



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Advocates for the Responsible Development of Long Pond v. Eastern
Newfoundland Regional Appeal Board*, 2022 NLSC 64

Date: April 6, 2022

Docket: 202101G5705

BETWEEN:

**ADVOCATES FOR THE
RESPONSIBLE DEVELOPMENT OF
LONG POND**

FIRST APPELLANT

AND:

SUNSET KEY MARINA INC.

SECOND APPELLANT

AND:

**EASTERN NEWFOUNDLAND
REGIONAL APPEAL BOARD**

FIRST RESPONDENT

AND:

**THE TOWN OF CONCEPTION BAY
SOUTH**

SECOND RESPONDENT

AND:

OMNI MARINE SERVICES INC.

THIRD RESPONDENT

Before: Justice Garrett A. Handrigan

On Appeal From: A Decision of The Eastern Newfoundland Regional Appeal Board pursuant to Section 46 of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, File # 15-006-072-015/016, dated the 21st day of October 2021.

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: March 16, 2022

Summary:

The Eastern Newfoundland Regional Appeal Board dismissed an appeal that the Advocates for the Responsible Development of Long Pond and Sunset Key Marina Inc. brought against the Board, the Town of Conception Bay South and Omni Marine Services Inc. to set aside a development permit that the Town issued to Omni to build a finger pier, a laydown area, a parking area and a cold storage building on a water lot in Long Pond Harbour, situate within the Town.

The Advocates and Sunset Key claimed that the Appeal Board erred in various ways, including as to what planning regulations applied, whether the Development was wholly within the waters of Long Pond Harbour and whether the Town had jurisdiction to approve it. They also claimed that the Appeal Board denied them procedural fairness by refusing to postpone the hearing of the appeal.

The Court dismissed the Advocates' and Sunset Key's appeal. It found that the Appeal Board acted correctly when it dealt with most of the issues that the Advocates and Sunset Key raised and otherwise that it did not commit palpable or overriding error. It ordered the Advocates and Sunset Key to pay, jointly and severally as between them, the costs of the Town and Omni, to be taxed by Column 3 of the Scale of Costs.

Appearances:

Geoffrey E. Budden, Q.C.
Scott Lynch

Appearing on behalf of the First and Second
Appellants

No Appearance	On behalf of the First Respondent
J. Alexander Templeton	Appearing on behalf of the Second Respondent
Erin E. E. Best	Appearing on behalf of the Third Respondent

Authorities Cited:

CASES CONSIDERED: *Canada Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65; *Furlong Estate v. Newfoundland Light & Power Co.*, 2005 NLCA 25; *Green v. Green*, 2005 NLCA 29; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Paradise (Town) v. Newfoundland and Labrador (Eastern Regional Appeal Board)*, 2010 NLTD(G) 116; *Flynn v. Newfoundland and Labrador*, 2018 NLSC 29

STATUTES/REGULATIONS CONSIDERED: *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8; *Conception Bay South Municipal Planning Area Regulations, 2021*, N.L.R. 28/21; *Interim Development Regulations, 2003*, N.L.R. 137/03; *Interim Development Regulations, 2021*, N.L.R. 29/21; *Interim Development Regulations, 2022*, N.L.R. 1/22

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] Omni Marine Services Inc. (“Omni”) is a subsidiary of one of the partners of Ocean Choice International and is, like its affiliates involved in the fishing industry in this Province. Omni wants to build a 90-metre-long finger pier, a laydown area, a parking area and a cold storage building on a 1.7-hectare water lot that it owns in Long Pond Harbour, in the Town of Conception Bay South, NL (the “Development”). Omni plans to offload fish product at the facility, to store it there and then ship it to market.

[2] Omni applied to the Town of Conception Bay South (the “Town”) for a permit to develop the facility and the Town approved its development application on June 29, 2021. On July 6, 2021, the Advocates for the Responsible Development of Long Pond (the “Advocates”) and Sunset Key Marina Inc. (“Sunset Key”) appealed the Town’s decision to approve the development application, to the Eastern Newfoundland Regional Appeal Board (the “Appeal Board”).

[3] The Appeal Board heard the appeal on October 20, 2021 and released its decision the following day. It dismissed the appeal and confirmed the Town’s approval of the development. The Advocates and Sunset Key appealed the Appeal Board’s decision to this Court on October 22, 2021. I heard the appeal on March 16, 2022 and reserved my decision until now.

THE ISSUES

[4] The appeal raises these issues:

1. What standard of review applies to the Appeal Board’s decision?
2. Did the Appeal Board err in fact when it found the Development was located wholly within Long Pond Harbour?
3. Did the Appeal Board err in jurisdiction or law when it confirmed that the site of the Development was added to the Town’s Municipal Planning Area by the *Conception Bay South Municipal Planning Area Regulations, 2021*, N.L.R 28/21 (“*Regulation 28/21*”)?
4. Did the Appeal Board err in jurisdiction or law when it confirmed that the Town had the authority to approve the Development?

5. Did the Appeal Board err in jurisdiction or law when it confirmed that the Town's Municipal Plan and the Town's Development Regulations did not apply to the Development?
6. Did the Appeal Board deny the Advocates and Sunset Key procedural fairness or natural justice by refusing to postpone the appeal?
7. Did the Provincial Government's promulgation of the *Interim Development Regulations, 2003*, N.L.R. 137/03 (Amendment) cause procedural unfairness for the Advocates and Sunset Key?

THE LAW

Statutes & Regulations

Urban & Rural Planning Act, 2000

[5] Section 46 of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, provides a right of appeal from decisions of various boards established under the *Act*, including the Appeal Board. It reads, as is relevant here:

46. (1) A decision of a board may be appealed to the court not later than 10 days after that decision has been received by the appellant.

(2) An appeal of a decision of a board under subsection (1) may be made on a question of law or jurisdiction.

...

(4) The court shall either confirm or vacate the order of the board and where vacated the court shall refer the matter back to the board with the opinion of the court as to the error in law or jurisdiction and the board shall deal with the matter in accordance with that opinion.

I will refer to this statute throughout these reasons as the “*Urban and Rural Planning Act, 2000*”.

Conception Bay South Municipal Planning Area Regulations

[6] The Minister of Municipal and Provincial Affairs adopted this regulation on June 10, 2021. It reads, as relevant here:

Under the authority of section 11 of the *Urban and Rural Planning Act, 2000*, I define the following area as the Conception Bay South Municipal Planning Area.

[7] What follows in the regulation is a metes and bounds description of the entire Municipal Planning Area, adding the waters of Long Pond Harbour that had not been included in the planning area previously, to the Planning Area. I will refer to this regulation throughout these reasons as “*Regulation 28/21*”.

Interim Development Regulations

[8] The Minister of Municipal and Provincial Affairs also adopted this regulation on June 10, 2021. It reads, as relevant here:

Under the authority of section 34 of the *Urban and Rural Planning Act, 2000*, I make the following regulations:

1. The Schedule to the *Interim Development Regulations, 2003* is amended by adding the words “Conception Bay South Municipal Planning Area” immediately after the words “Campbellton Municipal Planning Area”.

I will refer to this Regulation throughout these reasons as “*Regulation 29/21*”.

Interim Development Regulations

[9] The Minister of Municipal and Provincial Affairs then adopted this Regulation on January 13, 2022 and I will refer to this regulation throughout these reasons as “*Regulation 1/22*”. It reads, as relevant here:

Under the authority of section 34 of the *Urban and Rural Planning Act, 2000* I make the following regulations:

1. The Schedule to the *Interim Development Regulations, 2003* is amended by adding a comma and the words “the water body and the islands of Long Pond and Long Pond Gut only” immediately after the words “Conception Bay South Municipal Planning Area”.
2. These regulations are considered to have come into force on June 10, 2021.

