

15-006-067-0.5
EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

BETWEEN:

SUNSET KEY MARINA INC. C/O JEROME COADY

APPELLANT

AND:

TOWN OF CONCEPTION BAY SOUTH

RESPONDENT

AND:

**OCEAN CHOICE INTERNATIONAL
(AKA OMNI MARINE SERVICES INC.)**

PROPONENT

SUPPLEMENTARY SUBMISSION OF THE RESPONDENT

The Respondent, Town of Conception Bay South, makes the following Supplementary Submission in response to the Brief of the Appellant. Terms used herein have the same meaning defined in the Town's original submission.

1. The Town repeats its original request for a dismissal of the Appeal on the basis that the Appellant failed to raise any ground of appeal in its Notice of Appeal (i) that identified a failure on the part of the Town to follow proper procedure in issuing the Approval in Principle, or (ii) that identified an error respecting the Application meeting the preconditions for issuance of the Approval in Principle. The Appellant failed to raise any ground relating to the Town's decision that questioned the Proposed Development's conformity to the general intent of the *Municipal Plan* and the *Development Regulations*. The Town submits that the Appellant should not be permitted to raise new grounds of appeal in its submission as a means of effectively amending its Notice of Appeal. The Appeal should be dismissed.
2. Should the Board permit the Appellant to proceed on the new grounds of appeal articulated in the Appellant's submission, then the Town responds to that submission as follows:

Was this Appeal Commenced in Time?

3. The Town adopts the submissions of the Proponent, at paragraphs 15 to 20 of the Proponent's original submission, that the Appeal was filed out of time and that it should accordingly be dismissed.
4. Pursuant to subsection 42(4) of the *Urban and Rural Planning Act, 2000*, third-party appellants have a 14 day deadline to file their appeals.
5. In ***Gillespie v. Newfoundland and Labrador (Eastern Newfoundland Regional Appeal Board)***, 2012 CanLII 17720 (NL SC), the Supreme Court held that the 14 day deadline runs from the date of "notification to the public" of the decision. The Court indicated that the event which comprises "notification to the public" is to be determined by an examination of the facts of a particular case and does not impose an obligation to provide notice to particular third party appellants.
6. The Appellant's Notice of Appeal was filed on October 2, 2020, 43 days after the Approval in Principle was issued.
7. The Town submits that the document raised by the Appellant at paragraph 10 of the Appellant's Brief is irrelevant to the issue of the timeliness of the Appeal. The notice from the Town dated September 18, 2020 does not constitute notification to the public of the Approval in Principle, being the decision appealed from in this case. The September 18, 2020 notice regards the Application generally and makes no reference to the Approval in Principle.
8. Rather, the Town submits that the events which comprised "notification to the public" in this case were news media reports published earlier in September of 2020. These include a September 3, 2020 Shoreline news article and a September 16, 2020 CBC radio interview concerning the issuance of the Approval in Principle. It is further evident that on September 16, 2020, the principal of the Appellant gave an interview to CBC news in relation to his opposition to the Proposed Development and specifically the Approval in Principle, as reported in a CBC news article dated September 17, 2020. These news reports are referenced in paragraph 9 of the Affidavit of Corrie Davis and copies of same are appended thereto as Exhibits "D", "E" and "F".

9. The time period of September 3, 2020 to October 2, 2020 is 29 days. The time period of September 16, 2020 to October 2, 2020 is 16 days. Whether the statutory limitation period is calculated from the date of notification to the public or the date on which the Appellant evidently was aware of the Approval in Principle, the Appeal was filed out of time and should be dismissed on that basis.

