Development and also feature prominently in the presented evidence. The Development is in direct proximity to many water-related wildlife habitats and, for the purposes of context, the entirety of the Development Site is itself part of these wildlife habitats.

Water Services, Storm Water and Hydrology

[23] The source of water from the underground aquifers in the Cambrian Shield rock lying beneath the Development, required to service the lots, and to supply the owners who will buy these lots, has also been the subject of conflicted testimony. So too is the potential impact of removing that ground water upon neighbouring wells or the surrounding environment and the creation of storm water runoff from the roads and infrastructure of the Development. The manner in which septic services will return water back to the surrounding waters, aquifers and water-based ecological systems is an issue, as is the concern of contamination and impact upon those water systems.

Other Water-Related Context

[24] Many other elements or potential effects of the Development relate directly to water, such as: the inclusion of Development buffers and conservation easements adjacent to the Lake or the wetlands; how residents will gain lot access to the shores of Stony Lake for their water-based recreation; the propriety and impacts of constructing a marina and recreational facilities on, or adjacent to, the waters of Stony Lake; the increase in boating traffic on the waters of Stony Lake, and the adequacy and impact of the small beach to be located in the Core 1 waterfront area.

Cultural Heritage Water Context

[25] The evidence also discloses a cultural context related to water. The historical evolution, migration and movement of many of Canada's First Nation peoples who were drawn to the Kawartha Lakes waters and shores, has led to the resultant presence of archaeological artifacts left behind by them and discussed in the evidence. Scholarly archaeological debate is unresolved as to whether the Site contains the elements of a sacred water Seep that might have had cosmological connections for early First Nations and for First Nations in present day, including Curve Lake, thus possibly elevating water as a spiritual element integrally connected to the cultural heritage priorities identified in the PPS.

Summary

[26] All of these water-related contextual elements are of relevance in determining how this Development deals with, uses, treats, draws, and returns water to the local environment, and how the Development is integrated into, and impacts upon, these many watery natural heritage elements and the wildlife and flora and fauna inventory connected to the multi-faceted elements of these water environments. In considering the evidence the Board is required to consider the PPS policies and the applicable OPs as they relate to these features, to determine whether the proposed Development, and the related and necessary amendments to the municipal planning legislation required to implement the Development, are, or are not, consistent with those provincially mandated policies and related planning legislation and regulations and represents good planning.

[27] Ultimately it is the commonality of water as a component of the evidence that is, to no small extent, relevant to the majority of the Board's various findings and the summary conclusion that the appeals by BBC should be dismissed, and the applications that would permit the Development be denied.

CONTEXT –THE LAYOUT AND PARTICULARS OF THE DEVELOPMENT

[28] The evidence relating to the particulars of the Development and the immediate context of the area is not in dispute. During the course of the hearing the Board was presented with an ongoing overview of the form and site context of the proposed Development including the primary Site Plan and a number of the various maps presented in the evidence. The Development has been altered a number of times, as recently as in the course of this hearing, but in its final form there are 58 condominium lots (“Lot” or collectively, “the Lots”) proposed for the Development. Each Lot contains a designated “Private Building Area” representing approximately 11% of each average sized lot, in which all residential improvements are to be located. Except for Core Area 1, all shoreline Lots and Core Areas have a 30 metre buffer along the lakeshore. Any Lot adjacent to a segment of the Fraser PSW Complex has a 30 metre wetland buffer.

[29] Of the 58 Lots in the Development, 12 of them are non-waterfront, and considered “backlot”, properties where the Private Building Area will be located north of the internal Road.

[30] The buffers in the Lots are to be owned by each condo owner but would be subject to restrictions contained within the title documents and/or the Condominium documents, the details of which would not be firmly determined until the Development is completed and all of the required steps related to the creation of the condominium by-laws and other related agreements are in place. Previously communicated information suggested that Parks Canada, through the Trent-Severn Conservation Authority, or possibly the County or Township, would assume responsibility for the monitoring of these buffers. On the evidence before the Board, that has not occurred and there is no evidence that the buffer will be controlled and monitored by any outside authority, other than BBC and the condominium corporation’s governing body (which in practical terms, is comprised of the owners of the Lots).

[31] In addition to the Lots, the Development proposes five Core Areas to contain supportive facilities, employee/owner residences and communal recreational areas. There are two Core Areas located to the west (No. 4) and east (No. 3), and one Core

Area to the north (No. 2). Core Area No. 4 has been expanded such that Lots 6 and 7 will be withdrawn from the Development, thus reducing the Development from 60 Lots to 58 Lots.

[32] The primary Core Area (No. 1) and Water Block B, located along the shoreline in the central area of the Development, will contain the concentration of the extensive common facilities making up the primary lakeside recreational area referred to above. Core Area 1, with its marina, will be without any buffer and fronts a contained interior segment of Stony Lake framed by Fraser Island and Woods Island. This sheltered area of the lake, has only two points of water access: one being a narrow channel between the two islands and the other a somewhat wider channel between Woods Island and the shoreline. Fraser Island is also owned by BBC and accessed by a bridge, of sorts, connecting at a point east of Core Area 1 with a designated access road leading to the Development's Road System. Fraser Island is not part of the Development and may be sold at a later date.

[33] The Development Plan lays out the major internal private roads (the "Roads" or "Road System") to be built anew, or in some areas, upgraded, with one point of entry from the north, off of Highway 28. What is not shown on the Development Plan, are the 58 private driveways ("Driveways") that will have to be constructed for each and every one of the Lots linking the Private Building Areas to the Development's Road System. As explained later, these proposed Driveways are of relevance in the findings relating to a number of issues because, with only a few exceptions, each of the Private Building Areas are a significant distance removed from the Roads which will cumulatively necessitate the construction and installation of a further network of connective vehicle and human dissections of the terrain within the Development. Each Lot owner would thus be responsible for subsequent maintenance of their Driveways which would include additional applications of treatments for ice, compaction or dust, perhaps with some controls imposed through the condominium.

[34] The Development's internal Road System is to be retained by BBC and will not be assumed and dedicated by the Township as part of its municipal road system. The evidence is that these Roads are to be privately maintained by the Condominium

Corporation as part of the common elements of the condominium subdivision. The evidence discloses that stormwater accumulating from these Private Roads will be managed through the construction and subsequent maintenance of a system of catch basins, the particulars of which are discussed subsequently in this Decision.

CONTEXT – PPS - PROVINCIALY SIGNIFICANT WETLANDS AND STONY LAKE

[35] In this case, an examination of context necessitates a detailed review of the abutting water elements because of the intimate proximity of the entirety of the Development to Stony Lake, and within, or adjacent to, the two PSW Complexes, and other water movements flowing across the property. This context figures significantly in the evidence and the findings of the Board in considering whether this Development is appropriate, and in particular in determining whether the Development is consistent with the relevant provisions of the PPS which relate to PSWs, and conforms to the County OP.

[36] As indicated later, in response to the issue raised by BBC, the Board has determined that it must be satisfied that the Development is consistent with the 2014 PPS. All references to the PPS in this Decision are to the 2014 PPS, and the Board has determined that it must find that all aspects of the Development are consistent with the various policies, including those relating to PSWs. For the reasons indicated, the Board has also considered what effect, if it were applicable, the former test of “have regard to” the PPS would have upon the analysis in this Decision and has determined that it makes no difference.

[37] The proposed Development abuts or surrounds the individual components of two PSW Complexes identified by the Ministry of the Natural Resources and Forestry (“MNR”) as being subject to protection. The waters of Stony Lake off the eastern one third of the Site’s shoreline are part of the designated Class 2, Fairy Lake PSW Complex. The entirety of the Site was itself identified in 1995 as the “Fraser PSW Complex” containing some 17 wetland “pockets” in a variety of sizes and spread throughout the property owned by BBC.

[38] The 2014 PPS defines “significant” as it applies to wetlands, as “an area identified as provincially significant by the Ontario MNRF using evaluation and scoring procedures established by the Province”. “*Wetlands*” are defined as “lands that are seasonally or permanently covered by shallow water which has caused the formation of certain soils that cause the formation of certain water tolerant plants”. PSWs are, among other elements, specifically included in the PPS definition of “Natural heritage features and areas”, which also includes “fish habitat...habitats of endangered species and threatened species...”, and “significant wildlife habitat”.

[39] For the purposes of an analysis of the planning evidence it is important to identify at the outset why the Province has, within s. 2.1 identified PSWs as warranting special protection as Natural Heritage features. The PPS, when read in its entirety (as required by the document), helps to appreciate the context of protecting important resources and the quality of the natural environment but two sections warrant identification. In Part IV, outlining the vision for Ontario’s Land Use Planning System, is the following statement:

The Province’s natural heritage resources, water resources, including the Great Lakes, agricultural resources, mineral resources, and cultural heritage and archaeological resources provide important environmental, economic and social benefits. The wise use and management of these resources over the long term is a key provincial interest. The Province must ensure that its resources are managed in a sustainable way to conserve biodiversity, protect essential ecological processes and public health and safety, provide for the production of food and fibre, minimize environmental and social impacts, and meet its long-term needs.

In the preamble to the Natural Heritage policies, the PPS again focuses on the conservation and protection rationale for the wise use and management of resources including natural resources:

Ontario’s long-term prosperity, environmental health, and social well-being depend on conserving biodiversity, protecting the health of the Great Lakes, and protecting natural heritage, water, agricultural, mineral and cultural heritage and archaeological resources for their economic, environmental and social benefits.

In addition, s. 2.2.1 of the PPS states that: “Natural features and areas shall be protected for the long term.”

[40] Of the 58 proposed Lots in the Development, within the lands of the Fraser PSW Complex there are only two Lots that are not adjacent to at least one PSW “pocket” or part of a PSW. More often Lots are adjacent to two PSW/water features – either a PSW pocket, a section of lake shore frontage or a stream/watercourse components (subject to the set-backs as discussed herein). All but 12 of the Lots front on Stony Lake. The 15 Lots in the western-most section are laid out with Stony Lake to the south and three segments of the Fraser PSW Complex to the north. Nine of those Lots front on the shoreline of West Bay which is designated as one of the pockets in the Fraser PSW Complex and an identified spawning area for Muskellunge and other fish species. The Lots laid out on the southern shore of the West Bay have that Bay to the north and Stony Lake to the south. The central area of the Development then has an extended wetland pocket running from west to east with Stony Lake to the South. The eastern-most section of Lots (Lots 46 to 55) is compressed in and around three PSW pockets and the Fairy Lake PSW Complex within Stony Lake, with additional watercourses cutting through the lots.

[41] The evidence demonstrates that many aspects of the proposed design and location of the Roads, Lots and Core Areas within the Development are spatially determined by the location of not only the shoreline of Stony Lake and the Fairy Lake PSW Complex, but also the lake enclave of West Bay and this multitude of not less than 17 individual and separate wetland components (“PSW Pockets”) of the Fraser PSW Complex which extend throughout the entirety of the Site (and beyond). There are also flowing streams and tributaries and surface water drainage that also flow through the development connecting all these water features in differing directions.

[42] The environmental, ecological and hydrogeological evidence provided by all the experts testifying on these matters cumulatively leads the Board to conclude and find, at the outset, that contextually the proposed Development is significantly integrated into, and surrounded by, water features and protected PSWs, so much so that the vast majority of the proposed Development, as it is to be constructed, will become overlaid man-made placements upon the lands that are either part of the “*connectivity*” and “*linkages*” between these “*natural heritage features*” or constitute “*adjacent lands*” as defined in s. 6.0 of the PPS.

[43] These circumstances factor heavily in the analysis of whether BBC is able to demonstrate to the satisfaction of the Board that there will be no negative impacts arising from the Development and Site alteration as set out in s. 2.1.8 of the PPS. For that reason it is necessary to consider the relevant portions of the definition of “*adjacent lands*” in the PPS:

Adjacent lands: means

- a) (*omitted*)
- b) for the purposes of policy 2.1.8, those lands contiguous to a specific natural heritage feature or area where it is likely that *development* or site alteration would have a negative impact on the feature or area. The extent of the *adjacent lands* may be recommended by the Province or based on municipal approaches which achieve the same objectives;
- c) (*omitted*); and
- d) for the purposes of policy 2.6.3, those lands contiguous to a *protected heritage property* or as otherwise defined in the municipal official plan.

CONTEXT – CULTURAL HERITAGE AND ARCHAEOLOGY FEATURES

[44] Finally, for the purposes of examining the physical context of the Development, it is also necessary to identify the location of the cultural heritage and archaeology features relative to, near, or on, the Site. Although there are some unresolved differences in the evidence as to the character and significance of some of the archaeological findings in one area within the Site, and another area east of the Site, and although there is an issue before the Board as to whether the Site may be a component of a “cultural heritage landscape” as provided for within the PPS, much of the context evidence as it relates to the location of the assessed archaeological sites and the possible cultural heritage elements that are the subject of debate, is not disputed.

[45] All of the archaeological experts testifying in this hearing were consistent in linking the First Nations archaeological resources and artifacts found in the local area to the First Nations’ occupation patterns in the Kawartha Lakes system and the migratory

trends of First Nations peoples who used the waterway systems for travel for thousands of years. Elder Williams best described the reasons for the culturally enriched nature of this area as attributable to the fact that their Anishinaabe ancestors were “shoreline people” who occupied and travelled along much of the shores of the entire Kawartha Lakes system, and connected waterways, including Stony Lake. In his view, the section of shoreline across from Burleigh Falls where the Development is to be located on the Site would have been of particular attraction due to its ideal proximity close to the Falls, fishing weirs, and Teaching Rocks.

[46] Ms. Patricia Dibb, who performed much of the on-site archaeological assessment work over a number of years, provided considerable evidence relating to the various dig sites on the Lands which revealed numerous artifacts suggesting the temporary presence of aboriginal peoples migrating over, and using, the Lands during the various archaeological periods. There was no evidence of any burials in the areas that have been excavated, nor elsewhere on the Site. The significance of what exactly remains on the Site, and the application of the PPS policies relating to cultural heritage landscapes, is a disputed issue before the Board.

[47] The Development Site, in the larger context, is located in proximity to a number of cultural heritage sites. Nearby Lovesick Lake, to the west of the Site and above Burleigh Falls contains the discovered First Nations fishing weirs archaeological site. A few kilometres to the east of the Development Site, is one of the most significant First Nations cultural heritage sites in Ontario – the “Petroglyphs” or the “Teaching Rocks” which are of spiritual significance to the Anishinaabeg. Immediately to the east of the Lands, in a wooded area located on municipally owned lands, is an undisturbed area believed by some archaeologists and Curve Lake residents to contain a series of First Nations burial cairns, but which have not been conclusively determined as such and is thus only identified as a potential site with the Ministry.

[48] Finally, one particular area of the Site, which has also been the subject of some archeological academic debate, and reviewed in the evidence, is located in the western area of the Development between Lots 6 and 7, in the area designated as Core Area 4. This is the site which has sometimes been identified as the “Seep”, which, as both Ms.

Dibb and Dr. James Conolly indicate in their evidence, had first been reported by Dr. Jamieson, and supported by a geomorphologist, Dr. Peter Barnett. Ms. Dibb expressed her doubts as to whether this area is anything other than a natural drainage area, but Dr. Conolly was of the opinion that the archaeological evidence cumulatively supports a conclusion that the Seep was a natural feature of significant cultural significance having spiritual significance to the Anishinaabe peoples – a view adopted by Elder Williams and Elder Taylor. Ultimately, whether Core Area 4 does, or does not, contain a Seep, this area has nevertheless been set aside within the Development for non-development and is identified and recorded as a BdGn archaeological site subject to the protection and conservation processes in place through identification with the Ministry of Tourism, Culture and Sport (“MTCS”).

[49] A number of issues arise from the physical context of the Development Lands in relation to these cultural heritage/archaeological sites, and in particular, the Seep located on the property. Curve Lake has raised a number of concerns relating to the archaeological assessments completed by BBC which include the submission that the spatial and contextual location of these cultural heritage sites and artifacts is pointedly relevant to the question of whether the Development Site alone, or in conjunction with surrounding lands, represents a Cultural Heritage Landscape as defined in the PPS. Dr. Conolly was of the opinion that the Site is part of a Cultural Heritage Landscape. Curve Lake argues that the identification of a Cultural Heritage Landscape further adds to the reasons why the Development should not be approved through the proposed planning amendments. This opinion is challenged by BBC.

ANALYSIS OF THE ISSUES AND EVIDENCE - OVERVIEW

[50] The analysis of the evidence is provided within a five-part framework, as follows:

- A. **Natural Heritage Features, Ecology and Wildlife** - First, an analysis of the evidence and issues relating to the Natural Heritage PSW and lake habitat features identified above, and those related matters of the environment, wildlife species and habitat, and ecology. This leads to a determination of whether

the proposed Development should be permitted or refused based on the question of whether BBC has sufficiently demonstrated that: (a) there will be no negative impacts on the identified natural heritage features of the Lands or their adjacent lands or their ecological functions; and (b) that the Development is not within a habitat of endangered species and threatened species. These issues are governed by s. 2.1 of the PPS. The Development must further conform to the policies of the OPs.

- B. Water and Hydrology** - Second, an analysis of the evidence and issues relating to water quality and quantity issues as they may be impacted by the Development as governed by s. 2.2 of the PPS and the OPs. This requires a determination of whether the proposed Development may be contrary to the planning goals provided for in the PPS which require planning authorities to protect, improve or restore the quality and quantity of water and restrict development and site alteration in, or near, sensitive surface and ground water features. The Development must also conform to the policies relating to water within the OPs.
- C. Sewage, Water Services and Stormwater** - Third, an analysis of the evidence and issues relating to sewage systems, water supply and stormwater management as they are addressed in the design of the Development and whether they are consistent with the provincial planning policies set out in s. 1.6.6 of the PPS and conform to the OPs.
- D. Cultural Heritage, Archaeology and Cultural Heritage Landscape** - Thereafter an analysis of the evidence and issues relating to the Cultural Heritage and archaeological features identified above. This results in a determination of whether the proposed Development Lands contain archaeological resources or areas of archaeological potential, or can be identified as part

of a significant cultural heritage landscape and if so, whether BBC has sufficiently demonstrated that such resources, potential or landscapes will be conserved. Related to these issues, Curve Lake submits that there has been a failure in the duty to consult with First Nations, and also raise an issue relating to the treaty rights of Curve Lake.

E. Planning Evidence and Issues - The Board has considered the overall planning evidence received from the three professional planners: Mr. Peter Josephs, on behalf of BBC; Mr. Darryl Tighe, on behalf of the Township; and Mr. Stephen Fahner on behalf of FFW. The planners have formed their opinions based upon their assessment of the expert evidence of the other witnesses and their conclusions and opinions, findings and determinations made on the above issues. The Board is required to deal with two planning issues relating to the Clergy Principle and the transitional legislation as it relates to the PPS. At the end of the day, the Board's findings of the planning evidence is based upon the findings relating to the core issues and leads the Board to decide whether the proposed Development represents good planning, is consistent with, and conforms to, the PPS, the OPs, and other relevant planning documents.

ISSUE A – NATURAL HERITAGE FEATURES, ECOLOGY AND WILDLIFE

[51] The policies of the PPS relating to the wise use and management of resources are, like all other policies within that document, to be considered minimum standards and all land use planning decisions made by planning authorities must be consistent with these policies. It is important to look first to the additional relevant portions of these policies that apply to PSWs as natural features, which are as follows:

2.1 Natural Heritage

2.1.1 Natural features and areas shall be protected for the long term.

...

2.1.4 Development and site alteration shall not be permitted in:

- a) significant wetlands in Ecoregions 5E, 6E and 7E1; and
- b) significant coastal wetlands.

2.1.5 Development and site alteration shall not be permitted in:

....

- d) significant wildlife habitat;

....

unless it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions.

2.1.6 Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal requirements.

2.1.7 Development and site alteration shall not be permitted in habitat of endangered species and threatened species, except in accordance with provincial and federal requirements.

2.1.8 Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas identified in policies 2.1.4, 2.1.5, and 2.1.6 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions.

Negative impacts: means

....

- c) in regard to fish habitat, any permanent alteration to, or destruction of fish habitat, except where, in conjunction with the appropriate authorities, it has been authorized under the Fisheries Act; and
- d) in regard to other natural heritage features and areas, degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities.

[52] The broader issue relating to natural heritage, as defined in the PPS, can be addressed in three separate categories:

1. PSWs

2. Wildlife Species including Endangered or Threatened Species
3. Ecology and Fish Habitats

1. Provincially Significant Wetlands

[53] The Board's evidentiary findings with respect to the context in which the Development is interrelated with the PSWs has been partially outlined above. The manner in which the Development is carved out of the site, in and around the PSWs represents one of the most compelling reasons why the appeals should be dismissed.

[54] For the reasons set out below (and upon other findings relating to the ecological assessments and proposed mitigation strategies) the Board finds that BBC's proposed Development fails to meet the requirements imposed by the PPS and is therefore inconsistent with those policies. For the same reasons, the Board also concludes that the Development does not conform to the very specific prohibition against development within PSWs as set out in the applicable, and revised, County OP.

[55] The policies in the PPS provide prohibitions and restrictions relating to development in both PSWs and "adjacent lands". In order to effectively determine the impact of the Development on the PSWs, and whether the Development will be consistent with the PPS in that regard, it is necessary to identify with precision the PSWs that are in, and around, the Site. Whether the multiple PSW pockets or cells are considered individually, or instead as the "sum of their parts" and as a complex of smaller PSW Pockets and two Complexes combined, is dealt with differently by the Parties. This is of relevance to the issues before the Board.

[56] The term "complex" or "PSW complex" is not defined in the PPS. The evidence before the Board is that the Fraser PSW Complex is comprised of the various natural feature pockets or cells which are the actual wetlands, but as the term "complex" is ordinarily understood, a complex is collectively the grouping of the individual pockets and recognizes that the lands interspersed between the pockets are an integral part of the area complex. In this case the Province has specifically identified the components of the Fraser PSW Complex as a collective entity identifying each natural feature pocket

of the PSW as part of the complex. Certainly the evidence from all of the expert witnesses acknowledges that these pockets within the complex, and the two complexes, do not exist independently and that there are movements of all types of wildlife, amphibians, bird species, fish and water between these individual pockets and the two complexes and larger adjacent waters of Stony Lake. The evidence also discloses that the ecological functions and processes provided for in s. 2.1.8 of the PPS are also occurring between the PSWs in the Fraser PSW Complex on the connecting and adjacent lands, and between the two complexes.

[57] The importance of considering natural features such as PSWs in a broader holistic sense is supported by s. 2.1.2 of the PPS which provides direction as to the significance of connectivity between “natural features” in an area (which the PSWs and Stony Lake are):

The diversity and connectivity of natural features in an area, and the long-term ecological function and biodiversity of natural heritage systems, should be maintained, restored or, where possible, improved, recognizing linkages between and among natural heritage features and areas, surface water features and ground water features.

Whether or not formal natural heritage systems have been designated in the process of assessing any development in an area such as the subject Site, it is still mandatory that the connectivity, linkages and corridors between natural features in any area proposed for development (which includes the PSWs) be considered under s. 2.1.2.

[58] Mr. Gord Miller has testified as an expert with considerable experience in environmental and land use planning policy, wetland evaluations, and environmental matters in the PPS. Mr. Miller states that the identification of the Fraser PSW as a “complex” of pockets or “cells”, was not insignificant in his review of the proposed Development. In Mr. Miller’s opinion, a “complex” denotes connectivity and includes the “land between” and it is this connectivity that requires that the entirety of the Fraser PSW Complex be viewed as a whole due to the fact that these complexes are composed of all of the ecologically connected wetlands and their surrounding and adjacent lands. For the same reasons, so too does Mr. Miller believe that the Fraser PSW Complex and the Fairy Lake PSW Complex must also together be considered as

a whole. Of importance to Mr. Miller is the fact that the Fraser PSW Complex is immediately adjacent to a coastal, lake-dominated PSW.

[59] Mr. Miller provided an example in his Witness statement, and reiterated in his testimony, of the manner in which the PSWs are linked and how the “in-between” adjacent lands perform important ecological functions:

Consider for purposes of illustration lots 7 to 20. These lots are proposed to be on a ridge of land with pockets of the PSW complex along the north side and the south side. The width of this ridge varies from approximately 120 metres to 250 metres, bisected by an access road. For a wetland complex whose parts are by definition interacting together in ecological communication, **these short sections of upland forest between the north and south wetlands are not barriers in their natural state.** Birds, reptiles, amphibians, mammals and invertebrates would move and exchange genetic material between these wetland pockets and plants would exchange pollen and propagules....These are examples of the ecological functions and the PPS...requires a demonstration of no negative impacts to these ecological functions.

[60] Mr. Miller’s emphasis on the two PSW Complexes and the adjacent lands as a “whole” has been challenged by BBC on cross-examination when it was suggested that the PPS speaks to negative impact on the wetland and not on the wetland complex. Mr. Miller disagrees with that distinction and it was his view that the reason there is a section in the PPS that addresses impact upon the PSW and a second section on “adjacent lands” is that the complexes, inclusive of the PSWs and the adjacent lands must be considered as a whole.

[61] Although BBC and its experts, and in particular, Mr. Chris Ellingwood, do not in any way diminish the significance of the PSWs in relation to the proposed Development and certainly recognize the extent to which the PPS policies seek to protect and maintain the PSWs, their approach to the PSW Complexes is different. The evidence presented by BBC treats each of the PSWs on the Site as separate and independent wetlands and although the components of the Development are, without doubt, within the PSW Complex, BBC considers that the Lots and Core areas of the Development will be placed on adjacent lands only and therefore are appropriate, and in compliance with the PPS, so long as there is no negative impact under s. 2.1.8 of the PPS. BBC then relies, in part, upon the Ministry’s Natural Heritage Reference Manual’s recognition of

buffers or setbacks as approved methods of avoiding negative impacts on PSWs, adopts these methods, and submit that they are therefore in compliance with the PPS.

[62] BBC submits, critically, that Mr. Miller has “conflated the wetlands, the “complex” and the site in its entirety numerous times” and suggests that his evidence should, for this reason, be given no weight at all. For the reasons indicated, the Board disagrees. Mr. Miller’s approach of considering the combined PSWs, and all interconnecting adjacent lands between them, as a whole, should be considered to be the correct one. In the Board’s view the correctness of this approach is supported by the inclusion of s. 2.1.2 in the PPS which expressly provides that the maintenance, restoration or improvement of natural features and their ecological functions is to be done recognizing the “linkages between and among natural heritage features”.

[63] This, in turn, factors significantly in the analysis required under s. 2.1.8 which demands that the Board examine the “ecological function of the adjacent lands” and conclude that there will be “no negative impacts” on the PSWs or their ecological functions. Since BBC has designed the Development entirely within the boundaries of the Fraser PSW Complex, and entirely within the adjacent lands that are the linkages between, and among, the PSW Pockets and the Fairy Lake PSW Complex, the Board must accordingly determine whether the form and function of the entire Development, located as it is on the “adjacent lands” and within the linkages, creates no negative impacts.

