

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

AFFIDAVIT OF CORRIE DAVIS

I, **CORRIE DAVIS**, of the City of St. John's, in the Province of Newfoundland and Labrador, Canada, make oath and say as follows:

1. I am the Director of Planning and Development of the Town of Conception Bay South (the "**Town**"), the Respondent in the within Appeal, and as such, have personal knowledge of the facts herein deposed, except as otherwise stated.
2. I am a professional land use planner, having been granted membership in the Canadian Institute of Planners in 2005 after completing a university degree in a program accredited by that organization and several years of professional planning practice under the guidance and supervision of a professional planner.
3. The Planning and Development Department of the Town administers the Town's *Municipal Plan 2011-2021* (the "***Municipal Plan***"), *Development Regulations 2011-2021* (the "***Development Regulations***") and the development approvals process. True copies of the *Municipal Plan* and of the *Development Regulations* appear as Tabs 3 and 4, respectively, of the Record included in the Appeal Package.
4. On July 8, 2020, the proponent Omni Marine Services Inc., also known as Ocean Choice International ("**Omni**") filed a Building Permit & Development Application (the

“Application”) with the Town. The Application proposed a development of new land created by infilling 1.7ha (~4 acres) at the west end of Long Pond Harbour, and included a 90-metre wharf on the infilled land (the **“Proposed Development”**). A true copy of the Application appears as Tab 7 of the Record included in the Appeal Package.

5. Following receipt of the Application, I worked collaboratively with the Town’s Development Control Coordinator (the **“DCC”**), Daniel Barrett, in assessing and ultimately determining the Application. The DCC is authorized to issue approvals in principle on behalf of the Town by virtue of the Town’s *Delegation of Planning Authority Policy, No. 066* (the **“Delegation Policy”**), which was passed by the Town Council as Resolution No. 17-265 on June 30, 2017. True copies of the Delegation Policy and of Resolution No. 17-265 appear as Tabs 8 and 9, respectively, of the Record included in the Appeal Package.
6. The DCC’s discretionary authority to issue an approval in principle is as described in section 4.10 of the *Development Regulations*, which provides that the DCC may issue such an approval if the DCC determines that the Application conforms to the general intent of the *Municipal Plan* and the *Development Regulations*.
7. The DCC and I collaboratively considered the Application and determined that an Approval in Principle should be issued to Omni regarding the Proposed Development for the reason that it conforms to the general intent of the *Municipal Plan* and the *Development Regulations*:
 - a. The DCC and I determined that the Proposed Development fell within the jurisdiction of the Town for development planning, as it is located within the Conception Bay South Municipal Planning Area to which the *Municipal Plan* and *Development Regulations* apply. We reasoned as follows:
 - i. The Proposed Development is to be constructed by infilling certain land covered by water within Long Pond Harbour. The subject land is within the boundaries of a certain lot conveyed by the Long Pond Harbour Port Authority Inc. to OCI. A true copy of the relevant Deed of Quit Claim related to the conveyance is attached hereto as Exhibit “A” to this Affidavit.

- ii. The DCC and I recognized that 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 that 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." We accordingly interpreted the boundary of the Town, and therefore of the Municipal Planning Area, as following the shoreline/high water mark within Long Pond Harbour. True 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", respectively, of this Affidavit.
- iii. We recognized that 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 Proposed Development falls within the Town's Municipal Planning Area by virtue of the operation of subsection 2(2) of the *Municipalities Act, 1999*, which 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."
- iv. We therefore interpreted and applied the *Town of Conception Bay South Order* and subsection 2(2) of the *Municipalities Act, 1999* to mean that new infilled land within the 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.