Interim Development Regulations, 2003

[10] The Minister of Municipal and Provincial Affairs adopted the *Interim Development Regulations* on December 11, 2003 and I will refer to this regulation throughout these reasons as “*Interim Development Regulations, 2003*”. Section 5 of those *Regulations* deals with applications for development within areas subject to them. It reads, as relevant to this matter:

Applications for development

5. (1) An application for a permit to carry out development in an area
 - (a) shall be submitted to the council or regional authority for the area; and
 - (b) shall include plans and specifications that may be required by the council or regional authority.
- (2) A council or regional authority, when considering an application for a permit to carry out a development, shall not issue a permit for the development of land within an area unless the proposed development conforms with
 - (a) criteria set out in these regulations; and

(b) where applicable, a plan for the area referred to the council or regional authority by the Director of Urban and Rural Planning for the department.

(3) In considering an application for a permit, the council or regional authority shall take into account the effect of the development on the overall development of the area and shall consider

- (a) the topography, physical condition and natural features of the land;
- (b) the use or proposed use of the land and the use of the land in the immediate vicinity;
- (c) the number, location, safety and convenience of accesses;
- (d) the design, location and construction of the proposed development;
- (e) the amenity of the surroundings and general appearance;
- (f) the adequacy of the method and suitability of the land for the type of water and sewage disposal required;
- (g) the adequacy and suitability of the methods proposed for the disposal of waste material;
- (h) the shape and size of each lot or parcel of land;
- (i) its compliance with the National Building Code of Canada and ancillary codes; and
- (j) whether or not the development is contained within limits of established community development.

...

(6) A council or regional authority may

- (a) grant a permit, subject to terms and conditions;
- (b) grant a permit, without terms and conditions; or
- (c) reject an application for a permit,

to carry out development made under this section.

(7) Where a permit is rejected or granted under subsection (6), the council or regional authority shall inform the applicant, in writing and with reasons, for the rejection or terms and conditions of that permit.

(8) A council or regional authority shall, where it decides to reject a permit or to impose terms and conditions under subsection (6), inform the applicant of his or her right to appeal that decision.

Case Law

Standard of Review

[11] In 2019, the Supreme Court of Canada used the “... opportunity to re-examine its approach to judicial review” that *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and “its companion cases” provided (paragraph 1). In particular, the Court “...address[ed] two key aspects of the current administrative law jurisprudence which require reconsideration and clarification”:

...First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review....

[12] *Vavilov* begins with the presumption that reasonableness is the appropriate standard of review in all cases and derogates from that presumption only in exceptional cases or when there are clear variances. Those exceptions include constitutional questions, general questions of law which are centrally important to the legal system, and questions that relate to jurisdictional boundaries between several administrative bodies (see *Vavilov*, paragraph 17); none of which pertains here.

[13] The presumption may also be displaced by variances such as statutory provisions, which state a standard of review other than reasonableness, or for matters

that proceed as statutory appeals; the latter of which applies here, as the Supreme Court of Canada stated in *Vavilov*:

The first [situation in which the presumption of reasonableness review will be rebutted] is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision (*Vavilov*, paragraph 17). [Emphasis added]

[14] And further in paragraph 33:

The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards. [Emphasis added]

[15] Section 46 of the *Urban and Rural Planning Act, 2000*, provides for a statutory right of appeal from the Appeal Board to this Court. I find that appellate standards of review apply to this matter for that reason.

Appellate Standards of Review

[16] Almost two decades ago now, our Court of Appeal restated the appellate standards of review, as they apply to questions of law, questions of fact, questions of mixed fact and law and inferences of fact when they are raised on appeal. The restatement appears in *Furlong Estate v. Newfoundland Light & Power Co.*, 2005

NLCA 25 and *Green v. Green*, 2005 NLCA 29. This is what the Court restated about the standards and what I will apply, as appropriate to the issues this appeal raises:

- For questions of law, correctness;
- For questions of fact, "palpable and overriding error"; and
- For questions of mixed fact and law and inferences of fact, generally "palpable and overriding error", but this may vary, depending on the inferences or the mixture of fact and law.

[17] Some brief elaboration of these standards will assist in the following discussion. "Correctness" is the standard that applies to questions of law. It is a lower standard than "palpable and overriding error" and permits appellate judges to substitute their own findings for those of trial judges, if they find that the latter misconstrued the law.

[18] The search for "palpable and overriding error" in a trial judge's reasoning raises the bar considerably. Appeal courts invariably show great deference to trial judges' findings of fact, including the inferences to be drawn from the facts they find. The reasons for this deference are obvious so I will not state them.

[19] The Supreme Court of Canada explained the differences between questions of law, questions of fact and questions of mixed fact and law in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (at paragraph 35):

...Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

Deference Owed to Municipal Authorities

[20] In *Paradise (Town) v. Newfoundland and Labrador (Eastern Regional Appeal Board)*, 2010 NLTD(G) 116, (“Paradise”), Dunn, J. vacated a decision of the Appeal Board, which overturned a decision of the Paradise Town Council. She noted at paragraph 27, that “...deference is to be shown to decisions of municipal authorities, and this would be particularly so where the authority is exercising its discretionary powers”.

[21] Then, at paragraph 30, Dunn, J. enumerated “items” that “[t]he Board, in future, may wish to consider...in its review of discretionary decisions made by town councils and municipal authorities”:

- 1) Show a high level of deference to the decision of the town council and/municipal authority, being ever cognizant that it is not a matter of agreeing or disagreeing with council's decision.
- 2) The Board is not permitted to substitute the exercise of its own discretion for that of the council.
- 3) A decision of a town council and/or municipal authority may be overturned in instances where the Board finds the town council and/or municipal authority:
 - (i) acted in clear abuse of statutory authority or disregarded a statutory condition upon which a right to exercise such authority is based.
 - (ii) there is evidence of misconduct on the part of the town council and/or municipal authority.
 - (iii) the town council and/or municipal authority has failed to act in good faith.
 - (iv) there is evidence of improper motive or illegality in the actions of the town council and/or municipal authority.
 - (v) the town council and/or municipal authority has failed to understand the request contained in the application before it.

[22] Dunn, J. observed that “[t]he foregoing list is not exhaustive of situations which are worthy of consideration by a Board but are intended to assist it in its analysis”.

Duty of Procedural Fairness/Natural Justice

[23] In *Flynn v. Newfoundland and Labrador*, 2018 NLSC 29, Butler, J., as she then was, discussed the duty of procedural fairness when she reviewed a decision of the Provincial Minister of Municipal and Intergovernmental Affairs. She listed the following factors as “relevant to determine the duty of fairness”:

1. The nature of the decision being made and the process followed in making it ...
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates ...
3. The importance of the decision to the individual or individuals affected ...
4. The legitimate expectations of the person challenging the decision ...
5. The choices of procedure made by the agency itself, particularly if procedure is a matter of discretion or if the agency possesses expertise in determining appropriate procedures ...

[24] Butler, J. noted, as Dunn, J. did in *Paradise*, albeit in a somewhat different context, that the “list of factors is not exhaustive”; and added:

Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made. With those factors enunciated in *Baker* in mind, a court must determine whether the procedure that was used in reaching any given decision was, in fact, fair, impartial, and open. This involves a detailed review of the circumstances of each case and a determination of whether the factors were applied properly.

[25] Butler, J. also observed that “[t]here is no longer any doubt that the duty of procedural fairness applies to the investigative stage of an administrative law process”.