[64] The Board finds that the approach used by BBC to utilize the mechanism of buffers and mitigation strategies to allow the development to be compressed within the “in-between” areas, in and around protected PSWs, has led to the unfortunate minimizing of the significant linkages and connectivity between the PSWs. This has led to the mistaken assumption that the adverse effects of concentrating 58 development Lots and Core Areas within these two complexes, and all their connecting infrastructure, can be mitigated, as opposed to eliminated, by the introduction of measures such as the buffers and the conditions in the ZBL and through the use of future constating condominium documents.

[65] Based on all of the evidence heard with respect to the PSWs and the ecology experts who have discussed at length the enriched biodiversity of the entire Site, and the adjacent Lake and lands, and the testimony of the local witnesses and Participants, it is clear that the Development is situated in lands that are indeed part of a larger whole of ecologically connected wetlands, waters and lands in which there is a constant state of motion. Birds, including Osprey, Least Bittern, Common Nighthawk, and Eastern Wood Peewee feed, move and multiply moving throughout the PSW Complexes and woodlands. The Threatened Species of Blanding's turtle, as well as Eastern Musk and Snapping Turtles, snakes, and a variety of other reptiles and amphibians are located here and migrate within the area. Little Brown Bats, deer, the endangered Butternut Tree and possibly Bellied Frost Lichen also inhabit the Site. Fish species, including Muskellunge, move, feed, and spawn in the PSW waters moving in and out of these waters of Stony Lake. The Participants and witnesses provided supporting evidence as to the intensity of the wildlife and natural heritage element in this area because of the existence of the PSWs.

[66] The Board has reviewed the evidence relating to wildlife, ecology, buffers, roads, road mitigation strategies and has made findings as to the serious inadequacies of the mitigation strategies, buffers and design elements which BBC intends as a means to allow for this Development to be inserted into the Fraser PSW Complex and meet the requirement of the PPS that there be no negative impact. Mr. Ellingwood and BBC assert that the mitigation strategies, and many details of the Development design concepts, collectively mitigate any impact and allow for compliance with the PPS. The Board does not find this conclusion to be supported by the evidence.

[67] Based on the other findings that have been made, the Board prefers and accepts the evidence of Mr. Miller that the buffers and other mitigation strategies, will not adequately protect and fully insulate the wetlands or the adjacent lands, or their ecological functions from negative impact. The Board finds, as Mr. Miller has opined, that even if the buffers and other mitigation strategies, were to successfully mitigate all adverse impacts upon the two PSW Complexes, which the Board does not find to be the case, there are still serious deficiencies in the practical and effective operation of such buffers and strategies. This includes a clear lack of assuredness as to the policing

and enforcement of such buffers and strategies since no independent third party public agency will (or can) accept responsibility for monitoring these buffers and strategies.

[68] Considering the high value that has been placed upon the PSWs, and their adjacent lands, in Ontario, at the end of the day the Board is unable to find that BBC has, or can, satisfy the requirements of the PPS that they be protected. As Mr. Miller stated “the stakes are high” given the significance of the endangered species, a complex ecological system of entwined elements and functions and highly sensitive wetlands such as are found on this Site what exists on, and adjacent to, the Site. The Board finds that:

- (a) the potential for danger of permanent injury to the PSWs and the adjacent lands in which they will be situated is significant with Lots that will be privately owned by persons who rightfully have the expectation of use and enjoyment that may not be fully cognizant of the cumulative impact of their presence;
- (b) the likelihood of negative impacts to wildlife, ecology and water quality in the PSW Complexes caused by the network of roads, private driveways, barriers and obstacles to wildlife movements and by septic systems that are in place to address limitations imposed by a lack of permeable soils is high; and
- (c) the introduction of soils, building materials, phosphorous and chemicals, pets, noise, light, fencing, watercraft, marinas, a swimming pool, and most significantly, the density of human occupation that will follow this substantial Development, are such that I cannot find that BBC’s buffers and framework of conditions and stipulations will assuredly eliminate all negative impact under the PPS for the years, decades and centuries that lie ahead.

[69] The Board finds that on the totality of the evidence presented the introduction of all these elements of this concentrated residential and recreational Development, and all of these risks into this PSW Complex and within the lands adjacent to these PSWs, will not occur without negative impacts upon these PSWs or on their ecological

functions and will not adhere to the stringent policy mechanisms of the PPS that are in place to protect the PSWs.

[70] For the reasons, and upon the analysis previously set out, the Board accepts the opinion of Mr. Fahner, and the concurrent reservations expressed by Mr. Tighe, that the Development significantly is not consistent with the PPS as it relates to PSWs and lands adjacent to PSWs or the provisions of the County OP, as amended, which does not permit development within a PSW. The Board is unable to accept Mr. Josephs' opinion that the Development is consistent with the PPS as it relates to the PSW Complexes in which the Development is located. Mr. Josephs' findings are based upon his general acceptance of the Environmental Impact statements prepared by Niblett Environmental Associates Inc. and the optimistic effects of the proposed 30 metre buffers, as well as other 'back-up' mechanisms such as those conditions or restrictions to apply within the condominium standards, or site plan approval, which the Board does not similarly accept in the same manner.

2. Wildlife Species including Endangered or Threatened Species

[71] Four weeks of testimony confirmed that the Development Site is an enriched environment containing a multitude of wildlife species, a number of which are endangered or threatened. The Board heard much evidence regarding the assessments that have been completed and the manner in which BBC has attempted to mitigate impacts that the Development will have on wildlife. The extent to which BBC has successfully accomplished that goal determines the issue of consistency with the PPS policies.

[72] Some aspects of BBC's efforts to survey and assess the wildlife species on the Site have been thorough and complete. The Environmental Impact Study ("EIS") does assist the Board in confirming the enriched nature of the Site, though it is noted that the 2016 EIS was not submitted for peer review. The EIS does confirm that there may be over 450 species within the BBC Lands including nineteen bird species recorded during the June surveys that are area sensitive.

[73] Notwithstanding some aspects of the EIS that were thorough and complete, in a number of other instances the Board finds that these efforts have been less than adequate—unfortunately in the case of two high-profile species—the Blanding’s Turtle and the Little Brown Bat. The very recently updated EIS also lacked peer review because it was completed only just prior to the commencement of the hearing. Mr. Ellingwood’s evidence regarding the eleventh hour bat survey is one example of inadequate assessment processes. It is surprising that given the length of time that has elapsed since the original applications, and the later resubmission of the Applications in 2012, that BBC has been lax, or very rushed with last-minute work, in conducting full and complete surveys and studies, or mapping, relating to such species as Little Brown Bats, the Blanding’s Turtles, Osprey, deer, Snapping Turtles, Eastern Musk Turtles, Map Turtle. In this regard the Board finds that there are indeed concerns that insufficient data has been assembled in regards to a number of the wildlife species, to address concerns of impact arising from the Development on these species.

[74] Based on the completed Study, BBC proposes three primary measures to mitigate any impact upon wildlife species: the PSW and shoreline buffers; road mitigation measures tied to a local wildlife corridors network; and draft by-law conditions and condominium restrictions that will create safeguards and protection for wildlife species.

[75] The Board has carefully considered all the evidence and finds that the size, form and function of this Development as it would be constructed on the Site would most certainly negatively impact a significant component of the wildlife on the existing Site (including the PSWs) and adjacent property. The Board also concludes that the mitigation measures proposed by BCC will not, as they intend, effectively eliminate all impact to certain species of wildlife and their habitat on the Site. To the contrary, upon the evidence, the Development as designed, will almost certainly adversely impact the habitat and resident species on the Site.

[76] The Board received evidence from a number of experts in the various fields relating to wildlife, ecology, terrestrial ecology, road mitigation ecology, naturalist and habitat evaluation and species at risk. The evidence was received from Mr. Ellingwood

and Ms. Kari Gunson presented on behalf of BBC, and from Mr. Brent Parsons, Dr. Andrea Smith, Mr. Robert Bowles, and Mr. Dirk Janus on behalf of FFW.

Turtles, Corridors, Road Mitigation Strategies and Impact

[77] The Blanding's Turtle, (as well as the Snapping Turtle, Eastern Musk Turtle and Map Turtle), received the attention of a number of experts and witnesses. Though there are most certainly other wildlife species, about which there are concerns relating to the Development, the specific challenges raised by the presence of the Blanding's Turtle, as a Threatened species, merits a close review. It would be expeditious to also address BBC's proposed road mitigation strategy and conceived wildlife corridors in concert with the analysis of this issue.

[78] There is no dispute that the entire Site and adjacent surrounding land is a habitat for the Blanding's Turtle or that this species is identified as Threatened under the legislation. The Eastern Musk Turtle, Snapping Turtle and Map Turtle, species of Special Concern, are also within the Site. The limited confirmed sightings of the Blanding's Turtle alone result in the entirety of the Site being classified as Blanding's Turtle habitat, either as Category 1 (nesting and overwintering), Category 2 (documented areas of presence in and between wetlands and waterbodies) or Category 3 (the movement corridors) under the MNRF "General Habitat Description" for the Blanding's Turtle. The result, as Mr. Janus notes, is that 95% of the footprint of the Development is within that habitat, and this is not insignificant.

[79] The evidence is also clear that turtle species are always moving in relation to their life cycles and that the Blanding's Turtle is especially prone to travelling substantial distances of up to five or six kilometres from nesting sites. Turtle movements will occur across and through the entire Fraser PSW Complex and to and from the Fairy Lake PSW Complex - and most certainly through the areas of the Site where the Development will be situated.

[80] BBC submits that "there do not appear to be many of the Blanding's Turtles on the Site" due to the fact that Mr. Ellingwood has seen only one in the course of many

years, but submits that in any event, if there are concerns relating to impact upon this threatened species, the requirement for the necessary MNRF Permit under the *Endangered Species Act*, as a condition of approval, will sufficiently address any concerns and meet government requirements in s. 2.1.7 of the PPS will be satisfied.

[81] FFW submits that Mr. Ellingwood's assessment of the Blanding's Turtle, particularly in light of its status as an endangered species, is lacking and that the absence of adequate evaluation data, and the serious deficiencies in the mitigation strategies that BBC proposes for the Blanding's Turtle (and other species), are such that BBC cannot satisfy the requirements of the PPS and are not matters to be left to the subsequent permitting processes.

[82] Based on the evidence, the Board agrees with FFW's submission and the Board is unable to conclude that BBC has secured adequate ecological data, including mapping and movement patterns, relating to the Blanding's Turtle. The most recent updated EIS completed in July of 2016, and Mr. Ellingwood's testimony, do not support the completion of adequate in-depth investigations or surveys for the Blanding's Turtle. Mr. Ellingwood said it was "hard to know where to look" and "hard to say" where the Blanding's Turtle might be because they are secretive, he having seen only 1 in twenty years. Mr. Ellingwood offered that "they" are working with the MNRF on this matter of the Blanding's Turtle, but of interest is the fact that in cross-examination, Mr. Ellingwood admitted that he had failed to file any formal sighting report with the MNRF when he had found one in the eastern area of the Development.

[83] Mr. Ellingwood did acknowledge that there had been other reported sightings, including Mr. Bowles, Mr. Graham Cameron (MNRF), Mr. Scott Wootton and Ms. Catherine Kirk. Mr. Wootton and Ms. Kirk, who are immediately west of the BBC Lands testified as to seven separate Blanding's Turtle sightings in the month of June when moving to lay their eggs, two of which were seen within 100 feet of the BBC Lands. Mr. Bowles, an environmental consultant well-familiar with the local area, stated that the BBC Site and surrounding lands, was a well-known area for Blanding's Turtles and testified that with the information gathered, and based on his experience, the BBC Lands were definitely a Blanding's Turtle habitat. Mr. Bowles expressed concerns that

complete mapping and movement patterns had not been properly completed and assessed for the Blanding's Turtle within the BBC Lands.

[84] Notwithstanding the evidence as to the presence of Blanding's Turtles, Mr. Ellingwood proceeded with his updated EIS without further investigation of the Blanding's Turtle population. No real reason was provided as to why matters relating to the Blanding's Turtle were not advanced further with the MNRF.

[85] Mr. Janus commented that having four species of turtles on this one Site was of significance and something not often found. Clearly, he says, the Site is a Significant Wildlife Habitat as identified in the PPS. Mr. Janus is also of the view that the impact of the Development on the Blanding's Turtle, and other turtle species and their habitat, has not been properly evaluated. Although Mr. Ellingwood has generally identified the Site as Blanding's Turtle habitat Mr. Janus notes that no tagging, sampling or other common tracking and survey studies, have been done to properly evaluate the population or its movement patterns under the Survey Protocol for the Blanding's Turtle. It is this type of tagging and telemetry data what would allow for an understanding of both numbers and movement patterns for the Blanding's Turtle species that would then allow for both a determination of possible strategies to eliminate any impact and an assessment of impact.

[86] What is also notably absent from BBC's EIS is any formal evaluation to determine wildlife corridors for species, and in particular the Blanding's Turtle, on the Site as they exist prior to the Development. Instead, Mr. Ellingwood refers to the proposed local wildlife post-construction corridors which would exist in and around the Lots, Core Areas and road network as the Development is on the Site. Mr. Ellingwood was cross-examined on this point. It would seem logical, and almost trite, that in order to properly assess the impact of the Development upon wildlife and determine what effective wildlife corridors could be identified and used by wildlife to eliminate those impacts, it is necessary to first determine the connective linkages that are being used or which are likely to be accessed by wildlife species such as the Blanding's Turtle. On the evidence before me it is clear that this was not done.

[87] Instead Mr. Ellingwood's evidence, as introduced through Figure 12, is that Local Wildlife Corridors as they will exist post-construction, will permit wildlife to adequately circumnavigate the Development unencumbered in their movements. As the many facets of this Development have been explained during the Hearing, and as the issue was put to Mr. Ellingwood on cross-examination, it is clear to the Board that BBC has, without basis upon any ecological or scientific fact, arbitrarily "guesstimated" wildlife movements based on the Development design.

[88] There are also a number of questionable aspects of these wildlife corridors identified by BBC, and in particular the central corridor identified in Core Area 1 ("Core 1"). This corridor on the map produced by BBC posits that wildlife species, including the Blanding's Turtle, will utilize one of the most concentrated public areas of the Development, containing a swimming pool, public beach, a tennis court, parking lots, the infrastructure for a substantial 72 slip marina and all the humans that would frequent this area, as a central corridor for movement. This is supported by no hard evidence. Moreover, it was considered to be impractical by Ms. Gunson who, in preparing her road mitigation strategy for BBC, was not even aware that BBC was suggesting Core 1 was considered as a wildlife corridor. As well, Mr. Ellingwood's suggestion that wildlife would by-pass the western edge of the Development and go around the western-most Lots on lands outside the Site, also seemed contrived and ultimately was retracted by him on cross-examination.

[89] Mr. Janus was of the opinion that there were numerous corridors on Figure 12 that would, in his experience be more likely locations for movement of the Blanding's Turtle, particularly those extending across Lots 48, 49, 51 and 52 which front on the small shallow bay on the east side of the Development and are in proximity to the small wetland pockets to the north. In this area both the road, and the Lot development, would constitute obstructive activity that would isolate and affect the activity of the Blanding's Turtle species. It was his view that the movements of the species would ordinarily occur in a multitude of locations where BBC has planned building areas, roads, infrastructure. Mr. Miller, as noted in the referenced testimony in paragraph [58] also testified as to the movement of species between the PSWs and the Lake throughout the Development.

[90] The Board accepts Mr. Janus's opinions, and the other similar evidence, to be persuasive on this issue. In the totality of the evidence, despite the long passage of time, I am also not persuaded that Mr. Ellingwood's team has properly completed a comprehensive evaluation of the Blanding's Turtle beyond the limited processes he describes in his testimony. With the other numerous sightings of the Blanding's Turtle on or near the site by others, and his reliance upon theoretical post-construction corridors (shown in Figure 12 of Tab A9 of Exhibit 1) instead of properly evaluated and established wildlife corridors I consider BBC's investigations and evaluations with respect to the Blanding's Turtle (and other turtle species) to be lacking. The Board's finding on this is further strengthened when considering Ms. Gunson's evidence.

[91] Ms. Gunson, an expert in the field of road ecology, an ecology sub-specialty dealing specifically with the effect of roads on ecology and the assessment and determination of mitigation strategies to reduce the impacts that roads have on animals and more specifically to reduce animal mortality occurring with the introduction or presence of roads in the ecology. Ms. Gunson described her background and expertise in relation to consulting work, research, and other activities in relation to this area of expertise a portion of which related to work with the Ontario Ministry of Transportation. Although Ms. Gunson had not previously testified before the Board as an expert she had provided expert evidence before the Environmental Review Tribunal in relation to the proposed Ostrander Point wind turbine array in 2013 and 2015, which was addressed in the course of cross-examination and re-examination of her testimony.

[92] Ms. Gunson attended to the site once on April 2016 and was retained to prepare a Report outlining a road mitigation strategy and a witness statement presented in the evidence. Ms. Gunson referenced other reptiles and amphibians but her focus was primarily on the Blanding's Turtle.

[93] Ms. Gunson prepared her report based upon her attendance to the site but also upon the information provided by Mr. Ellingwood. Since no comprehensive study had been undertaken specifically dealing with the Blanding's Turtle, Ms. Gunson did not have before her certain information: she did not have the benefit of a determined estimate of the number of Blanding's turtles living on the Subject Property or the

adjacent portions of the wetlands; no traffic estimates for traffic on the roads to be developed on the Subject property; no identification of existing or suspected locations of turtle crossings across the existing roads; nor any identification of the potential nesting or winter hibernation sites for the Blanding's Turtle. None of this information has been assembled by BBC – information that, under the circumstances, is quite relevant, given the issues that must be determined.

[94] Instead of relying upon accumulated data, Ms. Gunson had, based on her experience, identified a number of potential “hotspots” for road crossing or encounters based on the flow of watercourses and other factors she set out in her evidence. It is noted that in doing so Ms. Gunson was not aware that West Bay was part of the Fraser PSW Complex and did not know of the extent of the significant recreational development of the public area in Core 1 (i.e. the tennis courts, the administration building, parking for many vehicles etc.). As well, Ms. Gunson had not undertaken any direct site visit of the wetlands or other areas of the Subject property beyond the Roads, or the immediate areas around the “hot spots” and culverts identified in Figure 1 of her Report. She was, as indicated, also not aware of the identification of Core 1 as a major wildlife corridor. Neither was her opinion evidence regarding the effectiveness of the proposed mitigation strategies based upon any mortality projections for the Blanding's Turtle. Finally, as the evidence as a whole is considered, Ms. Gunson's testimony as to the mitigation strategy did not include consideration of the not-insubstantial stormwater management infrastructure described by Mr. Smith and identified on the Site Plan and how these additional placements would sync with her expected mitigation measures.

[95] On the whole, although the Board would accept that some aspects of Ms. Gunson's proposed mitigation measures, such as underpass tunnels, exclusion fencing, signs and resident education programs would likely have some value, Ms. Gunson has predicated her measures, as she states, based upon a prioritization and determination of where roads bisect habitat or bisect identified movement corridors. Due to the abject absence of any reliable evidence as to the specific microhabitats, nesting, or overwintering locations of the turtles or reliable data-based identification of such movement corridors, these measures are hopeful at best. While Ms. Gunson's measures have, on the evidence, been established to be effective in other places,

without a tangible connection to collected ecological data on this Site, they are not persuasive.

[96] The Board would also indicate that notwithstanding the receipt of all of the evidence relating to roads, shoreline locations, the buffers, the building envelopes, the PSWs, Core Area 1 and the marina and despite repeated examination of the Site Plan submitted in evidence during the course of the hearing, it was not until the Member of the Board attended for the site visit that it was possible to appreciate what the Board would consider to be a highly relevant aspect of the evidence.

[97] The site visit, from both the land and water, was extremely helpful in placing all of these plans and details of the Development into context. Much of the testimony before the Board addresses the extent to which the interior Road network might impact wildlife ecology and species such as the Blanding's Turtle, and how the buildings, septic systems and structural and hardscape elements would constitute barriers to species' life cycles. The Site Visit, which included a walk along the proposed site of a good many of the western lakeshore Lots (Lots 1 to 14), the central Lots (22 to 29 and 30 to 45) some eastern Lots (46 to 55) and the landlocked Lots (15 to 20) afforded an opportunity to consider, in the Board's view, a rather relevant aspect of the intensity of the Development as it relates to the Roads.

[98] What is striking is twofold. First, it is clear from the evidence that the environmental and wildlife connectivity between and through the Fraser PSW Complex and the integral adjacent lands and waters will be required to coexist with the intrusive connectivity infrastructure of the Development comprised of not only buildings, human occupation, infrastructure and roads – but also the private Driveways and landscaping. When the Site Plan is examined and the building envelopes (where buildings, landscaping, decks etc. may be constructed by Lot owners) are located, it is clear that each of these 58 building envelopes is a rather significant distance away from the internal Road system. Based on the numerous maps within the evidentiary record, with a few exceptions, the private Driveways that will have to be constructed by each owner will be at least 30 metres in length, and in many cases more than 60 metres in length to allow for connectivity to the roads. This means 58 additional extended driveways, and

58 additional roads of the type identified by Ms. Gunson as “bisecting habitat” and representing obvious examples of the type of “landscape fragmentation” she explains in her testimony—and with it the insertion of culverts, hardscape structures, fences and vehicle travel for 58 connecting driveways.

[99] Additionally, the topography and elevations of the Development Site are part of the evidence, but the Site visit also put this into context and highlighted the rather significant rock topography and substantial changes in elevation that would exist in some parts of the Development between the location of the existing and to-be-constructed internal Roads and those Private Building Areas. The extent to which these changes in elevation will require engineered solutions to alter that rockscape and terrain is part of the evidence before the Board. 58 Private Driveways will be constructed in this terrain and collectively these driveways will again represent a substantial addition to the Development connectivity that will be overlaid upon the wildlife, ecology, biology and hydrology connectivity and functions of the “in-between elements” of the Fraser PSW Complex. In no part of the evidence, and specifically, BBC’s environmental impact analysis has this aspect of the Development been considered. It was, accordingly, not specifically considered by Ms. Gunson who confined her identification of the hotspots to the internal Road System.

[100] In the Board’s view, this further affects the weight to be given to Mr. Ellingwood’s opinion that the buffers, the wildlife corridors and Ms. Gunson’s related road mitigation strategies, are sufficient to eliminate any negative impact of the Development upon the Blanding’s Turtle and other turtles and species moving through the Site. There remain many uncertainties and conflict in the evidence relating to the Blanding’s Turtle. Mr. Bowles, for example considers this species to be a more terrestrial turtle that may not necessarily follow watercourses, while Ms. Gunson’s explained that one of her first steps was to identify the watercourses as the likely corridors for the Blanding’s Turtle to travel for nesting. At the end of the day it is impossible to know the exact location of these linkages, because no evaluation of this rather valuable information has been undertaken. On the evidence as a whole, the Board also finds that these same concerns regarding impact, apply equally to other species, including those that are at risk.

[101] The effectiveness of the 30 metre buffers (with related conditions affecting use) in “mitigating” any negative impact that the Development will have on the PSWs, water quality, wildlife, species migration, fish habitats, is an issue before the Board. BBC’s evidence, from Mr. Ellingwood and Mr. Josephs, is that these buffers will effectively allow for the negation of any negative impacts and thus the Development will be consistent with the requirements of s. 2.1.8. The effectiveness of the buffers is, in part, predicated on the assumption that despite the fact that the individual owners will own their Lots, the buffers will be subject to the conditions and restrictions as drafted. This has been rejected as being effective by FFW’s experts for a variety of reasons.

[102] The Board has considered and weighed all of the evidence relating to the 30 metre buffers. Despite the acceptance by the MNRF of such buffers as a possible means of minimizing negative impact this does not necessarily mean that they are effective in every instance. The Board has considered the context of the PSWs and, as has been noted, the special character of the Fraser PSW Complex, the intensity of the proposed Development, the unique characteristics of the landscape and the shorelines abutting portions of two different PSW Complexes, as well as the unique functions of the West Bay and the concerns with respect to long term impacts upon water quality and fish habitats. The Board has also considered all of the other real risks of harm that may arise from this Development and would further note that there will be no such 30 metre buffer along the shoreline within the most publically used portion of the Development at Core 1 – an area which is rather sizeable and located adjacent to a mostly undeveloped, pristine and highly functional ecological area and habitat.

[103] In the Board’s consideration of the acceptability of the 30 metre buffers as effective mitigation measures, and whether they will function as proposed, the Board has also listened to the evidence of the witnesses that practically dealt with the manner in which each of these Lots would be developed.

[104] As was elicited in the evidence of a number of the witnesses, conditions and restrictions related to the use of these 30 metre buffers may not be practical in light of the reasonable expectations of Lot owners that will come with ownership and human nature. Pets and children may not effectively honour a buffer that is not marked by any

fence or structure. Owners will gravitate to the shorelines adjacent to their Lots, across the property they own, and they will travel across the buffers with frequency. Nothing in the evidence suggests a complete prohibition against human use, possession or occupation of the 30 metre buffers. Despite the inability to erect any permanent structure, and the restriction on the removal of vegetation, human activity will nevertheless continue. The Board accepts the evidence that this activity will include swimming, access to personal water craft, the presence of lawn chairs and other items and hallmarks of humans in recreational areas, worn paths, noise, pets, and all the other positive shoreline experiences that come with rest and relaxation in cottage country. Humans will be present -- without interruption. It is clear to the Board, on the evidence, that the considerable shoreline vegetation clearing already undertaken by BBC or its predecessors, has not been reversed, and despite communications with agency representatives, regeneration of the substantial stretches of already cleared shoreline will be slow to occur, if ever.

[105] Equally concerning for the Board, is the fact that there will clearly be no independent, third-party enforcement of the buffers since neither the Township or the County or Parks Canada have accepted responsibility for the onerous task of policing and enforcing the 30 metre buffers and the conditions that will accompany these buffers. The Board is inclined to accept as more likely than not, the fact that the Condominium Corporation and its members, given its obvious composition of Owners, will not necessarily be effective in always upholding all of the conditions and restrictions as presented to the Board. The Board must be concerned with the long term effects of this Development, not just for years to come, but for decades and centuries to come, as the PPS requires. The Board must accordingly ensure that the PSWs are safeguarded for future generations as mandated by the policies of the PPS, and accordingly cannot conclude that the 30 metre buffer, without governance by a long-term governmental agency, will, in the long term, adequately fulfill the curative/mitigating functions envisioned by BBC. Even if responsibility for the buffer was undertaken by any governmental agency, the Board does not find, on the evidence, that it has been established that the buffer, in and of itself, will represent the kind of effective

preventative zone that will result in “no negative impact” on the natural features of a PSW or their ecological functions

[106] Consideration of the corridors, the road ecology mitigation strategies, the buffers and the Draft conditions, as undertaken, is relevant to far more of the ecological and environmental concerns before the Board than just the Blanding’s Turtle. Upon all this evidence the Board finds that these buffers will not function as they are anticipated. Further, the Board finds that these other measures will not ameliorate the fact that development and site alteration is occurring in a significant wildlife habitat or a threatened species habitat. As FFW has submitted, mitigation of negative impact is not enough. Applying a reasonable and workable view of what is “negative”, negative impact must be eliminated altogether and the Board does not find that these buffers will fully eliminate all negative impact on the natural Lake and PSW features or their ecological functions. Due to the manner in which these Lots will be developed, the Board cannot conclude that the proposed type of conditions attached to the 30 metre buffers, as they will be imposed and applied, will be practically effective for the reasons indicated.