The Substance of the Appeal: Jurisdiction

10. The Conception Bay South Municipal Planning Area, as set out in the *Conception Bay South Municipal Planning Area* regulation under the *Urban and Rural Planning Act, 2000*, is comprised of "All that area within the boundary of the Town of Conception Bay South as defined or redefined by an Order-in-Council and published in the Gazette." The Order-in-Council defining the boundary of the Town of Conception Bay South is that set out in the *Town of Conception Bay South Order* under the *Municipalities Act, 1999*. As regards the area in the vicinity of Long Pond Harbour, the boundary of the Town is defined by the words "Then following the coastline of Conception Bay, running generally northwestward via the shoreline of Seal Cove, Kelligrews, Foxtrap, Manuels and Topsail, to the point of beginning." Copies of the *Conception Bay South Municipal Planning Area* regulation and of the *Town of Conception Bay South Order* appear as Exhibits "B" and "C" of the Affidavit of Corrie Davis.
11. As set out in the Affidavit of Corrie Davis, the Town interpreted the boundary of the Town, and therefore of the Municipal Planning Area, as following the shoreline/high water mark within Long Pond Harbour. While the location of the Proposed Development falls seaward of the shoreline/high water mark of Long Pond Harbour, and thereby *prima facie* beyond the boundary of the Town's Municipal Planning Area, notwithstanding these facts the Town determined that the Proposed Development falls within the Town's Municipal Planning Area by virtue of the operation of subsection 2(2) of the *Municipalities Act, 1999*. Subsection 2(2) of the *Municipalities Act, 1999* provides that "[a]ll docks, quays, wharves and structures touching the boundaries of a municipality and all ships attached either permanently or temporarily to a dock, quay, wharf, ship or structure shall be considered to be within and to be a part of the municipality." The fact of the Proposed Development's touching the Town's boundaries is established by the conveyance document of the Long Pond Harbour Port Authority Inc. to OCI, which appears as Exhibit "A" of the Affidavit of Corrie Davis.

12. A substantively similar case respecting the jurisdiction of a municipality established by subsection 2(2) of the *Municipalities Act, 1999* to circumstances presented by construction of a wharf by infilling of lands covered by water was addressed by the Supreme Court of Newfoundland and Labrador, General Division in ***Janes v. Embree (Town)*, 2018 NLSC 127**. That case concerned a wharf structure that was slightly larger (1.8 ha) than that of the Proposed Development (1.7 ha). Justice Paquette held that the Town of Embree had jurisdiction over the wharf, reasoning as follows:

[21] For jurisdiction, counsel for the Town relies firstly on the provisions of the *Town of Embree Order, Regulation 152/96* which I find establishes the boundaries of the Town (in relation to the Site) as running from the shoreline/high water mark of the Bay of Exploits. In addition, counsel relies on section 2(2) of the *Municipalities Act, 1999*, which provides that "All docks, quays, wharves and structures touching the boundaries of the municipality ... shall be considered to be within and to be part of the municipality".

[22] Despite these legislative provisions, Mr. Janes' own description of the Site as a "wharf" and the terms of the Crown Lease to Embree Fisheries Inc., counsel for the Plaintiffs objects to the Town's jurisdiction to make the Orders on April 10, 2013 and August 14, 2013. She asserts that the Town has not proven that the Site is "touching the boundaries of" the municipality.

[23] I find no merit whatsoever in the argument presented by Plaintiffs' counsel in this respect. The Crown Lease upon which Nelson Janes relies to establish his right to occupy the Site is clear and unequivocal in this regard.

[24] The site is a parcel of land consisting of 1.80 hectares (originally under water) and running from a point being "ordinary high water mark" which point matches the language of *Regulation 152/96* defining the boundaries of the Town of Embree.

[25] Since Mr. Janes does not dispute that what he developed was a "wharf" and since the Lease confirms that the West boundary of the Site is the high water mark, it follows that the wharf touches the boundaries of the Town. The Town has therefore established that it has jurisdiction over the Site.

13. As set out in the Affidavit of Corrie Davis, at paragraph 7.a., the Town interpreted the *Town of Conception Bay South Order* and subsection 2(2) of the *Municipalities Act, 1999* to mean that new infilled land within Long Pond Harbour should be considered a quay/wharf/structure that would permanently touch the boundary of the municipality and therefore should be considered part of the municipality. This interpretation of the Town's jurisdiction is entirely consistent with the approach affirmed by Justice Paquette in *Janes v. Embree (Town)*.