[26] As to natural justice, Butler, J. noted at paragraph 19 of *Flynn*, that its “...two fundamental principles...are the right to be heard and the rule against bias”.

[27] This is the law I will apply as appropriate to the issues I stated above. I turn now to analyze those issues, starting with the background to them.

ANALYSIS

Background

[28] There is a lengthy and involved history of dealings between Omni and the Town relating to the Development. I will recreate some of it here, as relevant to the issues on this appeal, starting with a timeline, showing their interactions *inter se* and then between them, the Advocates and Sunset Key and the Appeal Board:

Date	Activity
July 13, 2020	Omni applied to the Town for a Permit.
August 6, 2020	Omni revised its application.
August 19, 2020	The Town issued an Approval in Principle (“AIP”) to Omni.
October 2, 2020	Sunset Key appealed the AIP to the Appeal Board.
January 27, 2021	The Board heard Sunset Key’s appeal.

January 29, 2021	The Board allowed the appeal, reversing the AIP because the Town did not have planning authority over the waters of Long Pond Harbour.
February 12, 2021	The Town appealed to this Court from the Board's decision.
April 20, 2021	The Town passed a resolution to ask the Department of Municipal and Provincial Affairs to clarify if it had planning jurisdiction over the waters of Long Pond Harbour.
June 3, 2021	Omni revised its application to submit a new Land Use Impact Assessment Report ("LUIAR").
June 10, 2021	The Department implemented <i>Regulation 28/21</i> , so that the <i>Interim Development Regulations, 2003</i> applied to development within the Town's boundaries.
June 10, 2021	The Department implemented <i>Regulation 29/21</i> , so that the waters of Long Pond Harbour were included in the Town's planning area and subject to the <i>Interim Development Regulations, 2003</i> .
June 16, 2021	Omni applied to the Provincial Department of Environment and Climate Change for a Permit to Alter a Body of Water, by installing a culvert in Long Pond Harbour.
June 29, 2021	The Town approved Omni's revised application unanimously.
June 30, 2021	The Town advised Omni it had approved its revised application, with several terms and conditions.
July 9, 2021	The Advocates and Sunset Key appealed the Town's June 29, 2021 approval to the Appeal Board.
August 10, 2021	The Provincial Department of Environment and Climate Change issued a Permit to Omni to Alter a Body of Water.
October 20, 2021	The Advocates and Sunset Key asked the Board to postpone the hearing of the appeal set for that day but the Board refused and proceeded with the appeal.

October 21, 2021	The Board released its decision, dismissing the appeal.
October 25, 2021	The Advocates and Sunset Key appealed the Board's decision to this Court.
October 25, 2021	The Advocates and Sunset Key also filed an Interlocutory Application for an injunction against the Town and Omni.
November 2, 2021	The Town issued a Construction Permit to Omni to construct a harbour infill, marginal wharf and finger pier.
November 3, 2021	The Advocates appealed the Town's decision to issue the Construction Permit to Omni to the Appeal Board.
January 12, 2022	The Advocates withdrew their appeal of the Construction Permit the Town granted to Omni, the day before the Appeal Board was scheduled to hear it – January 13, 2022.
January 14, 2022	The Department of Municipal and Provincial Affairs implemented <i>Regulation 1/22</i> , amending the Schedule to the <i>Interim Development Regulations, 2003</i> so that only the waters of Long Pond Harbour were subject to them and not the whole of Conception Bay South's Municipal Planning Area, effective June 10, 2021.
February 22, 2022	A contractor for Omni began infilling a portion of Long Pond Harbour as approved by the Town on November 2, 2021.
February 24, 2022	The Advocates and Sunset Key applied for an interim injunction (<i>ex parte</i>) to stop the infilling.
March 1, 2022	I heard the interim injunction application on an <i>inter partes</i> basis.
March 2, 2022	I dismissed the interim injunction application.
March 16, 2021	I heard the Advocates' and Sunset Key's appeal from the Appeal Board's October 21, 2021 decision, dismissing their appeal from the Town's decision to permit Omni's Development to proceed; and reserved my decision.

[29] The Appeal Board dismissed the Advocates' and Sunset Key's appeal on October 21, 2021. Let me provide a brief synopsis of the issues the Appeal Board considered and how it responded to them.

[30] The Appeal Board considered four issues:

1. Is the site of the proposed Omni development in the Town's Municipal Planning Area?

The Appeal Board accepted the advice of Mary Bishop, its Technical Advisor, that "...the Town's Municipal Planning Area was expanded by the Minister of Municipal and Provincial Affairs on June 10, 2021", and "...the Town gained the authority to control land use at Long Pond Harbour, including the site of the proposed Omni development".

2. What planning regulations apply to the site of the proposed Omni development?

Again, the Appeal Board accepted the advice of its Technical Advisor and found that "...when the Long Pond Harbour Area became part of the Town's Municipal Area in June 2021, the land use in the newly added planning area became subject to the Province's *Interim Development Regulations, 2003*".

3. Do the Town of Conception Bay South Municipal Plan, 2011-2021 and the Town of Conception Bay South Development Regulations, 2011-2021 still apply to the newly added area of the Town's Municipal Planning Area – i.e., Long Pond Harbour area?

The Appeal Board devoted most of its decision to this issue but ultimately decided that "[w]hether the geographic area of the Town included in the

Town's Municipal Planning Area as it existed prior to June 10, 2021 is still subject to the...Municipal Plan...and Development Regulations...in the Board's view remains unclear. However, that is not a matter for the Board to rule on. The Board's sole concern is the status of the site of the proposed Omni development and, as noted above, the Board has determined that it is solely the *Interim Development Regulations, 2003* that apply to the site".

4. Did the *Interim Development Regulations 2003*, authorize the Town to approve the Omni development on September 29 (sic), 2021?

The Appeal Board answered this question affirmatively: "Yes. Sections 5 and 6 of the *Interim Development Regulations, 2003* provides (sic) for submission and consideration of development applications. Under the *Regulations*, the Town has conferred discretion to determine the information required of a proponent for the purpose of the Town's consideration of a proposed development". The Appeal Board then addressed specific parts of sections 5 and 6 that were relevant to the Town's determinations.

The Appeal Board concluded its decision with these comments:

The Board has determined that the site of the proposed Omni development in Long Pond Harbour is in the Town's current Municipal Planning Area and is subject to the provisions of the Province's *Interim Development Regulations, 2003*. These *Regulations* authorized the Town to approve the application on June 29, 2021.

The Board has also determined that the application from Omni has been properly processed by the Town in accordance with the requirements of the *Interim Development Regulations, 2003*.

[31] This table I created above and my review of the Appeal Board's decision sets out the relevant background to the issues between the parties on this appeal. I will

provide more details as they pertain to the issues when I discuss them, to which I turn now.

DISCUSSION

[32] The Advocates and Sunset Key have taken a moveable approach to the issues their appeal raises. For example, when they filed their Notice of Appeal in this Court on October 25, 2021 they listed five grounds of appeal, four of which alleged the Appeal Board “erred in jurisdiction or law”, when it: (1) decided the Town had jurisdiction to approve the Development under the *Interim Development Regulations, 2003*; (2) decided the Town’s Municipal Plan and Development Regulations did not apply to the Development; (3) decided that the site of the Development was added to the Municipal Planning Area on June 10, 2021; and (4) and also breached its duty of procedural fairness and natural justice by ignoring or not adequately considering Mary Bishop’s evidence.

[33] For their fifth ground of appeal, the Advocates and Sunset Key claimed that the Appeal Board breached its duty of procedural fairness by refusing to postpone the hearing to allow them to review submissions from the Town and Omni and a related decision the Appeal Board released on October 19, 2021, just a day before the hearing.