Other Wildlife Species

[107] The Board has received other evidence regarding wildlife species on the Site which might be impacted by the Development. The evidence and findings relating to the effectiveness of BBC’s mitigation strategies and measures equally applies to each concern raised with respect to those species.

[108] There was conflicting evidence relating to the Little Brown Bat, and Osprey again raising serious doubts as to the sufficiency of BBC’s investigations and evaluations of species. Dr. Andrea Smith testified that the BBC Lands would be especially sensitive to disturbance due to the PSWs and the enriched forest habitat that existed on Site. Dr. Smith concluded that development adjacent to the PSWs and the adjacent lands would lead to fragmentation and reduction in habitat available for habitation, thus negatively impacting many species, including Species at Risk.

[109] Dr. Smith, Mr. Janus and Mr. Bowles, called by FFW, were all of the opinion that the Development was not consistent with the PPS policies that required an evaluation of the Site as a Significant Wildlife Habitat as defined in the PPS, particularly since Mr. Ellingwood and BBC had undertaken insufficient and incomplete field surveys or studies. The Board finds this to be the case and also accept the submissions of FFW that a portion of the EIS work and wildlife surveys appeared at the eleventh hour, and seem rushed, incomplete and not in accordance with the Procedural Order which required the delivery of statements/reports in advance of the hearing.

[110] There is little to distinguish a number of these other wildlife species from the analysis relating to the Blanding's Turtle. Other turtle, reptile, bird or animal species may face the same uncertainties and risks. The Board finds that there is no evidence that would alter its findings and conclusions relating to the inability of the proposed mitigation measures to prevent negative impacts upon other species in the habitats in which the Development is proposed.

[111] The PPS expressly prohibits development in significant wildlife habitat unless no negative impacts on those habitats or their ecological functions can be demonstrated. Based upon the totality of the evidence, the Board accepts the evidence of Dr. Smith, Mr. Janus and Mr. Bowles that if the Development was permitted there would be a variety of negative impacts which could not be eliminated by the measures proposed by Mr. Ellingwood and Ms. Gunson even if they were effective, which the Board finds has not been demonstrated.

[112] The absence of additional peer review of the revised reports submitted on the eve of the hearing, the failing on the part of BBC to convene like-experts meetings as provided for in the Procedural Order, the last-minute changes to the Development proposal (changing the surface treatment for the Roads, the proposed prohibition of fences) and the uncertainty of some aspects of the proposed development (such as the final form of road mitigation strategies, stormwater management designs, well and water supply infrastructure) also leads the Board to find that BBC cannot assuredly eliminate negative impacts of the Development on the PSWs, and the sensitive and significant wildlife habitats within the Site.

[113] For all of these reasons the Board concludes that the Development is not consistent with the provisions of the PPS relating to wildlife species including endangered or threatened species.

[114] Upon these findings, the Board accepts the related planning opinion of Mr. Fahner, generally supported by Mr. Tighe, that the Development does not represent good planning in the public interest because BBC has not sufficiently established that the Development is consistent with the natural heritage provisions of the PPS. Upon the evidence presented by FFW, Mr. Fahner opined that it has not been demonstrated that there will be no negative impacts on the PSWs or on fish habitat or Rare or Endangered Species including the Blanding's Turtle.

[115] The Board also accepts Mr. Fahner's planning concerns regarding the 30 metre buffers and the absence of any meaningful controls or monitoring by an independent body, including Parks Canada or the Township, which are substantiated by the evidence. Considering the extent to which BBC's Development is predicated on the effectiveness of the 30 metre buffers, the absence of any practical and effective planning processes to maintain such buffers for the years and decades ahead, results in a considerable failing in the Development from a planning perspective. The Board finds that Mr. Josephs', in his testimony, upon all of the evidence, was unable to counter this failing.

3. Ecology and Fish Habitats

[116] There is no dispute that the waters of Stony Lake, and in particular the West Bay, are historical fish habitats for a variety of species including the Muskellunge, Northern Pike and Largemouth Bass. A number of the Participants testified personally as to the reputed status of the waters in and around the Site, and in particular the West Bay, as an important sanctuary location for Muskellunge spawning.

[117] Mr. Ellingwood's testimony, supported by the EIS submitted into evidence reviewed the historical and recent data relating to fish inventories and spawning. The MNRF at various times accessed Stony Lake as an area for Muskellunge egg collection

for propagation. West Bay, identified as Habitat Zone 1 in the EIS, was confirmed as a Muskellunge spawning ground, (supported by anecdotal evidence from the local Participants). This area also functions as foraging and cover habitat, and likely spawning as well, for 12 different sport and forage fish species common to Stony Lake. The Fairy Lake PSW Complex, off the eastern area of the Site is also identified historically as spawning habitat for Muskellunge and also functions as foraging and cover habitat, and likely spawning as well, for eight varieties of sport and forage fish species common to Stony Lake. Historically, Largemouth Bass and Walleye are recognized as present in the waters off the Site, but Mr. Ellingwood's testimony and report confirmed that the Walleye survey resulted in a positive siting in Habitat Zone 4, and Largemouth Bass spawning surveys did not result in a positive siting though the surveys were done in late May. Nests and adults were recorded however. Also of note from the evidence is that Habitat Zone 3, which encompasses the enclosed Bay and proposed marina which will not have a shoreline buffer, will contain the Core 1 recreational facilities and the marina functions as foraging and cover habitat, and likely spawning grounds, for six sport and forage fish species common to Stony Lake and is a Pumpkinseed spawning habitat.

[118] Mr. Ellingwood's impact assessment study was reviewed by him in his testimony, which recognized that the West Bay and Fairy Lake PSW Complexes are dependent upon maintaining the water levels and limited vegetative condition of the habitat, as well as oxygen levels. Conversely the most significant negative impacts upon fish spawning habitats and Muskellunge and other species population are physical in-water habitat loss, related reductions or increases in water levels or changes in water quality, and shoreline riparian vegetation clearing.

[119] BBC's strategies to mitigate negative impact on fish habitats and fish species have been outlined by Mr. Ellingwood. BBC relies on the following to mitigate and minimize potential negative impact to fish species (and water habitat species which includes the Blanding's Turtle):

1. the primary mitigation measure significant there will be the 30 metre "no touch" shoreline buffer;

2. there will be no development in West Bay or the Fairy Lake PSW Complex;
3. owner education will inform residents on wetland function;
4. tributary flows into West Bay and the Fairy Lake PSW Complex will not be altered;
5. the proposed stormwater management (utilizing the infiltration basins) will mean that road run-off will be captured and treated and is not expected to cause significant harm to these water habitat;
6. the proposed wastewater treatment systems will be designed so that increased nutrient loading through septic system use will be mitigated by the use of phosphorous and nutrient retaining soils and thus avoiding transfers to the PSWs and Stony Lake waters;
7. other design and management restrictions such as bank stabilization techniques and erosion control, trash removal and grass cutting, routine removals of accumulated sediment;
8. further investigations and monitoring will occur.

[120] Based on these measures, BBC's evidence, introduced broadly through Mr. Ellingwood, is that although the Development will introduce 58 dwellings and extensive infrastructure and common services and amenities the above measures will minimize the impacts to the lake and shoreline. Although BBC plans to introduce a 72 slip marina within the waters off Core 1, BBC's evidence is that this will not cause serious harm to fish in that Habitat Zone 3 area and they intend to seek further approvals from Parks Canada based on a full Detailed Impact Analysis. Overall, BBC asserts that the strategies and measures are designed to protect all of the wetlands, and that impacts on the wetlands over the long term can be mitigated.

[121] The expert witnesses on behalf of FFW do not agree with BBC's optimistic assertions. Mr. Parsons reviewed both the wastewater treatment and stormwater management systems and concluded that given the limited soil and rocky terrain characteristics and topography of the Site as a whole, and with drainage patterns in the Development areas, the proposed systems would not successfully prevent nutrient loading into the PSWs, including the West Bay, or Stony Lake through gradual

movement of wastewater and stormwater. Mr. Parsons testified that any nutrient loading has the potential to transition wetland environments into cattail marshes and with the uncertainty of how nutrients will be contained the risk of future wetland transition is a real threat to the functionality of the PSWs. Mr. Parsons indicated that stormwater pulses flowing from increased road surfaces would also adversely impact the PSWs. Obviously this risk impacts upon the health and future of the PSWs as a whole, contrary to the PPS and OP policies, but practically this would also impact upon wildlife and fish species, including the Muskellunge. Mr. Parsons opined that although extensive studies and work had been undertaken by BBC, actual assessments of risks and impacts associated with stormwater and wastewater were not in place and in his view, the Development, as currently planned would not be recommended.

[122] Mr. Miller, qualified as an expert in biology, ecology and environmental impact assessments supported and repeated Mr. Parson's opinions opining that given the shallow soil sites, nutrients from at least some of the septic systems will eventually reach the wetlands with the resultant shift in species composition favouring dense cattail marshes and choking out the PSW wetlands. Mr. Miller also reiterated, from a policy perspective that BBC had the onus to establish that there would be no negative impacts and that this standard or test could not be met because, at best, BBC was establishing only that it was mitigating effects on the PSWs and adjacent lands – something that he felt was not accomplished as a result of the anticipated failure of a number of the mitigation strategies.

[123] Although touched on by some of the expert witnesses, the Board also received evidence primarily from the local Participants, regarding concerns relating to increased boating traffic in the waters (including West Bay and that portion of Stony Lake forming the Fairy Lake PSW Complex) and the cumulative impact this would have upon fish and aquatic species, as well as water quality. With the number of shoreline Lots in place, Participants such as Ms. Rachel Corbett were of the view that, based upon the habits and conduct of cottagers, it is highly unlikely that boats and watercraft will be launched or moored only at the marina, calling into question the practical effects of the 30 metre shoreline buffer.

[124] From the perspective of Mr. Edgar Wood, whose cottage/residence is on Woods Island, directly across from Core 1 and the proposed marina, the introduction of such a massive docking facility, and so many watercraft in the contained area framed by the shoreline and islands would give rise to great disruption to the waters and safety concerns given the narrow points of entry into this currently quiet and protected area. By Mr. Wood's estimation the construct of the marina docks would come to within some 150 feet of their island. The presence of such a large recreational and marina area would further, in his view, create substantial increases in ambient light, noise, activity and shoreline disturbance (since there would be no buffer in this area).

[125] Mr. Reid Brownscombe and Ms. Patricia Bourne presented the common Participant's statement on behalf of a group of 20 Participants expressing concerns of the impacts of the Development on Stony Lake, the PSWs and fish species as well as concerns about lake water quality and increases in phosphorous levels as explained by Dr. Howard in his testimony. Mr. Brownscombe recalled the days when the MNRF collected Muskie eggs from the Lake near the Development and the vigorous population of Muskellunge in the Lake area.

[126] Particularly persuasive was Mr. Brownscombe's testimony regarding increased boat traffic that would arise from the concentrated development and marina. It was noted that BBC had failed to provide any study relating to boating capacity and instead had suggested in general terms that there would be "infrequent use". Mr. Brownscombe and the group testified that adding such a large number of new residences in a development of this size would result in a substantial increase in boat traffic to an already-stressed lake with larger and faster boats becoming the norm. He also testified that given the means of most owners, based on the Participants' experiences, the number of boats would not be limited to just one, and it would be expected that the "boat profile" would include pontoon boats, wakeboards, fishing boats, kayaks, paddleboats, canoes, paddleboards, jet skis and larger craft. The location of the Development in proximity to the locks of the Trent Severn system would also invariably increase the risk of accidents due to the funneling, and bottleneck accumulations of craft into the shoreline area, the new marina and the areas north of the locks and the falls.

[127] Although the evidence of the Participants is not expert evidence, it generally was corroborated by FFW's expert witnesses and was presented in a forthright manner that was not, in the Board's view, exaggerated or alarmist. The Participants were generally consistent in their concern that the Development was large, intrusive, and intensive and was being placed within ecologically sensitive lands and wetlands that represented a significant component of the Stony Lake environment – a view shared by the Board upon all of the evidence presented. Upon the totality of evidence the Board cannot conclude that the Development, as it is inserted within the PSW Complexes, and as it is designed, can or will avoid adverse and negative impact upon the waters of the PSWs and Stony Lake. The Development will not only, as indicated earlier, cause negative impact on the PSW and the adjacent lands and their ecological functions, but by extension, will also adversely affect terrestrial habitats and the significant wildlife species that exist there and the fish habitats and their species as they are situated within or adjacent to the PSWs.

[128] In regards to other concerns regarding ecology and potential adverse impact upon plant species within the BBC Lands, the Board has considered the additional evidence in this regard, and for the same reasons, and upon the same evidence outlined at length above, because of the direct ecological connections and functions between the PSW Complexes and adjacent lands, and the forest and vegetative components of these environments it is unnecessary to examine specific concerns regarding individual plant species under the circumstances. Mr. Ellingwood's EIS identified those plant species in the BBC Lands and while there might be residual concerns relating to the protection of some at risk species such as the Butternut tree or Pale Bellied Frost Lichen, the Board's findings and conclusions that the Development should not be approved due to the lack of consistency with the policies of the PPS relating to natural heritage features adequately encompass those residual concerns.

SUMMARY – ISSUE A - PSWs, ECOLOGY, WILDLIFE AND RELATED PLANNING MATTERS

[129] The evidence in this hearing relating to the intensity and ecologically enriched character of the BBC Lands, and the surrounding area, very much “syncs” with the

policies of the PPS in that it becomes self-evident as to why the Fraser PSW Complex and the Fairy Lake PSW Complex have been assessed and designated as natural heritage lands that are the most valuable and subject to the special protection afforded by the policies of the PPS. It is clear that s. 2.1.2 should not be considered lightly as the PPS emphasizes “the linkages between and among natural heritage features and areas, surface water features and ground water features”. In the Board’s view, based on the evidence provided by the experts, this recognition of the “whole” and the areas in, around, and between as part of the complex, linked to the PSWs and Stony Lake is required.

[130] The appropriateness of the Development, and the issue of impact upon the PSWs and adjacent lands, must be considered in the context of the Fraser PSW Complex as a whole, and further, of both Complexes combined, and not just as a collection of separate wetlands. In the attempt to design this concentrated Development “around” and “into” the existence of these protected PSW Complexes, BBC has unfortunately failed to recognize the impact of the policies in s. 2.1 of the PPS and unfortunately this minimizes the importance and application of s. 2.1.8 to the linkages that connect the PSWs. The Development has essentially been inserted, or overlaid, atop these linkages and this is, in the Board’s view, an insurmountable obstacle to the type of intense and complex Development that is being proposed.

[131] The wording of s. 2.1.4 and s. 2.1.8 of the PPS are clear – there can be no development in a PSW and there can be no development in the lands adjacent to a PSW unless the ecological function has been evaluated and there is no negative impact. The circumstances that exist due to the existence of two PSW Complexes, and BBC’s attempt to integrate the proposed Development within the Fraser PSW Complex is inconsistent with the PPS or the OP provisions that further reinforce those policies.

[132] The issue of shoreline development, environmental impacts and conservation were further addressed in the planning evidence. All three planners were consistent in reviewing the various provisions of the County OP, as amended which included planning policies relating to environmental impacts, road development, the objectives

relating to the shoreline character, water quality and sustainable shore development. The primary goal of the amended County OP is:

To improve and protect the waterfront areas in Peterborough County as a significant cultural, recreational, economic and natural environment resource and enhance land areas adjacent to the shore.

[133] The objectives of the County OP are to recognize and preserve to the greatest extent possible the character of waterbodies and land adjacent to the shoreline with limited low density backlot development, ensure that the built-form along the shoreline is not overly concentrated, maintain enhance or restore the shorelines in a natural state through stewardship and best property management practices, and preserve and enhance fish and wildlife habitat areas within and along waterbodies. As a policy the County OP promotes, as explained best by Mr. Tighe, that natural vegetative areas and environmental conservation should be balanced with development to enhance and protect the qualities that contribute to the area's shoreline character. Section 4.4.3 of the amended County OP provides that tree cover and vegetation is encouraged to be retained along the shoreline to uphold the visual and environmental integrity of waterfront areas, and where development is to occur, the incorporation of natural buffers between the water and development should be provided for.

[134] None of these OP policies, in and of themselves, are the subject of controversy. The extent to which the Development conforms to such planning goals, objectives and policies is where the experts' opinions differ. Mr. Josephs' planning opinion, again based upon those opinions provided by BBC's experts, was that the Development conformed to the primary goal, and the objectives and policies of the County OP as set out above.

[135] Mr. Fahner's opinion was entirely opposed and was based upon the contrary environmental and natural heritage evidence introduced by FFW. Mr. Fahner's testimony expressed many planning concerns including: the practical effectiveness of the buffers; the density of the Development; the incomplete lake capacity assessment; the absence of stewardship for any buffer or conservation easement; the uncertainties of enforcement, control and stewardship of use and management of Lots and common

areas through the condominium; and the lack of assured water supply coupled with an unacceptable contingency plan.

[136] Mr. Tighe expressed various reservations regarding the Development due to the same concerns and uncertainties outlined by Mr. Fahner and the lack of completeness relating to the environmental assessments. Mr. Tighe testified that he had serious concerns regarding the absence of any assumption of responsibility for the conservation easement by the County or Parks Canada and the Township. Generally Mr. Tighe's opinion was that he could not assure the Board that the Development represented good planning.

ISSUE B - WATER SUPPLY, WELLS AND HYDROLOGY

Position of the Parties and Experts

[137] BBC's position is that the hydrogeological assessments that have been completed with respect to the proposed Development are sufficient to determine that an adequate and safe supply of water will be available for each of the 58 Lots as well as the common areas, including the central recreational facility and marina. If there are any residual uncertainties, BBC submits that the imposition of conditions and the well certification process will adequately address such uncertainties.

[138] FFW submits an entirely opposed view. There is an insufficient water yield available to meet the needs of the Development, which will negatively impact nearby residents and the larger hydrology priorities identified by the Province in the PPS. No conditions can be imposed to adequately safeguard against such uncertainties or risks to ground water features and hydrological functions.

[139] The Township, in its closing submissions, recognizes that one of the main concerns relates to the sufficiency of water supply to the subject property, and that the Board has conflicting evidence before it on the issue. The Township's Planner, Mr. Tighe, confirmed that the Township does not support access to surface/lake water as an alternative contingency water servicing option but notes that if the Board approves the

Development the Well Certification Program and Contingency Plan should be maintained. The Contingency Plan requires Township written permission for surface water access -- permission that the Township has plainly stated it does not wish to give, and an option which it does not support as viable.

[140] Based on the evidence before the Board, the Contingency Plan which provides for the possibility of lake water access as a last resort, is effectively rendered meaningless and a nullity, at the outset, because if there is insufficient well water to service the Development the Township is opposed to Lake water usage and thus, there is no Contingency Plan if there is insufficient well-water from the aquifer. What is significant is that if the Development were to proceed, Lots would be sold on an ongoing basis and owners would sequentially proceed to drill and seek certification for their wells. The scenario that could conceivably unfold is that subsequent owners might face circumstances where no water source could be accessed, and look to the Township for validation of the Contingency Plan.

[141] It is noted that the issue of water supply and wells was listed in the Issues List as whether a communal well concept would be appropriate for a seasonal development. That has been abandoned in favour of multiple wells with a possibility of a cluster well accessed via easements and multiple connection lines in the event individual owners cannot find water via a well on their Lot. The evidence before the Board is also very clear that dwellings on the Lots will not necessarily be seasonal and may very well be year-round residences.

Planning Context

[142] The PPS includes the following excerpted planning policies relating to water quality and quantity:

2.2.1 Planning authorities shall protect, improve or restore the *quality and quantity of water* by:

- a) using the *watershed* as the ecologically meaningful scale for integrated and long-term planning, which can be a foundation for considering cumulative impacts of development;

- b) minimizing potential negative impacts, including cross-jurisdictional and *cross-watershed* impacts;
- c) identifying water resource systems consisting of *ground water features, hydrologic functions, natural heritage features and areas*, and *surface water features* including shoreline areas, which are necessary for the ecological and hydrological integrity of the *watershed*;
- d) maintaining linkages and related functions among *ground water features, hydrologic functions, natural heritage features and areas*, and *surface water features* including shoreline areas;
- e) implementing necessary restrictions on *development* and *site alteration* to:
 1. protect all municipal drinking water supplies and designated *vulnerable areas*; and
 2. protect, improve or restore *vulnerable* surface and ground water, *sensitive surface water features* and *sensitive ground water features*, and their *hydrologic functions*;
- f) planning for efficient and sustainable use of water resources, through practices for water conservation and sustaining water quality;
- g) ensuring consideration of environmental lake capacity, where applicable; and
- h) ensuring stormwater management practices minimize stormwater volumes and contaminant loads, and maintain or increase the extent of vegetative and pervious surfaces.

2.2.2 Development and site alteration shall be restricted in or near *sensitive surface water features* and *sensitive ground water features* such that these features and their related *hydrologic functions* will be protected, improved or restored.

Mitigative measures and/or alternative development approaches may be required in order to protect, improve or restore *sensitive surface water features, sensitive ground water features*, and their *hydrologic functions*.

Negative impacts: means

....

- b) in regard to policy 2.2, degradation to the *quality and quantity of water, sensitive surface water features* and *sensitive ground water features*, and their related *hydrologic functions*, due to single, multiple or successive *development* or *site alteration* activities;

[143] Section 7.4 of the County OP expressly requires that an adequate supply of potable water and appropriate servicing be demonstrated for any proposed development such as this one – a somewhat basic but immensely important element for a development of this scale and form. It also confirms a primary objective, in doing so, of environmental protection.

Specific Issues

[144] Given the contextual placement of the Development, the PPS and County OP thus impose obligations upon BBC to establish three things:

- (a) First, from an overall planning perspective BBC must establish that the Development can be serviced with an adequate supply of water. The OP, in this regard, essentially safeguards the interests of owners who, if the Development were approved, would be assured an adequate and safe supply of water.
- (b) Second, BBC must demonstrate to the Board that the supply of water to 58 individual residence developments and other buildings and facilities in the Core areas, in the manner proposed, will “protect, improve or restore....sensitive ground water features and their hydrologic functions” The word “sensitive” in regards to ground water features is defined in the PPS as “...*areas that are particularly susceptible to impacts from activities or events, including, but not limited to, water withdrawals, and additions of pollutants.*”
- (c) Third, BBC must also confirm that the Development’s water servicing will “*minimize any potential degradation to the quality and quantity of water*” and those “*sensitive ground water features, and their related hydrologic functions*”.

Evidence and Analysis – Water and Hydrogeology

[145] Two experts were qualified to provide evidence in this issue. Mr. Chris Rancourt appeared for BBC and Dr. Ken Howard on behalf of FFW.

[146] The Board was asked to take Mr. Rancourt's alleged conduct during recesses of the hearing, unrelated to the issues at hand, into consideration when weighing his testimony. The Board has considered this submission relating to events that occurred outside of the hearing, and does not agree that it has any bearing on Mr. Rancourt's testimony or the issues in this hearing.

[147] For the purposes of an overall review of the hydrogeological evidence it is important to note that Mr. Rancourt appeared fairly late in the day (and, as it turns out, for the hearing) relative to the entirety of the time period that BBC has requisitioned and assembled its supporting information and testing results relating to the sufficiency of the ground water supply and the impact that the Development would have on the ground water supply (and the sewage and stormwater systems). The original well and hydrogeological studies and investigations were undertaken earlier by two other individuals with the Trow exp. Engineering company ("Trow") who preceded Mr. Rancourt's involvement but who were unable to attend to provide testimony due to unfortunate issues of health and the passage of time. The original hydrogeological investigations, reports and peer review date back to 2002 and 2004 with some supplementary reports in 2008 and 2012 with a peer review process continuing through to 2014, undertaken by Oakridge Environmental Limited. Additional well test data was secured and prepared at the eleventh hour by BBC's consultants for the purposes of this hearing but only delivered to the other Parties as the hearing began.

[148] In the Board's view the timing and manner of hydrogeological investigations occurring when and as it did, and Mr. Rancourt's responses to a number of questions during his testimony, results in some impact upon the weight to be given to his evidence. When pressed for clarification on troublesome concerns and conflicting opinions relating to the issue of whether the Development can be serviced with an adequate supply of water Mr. Rancourt hedged his answers to a number of questions,

often responding that unfortunately time constraints, and the fact that he had no involvement whatsoever in the preparation of the earlier reports, left him unable to provide opinions as to such certainties. Mr. Rancourt said on a number of occasions, that “there was more work to be done”, and that “further investigations were required” in relation to water servicing issues.

[149] Mr. Rancourt also confirmed that due to the length of time that has elapsed since the original reports were prepared in 2002, and the investigations undertaken at that time (including the 11 well tests) the standards and processes utilized in hydrogeological reviews such as this one had changed. At a number of points in his testimony, Mr. Rancourt stated that in providing opinions as to the sufficiency of the proposed wells and septic systems, and any impact the design might have on nearby water systems or the aquifers, a “final” opinion, and “answers to a number of questions” would have to be deferred until the appropriate, necessary, and more thorough and comprehensive reviews, testing, and hydrogeological studies have been completed. The deferral of answers to such questions is cause for concern. Also of concern is Mr. Rancourt’s heavy reliance on the proposed Well Certification Program and Contingency Plan about which the Board has reservations.

[150] The Board accepts that Mr. Rancourt unfortunately entered into the investigation and consultation at a late stage and that he was not involved in the early assessment reports or peer review processes. Nevertheless, that is the extent of the evidence that the Board has before it from BBC as the Applicant. Based upon the rather underwhelming testimony on the part of Mr. Rancourt regarding the hydrology issues, the board remains unable to conclude that BBC is in a position to satisfy the important task of ensuring that a water supply will be available for, at a minimum, 58 households, visiting guests, BBC staff and owners, and the substantial water supplies for the recreational complex in Core 1, which includes a public pool.

[151] Similarly the Board is not persuaded by Mr. Rancourt’s testimony that BBC has adequately investigated and determined what adverse short or long term effects the density of well systems within the confines of the Development Site will have on the

aquifer, the adjacent PSWs, Stony Lake, general and long-term water quality, or other nearby wells.

[152] Generally, aside from the weight to be given to the specifics of Mr. Rancourt's evidence in comparison to Dr. Howard's evidence where their opinions differ, on the whole of the evidence on these hydrology issue, for the reasons herein, it the Board's view that this Development application has come before it without the required and necessary testing, assessments, review and investigations having been sufficiently completed to allow the Board to determine, with assurance, that the proposed methods of supplying water to the Development will be successful or are consistent with the PPS or the applicable OPs. The Board does not find that Mr. Rancourt's statement that it is his expectation that "*we are going to be in pretty good shape*" on the question of an adequate supply of water and that "*this is why we have a well certification process*" comes close to the level of certainty the Board requires as to compliance with the PPS or the County OP.

[153] Nor does the Board find, due to the manner in which these issues have been dealt with over the course of over 15 years, that the peer review process on the question of water supply provides any additional level of comfort to the issue of water supply given the manner in which the proposed conditions and Well Certification Program and Contingency Plan have been left, as discussed below.