The Substance of the Appeal: Water Lease Policy

14. The Water Lot Lease Policy to which the Appellant refers does not apply to the portion of Long Pond Harbour where the Proposed Development is to be located. As set out in the Affidavit of Corrie Davis, at paragraph 10, the Water Lot Lease Policy does not apply to waters and lands beneath the water owned by the Long Pond Harbour Port Authority Inc. and does not apply to the waters and lands beneath the water in the location of the Proposed Development.

The Proposed Development is to be constructed on land beneath the water within the boundaries of a certain lot conveyed by the Long Pond Harbour Port Authority Inc. to OCI, which lot is evidence in the conveyance document appearing as Exhibit "A" of the Affidavit of Corrie Davis.

The Substance of the Appeal: Compliance with the general intent of the *Development Regulations* and the *Municipal Plan*

15. As the Appellant failed to raise any issue in its Notice of Appeal regarding the Application's conforming to the general intent of the *Development Regulations* and the *Municipal Plan*, the Town's determination of the Application's conformity was irrelevant to the Appeal as originally plead by the Appellant. It was on that basis that no evidence was originally provided to the Board related to the land use planning assessment or considerations of the proposal in accordance with the general intent of the *Development Regulations* and the *Municipal Plan* prior to issuance of the Approval in Principle; such evidence was not relevant to the issues raised in the Notice of Appeal.
16. Whereas the Appellant has now raised, as new grounds of appeal, the issues identified by Ms. Kim Blanchard, MCIP in the Land Use Planner's Technical Report, the Town has now produced in response to those issues the Affidavit of Corrie Davis, Director of Planning and Development of the Town, which sets out the detailed reasons for the Town's determination that the Application conforms to the general intent of the *Development Regulations* and the *Municipal Plan*.
17. The Affidavit of Corrie Davis speaks to the Town's determination that the Proposed Development falls within the jurisdiction of the Town for development planning. The Affidavit of Corrie Davis also speaks to the steps that the Town's Planning and Development Department took to determine the conformity of the Proposed Development to the general intent of the *Development Regulations* and the *Municipal Plan*.
18. The Town was compliant with section 4.10 of the *Development Regulations*, which provides that an Approval in Principle may only issue if it is determined that an application conforms to the general intent of the *Development Regulations* and to the *Municipal Plan*. The Town does not ask the Board to infer this finding; rather, the Affidavit of Corrie Davis sets out the evidentiary basis for this finding. The Town does not ask the Board to assume the requisite

assessment occurred prior to issuance of the Approval in Principle; rather, the Town offers sworn evidence setting out the facts of that assessment.

19. The Affidavit of Corrie Davis further attests to the interpretation and application of the land use zoning to the Proposed Development that was adopted by the Town in determining that issuing the Approval in Principle was warranted. Section 10.3 of the *Development Regulations* directs the approach to be taken in circumstances of uncertainty concerning the location of zoning boundaries; it is prescriptive in this regard, such that there is no possibility of a zoning void. The zoning and related guidelines were established and existing at the time of assessment of the Application and resulting issuance of the Approval in Principle.

Concluding Remarks

20. The Town had jurisdiction to issue the Approval in Principle, followed the proper procedures before issuing the Approval in Principle, and reasonably determined that the Application conforms to the general intent of the *Development Regulations* and the *Municipal Plan*. The Approval in Principle is not deficient. Moreover, the Appellant commenced the Appeal outside the statutory time limitation.

21. The Town requests dismissal of this Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, Newfoundland and Labrador this 11th day of January, 2021.



J. Alexander Templeton

McInnes Cooper

Solicitors for the Respondent

Whose address for service is:

10 Fort William Place, 5th Floor

Baine Johnston Centre

PO Box 5939

St. John's, NL A1C 5X4

E-mail: alex.templeton@mcinnescooper.com

TO: Eastern Newfoundland and Labrador
Regional Appeal Board
By E-mail: rcotter@gov.nl.ca

AND TO: Geoffrey E. Budden
Budden & Associates
Solicitors for the Appellant
By E-mail: geoff@buddenlaw.com

AND TO: Erin E. Best
Stewart McKelvey
Solicitors for the Proponent
By E-mail: ebest@stewartmckelvey.com