[34] The Advocates and Sunset Key filed a Brief to support their Notice of Appeal on January 26, 2022 and largely followed the format they set out in the Notice. However, when counsel for the Advocates and Sunset Key addressed me on March 16, 2022, he generally sidestepped the specific issues that his clients raised, both in their Notice of Appeal and in their Brief and directed many of his comments to another claim that his clients had once again been denied natural justice.

[35] To that end he focused on how, when the Department of Municipal and Provincial Affairs adopted *Regulation 1/22* on January 13, 2022, it changed the *Interim Development Regulations, 2003*, retroactively so that the change took effect on June 10, 2021 and not on January 13, 2022 when it adopted the *Regulation*. Thus,

claimed counsel both when his clients filed their Notice of Appeal with the Appeal Board on July 9, 2021 and when he argued the appeal on their behalf on October 20, 2021, he spoke to a different regulatory regime than would operate eventually because of the retroactive change. He says this change put the Advocates and Sunset Key at a decided disadvantage. I will address this concern when I discuss the issues in more detail.

1. Standard of Review

[36] I noted earlier in these reasons that I will apply the appellate standards of review to the Appeal Board's decision because the right of appeal that the Advocates and Sunset Key are exercising arises from section 46 of the *Urban and Rural Planning Act, 2000*. The issues, which I will address, raise issues of law or jurisdiction, in the main, so that the appropriate standard of review is correctness. Correctness accords the least amount of deference to the Appeal Board's decision and allows me to substitute my decision for the Appeal Board's if I find that it erred. I note as well that all counsel agree that correctness is the standard of review that applies.

2. Did the Appeal Board err in fact when it found the Development was located wholly within Long Pond Harbour?

[37] The Appeal Board relied on Mary Bishop, its Technical Advisor when it concluded that the Development was wholly within Long Pond Harbour, as it noted in its decision. However, the Appeal Board had available to it, aside from Ms. Bishop's evidence, ample evidence that the Development was wholly within the waters of the Harbour, including, as counsel for the Town summarized in paragraphs 46-51 of his Factum:

- the map drawings that Omni included with the application it presented to the Town on June 3, 2021. Counsel for the Town included a drawing shaded in blue at paragraph 6 of his Factum and it clearly shows that the finger pier, the laydown area, the parking area and the cold storage

building all lie below high-water mark and do not encroach on the shoreline.

- the legal survey plan that Allnorth NL Surveyors prepared for the water lot that Long Pond Harbour Port Authority Inc. conveyed to a company related to Omni, on which the Development will be constructed. This plan was part of the revised LUIAR that Omni submitted with its revised application on June 3, 2021.
- The LUIAR notes where the Development will take place and confirms that “[a] survey of the waterlot conducted by Allnorth NL Surveyors in 2021 is provided and attached as Appendix C. This proposal is based on the Development being completed within this waterlot”.
- The LUIAR also included other maps showing the location of the Development, in particular, Figures 1 and 2, the former referred to as “Map of Proposed Development” and the latter as “Project Footprint in Long Pond”.
- Omni depicted the location of the Development in the material it submitted to the Provincial Department of Environment and Climate Change when it applied for a Permit to Alter a Body of Water on August 10, 2021.

[38] It is also noteworthy that the location of the Development was of great interest to all parties to this process by June 2021. In the timeline I set out above, I noted that the Town issued an Approval in Principle to Omni on August 19, 2020, to which Sunset Key filed an appeal on October 2, 2020. The Appeal Board heard Sunset Key’s appeal on January 27, 2021 and allowed it two days later.

[39] The Appeal Board allowed the appeal because the Town did not have planning authority over the waters of Long Pond Harbour where Omni would set the Development. The Town moved to acquire planning authority over the harbour and that led to *Regulation 28/21*, *Regulation 29/21* and ultimately *Regulation 1/22*. Therefore, it is safe to assume that Omni, the Town, the Department of Municipal and Provincial Affairs, as well as the Advocates, Sunset Key and the Appeal Board were singularly focused on where the Development would occur.

[40] I noted earlier that I would apply the standard of correctness to my review of most of the issues in this matter. However, correctness is not the appropriate standard of review here: quite simply, this issue is primarily a matter of fact, to which the appellate standard of review, “palpable and overriding error” applies. I must exercise a high degree of deference to the Appeal Board’s finding that the Development was wholly within the waters of Long Pond Harbour. Thus, on the evidence and in the process on which Omni and the Town were engaged, I find that the Appeal Board did not err when it found that it did.

3. Did the Appeal Board err in jurisdiction or law when it confirmed that the site of the Development was added to the Town’s Municipal Planning Area by the *Conception Bay South Municipal Planning Area Regulations, 2021*, N.L.R 28/21 (“*Regulation 28/21*”)?

[41] As I noted above, the Appeal Board again accepted the advice of its Technical Advisor and found that “...when the Long Pond Harbour Area became part of the Town’s Municipal Area in June 2021, the land use in the newly added planning area became subject to the Province’s *Interim Development Regulations, 2003*”. [Emphasis added]

[42] It appears that the Town was surprised to learn that it did not have planning authority over Long Pond Harbour. The Town accepted as a certainty that it did not have planning authority over the harbour when the Appeal Board allowed Sunset Key’s appeal from its decision to grant Omni an Approval in Principle and set it aside on January 29, 2021. However, the Town acted decisively then and called on the Department of Municipal and Provincial Affairs to remedy the deficit in its planning authority by bringing the waters of the harbour into its planning area.

[43] The Department responded with *Regulation 28/21* which contained a metes and bounds description of the revised planning area, that all parties accept includes the waters of the harbour. *Regulation 28/21* was filed on June 10, 2021 and over the name of the Minister of the Department, it declares: “Under the authority of section 11 of the *Urban and Rural Planning Act, 2000*, I define the following area as the Conception Bay South Municipal Planning Area”. The Regulation recites the description of the area and concludes with this statement: **“The Conception Bay South Municipal Planning Area, Consolidated Newfoundland and Labrador Regulation 835/96 is repealed”**.

[44] *Regulation 28/21* operates in tandem with *Regulation 29/21*, which the Department of Municipal and Provincial Affairs also adopted on June 10, 2021. Once again, over the name of the Minister, the Regulation states: “Under the authority of section 34 of the *Urban and Rural Planning Act, 2000*, I make the following regulations: **1. The Schedule to the *Interim Development Regulations, 2003* is amended by adding the words “Conception Bay South Municipal Planning Area” immediately after the words “Campbellton Municipal Planning Area”**”.

[45] By those two Regulations, the Department intended and the Town expected that it had acquired planning authority over the harbour and it did, but some confusion resulted from how the Department did it. I will explore the cause and the effects of that confusion more fully when I discuss the next issue but suffice it for now to say that the Department remedied the Town’s erstwhile planning deficit and the Town had the authority to issue the permit to Omni when it did on June 29, 2021.

[46] The Appeal Board accepted that the harbour was within the Town’s Planning Area when the Town issued its permit to Omni on June 29, 2021. The Appeal Board acted on the advice of its Technical Advisor but it did not simply adopt that advice carte blanche. Counsel for the Town referred to the summary of that advice that the Appeal Board included in its decision. He drew it from the “...synopsis/summary of the verbal representations made to the Board during the Appeal Hearing”. The Board also received and reviewed written submissions from the Technical Advisor, as well as representatives for the Appellant, and the Authority.