[154] It is the Board's conclusion, based on the evidence provided, that the unknown aspects of this Development relating to the sourcing and supply of water from ground water supplies (as well as the discharge of stormwater, the handling and discharge of sewage, and the impact of such water issues on the environment and natural heritage issues) have not been adequately investigated or determined to permit the Board to conclude that the Development will not result in the types of negative impacts referred to in the PPS or satisfy requirements for development under the County. The investigations are also insufficient to overcome the very firm opposed opinion of Dr. Howard that there is insufficient water available to supply a development of this size.

[155] Dr. Howard's opinion is that the data collected by BBC through the test wells confirms that the confined aquifer that is intended to supply the water needs of the Development is far too weak and that there are serious sustainability problems. Dr. Howard has provided an overview of the eleven test wells that had been completed and through a summary chart (Exhibit 26) he prepared, explains that these test wells themselves are sufficient to raise grave concerns not only regarding the adequacy of a water supply but also the potential impacts that could occur on the aquifer, Stony Lake or the sensitive PSWs in the absence of sufficient data and knowledge regarding the aquifer.

[156] Dr. Howard's conclusion is that only two out of the eleven wells, Wells 5 and 8, provided a reasonable well yield of at least 20 cubic metres per day and even then, Well 8 is located some distance from the Development and displayed hard water quality problems. Dr. Howard advised the Board that a transmissivity value of less than one cubic metre per day can barely be characterized as a water supply, and six of the wells (Wells 3, 4, 7, 9, 10 and 11) were below that, with Wells 3 and 4 running dry after just three hours of gentle pumping. The third best well (Well 2) had the third highest transmissivity value at 6.91 cubic metres but was likely connected to a surface water source and he agreed it had to be abandoned, as BBC's consultants recommended. These basic results, in Dr. Howard's view should have been a "red flag" that the Development would not have a sufficient ground water supply and would be required to resort to surface water.

[157] Dr. Howard was critical of the limited testing and inadequate data that had been obtained to sufficiently establish that the aquifers would be able to provide consistent water flow rates over an extended time and noted that if the Development were to proceed, as each Lot "came on line" the ability of each successive Lot to access a long-term sustainable water flow was doubtful. Dr. Howard's very adamant view was that Trow's approach to determining safe yield based upon infiltration estimates, surface runoff and a very arbitrary runoff coefficient for rock of 60% to calculate recharge, on an assumption of use equal to 2,250 liters per day for a four bedroom home was a "crude" approach and not at all helpful.

[158] Dr. Howard did provide what he viewed as a proper safe yield calculation based upon the accepted methodology applying “Darcy’s Law”, to calculate the volume of water running through the supplying aquifer in a day and then apply a 10% safe yield approach. Based upon Trow’s determined hydraulic gradient, Dr. Howard estimated that approximately 20 cubic metres of water were passing beneath the Site. Assuming a basic water demand of 450 liters per day, per person, this translated into a supply for only 44 people—far below the potential occupants of the Developed Site. Invoking the safe yield approach, assuming all of the groundwater was intercepted provided a safe yield for only four people.

[159] Dr. Howard had the opportunity to review the additional test data provided by Mr. Rancourt after the hearing had commenced and concluded that this did not change his opinion that the aquifer was confined, or his opinion summary of the transmissivity rates. In his view, with the additional wells, there was still an inadequate water supply.

[160] Dr. Howard’s opinion was that the aquifer was a confined aquifer and thus raised concerns regarding the stability of the aquifer. Dr. Howard pointed to the reports of Trow (Exhibit 1, Vol. 2, Tab B(1)) which also identified a confined aquifer in the well test records. Notwithstanding Trow’s earlier reports which conflicted with his opinion, Mr. Rancourt, in contrast, suggested that BBC was dealing with an unconfined aquifer. If a confined aquifer does exist, and there is little persuasive evidence provided by Mr. Rancourt that it is not, then concerns regarding the aquifer’s long term stability would exist. Given the low infiltration rate due to the volume of surface rock, the depth of the aquifer below 30 metres, and the lack of information relating to hydrological function and the input and output of water to the aquifer, Dr. Howard was of the opinion that there were serious concerns about the long term sustainability, quantity or quality of the aquifer if it was, as a confined aquifer, being depleted and not replenished.

[161] Dr. Howard’s summary in his witness statement is as follows:

In summary, I find that the hydrogeological investigations conducted by Trow (2002) to be poor, superficial and lacking in basic hydrogeological information such as a water table/potentiometric map and aquifer flow estimates. Moreover, only crude, unsubstantiated estimates of aquifer recharge (aquifer replenishment) are provided and no attempt has been

made to develop a groundwater management model. Fortunately, short term pumping tests were carried out on 11 deep wells constructed on the property and these data provide critical information on the aquifer's ability to provide an adequate groundwater supply. They demonstrate that the target aquifer is extremely weak and totally incapable of supplying the water needs of the development.

[162] There are other minutiae of the hydrology issues and a lack of sufficient answers to other questions which form part of the evidence and which has been considered. In its totality the evidence leads the Board to conclude that the Development raises legitimate concerns regarding the possible degradation of ground water table or other adverse impacts. The Board finds, based upon the evidence, that BBC's Development is not consistent with the PPS or the County OP and with the substantial Development planned BBC has not established that the quantity of water that would be supplied to the Development is sufficient. The proposed Condition, and most importantly, the Water Certification Program and Contingency Plan do not change this finding.

Proposed Condition – Water Certification Program and Contingency Plan

[163] Mr. Rancourt, as indicated, places much reliance on the proposed Well Certification Program and Contingency Plan as a means to address the uncertainty as to whether adequate yields can be sustained for the Lots. What is of concern is the fact that Mr. Rancourt frankly states that he is "not comfortable commenting on the certification program" because he was not involved in its preparation.

[164] As to the Contingency Plan if individual wells cannot access adequate water, Mr. Rancourt acknowledged that this would mean drawing water from the lake. On cross-examination Mr. Rancourt acknowledged the opposition to this option as expressed in the peer review (and by the Township) and indicated that "personally, this is not something he wants to consider" and that he would "worry about surface water draws". As to the other option of the communal wells, which is the other contingency option, Mr. Rancourt testifies that based on what he had seen that option would not be an easy case, that it would be a challenge to find a good location for a communal well, and that this issue had not been properly examined as yet.

[165] BBC submits that the appropriate way to deal with these concerns raised by Dr. Howard is to impose the draft condition that further work be done to demonstrate to the satisfaction of the County that the taking of water by way of wells is within the acceptable safe yield of the aquifer and its sustainability. Essentially this amounts to the Board “shelving” its jurisdiction in deciding this issue in these appeals and ceding responsibility for this larger, and long-term, decision making, to the County, which elected not to participate in this hearing. As well, BBC submits that the Well Certification Program and Contingency Plan solves the problem as no building permit will be issued until a well has been proved on the unit to be built. On the facts of this case the Board does not accept that either the Condition or the Program or the Plan are appropriate as a means to address the nonconformity with the County OP or OP policies of the Township, or the failure to adhere to the policies of the PPS.

[166] The evidence before the Board is that the proposed form of this “Well Certification Program and Contingency Plan” requires the Condominium Corporation to be responsible for the water supply development. However, it is equally clear from the evidence that BBC chooses to remain completely uninvolved and will not assume any responsibility or risks related to the well drilling necessary to access a water supply. These costs and obligations, as well as the uncertainties of access to a sufficient supply of water, are transferred to each owner – essentially on a “Buyer Beware” basis. The program requires that for each well the owner confirm whether “*the supply aquifer is confined or unconfined*”, whether “*water quality is impacted by nearby activities*”, and assume obligations to abandon and seal wells that produce an insufficient supply for domestic use before re-drilling a second well on each Lot.

[167] The program further provides for the “unlikely event” that water cannot be sourced from a well, with a contingency that anticipates access to a surface water source (i.e. Stony Lake) but “*only with the written permission of the Township*”. BBC, through its hydrogeological expert has provided very guarded, qualified and less-than-firm opinions that there is likely an adequate supply of water and relies upon the uncertainties of the Well Certification Program, and a surface water Contingency Plan which the Township has already confirmed it will not approve.

[168] The task of determining whether or not the Development meets the requirements set out in the PPS and the OPs, and whether imposed restrictions and conditions might be adequate to address uncertainties, falls to the Board. Certainly, in considering development proposals the facts can be reviewed, and sometimes determinations can indeed be made that it is sufficient to impose after-the-fact conditions, prerequisites, and safeguards that will ensure practical concerns are addressed before building commences. Such conditions should not, however, effectively mean that the Board is forgoing and ceding the required consideration and determination of significant planning issues to a third party. The Board cannot forgo its duty, on an appeal such as this one, to consider the evidence and decide whether an aspect of the Development does, or does not, comply with provincial, county or municipal planning policies. It is not reasonable or sufficient to leave such undetermined planning considerations to later review particularly when they may deeply affect the propriety and viability of a proposed development. BBC is asking the Board to do exactly that, and in the Board's view that is not possible.

[169] BBC points to the peer review process completed by Oakridge Environmental Ltd. ("ORE") as having validated the sufficiency of the hydrogeology investigations and the value of the Well Certification Program and Contingency Plan in assuaging any potential concerns relating to water supply. The Board has carefully reviewed and considered the exchange of comments that occurred in the course of the review processes between BBC's consultant, and the peer review agency retained by the Township. In the Board's view ORE has, surprisingly, failed to heed its own misgivings or properly consider the ramifications of the failure of the ground water system to service a significant concentration of development via multiple private wells. The evidence before the Board is that:

- In November of 2003 ORE expressed pointed concerns as to the adequacy of the test well coverage and the reasons relating to the location, number, success and failure, randomness and sufficiency of the well tests – the same deficiencies noted by Dr. Howard. ORE reviewed Ministry Guidelines to determine adequacy of the well testing and reiterated the previously-

- expressed concerns. ORE concluded that the possibility of accessing communal wells (on common lands drilling for water in the same area) and the Well Certification Program and Contingency Plan would suffice to deal with such concerns. ORE then provided a detailed review of the form of such Program and Plan which expressly would require that the technical burden of satisfying the Program requirements remain with the Condominium Corporation and that this should occur before a sale so as not to burden the buyer.
- In July of 2004 ORE reviewed the contingency plan options, concluded that, for the reasons indicated, the use of lake water is not appropriate and confirmed that “*the use of lake intake systems for this site is not acceptable to the municipality*” (with their added underlining for emphasis). Sharing wells located on common lands is the contingency that is described as reasonable if the implementation measures are “*workable*”.
 - In response Trow countered that surface water “*presents a suitable alternate source of potable water for most of the lots*” and although a matter of last resort, should remain as a contingency.
 - In August of 2004 ORE, reiterated that “*water supply conditions are not ideal*” and is concerned with BBC’s approach to lot servicing. ORE acknowledged that there were “*potential difficulties associated with securing a suitable supply [of water]*” and that balancing the development’s efficiencies while “*protecting stakeholders*” is not a simple matter. After reviewing the well-founded concerns, based on the uncertainties of water supply, ORE then relented and conceded to a requirement that the Well Certification be tied to a building permit instead of sale.
 - In September of 2004, BBC, not surprisingly, agrees that the Well Certification Program should be tied to the building permit application and not the sale and acknowledges that “a surface water source is not an option”.

- When the issue again resurfaced in December of 2008, ORE again reiterated its concerns regarding the timing of compliance and safeguarding the buyer and when and how to best ensure every buyer's access to an adequate and safe supply of water.
- In October of 2012, ORE did not raise any further issues on the sustainability of the aquifer to service the development although it is unclear what additional compelling data has been secured to assuage the concerns expressed in the earlier peer review process. Reliance is instead placed on the existence of the Well Certification Program and Contingency Plan to deal with the uncertainties. That revised Program now defers the determination of whether a viable well source of water to the point that the owners of the Lot are applying for a building permit.
- Despite the issues raised by ORE in the peer review, as the Program and Plan is drafted the risks associated with certification in the event of an unsuccessful well are transferred to buyers. As well, despite the clear consensus by all Parties that accessing Stony Lake as a water supply is unacceptable, the contingency plan nevertheless includes this as an option, albeit with the consent of the Township.

[170] In the Board's view, this hydrology and peer review process, as it has unfolded, provides sufficient reason to conclude that the Well Certification Program and Contingency Plan do not adequately address the above noted concerns of the Board. It is difficult to follow the analytical process applied by ORE that resulted in the perceived solution that the final form of the Program and Plan now presented to the Board adequately deals with the issues plainly raised by ORE during its peer review. ORE's requested method of transferring full responsibility to the Condominium Corporation to ensure that a safe and adequate water supply is available to each purchaser was ultimately abandoned. In the Board's view, it should not have been discarded. Neither should the contingency plan include the possibility of accessing Stony Lake waters "as a last resort" and the resultant likelihood of the Township being asked to remedy the problem and find solutions after-the-fact.

[171] In the Board's view this approach to implementing such a well certification and contingency plan entirely ignores the practical implications of placing a concentrated waterfront development relying on multiple wells, in close proximity, on lands that have been identified as possibly incapable of supplying water to every lot owner. If there are real uncertainties as to well access to water for buyers, this means they are purchasing lots with these potential issues related to water servicing and the significant costs associated with this reality, being left unresolved.

[172] To include a contingency solution that is, at the outset, objectionable would practically place all Parties, including the Township, into the difficult planning quagmire. The Township would be required to make a decision on a case by case basis as to whether to allow access to lake waters by a buyer who has bought a development lot and discovered there is an insufficient source of water in the well that has been dug – in a location that brings with it, upon the evidence, the real risk of such an inadequate or non-existent water supply. Still unresolved, in each such case, would be the manner in which some of the Private Building Areas could even be connected to lake water intakes, and the route such connections would run.

[173] The ability of a ground water supply to sustain this Development, and the potential adverse impacts that could occur upon ground or surface water features, hydrologic functions or the long term sustainability of water supply and quality in the aquifer from this substantial waterfront development cannot be left to the uncertainties of future investigations or well certification programs for some 60 or more wells. In the absence of sufficient evidence the Board cannot conclude that the Well Certification and Contingency Program envisioned by BBC is a viable option to deal with these hydrology issues.

SUMMARY – ISSUE B

[174] On the evidence, the Board finds that BBC has not established that the Development can be serviced with an adequate supply of water. Due the number of unanswered questions, and concerns expressed by Dr. Howard, the Board is also not persuaded that the manner in which the Development will access water from the aquifer, and in particular the demands placed upon below-ground water sources by 60 or more individual wells (or even shared wells, if it were even possible) will assuredly protect the sensitive ground water features and hydrologic functions of the area around and beneath the Development Lands or avoid potential the type of potential risks to the quantity of water in, and functions of, the aquifer.

[175] Upon these findings, the Board accepts the opinion of Mr. Fahner that BBC has not satisfied the PPS requirements relating to stormwater management or the supply and service of water to the Development and therefore does not represent good planning. The Board also accepts Mr. Fahner's planning opinion, based upon FFW's expert witness, that the Development fails to conform with the County OP in that the existence of an adequate water supply has not been demonstrated, based upon the findings made earlier.

[176] The Board accepts the submissions of FFW that there is a need for certainty when considering whether or not planning requirements and thresholds have been met. The Board requires a measure of certainty as provided for in the case of *James Dick Construction Ltd. v. Caledon*, and future possibilities and as-yet unknown strategies and plans may not satisfy the requirements necessary for pre-Board approval of the Development. As indicated in the course of this Decision, it is insufficient that BBC has, as indicated, argued that the Development represents good planning based upon the outcome of future reviews, studies, mitigation strategies and to-be-determined planning vehicles or instruments as subject to the various proposed conditions. In other cases, such as that of a sufficient water supply to all Lots and the common features, BBC looks to an alternative contingency plan which itself has been determined to be unacceptable to the Township and to a "buyer-beware" regime where buyers may potentially be unable to access a sufficient supply of water.

[177] Mr. Fahner's opinion was that there were concerns, from a planning perspective, that the proposed condominium constating documents did not yet exist and based on all of the evidence the Board would consider that planning concern to be persuasive. Given that a number of issues of consistency and conformity to planning policies are tied to the manner in which ownership rights and obligations might exist under the condominium plan, and with the lack of certainty regarding such rights and obligations, the absence of such condominium by-laws (and declaration) makes Board approval of the Development, based upon good planning, difficult.

ISSUE C - STORMWATER MANAGEMENT, SEWAGE SYSTEMS, AND LAKE CAPACITY

[178] The PPS includes governing policies relating to the provision of sewage and stormwater services in developments which provide:

1.6.6 Sewage, Water and Stormwater

1.6.6.1 Planning for sewage and water services shall:

- a) direct and accommodate expected growth or development in a manner that promotes the efficient use and optimization of existing:
 1. municipal sewage services and municipal water services; and
 2. private communal sewage services and private communal water services, where municipal sewage services and municipal water services are not available;
- b) ensure that these systems are provided in a manner that:
 1. can be sustained by the water resources upon which such services rely;
 2. is feasible, financially viable and complies with all regulatory requirements; and
 3. protects human health and the natural environment;
- c) promote water conservation and water use efficiency;
- d) integrate servicing and land use considerations at all stages of the planning process; and
- e) be in accordance with the servicing hierarchy outlined through policies 1.6.6.2, 1.6.6.3, 1.6.6.4 and 1.6.6.5.

- 1.6.6.2 Municipal sewage services and municipal water services are the referred form of servicing for settlement areas. Intensification and redevelopment within settlement areas on existing municipal sewage services and municipal water services should be promoted, wherever feasible.
- 1.6.6.3 Where municipal sewage services and municipal water services are not provided, municipalities may allow the use of private communal sewage services and private communal water services.
- 1.6.6.4 Where municipal sewage services and municipal water services or private communal sewage services and private communal water services are not provided, individual on-site sewage services and individual on-site water services may be used provided that site conditions are suitable for the long-term provision of such services with no negative impacts. In settlement areas, these services may only be used for infilling and minor rounding out of existing development.
- 1.6.6.5 Partial services shall only be permitted in the following circumstances:
- a) where they are necessary to address failed individual on-site sewage services and individual on-site water services in existing development; or
 - b) within settlement areas, to allow for infilling and minor rounding out of existing development on partial services provided that site conditions are suitable for the long-term provision of such services with no negative impacts.
- 1.6.6.6 Subject to the hierarchy of services provided in policies 1.6.6.2, 1.6.6.3, 1.6.6.4 and 1.6.6.5 planning authorities may allow lot creation only if there is confirmation of sufficient reserve sewage system capacity and reserve water system capacity within municipal sewage services and municipal water services or private communal sewage services and private communal water services. The determination of sufficient reserve sewage system capacity shall include treatment capacity for hauled sewage from private communal sewage services and individual on-site sewage services.
- 1.6.6.7 Planning for stormwater management shall:
- a) minimize, or, where possible, prevent increases in contaminant loads;
 - b) minimize changes in water balance and erosion;
 - c) not increase risks to human health and safety and property damage;
 - d) maximize the extent and function of vegetative and pervious surfaces; and

- e) promote stormwater management best practices, including stormwater attenuation and re-use, and low impact development.

Negative impacts: means

- a) in regard to policy 1.6.6.4 and 1.6.6.5, degradation to the quality and quantity of water, sensitive surface water features and sensitive ground water features, and their related hydrologic functions, due to single, multiple or successive development. Negative impacts should be assessed through environmental studies including hydrogeological or water quality impact assessments, in accordance with provincial standards;

[179] Section 7.5 of the Local Plan Policies of the most recent County OP also includes requirements for stormwater management and sanitary sewage disposal which generally and broadly require that Developments must provide adequate storm drainage and ensure that a suitable method of handling surface runoff shall be developed and implemented. The County OP includes a provision that provides that no OPA or ZBL amendment shall be approved if the Development would have “a significant adverse impact on surface drainage, flooding, water quality or erosion of soils”.

Stormwater Management Plan

[180] BBC’s evidence relating to the installation of stormwater management systems and sewage systems was provided through the engineering expert Mr. Ken Smith and challenged by FFW through Dr. Howard and Mr. Parsons. The overall design of the stormwater system adapted to the specific soil and topography conditions on the site and the fact that the Site is characterized by very shallow and limited surface soils which are unable to absorb surface runoff, and large areas of exposed or shallow subsurface rock.

[181] BBC submits that Mr. Smith’s designed system of 44 infiltration basins located in numerous planned locations along the interior road system will function effectively to implement the requirements set out in Policy 1.6.6.7 of the PPS and the local level planning requirements. The engineered infiltration basis system is designed to direct stormwater runoff into the designed infiltration basins where the stormwater is filtered through the basins at a slower rate and drains to the catchment areas and there are

erosion and sediment control measures engineered into the design. The mapping of the system was explained by Mr. Smith (as set out in Exhibit 1, Tab D1, Figure 1).

[182] Mr. Smith testified that ongoing maintenance of the stormwater management system would be essential to the successful performance of the infiltration basins. As the private internal Road System is not to be maintained by the Township, maintenance responsibilities will fall to the condominium corporation. A late change to the design was confirmed by Mr. Smith whereby the roads would not be paved to reduce hard surface runoff.

[183] Based on what has already been determined in relation to the 58 additional Driveways that will be added to the Development's vehicle and human connectivity system, the Board has no evidence before it as to whether the stormwater management plan, designed for the internal Road System, will also be sufficient to cover the additional stormwater runoff from the numerous, interconnecting private driveways that will radiate additional distances throughout the Development. There is no evidence that the additional combined area of hard surfaces for driveways and parking areas have even been considered in the stormwater management plan.

[184] Not surprisingly, the opinions from Mr. Smith and Mr. Parsons and Dr. Howard were opposed as to the effectiveness of this system design in preventing the infiltration of phosphorous and other contaminants introduced through the Development road systems into the nearby sensitive PSWs. In the Board's view BBC has, on the evidence, provided the most appropriate and effective stormwater management design for the characteristics of the Site, but that does not sufficiently deal with the question of whether the system meets the requirements contained in the PPS.

[185] The Board's concerns again are rooted in the reality that this Development, as discussed at length above, is in close proximity to PSWs, within a significant wildlife habitat and contained within an entire PSW Complex. The stormwater management system must not only be consistent with s. 1.6.6.7. Given its positioning on lands adjacent to the PSWs the system must accordingly also function sufficiently so as to be consistent with s. 2.1.2 and s. 2.1.5 and s. 2.1.8. As such, the Board must be satisfied

that there will be no negative impacts on the natural features or their ecological functions, and this is not a matter of mitigating impacts.

[186] On the evidence the Board is unable to conclude that there will be no negative impact as required for reasons which include the following findings and conclusions:

- (a) The evidence is that internal gravel roads will be sanded and not salted and will, through “appropriate construction” avoid the need for dust suppressants. As the evidence indicates, the Board is unable to conclude that these measures will be sufficient to prevent the eventual escape of phosphorous or contaminants in the long term because the Board finds that: winter maintenance operations will cause road surface accumulations to be transferred to ditches; the infiltration basins cannot prevent 100% of phosphorous, nutrients or contaminants from leaving the infiltration basins; and additional stormwater runoff from lengths of private driveways of between 30 and over 90 metres have not been addressed in the stormwater management design.
- (b) On cross-examination Mr. Smith conceded that the design had assumed the presence of paved internal roads and that he had not considered dust and other transfer of material and sediment into the system and the effect this might have on maintenance and performance. He also confirmed that his work had dealt with the recovery of 80% of suspended solids and he was not aware of what other studies had been done to deal with contaminant or nutrient control.
- (c) Mr. Smith, on cross examination, confirmed that based on the design, the remaining 20% of suspended solids and other dissolved contaminants would leave the infiltration basins but this was within the acceptable MOE Guidelines. This does not alter the uncontradicted evidence that water flows from extended portions of the infiltration basins will end up in the West Bay or other PSW Pockets or Stony Lake.

- (d) The Board accepts Mr. Parsons' opinion that there cannot be sufficient mitigation from impacts caused by leaching of contaminants, erosion and nutrients given the extent to which drainage patterns and soils will result in large quantities of stormwater being directed to the PSW that is the West Bay. This will occur because of the visibly rock covered, impermeable terrain located through much of the Development. As indicated it is uncontradicted that West Bay is a Muskellunge spawning ground and highly sensitive to negative impact and in Mr. Parson's opinion more advanced wastewater treatment would be required to result in no negative impact. These concerns also apply to those other PSW Pockets and Stony Lake, sections of which, in the eastern area, are also designated PSW waters.
- (e) The evidence, as indicated, is uncontradicted that nutrients, phosphorous and contaminants from roadways result in increased growth of cattails which eventually would choke PSW waters such as the West Bay thus permanently destroying fish habitat and spawning waters.
- (f) The submission, and evidence, by BBC that Highway 28 already contributes salt load runoff which is "far more significant" is not, in the Board's view, a persuasive argument. Given the importance of protecting PSWs in the PPS, the Board cannot apply such a comparative value analysis and consider this helpful. On the contrary, if the Development will add additional runoff into a sensitive PSW Complex, albeit less than what is already added from a public highway, this cannot alter the conclusion that there is negative impact occurring from the Development.
- (g) With the evidence before the Board, it is optimistic conjecture that the privately controlled maintenance of the stormwater management system will be effectively undertaken by the body controlling such maintenance. Binding and effective regulatory controls could most certainly be imposed through the condominium processes and conditions could be required by the Board to sufficient to ensure that this will occur are possible. However, the highly sensitive proximity of the system to the PSWs, fish habitat and significant

wildlife habitat elevates the level of assurances required. The PPS requires that the Board consider the policy of long term protection and be satisfied that this privately controlled stormwater management system will, decades from now, function to protect such sensitive natural heritage attributes. If this Development were not so intensely integrated into such sensitive natural heritage features protected by Provincial Policies, the Board could likely dismiss the issue of maintenance alone as an obstacle to concluding that there will be no negative impacts from these adjacent lands related to maintenance. That is not the case here.

- (h) This is another case where the submitted reports from BBC to support its applications have not been peer reviewed.

[187] For these reasons, to the extent that the stormwater management system has been designed, and based on the evidence presented, the Board is unable to find that this facet of the Development is consistent with the PPS. The findings in this regard also factor significantly into the Board's analysis and findings relating to the PSWs, significant wildlife habitat and adjacent lands as noted above. The Board is also unable to conclude, because of the circumstances of the stormwater management systems operating within a PSW Complexes, that there will not be a significant adverse impact on the PSWs or that the drainage systems are therefore adequate in the context in which they would exist. For that reason the Board prefers the expert opinions of Mr. Parsons and Dr. Howard that the Development is not consistent with the PPS and does not conform to the County OP.

Sewage Systems and Lake Capacity

[188] Mr. Michael Varty, an Environmental Engineer qualified as an expert in relation to sewage system designs and lake capacity explained BBC's proposed sewage treatment systems for the Development and provided his opinion as to lake capacity issues relating to phosphorous loads.

[189] The evidence before the Board as to the appropriateness of the proposed methods of providing sewage systems in the Development is really not substantially in dispute, although Mr. Parsons was of the opinion that a shared “package plant” was preferable. Individual sewage systems are proposed by BBC since access to municipal sewer systems is not an option and a communal sewage system is not viable for the Development.