- b. The DCC and I further determined that the Proposed Development conforms with the general intent of the *Municipal Plan* and the *Development Regulations*. The *Municipal Plan* includes, among other things, land use management policies that allow the Town to manage the location and quality of development in the Town's municipal planning area. The land use policies require that land use in the area be managed in accordance with the land use designations specified in the plan and set out on the Future Land Use Map.
- c. The land use designation relevant to the Proposed Development is that named "Industrial General". The specific policies applicable to the Industrial General designation are set out in section 5.5 of the *Municipal Plan*, which reads:

5.5 Industrial

Industrial lands are limited in the Town of Conception Bay South. The port at Long Pond is a recognized industrial area, and lands at Fowlers Road have been identified for light industrial uses. There are also a number of small general and light industry uses scattered throughout the Town.

5.5.1 Goal

To increase the industrial tax base of the Town.

5.5.2 Objectives

- To ensure an adequate supply and variety of land at appropriate locations to support light and general industrial activities;
- To support the location of industrial activities to areas which have access to major transportation routes;
- To ensure a high quality of development in industrial development sites; and
- To encourage and support further industrial development at the Port of Long Pond.

5.5.3 Policies

The Plan includes two land use designations that will guide industrial development in the Town.

- Commercial/Light Industrial
- Industrial General

1. **Industrial General** – Lands around the port at Long Pond and smaller existing general industrial sites within the Town are designated General Industry. Lands designated for Industrial use are intended to accommodate a mix of industrial uses, including wholesaling, manufacturing, distribution, communications, warehousing, marine-related industrial uses, service stations and bulk storage uses. Uses and activities related to the processing or transporting of mined material and recycling uses may also be considered in areas designated and zoned for general industrial use. Generally, retail commercial uses shall not be permitted in the Industrial

General designation unless they directly service the industrial uses or their employees or they are accessory to the industrial use, i.e., a factory sales outlet.

2. **Commercial/Light Industrial** – Lands at Fowlers Road and existing light industrial/commercial sites throughout the Town are designated Commercial/Light Industrial. These areas are intended to accommodate a mix of light industrial, office and general assembly uses. General industry, service stations, passenger assembly, retail uses may be considered. A Commercial/Light Industrial Land Use Zone shall be established in the Development Regulations to guide development in these areas.

3. The Town will examine and improve vehicular access to the Long Pond Port facility and surrounding industrial area as a means of improving port usage and long term viability.

4. **Impacts on Neighbouring Residential Uses** – In considering proposals for industrial development or expansion, Council shall consider the impacts on abutting residential neighbourhoods and require mitigative measures to reduce conflicts, such as proper siting, buffering and screening where activities could cause a nuisance by virtue of generating undue truck traffic, noise, smell and unsightly properties.

[Emphasis added.]

d. Section 10 of the *Development Regulations* also relates to land use zones. Section 10.6 provides that, subject to the regulations, the uses that fall within the permitted use classes set out in the use zones are to be permitted by the Town in those zones. Section 10.23 specifies the permitted uses, discretionary uses, lot requirements and other detailed requirements that apply to the Industrial General zone. Schedule A of the *Development Regulations* includes as non-building uses “docks and harbours” and “wharves and marinas”, which coincides with the permitted uses of “ports, wharves and docks” in the Industrial General zone, as set out in section 10.23.1.

e. Regarding the interpretation of zone boundaries, section 10.3 of the *Development Regulations* provides:

10.3 Interpretation of Zone Boundaries

Where possible the boundaries of the use zones follow identified features such as streets, fences, watercourses, transmission lines, or lot lines. Where there is any uncertainty, contradiction, or conflict concerning the intended location of a zoning boundary, the Authority shall interpret the exact location of the zoning boundary in a manner that is consistent with the intent and policies of the Municipal Plan without amendment to the Land Use Zoning Map.