[47] I note, first from page 4 of this synopsis/summary:

In its resolution #21-140 on April 20, 2021, the Town resolved to “initiate an amendment to the Municipal Plan policies, future land use designations, and zoning within and adjacent to Long Pond Harbour and also request that the Minister of Municipal and Provincial Affairs amend the Conception Bay South Municipal Planning Area Order (CNLR 835/96) so that the Town’s authority to control and regulate development within and adjacent to Long Pond Harbour is afforded greater certainty”. [Emphasis added]

[48] From this passage two things are clear: The Town intended to extend its planning authority to the waters of the harbour; and the Appeal Board knew that it intended to do so.

[49] And this from page 5 of the synopsis/summary:

In response to the Town’s request, the Minister of Municipal and Provincial Affairs on June 10, 2021, revised the Town’s Municipal Planning Area (*Regulation 28/21*) and implemented *Interim Development Regulations* to include areas not covered by the Town’s Municipal Plan and Development Regulations (*Regulation 29/21*). [Emphasis added]

[50] As to the operation of the *Interim Development Regulations, 2003*, this excerpt from page 8 of the synopsis/summary:

Interim Development Regulations

On June 10, 2021, the Minister of Municipal and Provincial Affairs under Section 11 of the URPA [*Urban and Rural Planning Act*], implemented *Regulation 28/21* which restated the Conception Bay South Planning Area to include the Long Pond Harbour. At the same time, under the Authority of Section 34 of the URPA, the Minister amended the *Interim Development Regulations, 2003*, making them applicable to the Conception Bay South Planning Area (*Regulation 29/1* (sic)).

Interim Development Regulations are intended to provide municipalities with the ability to control and manage development within a defined planning area to which

no land use zoning applies, until such time as plans and regulations are prepared in accordance with the *Act*, for the area in question.

As of June 10, 2021, the Conception Bay South Municipal Planning Area includes Long Pond Harbour. Until an amendment to the Town's Municipal Plan and Development Regulations has been prepared and approved, Interim Development Regulations for the area included in the Planning Area revision, apply. [Emphasis added]

[51] It is clear from these excerpts, that the Appeal Board was aware of the following when it accepted its Technical Advisor's advice that "...the land use in the newly added planning area [the waters of Long Pond Harbour] became subject to the Province's *Interim Development Regulations, 2003*":

- The Town formerly did not have planning authority over the waters of Long Pond Harbour.
- The Town resolved to gain planning authority over the waters of Long Pond Harbour.
- The Town engaged with the Department of Municipal and Provincial Affairs and requested that it include the waters of Long Pond Harbour within its Municipal Planning Area.
- The Department adopted *Regulation 28/21* on June 10, 2021 to expand the Town's Municipal Planning Area to include the waters of Long Pond Harbour.
- The Department adopted *Regulation 29/21* on June 10, 2021 to apply the *Interim Development Regulations, 2003* to the Town's expanded Municipal Planning Area, including the waters of Long Pond Harbour.

- The Town exercised its municipal planning authority on June 29, 2021 when it granted Omni a permit to locate the Development on its water lot wholly within the waters of Long Pond Harbour.

[52] In making its decision the Appeal Board had to interpret the various statutory initiatives that the Town and the Department of Municipal and Provincial Affairs undertook for the Town to acquire planning authority over the waters of Long Pond Harbour. The Appeal Board's decision "...confirming that the proposed site of the Development was added to the Town's Municipal Planning Area by the *Conception Bay South Municipal Planning Area, N.L.R 28/21*" is reviewable on the standard of correctness. Overall, the Appeal Board did not err in law or jurisdiction but exercised its discretion correctly when it so decided and I will not interfere with it.

[53] There is one further point I wish to note about how the Department responded to the Town's request to extend its planning authority to the waters of Long Pond Harbour: Neither the Advocates nor Sunset Key challenges the Department's authority to adopt either of *Regulation 28/21* or *Regulation 29/21*; nor do they say that the Department did not exercise that authority properly.

4. Did the Appeal Board err in jurisdiction or law when it confirmed that the Town had the authority to approve the Development?

[54] I found in discussing the preceding issue that the Town had acquired planning authority over the waters of Long Pond Harbour and that the *Interim Development Regulations, 2003* applied to the newly added part of the Municipal Planning Area. I also found that the Town exercised that authority properly and that the Appeal Board acted correctly when it found that the Town had done so. It is implicit in those findings that the Appeal Board did not err in law or jurisdiction when it found that the Town had authority to approve the Development. Nonetheless, I will briefly examine the legislative basis for the Board's confirmation that the Town had the authority to permit Omni to proceed with the Development.

[55] Section 5 of the *Interim Development Regulations, 2003*, deals with “**Applications for development**”. Section 5(1) provides as follows:

5 (1) An application for a permit to carry out development in an area; and

(a) shall be submitted to the council or regional authority for the area; and

(b) shall include plans and specifications that may be required by the council or regional authority.

[56] Section 5(2) provides that:

5(2) A council or regional authority, when considering an application for a permit to carry out a development, shall not issue a permit for the development of land within an area unless the proposed development conforms with

(a) criteria set out in these regulations; and

(b) where applicable, a plan for the area referred to the council or regional authority by the Director of Urban and Rural Planning for the department.

[57] And section 5(3) lists 10 factors a council or regional authority “shall take into account”, in addition to the “effect of the development on the overall development of the area”, before it approves a development. The 10 factors listed in section 5(3) include matters as diverse as “the topography, physical condition and natural features of the land” to “whether or not the development is contained within the limits of established community development”. More particularly relevant to this matter are the factors in sections 5(3)(b) (“the use or the proposed use of the land in the immediate vicinity”) and 5(3)(e) (“the amenity of the surroundings and general appearance”).

[58] Finally, section 5(6) says that:

5 (6) A council or regional authority may

(a) grant a permit, subject to terms and conditions;

- (b) grant a permit, without terms and conditions; or
 - (c) reject an application for a permit,
- to carry out development made under this section.

[59] Section 34(3) of the *Urban and Rural Planning Act, 2000* says that “[i]nterim development regulations made under...[section 34] may apply to all or in part of the planning area as specified by the minister in the regulations”. I noted above that the Department of Municipal and Provincial Affairs adopted *Regulation 28/21* on June 10, 2021 to expand the Town’s Municipal Planning Area to include the waters of Long Pond Harbour; and that the Department adopted *Regulation 29/21* on June 10, 2021 to apply the *Interim Development Regulations, 2003* to the Town’s expanded Municipal Planning Area, including the waters of Long Pond Harbour.

[60] So, to summarize:

- The Town’s planning authority was expanded to include the waters of Long Pond Harbour.
- The *Interim Development Regulations, 2003*, applied to the expanded planning area;
- The Town was authorized to grant a permit to Omni under those *Regulations*; and
- The Town acted under those *Regulations* on June 29, 2021 when it granted a development permit to Omni.

[61] The Appeal Board did not err in jurisdiction or law in confirming that the Town had the authority to approve the Development. On page 14 of its decision, the Appeal Board answered that question affirmatively and referred to sections 5 and 6 of the *Interim Development Regulations, 2003*, for the Town's authority. The Appeal Board was required to interpret the *Regulations* and the *Urban and Rural Planning Act, 2000* to make that decision. Its decision is reviewable on the standard of correctness. The Appeal Board exercised its discretion correctly when it so decided and I will not interfere with it.

5. Did the Appeal Board err in jurisdiction or law when it confirmed that the Town's Municipal Plan and the Town's Development Regulations did not apply to the Development?