[190] Individual raised Class 4 septic systems would accordingly be used and installed on each Lot based upon directed conditions imposed through the Condominium agreement and documents. Where necessary, in particularly sensitive areas of the Development, where drainage would be directed to a PSW or the Lake (which might apply to the vast majority of the Development) additional phosphorous treatments would be required in the design and installation of the septic system through the introduction of septic sand with high alum or iron content to remove phosphorous. Thereafter septic maintenance would also be required as a provision of the Condominium provisions. Again, due to the poor and limited soils in some areas of the BBC Lands, additional soils, with phosphorous attenuation capabilities would be required. Either the Health Unit or the Township would, in the usual course, control design compliance, installation and certification.

[191] Mr. Parson’s expert opinion was that a communal plant would provide a more advanced wastewater treatment system to better control nutrients and avoid them being subject to septic system containment and attenuation, and with that, the risks of transfer into the PSWs and Stony Lake. Mr. Parson’s opinion was based largely on his examination of the limited and insufficient soil cover in most Lot areas on the BBC Lands.

[192] The Board must assume that the individual septic systems, as proposed by BBC would be implemented in the Development, and with it, the possible risk of some transfer of phosphorous nutrients into the highly sensitive PSWs, Stony Lake. Mr. Varty, in his testimony, did not provide significant focus on the design or effectiveness of the 58 or more septic systems that would be installed with the Development. Mr. Varty’s testimony simply assumed, for calculation purposes that there would be

phosphorus loading generated from 63 additional permanent dwellings in the Development, noting the additional attenuation measures of introduced septic sands to assist in the removal of phosphorus. On cross-examination Mr. Varty indicated that if there were natural environment concerns, then pre-discharge treatments could be utilized as opposed to the use of the iron enriched septic sands.

[193] Mr. Varty's testimony, supported by his Lake Capacity Assessment Report, then focused on the use of the computer lake capacity modelling to determine whether the addition of 63 permanent residential units, with additional phosphorous loads would result in acceptable levels of impact to the surface water resources of Stony Lake. His conclusion, based on the models and the conservative assumption that septic bed designs would permit the transfer of phosphorous load, was that the Lake capacity impacts were acceptable.

[194] Leaving aside, for the moment, the matter of the lake capacity assessments, there are difficulties with Mr. Varty's limited approach to the matter of phosphorous loads from the Development. Mr. Parsons and Dr. Howard expressed concerns, in their testimony that notwithstanding the question as to whether additional phosphorous may or may not represent unacceptable levels for lake capacity, the potential for adverse impact upon the PSW Complexes remains.

[195] The Board prefers the testimony of Dr. Howard and Mr. Parsons as it relates to adverse or negative impact in relation to the environment, and finds that the differences of opinion relating to lake capacity are actually of secondary concern. The Board has considered all of the testimony and evidence in relation to these issues and find as follows:

- (a) BBC's proposed septic system requirements for the Development, with the additional phosphorous controls with the introduction of septic systems, in and of themselves are not problematic but less effective than a common package plant system described by Mr. Parsons. As such, the Board accepts the evidence from Dr. Howard and Mr. Parsons that it would be anticipated

- that the addition of at least 63 additional septic beds would likely allow for some additional phosphorous load to be transferred to ground water;
- (b) The Board finds that Mr. Varty, in his evidence has focused, as he was asked, on the more limited question of additional phosphorous load to the lake systems, and his lake capacity calculations determine only whether the additional load is acceptable. The Board accepts his testimony in that regard. Mr. Parsons disagreed with some of the parameters applied for the modelling of the lake capacity, and applied a somewhat different methodology to arrive at a result that represented a small increase in the projected concentration for lake capacity. In isolation the Board does not find that such differences in the estimated phosphorous concentrations, in the totality of the evidence, would have any significant impact on all of its findings.
- (c) However, considering the extensive context evidence the Board has reviewed, and the findings made regarding the PSW Complexes, and the question of negative impact upon the PSWs and the adjacent lands, the determination by both Mr. Varty and Mr. Parsons that the additional phosphorous loads are within acceptable parameters is quite separate and apart from the more relevant question. That question is whether such additional phosphorous loads, in the totality of the evidence, will find their way into the PSW Complexes and contribute to negative impacts upon the complexes, ecological functions and adjacent lands, fish habitats or the sensitive species and natural heritage context.
- (d) As to that issue, Mr. Varty has not addressed such concerns, focusing primarily on the Lake Capacity assessment. Accordingly, the Board must rely on the expert evidence of Mr. Parsons and Dr. Howard, as well as the other opinions and evidence already touched upon relating to risks to the PSWs arising from the downward transfer of phosphorous or other contaminants from the Development.

- (e) Dr. Howard is of the opinion that because of the limited soils and rock topography throughout the Development Site, there is limited opportunity for dilution or retention of phosphorous or other transfers from septic effluent. With the risk of elevated stormwater runoff that the Board has found to exist because of the form of the stormwater management, the opportunity exists for the transfer of some portion of phosphorous loads from the more than 58 septic beds to the PSW Complexes, particularly the West Bay, as identified by Dr. Howard and Mr. Parsons.
- (f) The Board accepts Mr. Parson's evidence that in the absence of a more advanced wastewater treatment plant, there will not be a complete natural attenuation of phosphorous through the existing soil cover in the BBC Lands and therefore, given the close proximity to, and within the Fraser PSW Complex, the Development will likely reduce the functionality of the PSW through wastewater derived nutrient inputs (as Mr. Parsons also opined in relation to stormwater management).
- (g) The Board accepts Mr. Parson's testimony that, under the circumstances, in relation to risks of phosphorous transfers to the PSWs arising from the Development, without the Development there will be no adverse impact caused by extra phosphorous loads finding their way into the PSW Complexes, but with the Development there will likely be additional loading in the PSW waters and therefore it cannot be determined that there will be no adverse impact

[196] Accordingly, the Board accepts Mr. Varty's evidence in relation to the lake capacity assessments he completed, and finds that the lake capacity assessment likely would not represent, alone, an impediment to the Development. However, the Board does not find that the Lake Capacity assessment and the question of whether the extra loading from the Development is within an acceptable range represents the whole of the issue and concludes that the sewage systems within the Development will, to some extent, contribute to the negative impacts upon the PSWs and therefore is not consistent with the PPS policies.

ISSUE D – CULTURAL HERITAGE, ARCHAEOLOGY, CULTURAL HERITAGE LANDSCAPE

[197] Opposition to BBC's proposed Development and its presented evidence relating to consistency with the Cultural Heritage and archaeological provisions of the PPS was advanced through Curve Lake, and supported by FFW. Curve Lake asserts that there has been a lack of compliance with First Nations consultation obligations and submits that this Development would impact the cultural heritage of First Nations communities including theirs. It is Curve Lake's submission that the Lands as a defined area, or as part of a larger area, constitute a Cultural Heritage Landscape ("CHL") that is significant and therefore all of the Lands, and the archaeological resources on the Lands must be conserved under the PPS.

[198] The Board heard from a variety of witnesses on these issues, both expert and local. Ms. Dibb, a qualified archeologist was the primary witness on behalf of BBC, and provided significant detail regarding the archaeological work undertaken on the Site through the years. Testimony from Curve Lake was introduced through their expert, Dr. Conolly, as well as a number of other Curve Lake witnesses. Only Dr. Conolly was qualified as an expert able to provide opinion evidence in relation to CHLs.

[199] The evidence, as presented in this issue, essentially results in three sub-issues:

- (a) Whether the Lands are, or part of, a CHL that is significant as provided for in the PPS, and is thus subject to the provisions that relate to such areas;
- (b) The sufficiency of BBC's compliance with the PPS as it relates to the requirements for protection or conservation of archaeological resources; and
- (c) Whether BBC has properly considered the interests of Aboriginal communities under the PPS, and whether BBC or the Township have met those obligations relating to the duty to consult as raised by Curve Lake in this proceeding.

[200] Before turning to an analysis of these three sub-issues it is necessary to address a few preliminary matters that arose in relation to the qualification of witnesses in this part of the hearing, and the governing provisions of the PPS.

Qualification of First Nation Witnesses

Melissa Dokis

[201] For the purposes of the hearing the request was made to qualify Ms. Dokis as an expert having expertise in the area of First Nations consultation and intergovernmental affairs. This was challenged by BBC and the Board heard argument as to whether Ms. Dokis should be accepted as an expert witness. After hearing argument, and considering the matter, the Board could not accept Ms. Dokis as an expert for a number of reasons.

[202] The most significant reason for refusing to qualify Ms. Dokis as an expert is her position as an employee and active member of Curve Lake's administration. Although Ms. Dokis has some experience in dealing with matters of First Nations' consultation, this does not amount to expertise entitling her to provide the Board with objective conclusions on the issues of adequacy of consultation or consideration of Curve Lake interests in relation to the planning legislation. Ms. Dokis has formulated clear opinions as a representative of Curve Lake based mainly on the chronology of her interactions with BBC and agencies, as opposed to specialized knowledge or experience. Ms. Dokis was also closely involved in the development of the Curve Lake "Consultation and Accommodation Standards" which Curve Lake has proffered as relevant to the issue of the adequacy of consultation regarding the Development. Also of significance is Ms. Dokis' own statement, in the process of being qualified, that she is not an expert and does not profess to be an expert in matters relating to aboriginal consultation.

[203] Ms. Dokis is understandably a vocal advocate for Curve Lake in the issues relating to public consultation and the cultural heritage issues and having being actively involved in the consultation processes, on behalf of Curve Lake, in this hearing, she does not satisfy the requirement for impartiality. That is not to say that Ms. Dokis is not

a proper and important witness, but merely that her testimony was not evaluated as expert opinion evidence.

[204] The Board has considered cases relating to the admissibility and qualification of expert witnesses, such as *R. v. Abbey*, ([1982] 2 S.C.R. 24) which address the expert's function, which is to provide the trier of fact with a ready-made opinion which, due to the technical nature of the facts, the adjudicator is unable to formulate himself or herself without such specialized assistance. As the Court stated: "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary". Ms. Dokis, in providing evidence, would not be performing the role of an expert who has acquired special or particular knowledge through study or experience, in respect of the matters on which she intended to testify, and about which the Board requires specialized, scientific or technical evidence to assist in the understanding of the issues. Ms. Dokis had no such specialized expertise, academic training or background beyond her experiences working for Curve Lake. On the issues before the Board, the panel is well able to form its own conclusions regarding the consultation issue, as raised by Curve Lake.

[205] For these reasons, Ms. Dokis was not recognized as an expert as requested by Curve Lake for the purposes of her testimony before the Board.

Joseph Pitawanakwat

[206] In the course of hearing the evidence in this case the Board had the occasion to address a further issue in relation to matters of expertise. The Board recognizes that some aspects of Anishinaabeg culture are based on oral knowledge and traditions which are not reduced to writing and instead handed down from generation to generation by members of the community who are considered to be traditional practitioners, and respected sources of such knowledge. This cultural hallmark of respect and deference to be given to Elders of the Anishinaabe, as "keepers" of such knowledge and tradition, and the manner in which such knowledge is passed down to

subsequent generations, in some respect, clashes with the more formalized approach of expertise based upon a written record. The Board, like the Courts, is accustomed to the qualification of experts based on measurable criteria, often in the form of written records, related to education and related degrees and diplomas, scholarly writings, academic achievements, professional certification or membership, and appearances before a court or tribunal to substantiate experience and expertise. The Board, again like the Courts, has, nevertheless, often relied upon experience in qualifying witnesses as experts notwithstanding the absence of a written record of credentials.

[207] In matters relating to Anishinaabeg/First Nations culture and traditions, of which there is a connection to the issues raised by Curve Lake in these appeals, the process of qualifying “experts” must reasonably be adapted to these cultural oral traditions and “expertise” rooted not in formal academic training but in experience and accumulated knowledge from First Nations cultural connections. This is not to say that the more formal process of qualifying witnesses in many areas of First Nations history, culture, archaeology, or anthropology is to be abandoned, and that is not what is suggested, and this is, in fact, preferred. The Board must also be very cautious in accepting, as experts, persons who through self-perception consider themselves to have “expertise” because of an affinity for an aspect of cultural heritage but fail to provide adequate evidentiary proof of accumulated knowledge or experiences that cannot otherwise be gained through conventional academic methods and formalized qualification. As noted by BBC, the case law does not support the abandonment of general evidentiary principles and while it is appropriate to recognize traditional knowledge the consideration of such evidence should not be weighed in a manner that fundamentally contravenes the principles of evidence law. The Board has no concern in this regard in this case.

[208] In this case the Board qualified a member of an Ojibway First Nation, Mr. Pitawanakwat, in what is obviously a subject somewhat removed from academia. Mr. Pitawanakwat sought to be qualified in the subject of the *cultural* significance of plants, plant assemblage and plant based communities for Aboriginals. Mr. Pitawanakwat has no formal education in botany or science beyond an Indigenous Health Science course, no scholarly papers or formalized history of contribution to a field of cultural, historical,

scientific or anthropological study, nor any record of appearances before tribunals. What Mr. Pitawanakwat has, within his community, is recognition as a plant-based knowledge holder based primarily on his rather active experience and involvement in seminars and programs which has resulted in the sharing of his accumulated knowledge acquired, and passed on to him, from his work and studies with Elders. Mr. Pitawanakwat has gleaned experience and further knowledge, from his own investigations and his work in lectures and workshops relating to the traditional approach to plant-based medicines as part of traditional aboriginal knowledge and culture.

[209] It would, in the Board's view, be inappropriate, unduly restrictive and contrary to the principles of natural justice and fair hearing to deny recognition of someone such as Mr. Pitawanakwat as an expert, who has obviously immersed himself in an aspect of First Nations culture but does not have a defined skillset or framework of traditional educational training or certification or recognition through a degree or diploma, just because his expertise and experience has its origins in oral traditions and the accumulation of knowledge of an aspect of his cultural heritage. There is support in this approach in the Supreme Court's comments in *Mitchell v. Minister of National Revenue*.

[210] The Board was prepared to qualify Mr. Pitawanakwat to provide opinion evidence in this hearing for the following reasons:

- (a) while under oath, he is sharing bona fide knowledge based on oral traditions, and First Nations' spiritual and cultural beliefs which appears credible;
- (b) he has "expertise" in the commonly understood sense of the word because, in matters relating to Anishnaabeg culture, Mr. Pitawanakwat is providing opinion evidence on a specialized topic and sharing specialized information that would be considered to be beyond the experience and knowledge of a lay person and, in this case, the Board, might be unable to consider and appreciate without some assistance from a person having specialized knowledge

- (c) in the matter of the cultural importance of plant based medicine for the Anishnaabeg (as distinguished from matters of scientific and medical-related questions of plant based medicine) I find that Mr. Pitawanakwat's testimony, is based on his experience and qualifying study, and meets the threshold of reliability; and
- (d) his qualification by the Board, in this case, is subject to the very stringent caveat that Mr. Pitawanakwat is not able to testify as to any botanical, biological, ecological, medical, scientific or non-cultural aspects of plants and plant based assemblages and medicines beyond his experiences, knowledge and opinions relating to cultural traditions and knowledge. As such he was not able to provide an opinion as to whether the various plant species and herbs referred to in his evidence have any type of exclusivity in the habitats of the BBC Lands.

PPS, Legislation and Cultural Heritage and Archaeological Resources

[211] Due to the nature of the submissions to the Board, and the determinations that must be made in this broader issue it is worthwhile to set out s. 2.6 of the PPS setting out the policies relating to Cultural Heritage and Archeology and those definitions utilized in this section. They are as follows:

- 2.6 Cultural Heritage and Archaeology
 - 1.6.1 Significant built heritage resources and significant cultural heritage landscapes shall be conserved.
 - 1.6.2 Development and site alteration shall not be permitted on lands containing archaeological resources or areas of archaeological potential unless significant archaeological resources have been conserved.
 - 1.6.3 Planning authorities shall not permit development and site alteration on adjacent lands to protected heritage property except where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved.
 - 1.6.4 Planning authorities should consider and promote archaeological management plans and cultural plans in conserving cultural heritage and archaeological resources.

- 1.6.5 Planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources.

Archaeological resources: includes artifacts, archaeological sites, marine archaeological sites, as defined under the Ontario Heritage Act. The identification and evaluation of such resources are based upon archaeological fieldwork undertaken in accordance with the Ontario Heritage Act.

Areas of archaeological potential: means areas with the likelihood to contain archaeological resources. Methods to identify archaeological potential are established by the Province, but municipal approaches which achieve the same objectives may also be used. The Ontario Heritage Act requires archaeological potential to be confirmed through archaeological fieldwork.

Built heritage resource: means a building, structure, monument, installation or any manufactured remnant that contributes to a property's cultural heritage value or interest as identified by a community, including an Aboriginal community. Built heritage resources are generally located on property that has been designated under Parts IV or V of the Ontario Heritage Act, or included on local, provincial and/or federal registers.

Conserved: means the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained under the Ontario Heritage Act. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.

Cultural heritage landscape: means a defined geographical area that may have been modified by human activity and is identified as having cultural heritage value or interest by a community, including an Aboriginal community. The area may involve features such as structures, spaces, archaeological sites or natural elements that are valued together for their interrelationship, meaning or association. Examples may include, but are not limited to, heritage conservation districts designated under the Ontario Heritage Act; villages, parks, gardens, battlefields, mainstreets and neighbourhoods, cemeteries, trailways, viewsheds, natural areas and industrial complexes of heritage significance; and areas recognized by federal or international designation authorities (e.g. a National Historic Site or District designation, or a UNESCO World Heritage Site)

Heritage attributes: means the principal features or elements that contribute to a protected heritage property's cultural heritage value or interest, and may include the property's built or manufactured elements, as well as natural landforms, vegetation, water features, and its visual setting (including significant views or vistas to or from a protected heritage property).

Protected heritage property: means property designated under Parts IV, V or VI of the Ontario Heritage Act; property subject to a heritage conservation easement under Parts II or IV of the Ontario Heritage Act; property identified by the Province and prescribed public bodies as

provincial heritage property under the Standards and Guidelines for Conservation of Provincial Heritage Properties; property protected under federal legislation, and UNESCO World Heritage Sites.

Significant: means

- (e) in regard to cultural heritage and archaeology, resources that have been determined to have cultural heritage value or interest for the important contribution they make to our understanding of the history of a place, an event, or a people.

Criteria for determining significance for the resources identified in sections (c)-(e) are recommended by the Province, but municipal approaches that achieve or exceed the same objective may also be used.

While some significant resources may already be identified and inventoried by official sources, the significance of others can only be determined after evaluation.

[212] Section 2.6 of the PPS demonstrates that the Provincial policies are very specific as to the types of cultural heritage and archaeological resources that require conservation and protection. The Board must be careful to ensure that it is not imposing a broad and generalized requirement for conservation on a development property just because there may be archaeological resources or cultural heritage elements present on the development property.

[213] The requirement of conservation on, or of, a development property under s. 2.6 of the PPS occurs only in four instances (with emphasis added):

- (1) If a specific **built heritage resource**, as defined in the PPS, exists on the development property, and it has also been determined to be **significant**, then that *specific* built heritage resource must be conserved under s. 2.6.1.
- (2) If, after study and analysis, a **cultural heritage landscape** and its **geographical area** have been identified, and it has also been determined to be **significant**, and if the development property is determined to be a part of that geographical area, then s. 2.6.1 requires that the *entirety* of the significant cultural heritage landscape, including the development property, be conserved.

- (3) If, **archaeological resources** or **areas of archaeological potential**, as defined in the PPS, have been identified as present on a development property, and if all, or part of those archaeological resources have been determined to be **significant**, then the *specific significant archaeological resources* on the development property (as distinguished from *all* of the archaeological resources) must be conserved under s. 2.6.2.
- (4) If the development property (or a part of it) is **protected heritage property**, designated in the manner set out in the PPS definition, or if the development property is **contiguous** to that protected heritage property as defined in the PPS (or in a municipal official plan), then the **heritage attributes** of the protected heritage property (as distinguished from the protected heritage property itself) must be conserved under s. 2.6.3.

[214] The Lands being developed by BBC do not contain built heritage resources of consequence in this hearing and is not protected heritage property or contiguous to protected heritage property. Accordingly only the second part of s. 2.6.1 and s. 2.6.2 of the PPS, as set out in scenarios (2) and (3) above, apply to the BBC Lands.

[215] An analysis of the provincial legislation and the PPS that are relevant to significant CHLs is provided for below.

Underlying Evidence and Findings – Archaeological Assessments

[216] Before turning to the three sub-issues it is helpful to outline some of the basic findings as to the relevant evidence, which are not disputed, or which the Board accepts for the purpose of analysis and findings on the sub-issues:

- (a) BBC has expended considerable time and resources in undertaking archaeological assessments of the Site and the required follow-up processes based upon those assessments. BBC retained an archaeologist, Ms. Patricia Dibb, of York North Archaeological Services Inc., in 2000 and thereafter Ms.

Dibb and her teams undertook extensive work on the Site and prepared numerous reports through to the preparation for this hearing.

- (b) No portion of the Lands has been designated by any level of government as a Heritage District or Cultural Heritage Landscape under the *Ontario Heritage Act* and there is no Statement of Significance in the National Historic Registry.
- (c) No formal study or analysis (involving any type of public consultation or collaborative process resulting in an objective, methodical, scientific analysis) has yet been undertaken and completed by any governmental agency, the Township, the County or any Party to define a geographical area encompassing the Lands, or the Lands in isolation, which might warrant consideration as an area having archaeological sites, natural elements or features or spaces that might be valued together for their interrelationship, meaning or association.
- (d) Certainly no analysis has been completed that has resulted in BBC's Lands being identified either in isolation, or in combination with other abutting lands as warranting consideration as a *significant* CHL such that such a geographically defined area has been determined to have cultural heritage value or interest for the important contribution they make to our understanding of the history of that defined area, an event, or a people, as defined in the PPS.
- (e) Although Dr. Conolly did testify as to his background and involvement in the specialty field of cultural heritage landscapes assessments, including work in Greece, and the development of processes for cultural heritage landscapes, he has not undertaken a cultural heritage landscape assessment for the purposes of a designation. Neither has Dr. Conolly been involved in formal statements of landscape significance in the province.
- (f) There has not, as yet, been any conclusive, peer-reviewed, accepted assessment study or report completed on the part of Dr. Conolly or any

- person or entity which might lead to the designation of a CHL in this area of the Kawarthas, and none which has led to the identification of the BBC Lands as a CHL or part of a CHL, significant or otherwise.
- (g) The Board also has no evidence of any formal undertaking that has been initiated by any Party, including Curve Lake, to study, assess and consider whether a selected and defined geographical area in the Kawartha Lakes area can be identified as a CHL as having cultural heritage value or interest by a community, including an Aboriginal community which should be valued together for their interrelationship, meaning or association.
- (h) The evidence of Curve Lake does indicate that, in isolation, Curve Lake's Council passed two resolutions, one undated but sometime in 2015 and the other on August 2, 2016. The latter resolution declares the BBC Land as a *"highly significant cultural heritage landscape"* and that it is *"located within a broader significant cultural heritage landscape on the north shore of Stony Lake"*. Notably, the Resolution also directed staff to work on designating the BBC Site as a property of cultural heritage value and interest under the *Ontario Heritage Act*. Based on the analysis set out below, and for the reasons indicated, the Board finds that these Resolutions of Curve Lake's Council do not, in themselves result in the existence of a CHL, nor is this statement of significance sufficient to result in the designation of the Site as a CHL or part of a CHL.
- (i) Ms. Dibb in her testimony provided much detail as to the digs, the sites identified in the assessments, helpful historical information and her analysis of compliance with the provincial requirements. She testified as to the general prehistory of the First Nations in and around the shorelines of Stony Lake as part of the much larger navigable waterway systems in southern Ontario, and
- (j) Fourteen potential sites were identified on the Lands, all of them along the northern shoreline Stony Lake (and one within the waters). In accordance with protocols, and reports were filed with the Ministry of Citizenship, Culture

and Recreation (the “Ministry”) which resulted in the assignment of Borden Numbers “BdGn-5” to “BdGn-18” for these sites.

- (k) In her testimony Ms. Dibb went through a site-by-site analysis describing the results of the assessments, what protection recommendations would be required if outside the 30 metre buffer (already designated for non-development by BBC), and what, if anything, had been found that was remarkable or of cultural significance. Ms. Dibb, in the course of her testimony, supplemented her comments with references to the previous work undertaken by Susan Jamieson of Trent University on some of the 14 identified sites.
- (l) With the exception of BdGn-12 all sites were described by Ms. Dibb as episodic and related to retooling “chert” artifacts indicating the presence of short-term campsites of migratory Anishinaabeg peoples. Of these, there were three sites which were the subject of more involved study and further assessment and mitigation. BdGn-17, BdGn-9 southeast of Lots 47 and 48, and BdGn-12 within the shoreline area south and west of Lots 5, 6, 7 and 8 and Core Area 4 west of West Bay. It is BdGn-12 site that warranted the focus of Ms. Dibb, and the Parties, due to the concentration of artifacts showing a wide time line of seasonal occupation.
- (m) Ms. Dibb testified that the BdGn-12 Site revealed artifacts from a number of historic periods in a manner that suggested that this area may have been more than a temporary campsite and one with repeated occupation over many years during the Middle and Late Woodland time period for hunting, fishing and/or trapping by First Nations communities. As such, the BdGn-12 Site had some potential cultural significance and interest which, in Ms. Dibb’s view, warranted further investigation and proposed mitigation strategies to protect this site. BdGn had already been the focus of investigation in 2003 and 2005 by Ms. Jamieson and the Board was directed to those Archaeological Licence Reports prepared and submitted to the Ministry at that time.

- (n) Although plentiful, all of the types of artifacts found at BdGn-12 were unremarkable and representative of the types of items found in many places along the lakeshores of the southern Ontario waterways, and all over southern Ontario, where First Nations travelled, hunted, fished, camped and lived. The only noteworthy item was a bowl and a nodule containing a small quantity of red ochre which might, or might not, have had ceremonial significance.
- (o) Site BdGn-12 is the area which possibly contains the “Seep”, the import of which is the subject of archaeological debate. The area described by Ms. Dibb, as a natural stone basin, does not, in her view, appear to have been constructed by human hand or actively used and she is doubtful that it is a Seep that had any of the significance ascribed to it by Ms. Jamieson or Dr. Conolly. What is not disputed is that the excavations immediately surrounding the Seep were sterile of any cultural artifacts. The absence of any datable cultural artifacts in the immediate area of the Seep leads Ms. Dibb to conclude that there was little likelihood that this location had any great spiritual importance that would have drawn First Nations to the spot. She notes that the topography and shallow soils may have resulted in movement of artifacts raising challenges in the further investigation.
- (p) The Board has considered Dr. Conolly’s opinion evidence on the significance of the Seep and his contrary view that the Seep was “culturally modified”, and his testimony that the absence of proof that the area was anthropogenically modified and the absence of nearby artifacts do not affect his opinion since natural features may be afforded great cultural significance without man-made alterations and nearby artifacts may have been destroyed. The Board does not consider this opinion to be any more or less persuasive or conclusive than that of Ms. Dibb or the third-hand opinions of Dr. Jamieson. Further, the Board does not find Dr. Conolly’s opinion to be supported by any evidence beyond speculative conjecture given the absence of any data or scientific processes to support such opinions and considering his stance that there should be no further investigation, excavation or disturbance of the area

around the Seep – additional processes that might possibly shed light on the debate.

- (q) The Board finds that in the absence of a devoted and fully reasoned archaeological study and analysis supported by data and scientific evidence, the Board is not in a position to make a determination whether the Seep is, or is not, a ceremonial cultural heritage resource, or one which is of some significance either in isolation or as part of a cultural heritage landscape. Nor should the Board do so given the manner in which this issue is placed before the Board. The evidence before the Board is that a full and complete archaeological study and assessment has yet to be completed at BdGn 12 and in fact the Ministry has confirmed that further investigations may be warranted. The character and archeological status of the Seep are questions to be determined another day.
- (r) As the Board has also found, a complete and proper CHL assessment has not been completed which might theoretically include a “hard” examination of the BdGn 12 Site and the Seep as part of such a CHL.
- (s) There is no evidence of any burial cairns or mortuary sites anywhere on the Lands including BdGn-12. Ms. Dibb stated that the shallow soils would not have been optimal for burial sites and there were no artifacts present that would suggest any internments occurred here. Dr. Conolly opines that the “nearby cairns” to the east of the BBC lands suggest that cairns are “likely to occur” on the BBC Site. Again, the Board is unable to, nor will, make any determination as to the existence or non-existence of burial cairns on property beyond the BBC Lands based on this evidence. The fact that no actual cairns have been located on the BBC Site and that the suspected cairns that Dr. Conolly speaks of have not been investigated again raises doubt that such an opinion is valid and without the benefit of a full and complete archaeological study and assessment the Board is unable to make findings in this regard. The existence or relevance of burial cairns either on other nearby property, or

- on the BBC Lands (if any were ever identified) are again questions to be determined another day.
- (t) Save and except for the disclosed historic buildings and man-made structures and detritus of modern day occupation there is no evidence of any Prehistoric First Nations building or structure or Built Heritage Resource of any kind on the BBC Lands.
 - (u) Control of the waters for the creation of the Trent Severn Waterways raised the level of the waters in Stony Lake and thus the shoreline as it exists now is higher than what would have existed at the time of First Nations travelled the shorelines of Stony Lake and other lakes in the Kawartha lake and waterway systems.
 - (v) Mitigation plans, based upon the archaeological assessments, were based upon the stated assumption that the 30 metre buffer along the entirety of the shoreline (except for Core 1) would be maintained for the Development without any disturbance. Additional State 3 and Stage 4 Assessments on portions of the Lands are to occur based on the information acquired to date.
 - (w) Ms. Dibb, on behalf of BBC completed a Supplementary report for the Stage 3 Archaeological Assessment of BdGn-12 which outlined recommendations for Stage 4 Strategies and options for conservation, protection, and further investigations which was submitted to the Ministry. In July of 2015 the evidentiary record confirms that the Ministry reviewed and confirmed the recommended proposed partial long-term avoidance and protection strategy with further Stage 4 assessments to be completed under the Ontario Standards and Guidelines.
 - (x) The Ministry concluded that based on the information provided by BBC, it was satisfied that the fieldwork and reporting for the archaeological assessment were consistent with the Ministry's Standards and Guidelines and this was entered into the Public Record. Similar evidence filed with the Board, and

confirmed by Ms. Jewel Cunningham who appeared on behalf of the Ministry, confirms that the Ministry having the authority to monitor and approve conservation plans and processes, is fully satisfied with respect to the investigative works, report and BBC's compliance with the Ministry's protection requirements on the remainder of the Borden designated sites on the Lands.

- (y) On the matter of consultation with First Nations, although Parks Canada initially expressed concern that consultation might be lacking, Ms. Cunningham testified that she was aware that there was subsequent communication by BBC's consultants with First Nations representatives in regards to the archaeological work but that she was not in a position to comment on the adequacy of such communications as consultation.

- (z) In recognition of the archaeological investigations undertaken, BBC amended the application by removing two Lots from the proposed development and Lots 6 and 7 were withdrawn from the Plan and to be set aside as undisturbed to support the investigations and recommendations of the Ministry.

[217] In her testimony, Ms. Dibb was of the opinion that with the extensive assessments and investigations that had been undertaken, and with the mitigation and protection measures and assessments already undertaken, or planned, including the shoreline buffers and the removal of the two Lots from the Development, there was compliance with the PPS and provincial Guidelines. She did recommend that if further archaeological resources were discovered with the additional assessments to be conducted or in the Development work, it would be necessary to take immediate steps to halt any construction. Ms. Dibb also recommended continued engagement with Curve Lake.

Are The BBC Lands a Significant Cultural Heritage Landscape?

[218] Curve Lake asks that the Board find that BBC's Lands are a Significant Cultural Heritage Landscape ("CHL") under the PPS. If so found, this would mean that the obligations under s. 2.6 of the PPS must apply. Curve Lake submits that if a Significant CHL exists then the Board must find that s. 2.6.1 of the PPS has not been satisfied because the Development, as proposed, will not conserve the Lands as part of such a Significant CHL. Curve Lake also submits that there is insufficient evidence to support a finding that BBC will adequately protect those natural heritage features that are a part of the spiritual and cultural heritage of Curve Lake.

[219] Curve Lake relies primarily upon the testimony of Dr. Conolly, (which is partly based upon the testimony of Elder Williams and Elder Taylor and Mr. Pitawanakwat) in support of its position that the Board has sufficient evidence before it to find that the Lands are themselves a CHL, or alternatively are part of a larger CHL.

[220] BBC submits that neither all, nor a part, of the privately-owned BBC Lands can be designated as a CHL upon the basis asserted by Curve Lake, and that accepting the approach of Curve Lake would effectively result in the sterilization of the Lands by a third party based upon its unilateral assertions of cultural heritage value and interest.

[221] For the reasons set out herein, the Board does not agree with the submissions of Curve Lake and cannot find, on the evidence before it, that in the context of these appeals, the BBC Lands are alone, or in combination with other lands, a CHL as defined in the PPS or that the BBC Lands, if were they part of a CHL, are within a *significant* CHL.

Process of Analysis of a Cultural Heritage Landscape

[222] Curve Lake submits that the Board, in this proceeding, "following an informed process in planning applications", should be able to weigh the evidence, and within its jurisdiction, and with its powers, make the determination that the BBC Lands (or some other larger composite of lands) is a significant CHL. The Board would agree that this is

possible, but such a determination by the Board requires the type of analytical evaluation process referred to in the PPS which is far more involved than the limited approach suggested by Curve Lake in this proceeding.

[223] It is the Board's view that in order for a designation of a CHL, or a significant CHL to be conclusively made a methodical and analytical process must be followed, based upon cogent and demonstrative evidence, which satisfies the definition of a CHL within the PPS and which is consistent with the intent and purpose of the policies relating to the conservation of cultural heritage and archaeological resources. A complete assessment and analytical process is required involving qualified experts to support a conclusion that a CHL or significant CHL exists, which is then capable of peer review and comment in public consultation processes. Only then would there be reliable evidence for the decision maker in deciding if a CHL exists.

[224] It is important to confirm that matters relating to the designation of the BBC Property of cultural heritage value or interest, or as part of a heritage conservation district under the *Ontario Heritage Act*, are not before the Board and the Board has no jurisdiction in that regard. Curve Lake has referred the Board to portions of the *Heritage Act* for the purposes of deciding whether a CHL exists. While some limited parts of the *Ontario Heritage Act* might be of assistance as a guide, any determination of the existence of a CHL would be made solely under the PPS.

[225] In this case, it would be the Board's view that the determination of the BBC Lands as being a CHL in isolation, or in combination with other lands, must therefore be determined under the PPS by applying the following analysis and processes:

1. Whether a CHL exists, and the determination of the geographic area of that CHL, is an independent process, and a stand-alone analysis that is separate and apart from the appeal proceeding itself. When the Board is considering s. 2.6 of the PPS the question must first be asked: Is this a case where the property is located within a geographic area that has been designated as a CHL? If so, and if the CHL is also determined to be "significant", then the

Board must consider s. 2.6 accordingly. If not, then the requirements for conservation of the entire significant CHL under s. 2.6.1 do not apply.

2. A mandatory requirement for a CHL is that the geographic area be “identified as having cultural heritage value or interest by a community, including an Aboriginal community”. The area may, or may not, have been “modified by human activity”.
3. The Board does not accept the identification of a CHL by a community as absolute without regard for the criteria that supports that identification. The Board must, objectively, still be satisfied that the identification by the community is based upon criteria which reasonably support a decision that a geographic area has cultural heritage value or interest for that community. However, the finding by the community may be subjective due to the fact that an area may realistically have cultural heritage value or interest for one community that is not necessarily shared by another community. Notably, the PPS definition identifies an Aboriginal community as a type of community which might reasonably find an area to have heritage value based upon their culture and traditions in a manner that is different from a non-Aboriginal community.
4. The phrase “cultural heritage value or interest” is not defined in the PPS. It is identical to the phrase set out in s. 29(1) of the Ontario Heritage Act under Part IV of that Act which grants a municipality the authority to designate a specific property within the municipality to be of “cultural heritage value or interest”. It is also identical to the similar phraseology in s. 41.1 under Part V of the Act relating to the cultural heritage value or interest of a designated heritage conservation district.

There is some legislated guidance as to the criteria that are to be considered in determining whether a specific property has cultural heritage value or interest under Ontario Regulation 9/06 of the Ontario Heritage Act. These criteria do not apply to a heritage conservation district.

The Ministry's Ontario Heritage Toolkit is a guideline that provides guidance as to evaluation of cultural heritage resources and attributes that will form a heritage conservation district. The factors that will be considered may differ depending on whether the conservation district is an urban or rural area. The Toolkit provides an extensive list of items for consideration such as architectural and historical details, surrounding landscapes and open areas, spatial patterns, site arrangements, vegetation, views, and how these elements are interconnected and how boundaries to the district might be determined.

What of this is helpful in determining whether an area is of cultural heritage value or interest under the PPS? The criteria in the Regulation relating to specific property designations under Part IV might be of some assistance in determining the existence of a cultural heritage landscape but these criteria apply to the narrower focus of whether a specific property has cultural heritage value or interest. The guidance set out in the Toolkit for determining a heritage conservation district may more practically assist since it similarly relates to a broader approach and involves a process of determining how multiple buildings, features and other related elements, may together form a larger identified area worthy of preservation.

Since the PPS does not expressly state that any of these criteria or Guidelines apply to the determination of a CHL under the PPS perhaps both the criteria under Part IV and the guidelines under Part V may together provide some assistance in the step of identifying an area of cultural heritage value and interest.

Ontario Regulation 9/06 of the Ontario Heritage Act provides as follows:

Criteria

- (1) The criteria set out in subsection (2) are prescribed for the purposes of clause 29 (1) (a) of the Act.
- (2) A property may be designated under section 29 of the Act if it meets one or more of the following criteria for determining whether it is of cultural heritage value or interest:

- a) The property has design value or physical value because it,
 - i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
 - ii. displays a high degree of craftsmanship or artistic merit, or
 - iii. demonstrates a high degree of technical or scientific achievement.

- b) The property has historical value or associative value because it,
 - i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,
 - ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
 - iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.

- c) The property has contextual value because it,
 - i. is important in defining, maintaining or supporting the character of an area,
 - ii. is physically, functionally, visually or historically linked to its surroundings, or
 - iii. is a landmark.

The Guide to Heritage Conservation District Designation under the Ontario Heritage Act sets out how cultural heritage attributes and resources are to be evaluated within “Step 5” of the designation process.

Together these resources related to the Ontario Heritage Act may be of assistance to the Board in accepting a geographic area that is identified as having cultural heritage value or interest by a community as a step in identifying a CHL.

5. It is important to note that due to the construct of s. 2.6 the PPS and the definitions, it is not the community that determines whether the CHL is significant. A community may identify the CHL under the definition – the planning authority, and in this case, the Board, is given the task of determining if the CHL then qualifies as a significant CHL. The definition of significant is set out in the PPS and is addressed below. The PPS definition directs that while some significant resources “*may already be identified and*

inventoried by official sources, the significance of others can only be determined after evaluation"

6. Once the Board finds that an area exists which has significant cultural heritage value or interest the CHL must, by definition, be a defined geographical area with boundaries and spatial limits for the purposes of designation. The development property that is the subject matter of the proceeding does not constitute the geographical area of the landscape (though it might in limited circumstances). The selected area of the CHL cannot be arbitrary or determined upon any basis other than the criteria and features provided for in the PPS definition.
7. The PPS definition requires that the geographic area be determined by the process identified in the definition of a CHL which is primarily based upon the features that exist. In some cases the geographic area might be readily discernible, such as the examples contained within the definition (i.e. a battlefield, a neighbourhood or a particular street) where the features, and the commonalities and relationship between those features of the CHL, is closely and intuitively related to the geographic area.
8. In other cases the identification of the cultural heritage features, and the connectivity of those features, as provided for in the definition, must first be considered in order to define the geographical area. Although a general area may be initially identified as the expected geographic area of the landscape, only a complete analysis can ultimately provide the basis upon which the final geographical boundaries of the CHL will be determined.
9. The determination of the features of a CHL requires an analysis dealing with two areas of inquiry.
 - a) First, the study and analysis giving rise to the CHL should result in the assembly of an inventory of the involved *"...features such as structures, spaces, archaeological sites or natural elements"* that will constitute the

collective aspects of the CHL. This analysis will often be interrelated to the process that led to the conclusion that the inventoried features possess a cultural heritage value or interest for the community.

- b) Second, the identification of the inventoried features that are to form the CHL should be based upon an identifiable and qualitative common denominator that supports the rationale as to why the individual features are being “*valued together for their interrelationship, meaning or association.*” This may, as a matter of common sense, be interrelated with the analysis that led to the conclusion of the community that a geographic area possesses cultural heritage value or interest for that community.
10. Once the final inventory of features is vetted and each of the features is verified as to its contributing value to the collective list of interrelated features (i.e. that each of the features share the underlying common denominator which has caused the community to value the interrelationship, meaning or association of the features) only then can the final boundary of the geographical area be identified so as to define the entirety of the CHL and capture all those properties which are part of that CHL.
11. As indicated earlier, the analysis does not end once it has been determined that there is a demonstrated *cultural heritage value* or interest which exists and is identified and a CHL is determined. It must also be demonstrated that the CHL contains cultural heritage value or interest which is *significant*. The test requires that the cultural heritage value or interest are significant “*for the important contribution they make to our understanding of the history of a place, an event, or a people*” and can only be identified, inventoried and determined after evaluation. If they are not found to be significant, the requirements for conservation of the CHL do not apply.

Consideration of the Evidence

[226] In the course of the hearing, the Board received a lot of general evidence as to the larger First Nations cultural heritage context already reviewed above, such as the existence of the Teaching Rocks and the Fishing Weirs some distance away, and the unresolved and conflicting opinions relating to the existence of burial cairns to the east of the Lands, or the Seep in the BdGn-12 site. The Board also received evidence from Elder Williams and Elder Taylor, and Mr. Pitawanakwat which describe the traditional and historical connections of the Anishinaabe, both spiritual and real, to the shoreline “highways”, the waterways, and the indigenous flora and fauna found in the Kawarthas.

[227] The Board accepts that the area of the Kawartha Lakes is considered, by the Curve Lake witnesses, to be of importance to First Nations culture and spirituality, and in particular, those cultural heritage sites such as the Fishing Weirs, the Teaching Rocks of the Petroglyph caves, and the debated sites on which the Seep and burial cairns are located.

[228] Despite the submissions of Curve Lake, this evidence as to Anishinaabeg traditions and culture, does not, in and of itself, provide the Board with sufficient and cogent evidence that these Lands, and this shoreline, and these wetlands, and these plants and herbs, owned by BBC, and any archaeological artifacts or sites located thereon, together constitute a “defined geographical area” which is distinct from any other area in the Kawartha Lakes, or beyond, or any other part of Stony Lake for that matter. The evidence fails to support a conclusion that there are unique and clearly interrelated features that are somehow valued together for their interrelationship or association with one another which are somehow connected to a defined geographical area that is within the confines of the BBC Lands or some other discernable block of lands (or waters).

[229] The Board has carefully considered the evidence of Elder Williams and Elder Taylor. There is no question that the witnesses produced for Curve Lake, and the First Nations, do indeed value the attributes of the BBC Lands as having some cultural heritage value and interest for the reasons they have earnestly indicated, but this

subjective and broad assertion is not enough to then conclude that the BBC Lands are (a) a CHL; or (b) a part of a CHL; or (c) that such a CHL would be significant, if it existed.

[230] Based upon the required analytical approach, the Board finds that Curve Lake has failed to establish that the BBC Lands are, or are part of, a CHL, or that the CHL is significant. The basis for this conclusion is based upon the following:

- (a) The Board does not find that Curve Lake has presented persuasive evidence defining the geographic area of a CHL. This is the most significant failing of the evidence that has been adduced to support the existence of a CHL. Dr. Conolly's testimony, as it expanded the content of his Witness Statement, was indeed compelling as it described the indigenous archaeology of the Kawartha Lakes and broader area and the history and complexity of the ancestral First Nations communities that have inhabited these landscapes for some ten thousand years. This is not really challenged by anyone. However, in his testimony the very broad and expansive nature of the "area" referred to by Dr. Conolly was obvious, and equally so, was the quite imprecise nature, and lack of specificity, as to what geographic area might make up the broader CHL in which the BBC Lands would be situated.

- (b) Dr. Conolly spoke of mobility patterns through, and between, the vast area lying between Georgian Bay and Lake Ontario. He discussed movements between the equally expansive areas between the northern and southern part of the Trent-Severn Watershed, which encompasses "the Kawarthas" (however that area might be defined) an equally large area in its own right. Other broad references of area referred to by Dr. Conolly included the north shore of the Kawartha Lakes, Buckhorn Lake, Pigeon Lake, Stony Lake, and Lovesick Lake, where archaeological sites are situated. Notably, Dr. Conolly highlighted the "Ancient Routeways of the Kawartha Lakes" (appended to his Witness Statement, Exhibit 8) which he identified as extending all the way from Georgian Bay in the west to the Trent River in the east, an area comprising hundreds of miles of lake and river shoreline.

- (c) In the course of his testimony, Dr. Conolly himself indicates that there is a “wider cultural landscape of the Kawartha Lakes” into which the BBC Lands are located which he referred to in general terms, on a number of occasions, as part of the even more extended “ancient and integrated travel route” linking a large segment of southern Ontario.
- (d) While Dr. Conolly’s evidence includes very broad references to these many parts of the Kawarthas, the “ancient and integrated travel route” that he identifies, the Trent-Severn Watershed, or other parts of south-central Ontario, which are of cultural heritage value or interest, this does not assist the Board in arriving at a point where it is able to determine the geographical area of the CHL. At best, Dr. Conolly narrowed his reference to areas, at one point, to the north shore of Stony Lake near the falls but again without precision.
- (e) When applying the analytical processes required to determine the existence of a CHL, it is the Board’s view that in the course of identifying the travel patterns of multiple First Nations over the course of 10,000 years in such a large area, as relevant to why the BBC Lands are noteworthy, Dr. Conolly has failed to complete the additional methodical and analytical steps required to conclusively determine the exact geographic area of a CHL for the Board. What is missing is the further, and much more involved process, which would require some type of inventory of the exact features that would be encompassed within the CHL and the objective rationale that would be applied to determine how, and which, of those features should be valued together for their interrelationship or association with one another.
- (f) As an indication of the insufficiency of Curve Lake’s evidence, if the Board were to simply accept this broader geographical area identified by him, as supporting the inclusion of the BBC Lands as part of a CHL, (in the absence of the identification and analysis of the features and their interrelationship and association) this would practically mean that hundreds, if not thousands, of individual homes, cottages, properties and lands within the ancient routeways

- of the Kawartha Lakes would also be subject to inclusion within that CHL. Surely this expansive approach is not the type of planning tool envisioned in the PPS to conserve significant CHLs within larger planning processes.
- (g) Given the manner in which the PPS supports the conservation of CHLs in the Province, and the significant impact that a CHL designation may have upon development lands within the geographic area of a CHL, it is the Board's view that a much more formalized study and assessment is envisioned and expected under the PPS in order to "create" a CHL or determine that a significant CHL exists. From a planning perspective, the Province, or a municipality, would best suited to initiate the formalized processes, which would presumably involve public consultation, necessary to result in something as significant as the planning designation of a geographic area within its jurisdiction as a CHL.
- (h) Equally problematic for the Board is the fact that from the wide breadth of commentary in his evidence, Dr. Conolly has provided the very specific opinion that the BBC Lands are, as a defined area, a culturally significant heritage landscape as defined by the PPS. The somewhat summary conclusion that the BBC Lands, which are the subject of these appeals, are *in toto*, a singular cultural heritage landscape, clearly short circuits the processes that must be followed, and is, in the Board's view, a summary conclusion without analytical connection to his testimony as to the history of the Anishinaabeg in the broad geographical area he has described.
- (i) Based on the evidence, including that of Dr. Conolly, none of those artifacts and archeological resources identified in the BdGn sites, are archaeologically unique or remarkable from those found at many other sites elsewhere in southern Ontario. As indicated, there is no conclusive evidence of any burial sites, or other significant prehistoric archaeological resource that has been found on the BBC Lands, and if there was sufficient evidence before it to support a finding that the BBC Lands were part of a CHL, the Board is not persuaded that there would be sufficient evidence that would lead to a

- conclusion that the archaeological resources have cultural heritage value or interest for the important contribution they make to our understanding of the history of the site or the Anishinaabeg peoples. That is readily seen in the case of the Fishing Weirs or the Petroglyphs site.
- (j) As to the legitimacy of the area identified as the “Seep” on the BBC Lands or the burial cairns east of the BBC Lands as archaeological resources, that question has not been resolved. As indicated earlier, the Board has inconclusive and insufficient evidence before it that would allow for such determinations to be made. Dr. Conolly in his testimony conceded that he was uncertain as to whether the Seep is constructed and man-made. The site which is east of the BBC lands, which may, or may not, contain First Nations burial cairns, have notably been assigned a Borden number but there has been no archaeological work undertaken that would permit this area, or the Seep, to be categorized as an archaeological feature, or a significant feature, to the extent required for the purposes of CHL designations.
- (k) Despite the fact that Ms. Dibb was not qualified as an expert in cultural heritage landscapes, her evidence is nevertheless supportive of the Board’s conclusion as to the elements and components of the processes relating to the determination of cultural heritage landscapes that have not been addressed and undertaken to date. Ms. Dibb’s work on the Lands highlight some of the features that exist there, and reveal some of the factors, criteria and considerations that would be necessary to identify a CHL, and based upon that evidence before me, the Board is persuaded that much more assessment and analysis of the Lands and the Lands in the Kawartha Lakes area is required to meet the requirements for a CHL as set out in the PPS which has been outlined in this Decision.
- (l) The lack of full analysis and consideration of the requirements for a CHL, significant or otherwise, also applies to the evidence put before me by Curve Lake through Mr. Pitawanakwat who spoke in general terms of the traditional importance of certain plants in Anishinaabeg culture, some of which are

located on the BBC Lands. Mr. Pitawanakwat's evidence was certainly reliable and of interest but in that regard, there was nothing to suggest that such plants are in any way unique or might not easily be found anywhere else within vast areas of the Province including other wetlands. Although the relevance of this evidence as presented by Curve Lake is unclear, if it was to suggest that such plants would somehow be regarded as cultural heritage features, meeting the requirements of the PPS and warranting inclusion within a CHL, the Board cannot conclude that this is the case.

(m) Without the benefit of a determined common denominator having been established, through analysis, that would result in the common basis for determining what would cause any features to be valued together for their interrelationship, meaning or association, the Board is unable to make a definitive finding as to what features on the BBC Lands might become part of a CHL. On the evidence before the Board it does not find that the entirety of the BBC Lands are part of such a Landscape, based on the very broad and general assertion by Curve Lake that they value those Lands by virtue of their flora and fauna and the existence of artifacts, or their proximity to Burleigh Falls or the Petroglyphs. The Board accepts the submissions of BBC that extreme care should be taken in labelling a large area as a CHL which could result in the sterilization of the whole of the BBC Lands – a result that would have extreme impact upon the owner of the Lands.

(n) Finally, the Board does not accept the submission of Curve Lake, in support of its position that the BBC Lands are part of a CHL, that it has the ability, pursuant to s. 29 of the *Ontario Heritage Act*, to designate a property to be of cultural heritage value and that having passed its Resolution, the BBC Lands should be recognized as having such value or interest. As has been indicated, within the analysis and processes relating to the designation of a CHL it is not tenable to suggest that a community's unilateral designation of a property as having cultural heritage value or interest is sufficient to make this a reality. The Board accepts BBC's submission that there is no legal basis to conclude that a band under the *Indian Act (Canada)* could somehow acquire

the same powers granted to a municipality under s. 29(1) of the *Ontario Heritage Act*, to designate a property within its boundaries to be of cultural heritage value or interest, and make such a designation to private lands entirely removed from lands over which they have ownership or rights.

[231] Accordingly for the reasons given, and upon the evidence before me, the Board finds that the BBC Lands are not a Cultural Heritage Landscape, or a part of one, that is significant as provided for in the PPS, and in this regard the Development, if it was approved, would not be constrained or subject to the requirements of conservation applicable to significant CHL's as set out in the PPS.

[232] As a final point in these issues, the Board's findings in regard to the position taken by Curve Lake in relation to CHL have considered the traditional knowledge as conveyed by Elder Williams and Elder Taylor and the other witnesses on behalf of Curve Lake, and their strong interests in preserving their culture. The Resolutions and testimony submitted on behalf of Curve Lake as a recognized Party in these appeals indeed reflect their interests in those aspects of the BBC Lands which they consider to be of significant cultural heritage value and interest. That interest alone however is insufficient for the Board to make the finding that a CHL exists, as requested by Curve Lake.

Has BBC Succulently Protected Archaeological Resources?

[233] In the absence of any CHL, there is the further issue as to whether BBC has protected the archaeological resources on the Lands as it is required under the legislation and the PPS.

[234] Leaving aside for the moment the separate issue of whether there are obligations to Curve Lake relating to consultation which have not been satisfied, on the totality of the evidence I conclude that BBC has indeed satisfied its obligations with respect to the proper assessment and protection of those archaeological resources that have been identified on the Lands. Ms. Dibb's testimony, and the Exhibits filed in support of her work, indicates that her extensive assessments, reporting and recommendations have

been thorough and compliant in all respects. Prior to her involvement there were additional assessments and studies undertaken on the Lands which have also become part of the record of archaeological assessment on the Site.

[235] The evidence confirms that the recommendations and mitigation measures that have flowed from the assessments and work of BBC have been adopted by the Ministry of Tourism, Culture and Sport and the BdGn sites are being protected in the manner that ensures their cultural heritage value or interest is retained and all work has been completed in accordance with the *Ontario Heritage Act* and related guidelines and regulations. Leaving aside the sufficiency of the 30 metre buffer for the purposes of protecting natural heritage features and the PSWs, the proposed 30 metre buffers, the removal of the two Lots in the vicinity of the BdGn-12 site, the steps that have been taken to ensure that any potential archaeological resources that may be later located, and the further acknowledged assessments to be undertaken, in the Board's view, cumulatively satisfies the obligations of BBC.