[62] On pages 12 and 13 of its decision, the Appeal Board reviewed the submissions it received on this issue, from: its Technical Advisor; the Advocates' and Sunset Key's counsel; and the Town's counsel and other representatives. It also noted that it reviewed the *Urban and Rural Planning Act, 2000* (section 34 – *Interim Development Regulations*) and the *Interim Development Regulations, 2003* and decided that, "...as the site of the Omni development was only added to the Town's Municipal Planning Area by the Minister of Municipal and Provincial Affairs on June 10, 2021, that the site of the Omni development is not subject to the provisions of the Town of Conception Bay South Municipal Plan 2011-2021 and the Town of Conception Bay South Development Regulations 2011-2021 but is subject to the Province's *Interim Development Regulations, 2003*".

[63] The Appeal Board also dealt with whether the areas of the Town outside the waters of Long Pond Harbour were still subject to the Municipal Plan and the Town's Development Regulations, of which it said:

Whether the geographic area of the Town included in the Town's Municipal Planning Area as it existed prior to June 10, 2021 is still subject to the provisions of the Town of Conception Bay South Municipal Plan, 2011-2021 and the Town of Conception Bay South Development Regulations 2011-2021, in the Board's view, remains unclear. However, this is not a matter for the Board to rule on. The Board's sole concern is the status of the site of the proposed Omni development and as noted

above, the Board has determined that it is solely the *Interim Development Regulations, 2003* that apply to the site.

[64] By now in this judgment, it is obvious that I agree with the Appeal Board that the *Interim Development Regulations, 2003* provided the Town with the sole statutory authority to decide on Omni's development in June 2021. The Advocates and Sunset Key do not agree and disagreed strongly when they filed their Brief in January 2022. In paragraph 29 of the Brief, they submitted:

[29] The Second Respondent [the Town] has continued to engage with and apply the Town's Development and the Town's Municipal Plan; their continued application is necessary and inevitable given that the Town of Conception Bay South is a large and mature municipality with many complex forms of development which the Second Respondent [the Town] must contend. *The Interim Development Regulations* simply do not contemplate the scope and complexity of development occurring within the Town of Conception Bay South.

[65] The Advocates and Sunset Key submitted "...that the *Interim Development Regulations* are meant to function as additional, positive requirements [and this] is borne out in practice". They noted that the Town "...has processed several dozen development decisions after the introduction of the *Interim Development Regulations*, and continues to cite and amend the Town's Development Regulations and/or the Town's Municipal Plan to almost every such decision". (Paragraph 25 of the Brief).

[66] There was good reason for the Appeal Board to conclude that it "remains unclear" if the Town's Municipal Plan and Development Regulations applied to the areas of the municipality outside the waters of Long Pond Harbour. Let me explain.

[67] *Regulation 28/21* reads as follows: "Under the authority of section 11 of the *Urban and Rural Planning Act, 2000*, I define the following area as the Conception Bay South Municipal Planning Area". It then provided the metes and bounds description of the area that is included. I have already referred to that description several times in these reasons and noted then, as I repeat now, it covered the whole of the Town's Municipal Planning Area, including the waters of Long Pond Harbour.

Regulation 29/21 then applied the *Interim Development Regulations, 2003* to that area. Therefore, on its face, it appeared that the Town may have been subject to two planning authorities, one from the newly adopted *Interim Development Regulations, 2003* and the other from its Municipal Plan and Development Regulations.

[68] The confusion about the scope of the geographic area covered by the *Interim Development Regulations, 2003* arises from a mistake: The Town wanted the Department of Municipal and Provincial Affairs to extend its planning authority to the waters of Long Pond Harbour only, but the Department erroneously included a description of the whole municipality in *Regulation 28/21*.

[69] The Department corrected its mistake on January 13, 2022 when it adopted *Regulation 1/22*. It read:

Under the authority of section 34 of the *Urban and Rural Planning Act, 2000*, I make the following regulations:

1. The Schedule to the *Interim Development Regulations, 2003*, is amended by adding a comma and the words **“the water body and the islands of Long Pond and Long Pond Gut only”** immediately after the words “Conception Bay South Municipal Planning Area”.

2. These regulations are considered to have come into force on June 10, 2021.

[70] This Regulation had two effects: It reduced the applicability of the *Interim Development Regulations, 2003* to only the waters of Long Pond Harbour and it made that change effective on June 10, 2021.

[71] I hasten to add, however, that on June 10, 2021, only the *Interim Development Regulations, 2003* applied to the Omni development, just as the Appeal Board said, whatever about the rest of the Municipal Planning Area. In oral submissions before me, counsel for the Advocates and Sunset Key claimed somewhat disingenuously that the Department changed the statutory regime that applied to Omni’s development by making *Regulation 1/22* retroactive; and that it left him in a difficult place to advocate on behalf of his clients when he did not know what the *Interim*

Development Regulations, 2003 applied to when he argued the appeal on October 20, 2021. I will deal with counsel's claim in more detail later in these reasons when I address the question if this change was procedurally unfair to the Advocates and Sunset Key.

[72] For now, it is sufficient to note that *Regulation 1/22* changed nothing about the statutory scheme that applied to the waters of Long Pond Harbour, whether on June 29, 2021 when the Town approved Omni's application nor on October 21, 2021 when the Appeal Board decided the appeal. Let me say as emphatically as possible: Throughout that entire period as well as on and after January 13, 2022, only the *Interim Development Regulations, 2003* applied to the Omni development.

[73] To find that the Town's Municipal Plan and the Town's Development Regulations did not apply to the Development, the Appeal Board had to interpret the whole or parts of: *Regulation 28/21* and *Regulation 29/21*; the *Urban and Rural Planning Act, 2000*; Town of Conception Bay South Municipal Plan, 2011-2021; the Town of Conception Bay South Development Regulations, 2011-2021; and the *Interim Development Regulations, 2003*. The Appeal Board's decision is reviewable on the standard of correctness. The Appeal Board exercised its discretion correctly when it so decided and I will not interfere with it.

6. Did the Appeal Board deny the Advocates and Sunset Key procedural fairness or natural justice by refusing to postpone the appeal?

[74] Counsel for the Advocates and Sunset Key asked the Appeal Board at the beginning of proceedings on October 20, 2021 to postpone the appeal. The Appeal Board described their request in the "Board's Note" on page 2 of its decision:

Prior to the commencement of the Appeal Hearing, the Solicitors for the Appellants made a request to the Board for postponement of the hearing on the grounds that the Appellant Counsel had insufficient time to appropriately review and respond to the extensive materials filed by Respondent Counsel. In addition, the Appellant Counsel requested time in order to review the Board's recent decision regarding

Appeal # 15-006-072-032 which pertains to the repair/reconstruction of the East Breakwater at the mouth of Long Pond by the Long Pond Harbour Authority.

[75] The Appeal Board also noted “...Counsel for both the Authority [the Town] and the Applicant [Omni] indicated strong objections to the request for a postponement”; so, the Appeal Board denied the request and proceeded with the appeal.

[76] In the Brief they filed on this appeal, counsel for the Advocates and Sunset Key focused on the “recent decision” of the Appeal Board and did not mention the “extensive materials filed by Respondent Counsel”.

...[T]he decision [in Appeal # 15-006-072-032, it] was received by Solicitors for the Appellants at 3:07 p.m. the day prior to the October 20th Hearing, allotting insufficient time to meaningfully digest its contents. Postponement was requested by the Solicitors for the Appellants at the outset of the October 20th Hearing, yet the request was declined by the First Respondent [the Appeal Board]. Had there been adequate time to review, process and apply the findings of the October 8th Hearing, Solicitors for the Appellants likely would have altered their line of argument accordingly and to the Appellants’ benefit.

[77] Counsel did not elaborate in its Brief on how they “would have altered their line of argument” or how it might have been “to the Appellants’ benefit” if they had been able to take a different tact.