[236] Specifically the Board finds that the obligations of BBC to protect archaeological resources or heritage attributes does not extend so broadly as to be required to protect the natural heritage features that are located on the Lands as culturally significant in that they might be linked to the spirit world as suggested by Curve Lake. Again, the evidence is insufficient to determine the existence of a CHL or a significant CHL. The flora and fauna and wildlife that are present on the BBC Lands have not been determined to be protected heritage features.

[237] Given that the appeals are not allowed, and the fact that the Board, for the other reasons given, cannot approve the Development does not mean that some future permeation of the Development or some other development will not occur. With that said, leaving aside the issue of the duty to consult, the Board cannot accept the submissions of Curve Lake that BBC has failed, to this point, to fulfill its obligations in regards to this proposed Development. In the event an alternative form of development may be envisioned for the BBC Lands, in one form or another, the existing assessment of archaeological resources for the purposes of satisfying Provincial requirements and the PPS will likely continue to be relevant and applicable. To this point, at least with

respect to the areas of placement of development on the Site, BBC has acted prudently and has initiated and continued processes of assessment, review, protection and conservation as necessary. On the evidence the Board has determined that this process will continue, particularly with respect to BdGn-12 near Core Area 4, and there is no reason to expect that such continued processes undertaken by BBC will not continue to apply to any future development work on the Site.

[238] Upon this analysis and these findings, the Board prefers the evidence of Mr. Josephs as it relates to the Development's adherence to the policies of the PPS and the County and Township OP as they relate to cultural heritage features and archaeological resources. In that regard, the Board finds that if such matters alone were determinative of whether the Development should proceed, it would not find that BBC has failed in any significant respect, to be consistent with the PPS or to conform to the relevant OP policies, subject to those conditions and additional assessments which might be imposed. The fact that BBC has satisfied the onus of consistency and conformance in relation to archaeological matters does not overcome the other planning concerns associated with the Development.

Has BBC Considered The Interests of First Nations? – Duty to Consult

[239] Curve Lake raises a number of concerns relating to the general question as to whether the interests of Curve Lake and other First Nations have been properly considered which includes objections regarding the duty to consult and a consideration of the treaty rights of Curve Lake and other Treaty 20 First Nations.

[240] It should be noted that subsequent to the receipt of closing submissions, and having heard argument, a decision of the Ontario Divisional Court (*Saugeen*) relevant to the issues relating to consultation was released and is discussed below. The Board invited the parties to provide supplementary submissions in relation to that decision, which were received and which included reference to some additional related cases including a decision of the Supreme Court of Canada also issued after the receipt of submissions. These additional submissions have been considered.

[241] There are a number of preliminary bases and principles which are confirmed by the Board as follows:

1. The Board has No Jurisdiction in Claims relating to Treaty Rights

(a) First, in regards to Curve Lake's assertion of claims to treaty rights in relation to Treaty 20, the Board has no jurisdiction to adjudicate on matters of title or treaty rights, including harvesting rights, in relation to lands. This exclusion of jurisdiction also includes any issues relating to the existence, scope or adequacy of a duty to consult in relation to such claims of treaty rights on the BBC Lands.

(b) As to the jurisdiction of the Board to adjudicate issues of title, or declare lands as sacred, Justice Hackland in a decision of the Divisional Court in *Cardinal v. Windmill Green Fund LPV* [2016] O.J. No. 2707; 2016 ONSC 3456; 89 OMBR 101, on a motion for leave to appeal a decision of the Board, succinctly stated as follows:

33. Underlying the Board's decision is the correct premise that it is not the Board's function to adjudicate issues of Aboriginal title, or to declare or recognize the lands in question as a sacred site to the Algonquins, other than in the context of the duty to consult embodied in the case law and the Policy Statement. The consultation process was carried out fairly and the appellants presented no evidence that they were precluded from involvement in that process.

(c) Accordingly, Curve Lake's submissions relating to treaty interests are not relevant with respect to the planning considerations associated with this Development. The Board has considered the authorities cited by Curve Lake purporting to support its position that the harvesting rights of seven First Nations continue to exist with respect to the BBC Lands. Notwithstanding Ms. Dokis' personal opinions on the subject, and the impact of Treaty 20, the Board is unable to accept Curve Lake's argument that it has the benefit of proven residual treaty rights on the BBC Lands based upon the Supreme Court of Canada's decision of *R. v. Howard*, [1994] 2 S.C.R. 299, the Divisional Court's decision of *Ontario Federation of Anglers and Hunters v.*

Ontario (Minister of Natural Resources and Forestry) 131 O.R. (3d) 223, and the Divisional Court and Ontario Court of Appeal decisions of *R. v. Taylor and Williams* OCA [1981] 3 C.N.L.R. 114; ONDivCt [1979] O.J. No. 1270.

- (d) The Court of Appeal's decision in *R. v. Taylor and Williams* has confirmed only the preservation of the historic right of the identified Indian tribes of Treaty 20 to hunt and fish on Crown lands and in the Board's view the accuracy of Curve Lake's submissions relating to the Court of Appeal's reasoning falls short of the mark in suggesting that the decision somehow "reinforces" harvesting rights on private lands such as the BBC Lands. The Board would note that the Court of Appeal was, rather pointedly, not required to rule on the secondary ground of the Divisional Court which had made a conclusion relating to the Royal Proclamation of 1763 as to the application of Ontario's hunting and fishing laws to First Nations and the Court in fact indicated that there were "serious reservations as to the correctness of their view". In any event, the Board is satisfied that, in the facts in this case dealing with privately owned development land, it has no jurisdiction or reason to consider claims relating to residual treaty rights or any additional duty to consult in relation to such purported rights.

2. The Duty to Consult is That of the Crown, But...

- (a) The Board also confirms the general and established principle, set out in a number of decisions of the Courts, principally that of the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, ("*Haida Nation*") that the duty to consult and accommodate the rights and claims of First Nations is a duty of the Federal or Provincial Crown and not third Parties such as BBC, or the Township.
- (b) Since the hearing of this matter, in the decision of *Saugeen First Nation v. Ontario*, [2017] O.J. No. 3701, ("*Saugeen*") released on July 14, 2017, the Divisional Court has provided some further guidance on the law relating to the scope of the Crown's duty to consult with affected First Nations communities and emphasized that such consultations must occur in a meaningful manner.

- The facts of that case related to an application for a quarry license and again the Divisional Court stated that the duty to consult was that of the Crown.
- (c) The Court in *Saugeen* noted that although the duty to consult is that of the Crown's, and that the honour of the Crown may not be delegated, developers and proponents such as BBC nevertheless have an interest (as opposed to an obligation) to facilitate the consultation process. If that role of facilitator, and the option of assisting in the consultation process, is declined, a developer may do so at their own peril if the consultation process becomes a lengthy and involved one, with resultant delays and possible adverse impacts upon the developer's plans and goal of seeking approval of the necessary applications.
- (d) BBC has submitted to the Board that it should also consider a decision of the Supreme Court of Canada which was also issued after the conclusion of the hearing. On July 26, 2017 the decision of *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* [2017] SCC 41, ("*Chippewas*"). In that decision the Court has considered the role of administrative hearings in consultation and the extent to which regulatory and administrative tribunals may satisfy or contribute to the satisfaction of the duty to consult in the process of performing its regulatory or adjudicative duties. In *Chippewas* the National Energy Board, as an independent regulatory body, was reviewing an application relating to a pipeline project. The Chippewas of the Thames argued that meaningful Crown consultation cannot be carried out wholly through a regulatory process.
- (e) The Court disagreed, and reaffirmed that functions performed by an administrative body such as the Board, may serve to contribute to, or partly satisfy, the Crown's duty to consult. At paragraphs 32 and 37 the Court explained the manner in which the consultation process may be achieved through the role played by a tribunal:

[32]As we conclude in *Clyde River*, the Crown may rely on steps taken by an administrative body to fulfill its duty to consult (para. 30). The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances.

p. 37 As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations

As to the concern that a tribunal's independence might be compromised if it was charged with both carrying out consultation on behalf of the Crown and then adjudicating on the adequacy of these consultations, the Court indicated this was no reason to dismiss the fact that the tribunal could not satisfy obligations relating to consultation:

[34] In our view, these concerns are answered by recalling that while it is the *Crown* that owes a constitutional obligation to consult with potentially affected Indigenous peoples, the NEB is tasked with making legal decisions that comply with the Constitution. When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for agencies to operate effectively and according to their intended roles (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 41). Furthermore, the Court contemplated this very possibility in *Carrier Sekani*, when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58).

- (f) The Board accepts BBC's submissions in regards to the *Chipewas* decision. These principles as provided by the Court confirm that a regulatory body or administrative tribunal, such as the Board, may in certain cases be assisting in the Crown's consultation process. The Supreme Court of Canada has however confirmed that an administrative or regulatory body does not always fully satisfy the Crown's duty to consult and the Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the National Energy Board.

(g) The Board's role to hear appeals of provincial planning matters such as this one, may form part of the consultation process where First Nations are granted Party or Participant status and are fully involved in the planning process, advocate on the issues, and provide input as to the manner in which issues should be decided. The consultation process in this case relates primarily to the obligation of the Board, as a planning authority, to "consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources". As such, the Board finds that the inclusion of Aboriginal communities in the adjudicative appeal process, and the Board's attention to their evidence, submissions and participation in the process, certainly represents an integral part of the consideration of their interests. To put it another way, the Supreme Court's recognition that administrative tribunals may represent a part of the consultation process in the *Chippewas* decision confirms that the consultation process, and the consideration of the interests of Aboriginal communities under the PPS does not stop at the doorstep to the OMB hearing (or even when the appeal is commenced before the Board). The process continues when Aboriginal communities are granted status as Parties or Participants and contribute to the planning and development approval and appeal processes.

3. The Scope of the Duty To Consult Will Vary

(a) As noted by Curve Lake in its supplementary submissions, the Board is required to scrutinize the consultation with First Nations within the Board's adjudicative processes. However the manner and form of that consultation is dictated by the circumstances of each case and the legislation that may govern the process. The Board would agree with BBC's submission that the duty to consult is not a fixed process and the scope of the duty may vary. The Divisional Court, in *Saugeen*, also addressed this established principle, referencing *Haida Nation*, and confirmed that the scope of the duty to consult is proportional to an assessment of the strength of the case, and the seriousness of the potentially adverse impact and that each case must be

approached individually. At paragraphs 138 and 139 the Court stated (emphasis added):

138 The scope of the duty to consult falls along a spectrum rather than in hermetic categories. ***The scope is to be based on (i) the nature and strength of the Aboriginal or treaty right (including asserted rights and title), and (ii) the seriousness of the impact on that right.***

139 Although the law in this area is nascent, the jurisprudence is developing a rough typology that describes the duty to consult as at the "low end", the "middle" and the "high end" of the duty to consult. This seems to result in five general positions -- the three just described, and two gradations between "low" and "middle" and between "middle" and "high". This is fine as a form of shorthand, but these five general positions should not be seen as tight "compartments" carrying with them defined procedural requirements. Otherwise the analysis will quickly devolve into the kind of compartmentalized categories against which the Supreme Court of Canada warned in *Haida Nation*.

- (b) Accordingly, as to the matter of the scope of consultation, it is necessary for the Board to identify the nature of the Aboriginal right that is the subject matter of the consultation, and then consider the seriousness of the impact on that right. The nature of the aboriginal right in these planning appeals specifically arise from s. 2.6.5 of the PPS policies that require a "*consideration of the interests*" of Aboriginal communities "in conserving cultural heritage and archaeological resources" as required under s 2.6 of the PPS, which would include significant cultural heritage landscapes. The list of issues identified by Curve Lake in this hearing precisely reflected such interests.
- (c) The nature of this right to a meaningful consideration of Aboriginal interests as it specifically relates to the conservation of cultural heritage and archaeological resources (and, as well, consideration of concerns relating to natural heritage resources) is fundamentally different from the more complex or entrenched rights of First Nations that might, for example, relate to land claims, or treaty rights or planning appeals which might involve direct impacts of development upon the reserve lands held by a First Nations.
- (d) The PPS does provide further, in s. 4.3, that the PPS shall be implemented in a manner that is consistent with the recognition and affirmation of existing

Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982* and implemented in a manner that is consistent with the *Canadian Charter of Rights and Freedom*. As has been indicated, in the consideration of the planning issues before me there is no issue of inconsistency with recognized and existing aboriginal and treaty rights.

4. Adequacy of the Consultation for First Nations (and Proponents)

- (a) As the Board has noted on previous occasions, in the context of planning processes, (again, absent any more significant matters of First Nations' ownership of the subject lands, treaty rights, or direct adverse impacts upon First Nations lands or interest) the duty to consult is not to be confused with a type of veto power in relation to a development. The failure to agree to what is requested by a Party in the planning processes does not necessarily represent a failing in the duty to consult.
- (b) However, the Divisional Court's approach in *Saugeen* is again helpful in understanding that once the scope of the duty to consult is determined, that consultation must be meaningful. The process may also have regard to the interests of a third Party. The Court set out general principles summarizing the duty to consult. At paragraph 22 the Court noted that "*the duty to consult often arises where interests of third parties are also at stake. Affected third parties are entitled to be treated fairly and reasonably as well.*" In that regard, as an example, the Court noted that a proponent may be "*entitled to a decision reached with procedural fairness within a reasonable period of time*".
- (c) That being said, the Court noted at paragraph 8 that the proponent's frustrations with delay, and its interests in moving forward with a development, are not valid reasons to defeat the First Nations' constitutional rights and the duty to consult. At paragraph 17 the Court also noted that the principles relating to consultation impose responsibilities upon First Nations stating that "*...for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting...*".

(d) The Court reiterated the basic principle set out in *Haida Nation* that “consultation must be meaningful” and went on to articulate the importance of following the required steps and determining the scope and adequacy of consultation, based on the issues before the decision maker, and the context in which the consultation is occurring. At paragraphs 24 and 25 the Court said (emphasis added):

24 Not every case involving the duty to consult is constitutional; the source of the duty is s.35 of the *Constitution Act*, but there is a link between constitutional doctrine and administrative law principles. The nature of the consultation and the procedural fairness requirements must be “appropriate to the circumstances”.³⁵ Use of “a forum created for other purposes may nevertheless satisfy the duty to consult if in substance an appropriate level of consultation is provided.”

25 The evaluation of consultation and accommodation must be contextual. The “adequacy of what passed (or failed to pass) between the parties must be assessed in light of the role and function to be served by consultation on the facts of the case and whether the purpose was, on the facts, satisfied.”³⁷ Thus “[t]here must be more than an available process: the process must be meaningful.” Therefore “[i]t cannot be said that offering [a First Nation] an opportunity to participate in fundamentally inadequate consultations preserves the honour of the Crown.”

[242] With these principles in mind, the Board must determine the scope of the Crown’s duty to consult in relation to the issues before it (as it may have been facilitated by BBC and the Board processes) and the adequacy of that consultation in the context of the PPS and the planning processes that give rise to the need for consultation.

[243] The Board concludes that a number of the authorities relied upon by Curve Lake, and assertions advanced as to the duty to consult in the circumstances of BBC’s applications, are overstated by Curve Lake. The circumstances of the case before the Board, as indicated, can be distinguished from claims as to title or rights to control lands, or development which impacts directly upon Curve Lake’s own reserved lands.

[244] The witnesses for Curve Lake have communicated their views as to the cultural value and interest of the BBC Lands, and the Board has considered this evidence, and made its findings as they relate to the issue of whether a CHL or a significant CHL has been determined to exist which includes the BBC Lands. What then remains in relation

to the planning and consultation issues relating to Curve Lake, can be precisely identified as being Curve Lake's non-exclusive interest in the aboriginal artifacts and archaeological resources relating to First Nations that may exist, or have been discovered to exist, on the BBC Site. The PPS mandates that Curve Lake's non-exclusive interest in conserving all such archaeological resources and cultural heritage "be considered". What then is the scope of consultation required in relation to these limited issues under s. 2.6 of the PPS?

[245] Given the limited and defined nature of the First Nations' interest in the conservation of cultural heritage and archaeological resources, and considering the "rough typology" and degree of consultation required, the Board does not find that a fairly onerous duty to consult exists here. The issues before the Board, in the circumstances of these planning appeals, do not call for the type of "high" level of consultation referred to by the Courts. As the Divisional Court has noted in *Saugeen*, the nature of the consultation and the procedural fairness requirements is contextual must be "appropriate to the circumstances", which in this case relates to Curve Lake's interests in the protection and conservation of Anishinaabeg archaeological resources and cultural heritage, and a shared interest in preserving natural heritage features, on private, and not public or Reserve, lands.

[246] It is clear that BBC has, for this proposed development, facilitated the obligation of the Crown to "consider the interests" of Curve Lake and other First Nations under s. 2.6.5 of the PPS within the framework of the Development's planning process. Initially, the potential presence of prehistoric artifacts and archaeological resources disclosed during the assessments gave rise to the obligation to consider such interests. Thereafter, once the BdGn sites were identified, and further assessed, the obligation to consider First Nations' interests, including Curve Lake, continued and still continues. The fact that consultation and consideration of First Nations' interests will continue, and the other evidence, leads the Board to conclude that it is misplaced for Curve Lake to suggest that the duty to consult on the part of the Crown, as facilitated by BBC, has not been "discharged".

[247] There have, in the Board's view, been good faith efforts made, on the part of BBC, to engage First Nations. Specifically there has been consultation and consideration of the interests of Curve Lake and other First Nations, on an ongoing basis and which continues as any further actions may be taken relating to the development of the BBC Lands. In the circumstances of these appeals, and taking into account the limited scope of consultation required with First Nations and their interests is indeed not yet fully "discharged" but has, in the Board's view, occurred and has been adequate to date, and may likely continue.

[248] On the evidence the Board is satisfied that the Crown's "duty to consult" in relation to the archaeological work and those cultural resources that exist on the Lands, has been more than adequately satisfied in the course of the work undertaken by BBC, with the involvement of Curve Lake, the other First Nations who appeared and were granted Participant status in this Hearing, the Trent-Severn Waterway and Parks Canada and the Ministry.

[249] In coming to this conclusion, the Board has considered the extensive evidence of Curve Lake in relation to the chronology of email communications and exchanges that took place, the recently adopted Consultation and Accommodation Standards, and Ms. Dokis' evidence in relation to these standards. Although it is accepted that BBC inadvertently may have been directing its point of contact to a person who may not have been designated to represent the interests of the Curve Lake, Mr. Narhgang was legitimately involved and sought out by BBC with genuine intent. If anything this speaks to the fact that BBC was not ignoring the interests of Aboriginal communities as it related to its' archaeological assessments.

[250] As Ms. Dibb noted in her testimony, since the artifacts can only generally be identified as Anishinaabeg, and cannot be ascribed to any of the individual First Nations, "*it is difficult to know who they should be dealing with*". Curve Lake, being in closest proximity to the BBC Lands, obviously had a strong interest in assuming a lead role in the consultation process. The other First Nations Participants in the hearing supported their decision to do so. Given the manner in which the archaeological work on the BBC Lands has unfolded over many years, and the fact that these First Nations'

archaeological resources date back hundreds and thousands of years, the Board would observe that it may indeed be a challenge to determine those Aboriginal entities that should be consulted to ensure the Crown's obligations and the cultural heritage policies of the PPS are satisfied.

[251] As difficult as that process might be, the Divisional Court in *Saugeen* has again clearly highlighted the importance of ensuring that consultation, whatever its scope, must be meaningful, and has reiterated the Crown's obligation to follow the steps involved in consultation processes (paragraph 15) and conduct a preliminary assessment of the scope of the duty to consult. In a development application such as this, that step should necessarily include the identification of those First Nations that should immediately be notified and given the opportunity to be involved in the pre-development archaeological assessment processes so that their interests relating to the conservation of heritage resources can be meaningful. Based on Ms. Dibb's evidence there may indeed be a lack of procedural focus on the part of both the Ministry of Tourism, Culture and Sport and Parks Canada, on behalf of the Crown, in assessing the scope of this type of consultation processes and identifying those First Nations entities who should be involved when archaeological assessments are undertaken on development properties. Anecdotally, it perhaps remains for the Crown to determine whether cases such as *Saugeen*, and this one, warrants a more focused procedure, within the consultation assessment process, to identify those Aboriginal communities that may have an interest in archaeological and cultural heritage matters arising during planning and development.

[252] In any event, despite the submissions of Curve Lake, on the facts of this case the Board finds that the few incidents of miscommunication or lack of communication with respect to the progress of the assessments, and findings, do not represent serious failings or breaches of the duty to consult on the part of BBC or the obligation under the PPS to consider the interests of Aboriginal Communities, as BBC accepted its role in facilitating the consultation process under s. 2.6.5 of the PPS. In coming to this conclusion the Board has also considered the form, manner, timing and background of Curve Lake's adopted Consultation and Accommodation Standards ("CAS").

[253] BBC may, through a limited period of time, have failed to communicate directly with the authorized representative of Curve Lake but this is not a serious failing in the duty to consult on the facts of this case. On this point, the Board has considered the Divisional Court's findings in the case of *Hiawatha First Nation v. Ontario (Ministry of Justice)* [2007] O.J. No. 506 ("*Hiawatha*") in circumstances where the First Nations' interests were not specific to any one First Nation. As the Court indicated, "...given that the interests of the Anishinaabeg as a whole were implicated, deep consultation at the level of each of the individual First Nation Applicants was not required"

[254] The Board does not agree with Curve Lake's submission that *Hiawatha* is distinguishable from this case. There, as here, the Court indicated that where the interests of the larger Anishinaabeg peoples was the case, the Crown could elect which First Nation they wished to consult and "deep consultation" was not required with each and every First Nation. There, as here, the First Nations geographically closest to the subject lands had participated in the consultation process and the Court determined that was sufficient. Given the lack of any specific and exclusive connection of interest with Curve Lake only, the fact that early communications may have been with someone other than Curve Lake representatives does not itself suggest a failing on the part of the Crown (or BBC as the proponent facilitating the process) to have considered the interests of First Nations interests or failed to adequately consult with First Nations.

[255] As well, given the broad and unspecific nature of the archaeological resources located on the Lands, the expectation of the kind of deep consultation referred to by Ms. Dokis on behalf of Curve Lake, based upon Curve Lake's unilateral CAS is overreaching and beyond what was appropriate and required to satisfy the requirements of the PPS for consideration of First Nations' interests and consultation.

[256] In regards to Curve Lake's CAS, certainly Curve Lake's unilateral determination of its requirements for consultation, as set out in that document, is appropriate and legitimate. However, it is not fully determinative of the question of whether there has been adequate consultation and consideration of Curve Lake's interests under the PPS within the planning process. The PPS, or the Constitution or the body of case law which addresses the subject of the Crown's Duty to Consult, does not grant to a First Nation

the ability to unilaterally set guidelines which create a standard for a duty to consult that goes beyond that determined to be required by the Province in planning processes or which has been determined to be required by the Courts. This is particularly the case where treaty rights to the Lands have been ceded and there is private ownership of the development property. Curve Lake's CAS does not alter PPS's policy requirements for the consideration of the interests of Aboriginals, which is the standard that the Board must apply in the circumstances of these appeals.

[257] That being said, Curve Lake's recently adopted CAS represent an important document to be considered by the Crown when assessing the scope of consultation required of the Crown in any case that requires consultation, including the type of consultation relating to cultural resources that may be required for developments such as the one proposed by BBC.

[258] Despite the occasional minor incident, BBC, through its retained consultant Ms. Dibb, obviously recognized the importance of involving a First Nations representative throughout the archaeological work and assessments and took this obligation seriously. Furthermore, as the work progressed Curve Lake was most certainly involved in the processes, aware of what was taking place, well able to relate concerns and issues, and had full opportunity to become as involved in the interests of First Nations.

[259] Separate and apart from Curve Lake's involvement in the Board hearing, the Board would find that the extent of consultation with Curve Lake was meaningful and sufficient. However, as identified in the *Chippewas* case discussed above, and considering the manner in which this appeal process, and this hearing has taken place, the participation of Curve Lake as a very involved party to this proceeding before the Board, and the granting of Participant status to other Aboriginal communities, has meant that the Board has, in performing its functions as a provincially created administrative tribunal, has to some extent facilitated and satisfied the consultation process requiring the consideration of the interests of Aboriginal communities as it relates to the conservation of cultural heritage and archaeological resources related to Aboriginal communities.

[260] Curve Lake has submitted that if the Crown intends to rely on a tribunal process as “a surrogate for Crown consultation” the First Nation must be informed. Curve Lake refers to the companion case of *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* 2017 SCC 40 (“*Clyde River*”) in support of this. The Board finds that, similar to the facts in the *Chippewas* decision, that requirement of being informed may be met through the circumstances of the involvement of the First Nations in the adjudicative processes. Curve Lake had notice of these proceedings and as a recognized Party, was aware that the Board was the final decision maker on the planning issues to be adjudicated. As the evidence from Parks Canada confirmed, no other Crown entity was expected to be further involved in the consultation process. The Board finds that the circumstances of this case should have made, and did make, it sufficiently clear to Curve Lake that the consideration of Curve Lake’s interest in all matters relating to archaeological resources and other concerns regarding natural heritage matters within the Board’s adjudicative processes would constitute a part of the Crown consultation duty and the absence of any formal notice to the Crown does not obviate the extent to which Curve Lake has been an active and integral part of the Board’s process.

[261] As well Curve Lake argues that the Board’s process in considering its interests was not sufficient to discharge the duty to consult and that the Board does not possess the same statutory authority as the National energy Board did in the *Chippewas* case. The Board disagrees. The Board is recognized as a specialized tribunal and is able to review and address the interests of Curve Lake as a First Nation as it relates to the planning and development issues before it. The Board has the necessary powers to address and determine matters relating to aboriginal interests which they have raised and about which they sought to be consulted. This also includes a consideration of Curve Lake’s expressed interest, through its shared counsel, in preserving and protecting the natural heritage features. Curve Lake has indicated that the natural heritage and environment quality of the wetlands are of spiritual and cultural importance and this has been considered in the Board’s findings on these matters. The Board is not suggesting that, in this case, the conduct of this hearing by the Board can be “considered a complete answer to the Crown’s duty to consult”. However when all aspects of the processes involving BBC, Parks Canada, Curve Lake, the other First

Nations recognized as Participants, and the Board's adjudicative role in receiving and considering the concerns of Curve Lake are taken cumulatively, the Board's role constitutes a component of that consultation requirement.

[262] The Board also cannot accept the submission of Curve Lake that "consultation has not yet begun". The facts simply do not support such a statement. The process has continued and will continue. Such archaeological resources that exist, or may be further discovered, will continue to be subject to the protection and mitigation strategies approved by the Ministry. The consultation processes will most likely continue dependent upon what alternative use or development of the BBC Lands are planned.