[78] Butler, J. (as she then was) set out the following factors in *Flynn*, as “relevant to determine the duty of [procedural] fairness”:

1. The nature of the decision being made and the process followed in making it...
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates...
3. The importance of the decision to the individual or individuals affected...

4. The legitimate expectations of the person challenging the decision...
5. The choices of procedure made by the agency itself, particularly if procedure is a matter of discretion or if the agency possesses expertise in determining appropriate procedures...

[79] The “recent decision” that the Appeal Board refers to in its “Note”, rejecting the Advocates’ and Sunset Key’s request for a postponement warrants closer examination.

[80] In the spring of 2021, the Long Pond Harbour Authority Inc. wanted to repair a breakwater at the entrance to the Harbour. It submitted an application to the Town of Conception Bay South for the work and the Town gave the Authority approval in principle on May 7, 2021. The Town then gave the Authority a development permit on May 31, 2021 to stockpile material for the work and issued a second development permit on September 2, 2021 to repair and/or reconstruct the breakwater.

[81] The Advocates for the Responsible Development of Long Pond Harbour appealed the Town’s decision to issue the development permit to the Appeal Board, which heard the matter on October 8, 2021. The Board gave its decision on October 19, 2021, confirming the Town’s decision and dismissing the appeal.

[82] In its Analysis, the Appeal Board asked and answered several questions, including:

Q. Is the site of the breakwater in the Town’s Municipal Planning Area?

A. Yes. The Technical Advisor has advised the Board that the Town’s Municipal Planning Area was expanded by the Minister of Municipal and Provincial Affairs in June, 2021. At that time, the Town gained the authority to control land use development related to the breakwater.

...

Q. What planning regulations apply to the site of the breakwater?

A. The Technical Advisor has indicated when the subject area (breakwater) became part of the Town's Municipal Planning Area in June 2021, the land use in the newly added planning area became subject to the Province's *Interim Development Regulations, 2003*.

As the site of the breakwater was only added to the Town's Municipal Planning Area by the Minister of Municipal and Provincial Affairs in June 2021, the Board has determined that the site of the breakwater is not subject to the Town's Municipal Plan and Development Regulations but is subject to the Province's *Interim Development Regulations, 2003*.

It remains unclear whether the geographic area of the Town included in the Town's Municipal Planning Area as it existed prior to June 2021 is subject to the Town's Municipal Plan and Development Regulations or to the Province's *Interim Development Regulations, 2003*; however, that is not a matter for the Board to rule on. The Board's sole concern is the status of the breakwater site and as note above; the Board has determined that it is the *Interim Development Regulations, 2003* that apply to the site, not the Town's Municipal Plan and Development Regulations.

...

Q. Did the *Interim Development Regulations, 2003*, authorize the Town to issue the permit on September 2, 2021 to the Long Pond Harbour Authority for the repair of the breakwater?

A. Yes. Sections 5 and 6 of the *Interim Development Regulations, 2003*, provides (sic) for submission and consideration of development applications. Under the *Regulations*, the Town is conferred discretion to determine the information required of a proponent for the purpose of the Town's consideration of a proposed development. Section 5(6) of the regulations authorize (sic) the Town to approve a development application subject to terms and conditions; approve a development application without terms and conditions; or to reject a development application. Section 6(1) of the regulations further details that the Town has a discretion to impose conditions "in the interest of the proper development of an area or a specific locality within an area".

[83] I note the following further points about the Appeal Board's October 8, 2021 hearing:

- The breakwater that the Harbour Authority wanted to repair/reconstruct was also situate wholly within the waters of the Harbour.
- The same 3-member Appeal Board dealt with the October 8 and October 20, 2021 appeals.
- Counsel for the Town was the same for both appeals, and while individual counsel differed for the Advocates and Sunset Key (Scott Lynch and Geoff Budden for both appellants on the October 20, 2021 appeal, with Scott Lynch for the Advocates, the sole appellant on the October 8, 2021 appeal), they were from the same firm and closely associated.

[84] I set out above the factors that Butler, J. (as she then was) stated in *Flynn* as relevant to the duty of procedural fairness. They include the nature of the decision being made and the process followed in making it; the importance of the decision to those affected; and the legitimate expectations of the person challenging the decision. Let me examine those factors as they relate to this matter.

Nature of the Decision and Process Followed:

[85] Section 42 of the *Urban and Rural Planning Act, 2000* authorizes the Appeal Board to hear appeals from a “person or association aggrieved of a decision” for, amongst other things (1)(a) “an application to undertake a development”. Boards may only decide on “a question of law or jurisdiction” (section 46(2)), but have a wide discretion about the procedure they will follow.

[86] In this case, the Appeal Board convened on October 20, 2021 to hear the Advocates’ and Sunset Key’s appeal of the Town’s decision on June 29, 2021 to allow Omni to proceed with the Development. Counsel for the Advocates and Sunset Key were from the same firm (Budden & Associates) and had appeared before the same panel of the Appeal Board on October 8, 2021 to appeal the Town’s’ decision to give the Harbour Authority a development permit to repair/reconstruct the breakwater.

[87] The issues were the same in both appeals and the Appeal Board answered the relevant questions in almost identical terms. The Appeal Board rejected the Advocates’ and Sunset Key’s request for a postponement because it was satisfied that “...the Appellant Counsel had had adequate time to review the submissions filed by the Respondent Counsel and to review the Board’s decision of the Long Pond Harbour Authority appeal [released on October 19, 2021]”.

[88] I find that the Appeal Board, against the background I have just articulated, acted fairly and justly when it rejected the Advocates’ and Sunset Key’s request to postpone the hearing.

Importance of the Decision to Those Affected:

[89] I do not doubt that those behind the Advocates and Sunset Key are passionately engaged in this process. When I reflect on the history of dealings

between the Town, Omni and them, it is clear that they believe sincerely in their cause and are using their best efforts to achieve it.

[90] However, the Appeal Board owes a duty of fairness to all who appear before it, including, of course, the Town of Conception Bay South and Omni. Both of these parties are as committed to their causes as are the Advocates and Sunset Key and the Appeal Board was obliged to take all interests into account when deciding on the requested postponement. Its decision to deny the request for a postponement reflects that analysis.

The Legitimate Expectations of Those Challenging the Decision:

[91] Omni has been trying to undertake the Development in the Town of Conception Bay South for at least two years. It has repeatedly revised and amended its plans to meet the terms and conditions imposed by all levels of government with regulatory authority over the Development area. At the same time, it has faced ongoing challenges from the Advocates and Sunset Key, which have held Omni highly accountable for its compliance with regulatory schemes and strict environmental standards.

[92] Omni and the Town accepted the appeal process that the Advocates and Sunset Key have invoked several times now but it is also reasonable for them to expect that it will proceed with some dispatch. This expectation is all the more plausible, because of the Advocates' decision to withdraw their appeal of the Construction Permit that the Town granted to Omni on November 2, 2021.

[93] The Advocates appealed that decision to the Appeal Board on November 3, 2021 and the Board scheduled the hearing for January 13, 2022. Then, when all parties had filed their materials and briefs with the Appeal Board, the Advocates withdrew the appeal on January 12, 2022, on the eve of the hearing. Omni estimated that the aborted appeal cost "...over \$700,000 of losses to Ocean Choice". It also described the appeal as "an abuse of process" and claimed that the Advocates simply filed it to "take advantage of the statutory stay" that operates while appeals before

the Appeal Board are outstanding. (See paragraph 103 of the “Appeal Brief” that Omni filed on March 8, 2022 in this matter).

[94] Overall, I find that the Appeal Board acted fairly and justly when it refused to postpone the appeal on October 20, 2021 and proceeded with it. When it did so, it did not deny the Advocates and Sunset Key procedural fairness.

7. Did the Provincial Government’s promulgation of the *Interim Development Regulations, 2003 (Amendment)* cause procedural unfairness for the Advocates and Sunset Key?

[95] The Advocates and Sunset Key claim further that they were denied procedural fairness when the Department of Municipal and Provincial Affairs adopted *Regulation 1/22* on January 14, 2022 and made it retroactive to June 10, 2021. I have discussed *Regulation 1/22* several times earlier in these reasons but simply note here, to deal with this issue, that it ensured that the Town acquired planning authority over the waters of Long Pond Harbour and that it acquired that authority on June 10, 2021.

[96] The Advocates and Sunset Key claim that *Regulation 1/22* changed the statutory framework from what they believed it to be when they argued the appeal before the Appeal Board on October 20, 2021 because of its retroactivity. They also claim that they may have approached the appeal before the Board differently if they had known then what they now know about that framework. I do not accept that submission. Let me explain why.

[97] *Regulation 28/21* and *Regulations 29/21* added the waters of Long Pond Harbour to the Municipal Planning Area of the Town of Conception Bay South and gave it planning authority over those waters under the *Interim Development Regulations, 2003*. The Department of Municipal and Provincial Affairs may have inadvertently overextended the reach of *Regulation 28/21* by including a metes and bounds description that applied to the whole of the Town’s Municipal Planning area, when it need only have added the waters of the harbour.

[98] The Department fixed its mistake with *Regulation 1/22* and clarified that it intended to add only the waters of the harbour to the Municipal Planning area and not the rest of the Town. Therefore, in effect, nothing changed for the waters of the harbour. *Regulation 28/21* and *Regulation 29/21* brought them into the Municipal Planning and they remained in it throughout these proceedings, including, most importantly to this issue, when the parties appeared before the Appeal Board on October 20, 2021 for the hearing.

[99] It is not unfair to the Advocates and Sunset Key that the Department clarified the area that *Regulation 1/22* applied to: *The Interim Development Regulations, 2003* took effect for the waters of the harbour on June 10, 2021 and remain in effect. Whether those regulations or the Town's Municipal Plan and Development Regulations apply to the rest of Conception Bay South is not, as the Appeal Board correctly stated in its decision, "...a matter for the Board to rule on. The Board's sole concern is the status of the site of the proposed Omni development and as noted above, the Board has determined that it is solely the *Interim Development Regulations, 2003* that apply to that site".

[100] In the Appeal Brief that counsel for Omni filed on this appeal, she made these observations, which are particularly relevant to the Advocates' and Sunset Key's claim of procedural unfairness. I take the liberty of quoting at some length from paragraphs 96-99 of her Brief:

96. The Appellants make further submissions on procedural fairness in their subsequent brief. They argue that the retroactive changes made by the Minister to the IDR [*Interim Development Regulations, 2003*] "creates procedural unfairness".

97. As set out above, given that the Board correctly found that the entirety of the Development was located on infilled land in Long Pond Harbour, the retroactive amendments had no effect on the Board's decision.

98. In any event, it is unclear who the Appellants are accusing of a breach of procedural fairness. This is an appeal of a decision of the Board alone, and the amendments to the IDR are not being appealed in this proceeding...

99. Nor does it appear that the Appellants are complaining about the conduct of the Board. The Board did not amend the IDR, nor could the Board have prevented the Minister from doing so.

[101] I agree with and adopt counsel's submission.

[102] For all of these reasons, I dismiss the claim of procedural unfairness that the Advocates and Sunset Key make because the Department of Municipal and Provincial Affairs adopted *Regulation 1/22* on January 14, 2022 and made it retroactive to June 10, 2021.

COSTS

[103] Both the Town and Omni ask me to order that the Advocates and Sunset Key pay their costs. Omni also asks that the costs awarded be taxable on Column 5 of the Scale of Costs. Omni points to what it considers a “frivolous and vexatious campaign [on which the Advocates and Sunset Key have engaged] to delay the Development”. (Paragraph 101 of the Omni's Brief)

[104] It offers the following in support of this claim:

- “This campaign [to delay the Development] has included, *inter alia*, multiple appeals, judicial review applications, an urgent *ex parte* injunction application, social media activity misstating the size and scope of the Development, and misleading letters to government officials”. (Paragraph 101 of Omni's Brief)
- This “appeal is completely without merit and is an abuse of process. It is based on a mistake of fact, a fact that ENRAB found, and that cannot be overturned on appeal”. (Paragraph 102 of Omni's Brief)
- “Another example of the Appellants' abuse of process is their ENRAB appeal [of the Construction Permit the Town issued to Omni on November 2, 2021]. On the eve of the hearing, after materials and briefs had been filed, the

Appellants withdrew the meritless appeal. The Appellants filed this appeal to take advantage of the statutory stay. ... There is no doubt this was an abuse of process”. (Paragraph 103 of Omni’s Brief)

- “More recently, on February 24, 2022, the Appellants filed an *ex parte* injunction seeking an injunction preventing work on the Development. The Appellants were ultimately unsuccessful. However, this application resulted in Omni incurring further costs”. (Paragraph 104 of Omni’s Brief)

[105] I believe that there is some merit in counsel’s claims about how the Advocates and Sunset Key have prosecuted the several initiatives they have undertaken against the Town and Omni about the Development. At times, too, I have struggled to divine their motives and purposes. However, in a general sense I regard their efforts as public interest litigation, by which they intend to ensure that the Town and Omni do what is in the best interests of the public, as much as for themselves, in developing this project in the waters of Long Pond Harbour.

[106] Thus, I am satisfied that costs taxable by Column 3 of the Scale of Costs are requisite. I order that the Advocates and Sunset Key pay, jointly and severally as between them, the costs of the Town and Omni, to be taxed according to Column 3 of the Scale of Costs. The award of costs encompasses this appeal, as well as the application for an interlocutory injunction that the Advocates and Sunset Key did not proceed with ultimately and the interim injunction (otherwise known as “the *ex parte* injunction”) that they did proceed with and which I dismissed.

SUMMARY AND DISPOSITION

[107] The Eastern Newfoundland Regional Appeal Board dismissed an appeal that the Advocates for the Responsible Development of Long Pond and Sunset Key Marina Inc. brought against the Board, the Town of Conception Bay South and Omni Marine Services Inc. to set aside a development permit that the Town issued to Omni to build a finger pier, a laydown area, a parking area and a cold storage building on a water lot in Long Pond Harbour, situate within the Town.

[108] The Advocates and Sunset Key claimed that the Appeal Board erred in various ways, including as to what planning regulations applied, whether the Development was wholly within the waters of Long Pond Harbour and whether the Town had jurisdiction to approve it. They also claimed that the Appeal Board denied them procedural fairness by refusing to postpone the hearing of the appeal.

[109] The Court dismissed the Advocates' and Sunset Key's appeal. It found that the Appeal Board acted correctly when it dealt with most of the issues that the Advocates and Sunset Key raised and otherwise that it did not commit palpable or overriding error. It ordered the Advocates and Sunset Key to pay, jointly and severally as between them, the costs of the Town and Omni, to be taxed by Column 3 of the Scale of Costs.

ORDER

[110] In the result:

1. I dismiss the appeal.
2. I order the Advocates and Sunset Key to pay, jointly and severally as between them, the costs of the Town and Omni, to be taxed according to Column 3 of the Scale of Costs. The award of costs encompasses this appeal, as well as the application for an interlocutory injunction that the Advocates and Sunset Key did not proceed with ultimately and the interim injunction (otherwise known as “the *ex parte* injunction”) that they did proceed with and which the Court dismissed.

GARRETT A HANDRIGAN
Justice