[263] Applying the approach as to what will be considered as "meaningful" consultation in the *Saugeen* decision, the Board finds that there was an extended public consultation process facilitated by BBC in which First Nations representatives were involved, or had the opportunity to be involved, but on occasion, declined. First Nations, including Curve Lake were actively involved in the assessments and received information which was, to some extent, guided by their own level of interest. Curve Lake attended the Site, received communications, and certainly, with their active participation in this proceeding as a Party, has quite ably continued to express its concerns as to their members' interests, which have been considered by the Board. There has been protection of those Anishinaabeg heritage resources that have been located on the Lands. The concerns of Curve Lake have been adequately expressed and have been considered through the intensive processes of archaeological assessment and review. Curve Lake's additional input on natural heritage resources, buffers, sensitive species, and other concerns relating to the natural environment has also been considered, particularly since they have "shared" their counsel with FFW who, on their behalf, have also advocated strongly and effectively on matters relating to natural heritage.

[264] For all these reasons, given the manner in which the review of matters relating to Cultural Heritage and archaeological Resources has occurred in the course of the Development applications relating to the Development, the Board finds that there has been no failing or lack of consistency with the applicable requirements of s. 2.6 of the PPS requiring consultation and the consideration of the interests of Aboriginal

communities with respect to cultural heritage and archaeology or with respect to any issues raised by Curve Lake in this proceeding. Neither have the processes represented a failure to recognize the constitutional rights of Curve Lake, contrary to s. 4.3 of the PPS, as submitted by its counsel. The Board finds that the duty to consult, in a manner that is meaningful and consistent with s. 4.3 of the PPS, and as it constitutes the form of consideration of the interests of Curve Lake and any other Anishinaabeg peoples, has been satisfied.

ISSUE E - PLANNING EVIDENCE AND ISSUES

[265] The hearing Board concluded with the presentation of the planning evidence. For the most part much of the planning opinion evidence provided by the three planners who testified was informed by the respective reports they each considered. It is unnecessary for the Board to review the findings in relation to the various planning policy issues arising with respect to the Development. For the reasons given, the Board has found that, having regard to the Provincial planning policies, BBC is not able to satisfy the requirements of the key Provincial planning policies or the Township and County policies. The Development is accordingly inconsistent with, or lacks conformity with, these policies as they relate to the PSWs, the protection of wildlife and fish species, stormwater management, sewage services, water services, and other issues fully addressed in this Decision.

[266] Those findings which are adverse to BBC obviously impact upon the Board's consideration and acceptance of Mr. Josephs' planning opinion which is directly based, in no small part, upon many aspects of the reports and opinions provided by BBC's experts in their fields of specialty. This conversely has resulted in the Board preferring the planning opinions of Mr. Fahner, and as well, Mr. Tighe, whose opinions have been provided as to consistency or conformity with the PPS or the OP in relation to the issues.

[267] The Board has been required to address two broader planning issues raised by BBC in this hearing: (1) the application of the Clergy Principle; and (2) whether, due to the timing of the applications, the Board must "have regard to" the PPS rather than

determine that the proposed Development is “consistent with” the PPS. There are also a few residual planning issues addressed below that are not otherwise dealt with earlier in this Decision.

Application of the Clergy Principle

[268] It was uncontradicted that this proposed Development has been a long time in the making, having been first initiated in 2002. The chronological planning history of the Development was well summarized and reviewed by the Township’s Planner, Mr. Tighe (Exhibit 58) most of which is not disputed. In the course of the 14 years leading to the hearing of the Appeals, there have been numerous iterations of the Development, and there was a prolonged period of inactivity by BBC before it again decided to again resurrect the applications.

[269] The Minutes of the meetings of the Township’s Council in 2011 and 2012 (Exhibit 57) confirm that BBC had itself decided not to move forward with the original applications due to instability in the Ontario economy, and then reactivated its plans for development some ten years later. BBC took the position that they were not submitting brand new applications in 2012, as this was not required, but would be “updating the current applications as applicable and as required by legislation”. The evidentiary record as a whole reflects the fact that BBC assembled its assessments, studies, reports, and initiated its extensive communications and submissions to the Township and the County on an ongoing basis with many updates and amendments, right up to the eve of this hearing, and in a few cases, after the commencement of this hearing. The Development has been more than 14 years in the making, but was really begun again, in a revised form, in 2012.

[270] Not surprisingly, the application of the Clergy Principle has arisen in this case, which affects which planning legislation is applicable to the determination of the issues in these appeals. The Clergy Principle, in its basic form, requires that planning applications be considered in the context of the policies which exist at the time the applications are first initiated, in order that there be some certainty to the land use planning process. Subsequently the Board, in decisions such as *Dumart v. Woolwich*

(Township) (1997), 37 OMBR 165 and *James Dick Construction v. Town of Caledon* (2003) OMBD No. 1195, clarified that the rule was not an inviolate or rigid rule or a “one size fits all solution” and that the Board could nevertheless determine, upon the facts of a given case, that it was appropriate to apply an alternate principle and consider other relevant, valuable and informative policies in making its determination. The Board classified the Clergy Principle as a matter of Board practice to promote fairness in the planning process.

[271] In *Sun Life Assurance Co. of Canada v. Burlington (City)* [2007] O.M.B.D. No. 1277 (Board Case No. PL060707) and *Landmart Realty Corp. v. Hamilton (City)* [2010] O.M.B.D. No. 848 the Board commented that the Clergy Principle should not be considered merely a Board policy but rather a component of well-settled law and that deviations from the Clergy Principle are not to occur without good reason. The identified legal basis for the Clergy Principle was essentially that natural justice and procedural fairness requires that a Party know the case it must answer and be permitted to answer in that case. If, in the context of planning law, the policy regime were a “moving target”, natural justice would be absent.

[272] Whether considered a matter of “mere” Board policy, or law in this case does not significantly affect the issue and the necessity of ensuring that procedural fairness and principles of natural justice are considered and when considering procedural fairness and natural justice, the Board must also consider the public interest, It would be equally as abhorrent to the concepts of procedural fairness and natural justice if applications also, by election, became “moving targets” because of ongoing amendments and changes to those applications and the applicant claimed the benefit of certain planning policies in place only at the time an application was first brought.

[273] In this case, as the Board has found, there have been numerous amendments to the form of the Development which have had substantive impacts on the Development including, but not limited to such things as: the number and configuration of the Lots; the significant increase in the number of proposed backlots; the nature and governance and monitoring of the buffers; the nature and ownership of the internal roads; the proposed mitigation measures for wildlife and species; the archaeological assessments; the wells

and water servicing options and contingencies; and the extent and form of, the administrative, recreational and marina complex in Core Area 1 and the waters off this area. Despite the conscious effort of BBC to assert that it was “resubmitting” the applications in 2012, the Board finds that the Applications were, practically speaking, submitted “anew” when they were placed with the Township and County at that time.

[274] To accordingly consider only the OP that existed 14 years ago without regard for the newer County OP now applicable in the Township would, in the Board’s view, be contrary to good planning policies and not in the public interest. As stated in *James Dick Construction Ltd.*, the Clergy principle must not bind or fetter the discretion of the Board to act in an appropriate manner in the face of new circumstances and there may be cases which warrant the application of another principle where the Board may choose, in its discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling public interest.

[275] It would also be difficult to accept that BBC would be prejudiced by the application of the planning policies which exist in 2016 when these Appeals were heard. Certainly BBC’s planners have been aware of the changes and, in fact, as the Minutes and communications between BBC and the Township indicate, BBC was aware that the applications were being updated to reflect the more current policies when it “resubmitted” its applications in 2012. The issue of prejudice and the knowledge of the applicant when considering the Clergy Principle was noted by the Board in the 2006 Decision *Ziff v. Niagara (Regional Municipality)* [2006] OMBD No. 765. In that case the Board found that the applicant was well aware of changes to planning policies that had occurred and had “ample opportunity” to update and complete additional evaluations and assessment studies necessary to address the concerns and criticisms raised during the application process.

[276] That is the case here, and given the length of time that has elapsed since BBC first filed its applications, through their choice and not that of the planning authorities, and the considerable time afforded to BBC to conduct all required investigations and address planning issues, the potential for procedural unfairness, prejudice or denial of natural justice does not exist. The Board prefers the opinions of Mr. Tighe and Mr.

Fahner on this issue for these reasons, and finds that with the considerable passage of time it is appropriate to consider all available planning documents and the newer County OP should be the primary plan for consideration by the Board. In considering the test of good planning, the Board finds that the Clergy Principle should not apply in these circumstances to prevent consideration of up-to-date planning policies.

[277] The non-application of the Clergy Principle by the Board, and the finding that it is appropriate to consider the amended and consolidated version of the County OP (2016) has one further effect upon the Board's review of the planning policies. Although the PPS contains, in itself, a complete policy as it relates to the protection and preservation of PSWs, the revised County OP, as it was updated to reflect and ensure consistency with the PPS also required greater emphasis upon PSWs. Section 4.1.2.1 of the revised County OP (Exhibit , Vol. 1, Tab 5B) provides that:

Development and site alteration within provincially significant wetlands and in significant portions of the habitat of endangered and threatened species is not permitted.

This provision of the County OP, as the applicable OP, is obviously of significant relevance to the Board's consideration of the Development and has been reviewed.

Application of the Burleigh Anstruther Official Plan

[278] Although the Board has determined that this is one of the cases where the Clergy Principle should not apply, and therefore the newer segments of the County OP applying to the Township should apply, BBC submits that due to the exclusion of the BBC Lands from the 2008 OPA (OPA#3) which repealed the Township OP there is an incongruence in the planning policies in that the County OP does not apply because the BBC Lands were excluded from the application of the OP. Following this analysis, BBC submits that if the Board finds that the Clergy Principle does not apply there is no local OP that applies save and except for the former Township Plan now repealed.

[279] Notwithstanding the submission of BBC as to this incongruence and the non-applicability of the local component provisions of the County OP, the Board is of the

view that it should nevertheless be guided by the policies of the as-amended County OP that are applicable to shoreline development. Based on the totality of the evidence, and in particular the context of this Development, for the purposes of good planning and the public's interest, it would be unduly restrictive if the Board were not to consider the most up-to-date shoreline OP policies as they have evolved to reflect concerns and priorities relating to shoreline development.

[280] Mr. Tighe's evidence, in this regard, was persuasive in identifying the policies of the amended County OP that should govern. They were supported by Mr. Fahner in some respects. As BBC has noted, at the end of the day, there are likely few substantial variances between the earlier 1994 County OP and the later amendments under the consolidated County OP as they relate to primary policies that are applicable to the Development.

The PPS – “Consistent With” or “Have Regard to”

[281] BBC argues that the Board should only be required to “have regard to” the provisions of the PPS rather than being required to decide whether the Development enabled by the proposed planning instruments “is consistent with” the PPS. The presumption is that the phrase “have regard to” imports a lesser standard of consideration or application of the PPS policies. Based on the submission made to the Board on this issue, the issue of which test is to be applied by the Board is segregated out from the issue of which version of the PPS applies.

[282] What version of the PPS is to be considered, and the manner in which the Board must consider the PPS in its decision, is governed first by the 2014 PPS itself. The applicability of the 2014 PPS and the test to be applied is also addressed within *Planning Act*. The Act is, in turn, affected by the transition provisions in the regulations passed under that Act. There are no transition provisions in the 2014 PPS.

[283] Under s. 3(5) of the *Planning Act*, the Board is required to ensure that the Development is consistent with the policy statements issued by the Minister, from time to time. BBC, in its submission, acknowledges that the 2014 PPS should apply, but

submits that notwithstanding the retroactive application of the most recent provincial planning policies, the wording of s. 70.4 of the *Planning Act* and Regulation 385/04, as it relates to transitional matters, means that because the “matter or proceeding” now before the Board was started before November 30, 2004, the Appeals must be continued, and finally disposed of, as the *Planning Act* read on November 30, 2004.

[284] Following the thread of BBC’s submission, s. 3(5) of the Act, as it then read in 2004, provided that

In exercising any authority that affects a planning matter, the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, shall have regard to policy statements issued under subsection (1).

From this, BBC submits that the Board, in these appeals, is instead required “only” to “*have regard to*” the PPS – a test that is considered more flexible than “*consistent with*” as it currently exists.

[285] The Board is unable to accept the submission of BBC that the test for the Board is to “have regard” to the PPS or that the Board is required, in its Decision, to do anything other than to ensure that the Development is “*consistent with the policy statements....that are in effect on the date of the decision*”.

[286] If the Board were to accept BBC’s argument that the transitional rules result in a substitution of the older “have regard to” test to be applied to the “*in effect*” provincial policy statements, but still recognize the application of the most recent 2014 PPS as the applicable provincial policy statement there would, in the Board’s view, be an inconsistency in the application of the 2014 PPS. The Board would, in this manner, effectively be complying with, and acknowledging the effect of, s. 4.1 of the 2014 PPS but concurrently ignoring the equally important and integrated requirement that follows in s. 4.2 of the 2014 PPS. Both sections together read as follows (emphasis added):

4.0 Implementation and Interpretation

- 4.1 This Provincial Policy Statement applies to all decisions in respect of the exercise of any authority that affects a planning matter made on or after April 30, 2014.
- 4.2 In accordance with section 3 of the Planning Act, a decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter, “**shall be consistent with**” ***this Provincial Policy Statement***.

Separate and distinct from the provisions of the *Planning Act*, the implementation provisions of the 2014 PPS clearly provide that the 2014 PPS is to apply to “all” decisions “*made on or after April 30, 2014*” and “*in accordance with section 3 of the Planning Act*” such decision “shall be consistent with” “this Provincial Policy Statement”, i.e. the 2014 PPS. The Province, logically, could not have intended that s. 4.2 of the 2014 PPS be nullified, and essentially made ineffective, by the subsequent transitional regulations relied upon by BBC. The two sections of the 2014 PPS, together, require the Board to both consider the 2014 PPS (and not the policies in effect at the time of the original applications) and apply the “*shall be consistent with*” test (and not the “have regard to test” also then in effect).

[287] Both the *Planning Act* and, importantly the provisions of the PPS itself, expressly imposes a requirement of retroactivity in regards to the 2014 PPS, addressing the effectiveness of the policies for any decision after April 30, 2014 and the manner in which the Board must ensure that the proposed development is consistent with the PPS. Unlike previous provincial policy statements, the 2014 PPS did not include transition provisions and instead implemented the retroactive and immediate application of the PPS to any decisions made after the stipulated date. For the purposes of these Appeals, it is not anecdotal that the policy changes in the 2014 PPS, which were immediately to govern in any decision to be made, expressly placed greater emphasis on environmental conservation, and long-term planning. It is self-evident that the changes to the provincial policy statement emphasized the importance of considering the cumulative impacts of development and ensuring that a development would be harmonious with the natural environment – issues that have been highlighted in the course of this hearing. Sections 4.1 and 4.2 must be assumed to plainly mean what they

say and It can be reasonably assumed that the legislature intended these new policy changes, including the requirement of consistency, to be “effective immediately”.

[288] This issue has been recently addressed by Justice M.G. Ellies of the Ontario Divisional Court in his decision of *Avery v. Pointes Protection Assn.*; 2016 ONSC 6463. In that case the developer originally brought applications for a development in 2004 and similarly argued that the Board should, in 2015, have applied the test in *Kalmoni Establishments Inc. v. Milton (Town)*, [1995] O.M.B.D. No. 1247, 32 OMBR 474, and *Clergy Properties Ltd. v. Mississauga (City)*, [1996] OMBD No. 1840, 34 OMBR 277 where the Board held that a series of previous decisions required that the Board apply the official plan policies in effect at the time of the application from which the appeal is taken. The developers argued that the Board in this case erred in law in failing to follow the *Kalmoni* and *Clergy* principles when it applied the 2014, rather than the 2005, PPS.

[289] Justice Ellies stated at paragraphs 43 to 47:

43 Unlike the situation at the time that *Kalmoni* and *Clergy* were decided, the question of which PPS to apply is now explicitly set out in both the Act and the 2014 PPS itself. Section 3(5) of the Act states:

3(5)A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,

(a) shall be consistent with the policy statements under subsection (1) *that are in effect on the date of the decision*; and

(b) shall conform with the provincial plans *that are in effect on that date*, or shall not conflict with them, as the case may be.
[Emphasis added.]

44 Section 4.1 of the 2014 PPS itself states:

4.1 This Provincial Policy Statement applies to *all decisions* in respect of the *exercise of any authority* that affects a planning matter *made on or after April 30, 2014*. [Emphasis added.]

45 There is no doubt that the legislature is entitled to enact such retroactive legislation, especially where it is legislation designed to

protect the public interest: *R.S. v. R.H.* (2000), 49 O.R. (3d) 451 (Ont. S.C.), at paras. 7 and 12.

- 46** The Board referred to and relied on these provisions in both the Act and the PPS in making its decision. There is no ambiguity in either provision. Each clearly requires the Board to apply the PPS in effect at the time of the hearing before it.
- 47** These provisions superseded the authority referred to in *Kalmoni* and *Clergy*. The Board was correct, in my view, in rejecting the developers' argument that those authorities applied in light of the provisions set out above.

[290] Although the Court does not address the effect of s. 4.2 of the 2014 PPS, the Board would apply the same rationale: there is no doubt that the legislature is entitled to enact such retroactive legislation as it requires the Board to ensure the development is consistent with the 2014 PPS, especially where the application of that test in the legislation is designed to protect the public interest.

[291] For these reasons the Board concludes that it must ensure that the Development 'is consistent with' the 2014 PPS, and as a result, the analyses throughout this Decision has involved a determination based on the test of consistency.

[292] If the Board is wrong in that regard, and if the transitional regulations mean that the Board in the circumstances of this case must only "have regard to" the 2014 PPS and not determine that the Development is "consistent with" the 2014 PPS, the Board would nevertheless find, in all cases, that the conclusions and findings that have reached would be no different if the Board was, under the prior legislation, having regard to the policies of the 2014 PPS. The Board finds this is the case for the reasons set out below.

[293] The policies of the 2014 PPS, represent a high-level planning policy foundation that leads, and thus impacts upon, all derivative planning policies in the province's land use planning system. As such, the significant status and relevancy of the 2014 PPS policies cannot then be considered to have been diminished by the fine differences in the practical manner in which the Act dictates how planning authorities, including this Board, are to apply the PPS policies. This is especially the case when considering the

importance and priority that the Province has placed on the wise use, management and protection of the Province's natural heritage resources and water resources over the long term and the emphasis on the objective of ensuring that Ontario's resources are managed in a sustainable way to conserve essential ecological processes and minimize environmental impacts.

[294] Given the importance of these policies, and the clear retroactivity of the policies under s. 4.1 of the PPS, the Board finds that the application of the "have regard to" test, would not practically affect the findings that have been reached in applying those policies to the assessment of the propriety of the Development if the transitional provisions are to be applied in the manner argued by BBC. In that regard, the Board is guided by the Divisional Court's statement of the working interpretation of the phrase "have regard to" in *Train v. Weir*, [2012] O.J. No. 5342; ONSC 5157 where the Court provided as follows:

Taking the reasons as a whole it is open to serious question whether the Board "had regard" to the provincial policies in the sense of considering them carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect, and determining whether and how the matter before it is affected by, and complies with, such objectives and policies, with a sense of reasonable consistency in principle.

[295] The Board is mindful of the fact that there is a difference in the manner in which the words "have regard to" and "consistent with" have been considered and interpreted by the Board and the Courts in s. 2.1 of the *Planning Act* (relating to decisions of Council), and the use of the wording in s. 3(5) of the *Act* as it relates to the application of the provincial policies. These are two very different sections and this "active contrast" in the use of the two phrases was addressed by the Divisional Court in *Train v. Weir* (supra). . The jurisprudence that developed over the distinction between the effect of the two phrases, as they relate to how the Board should consider the prior decisions of a municipal council in s. 2.1, should be carefully distinguished from the manner in which the two phrases are different as they relate to the question of how the Board should *apply* the hierarchical planning policy foundation set out in the PPS which informs all planning decisions that are made in the province.

[296] The Board concludes that in the context of s. 3(5) if it is to “have regard to” the PPS, it is nevertheless obligated to ensure that the objectives and policies of the 2014 PPS, as a whole, are considered carefully and that there is full and meaningful compliance and reasonable consistency with those policies and their objectives and what they seek to protect. Further, the Board must determine whether, and how, the matter before it is affected by, and complies with, such objectives and policies, with a sense of reasonable consistency in principle.

[297] As the Divisional Court has noted, the eventual amendment of the wording of s. 3 to require that development decisions “are consistent with” the provincial policy statements was intentional in order to distinguish this test from the body of case law that had developed in relation to the “have regard to” phrasing as it related to the import of prior decisions of Council for the Board. For that reason, if the Board is to “have regard to” the PPS policies due to the transitional provisions, the Board must practically apply the phrase to maintain and recognize the intended paramountcy of the PPS policies in the province’s planning regime and ensure compliance accordingly. To do otherwise would undermine the hierarchical framework of planning policy in the Province of Ontario and the intended overarching importance of provincial policies within that framework.

[298] On this basis, the Board concludes that in all instances in the findings herein, the “substitution” of the test of “have regard to” for the test of “are consistent with” would not alter the substantive impact, relevancy or application of the policies of the 2014 PPS as they apply to the proposed Development.

Other Planning Issues

[299] In regards to the issue of whether the BBC Lands are within a settlement area and governed by policies relating to such development, the planning evidence does not support a finding that such policies are applicable and it is unnecessary for the Board to consider this issue, or matters relating to established need or the Growth Plan.

[300] The Board accepts Mr. Fahner's planning opinion that the Development's proposed system of internal roads, private to the Condominium with additional private driveways, is contrary to the intent of the County OP which opposes privately owned roadways in a subdivision. Although, as the evidence indicates, a plan of condominium can be approved on a private road, the form and substance of this proposed Development is more akin to a subdivision plan where planning policies prohibit, for obvious reasons, private ownership of roads within such subdivisions.

[301] Both Mr. Tighe and Mr. Fahner are of the opinion that the Development specifically fails to conform with the current in-force County OP, relating to cluster development. Under the OP a cluster form of development is one that has an integrated open space system providing linkage to the waterfront and is encouraged. As the Development is proposed, with each lot retaining its own direct linkage to the waterfront (subject to the 30 metre buffer) both planners confirmed that the Development would not conform to the County OP.

[302] As indicated, the evidence before the Board is that the form of the applications as presented in 2012 included an increase in the number of back Lots proposed for the plan of condominium. Both Mr. Tighe and Mr. Fahner agreed that the prior Township OP did not support the existence of backlots promoting, as it did, shoreline areas and Mr. Tighe stated that the Township had not supported "backlotting". Mr. Josephs did not dispute this evidence. All three planners agreed that the earlier 1994 County OP also discouraged backlot development unless implemented through a plan of subdivision and that the current County OP introduced the possibility of local municipalities setting policies to permit backlot development. Mr. Tighe was of the firm opinion that the backlots should be deleted from the Development and that the inclusion of the 12 backlots did not represent good planning and he could not recommend this. On the evidence, the Board accepts Mr. Tighe's evidence, which is supported by Mr. Fahner, that in the absence of a local policy to the contrary, the inclusion of the backlots within the Development would not conform to the Township or County OP.

[303] At the conclusion of the hearing, although the position of Council for the Township had been referred to in the course of the hearing, the Board was provided

with the formal position of Council as to the Development. In arriving at this Decision the Board has had regard to the decision of Council in opposition to the Development.

SUMMARY OF FINDINGS AND COSTS

[304] The Board has carefully considered all of the evidence before it, and the submissions of counsel for the Parties. Recognizing the requirement for consistency with the PPS, and also having regard to the policies of the PPS in the manner provided for in this Decision, for all of the reasons given, and upon the findings made, given the extent of the concerns that have been heard by the Board, and upon the planning evidence that has been carefully considered, the Board finds that the Development as amended, even with the proposed conditions, does not represent good planning, nor is it in the public interest. The Board arrives at this conclusion despite the fact that BBC in some instances has satisfactorily established that the Development would be consistent with some policies within the PPS, and would conform to some aspects of the OP. The Board finds that the Development as it is constrained within the areas of the BBC Lands defined by BBC is not consistent with the policies of the PPS and the OP as it relates to the protection of natural heritage resources, and especially the PSW Complex in which the Development is located. No amount of mitigation, as proposed, or future reviews, strategies or further impact assessments and additional mitigation plans allow for the Board to conclude that the shortcomings of the Development, many of them significant, will assuredly be addressed. The very presence of the Development within and adjacent to the two PSW Complexes, and the likelihood of impact upon the natural heritage resources, species, endangered and otherwise, are in the Board's view factors which cannot be sufficiently addressed to permit the Development in its current form.

[305] Although it may be possible for a substantially altered development to occur within the entirety of the Lands, the Development does not represent good planning and development. Accordingly, the Board is unable to approve the applications to support BBC's proposed Development.

[306] FFW has requested costs against BBC in relation to the failure of Mr. Rancourt to appear when he was expected to appear before the Board. Pursuant to Rule 96 of the

Board's *Rules of Practice and Procedure*, FFW is to provide written submissions and supporting documentation in relation to that request for costs within 30 days of the date of issuance of this Decision and BBC shall provide responding submissions and any supporting documentation within 15 days thereafter. Although the Board is not opposed to receiving submissions from the Township on this request for costs it does not need to receive submissions from the Township on this issue. Should the Township wish to provide submissions they may do so within the 15 day period indicated. FFW will then have five additional days in which to provide any brief Reply submissions.

ORDER

[307] The Board accordingly orders that the applications be denied, and the Appeals are dismissed.

"David L. Lanthier"

DAVID L. LANTHIER
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

ATTACHMENT 1

LIST OF PARTICIPANTS

1. Reid Brownscombe and Patricia Bourne on behalf of the following 20 common participants:
 - Derek Nelson
 - Mike Ormsby
 - James Young and Lynn Smith (on behalf of Peterborough Field Naturalist)
 - Elaine Joan Cooper
 - Reid Brownscombe
 - Barbara Anne Rimmer
 - David Hall (on behalf of Juniper Point Cottage Owners Association)
 - Hugh Gordon MacPherson
 - Patricia Macdonald
 - Carole Cole
 - Andrea Marcus
 - Greg Finlay
 - Jamie R. Anderson
 - Suzanne Coros
 - Ralph Blefgen
 - Ronald O Drake
 - Robert Woosnam
 - Patricia Bourne (on behalf of Old Burleigh Road Cottagers)
2. John Huycke (on behalf of Stoney Lake Cottagers Inc.)
3. Jeffrey Chalmers (on behalf of Birchcliff Property Owners Association of Douro-Dummer Inc.)
4. Rachel Corbett
5. Lois Wallace (on behalf of Environment Council for Clear, Stoney and White Lakes)
6. Edgar Wood
7. Holly Blefgen

8. Catherine Kirk and Scott Wooton
9. Andrea Marcus
10. John McWilliams (written only)
11. Hiawatha First Nation (Chief Greg Cowie)
12. Mississaugas of Scugog Island First Nation (Dave Mowat)

ATTACHMENT 2

Environment & Land Tribunals Ontario

FORM OF OATH FOR FIRST NATIONS WITNESS:

*** As a descendent of one of the First Nations of Canada do you solemnly swear upon the Eagle Feather, which you hold in the spirit of truth as a symbol of the direct connection of the First Nations peoples to the Creator, that the evidence that you shall give to this Tribunal shall be the truth, the whole truth, and nothing but the truth.*

**** Note:** Witnesses are responsible for providing the appropriate Eagle Feather