[Emphasis added.]

f. The *Municipal Plan* also describes how the plan is to be implemented and administered. The plan describes, in sections 1.5 and 9.3, that the Town’s council

is required to prepare regulations for the control of the use of land, in strict conformity with the *Municipal Plan*, in the form of *Development Regulations*. The plan further describes, in section 1.5, that the day-to-day administration of the *Municipal Plan* and *Development Regulations* is to be conducted by staff members authorized by the Town Council. The plan describes, in section 9.1, that in administering the plan the Future Land Use Map is to be read only in conjunction with the goals, objectives and policies outlined in the plan, and that development applications will be evaluated for their conformity with the plan.

- g. The *Municipal Plan* also makes special provision for Land Use Impact Assessment Reports (“**LUIARs**”). The plan states in section 2.8.4:

As growth and development of the Town continue, there are growing concerns about the impact of developments on the environment, the amenity of neighbourhoods, vehicular and pedestrian traffic, views and municipal services that require more detailed analysis. For the first time, the Plan provides for the preparation of a Land Use Impact Report for developments deemed by the Town to require more detailed evaluation prior to approval.

[Emphasis added.]

- h. The *Municipal Plan* further details the administration of LUIARs, in section 4.3.8, as follows:

Where a development or use is proposed that cannot be adequately evaluated, the Town may require the preparation of a Land Use Assessment Report. A Land Use Assessment Report is a report prepared by suitably qualified persons to assess any significant impacts a use or development may have on the urban environment and/or surrounding lands or neighbourhood. The report and any supporting documentation shall be prepared at the expense of the developer unless otherwise determined by Council. The report shall evaluate the impacts identified in a Terms of Reference prepared by the Town, evaluate their importance and recommend measures of control and mitigation where appropriate.

1. Where determined by Council, Land Use Assessment Report(s) may be required as part of the development application review process.
2. Council shall prepare a Terms of Reference setting out the matters that would require assessment in a Land Use Impact Report. These may include, but are not limited to:
 - Impacts on the natural environment (waterways, wetlands, shorelands, fish, plant or animal habitat);
 - Land use impacts on the community;
 - Impacts on the quality of life of residents such as noise, outdoor lighting, views of Conception Bay;
 - Impacts on vehicular and pedestrian safety; and
 - Any other impact analysis consistent with this Plan that Council considers necessary to their consideration of the development.
3. Where determined by Council, the Land Use Assessment Report(s) will be required as part of the development application review process and may require public notification and review.

[Emphasis added.]

- i. A substantively similar provision to section 4.3.8 of the *Municipal Plan* is found in section 4.15 of the *Development Regulations*. Section 4.15 authorizes the Town to require a LUIAR to evaluate any proposed land use or development that affects the policies contained in the *Municipal Plan*.
- j. The *Municipal Plan* further makes special provision for natural hazard areas. The plan states in section 4.3.14:

Anticipating and addressing the impacts of climate change will become increasingly important over the planning period. Of particular importance is the identification of lands that are susceptible to geological hazards such as low-lying coastal areas and areas of steep slopes. Schedule A – Environmental Overlay Map identifies areas vulnerable to geological hazard in Conception Bay South based on work carried out by the Geological Survey Division, Department of Natural Resources.

1. Residential development shall be prohibited in areas identified in Schedule A as high hazard.
2. Residential development may be considered in areas identified as moderate hazard subject to site specific study to determine the level of hazard risk and suitability of the site for development.
3. In areas identified as moderate or high hazard, development of commercial, industrial or other non-residential uses may require a site specific study, prepared by suitably qualified persons to evaluate the level of hazard risk, taking into consideration the susceptibility of the proposed development to storm surges. Such studies will consider elevation, topography and erodability (geomorphology).
4. Development in any area identified as moderate or high hazard may also be required to assess the biophysical impact on the coastal ecosystem including the potential to contaminate (such as, hazardous materials storage), harmful disruption of natural habitats and disruption of natural coastal processes such as littoral drift.
5. In approving a development in an area with known or potential hazard, the Town may require additional engineering design or other measures to mitigate identified hazards as a condition of development. In any event, no private development in an area of known or potential hazard risk shall result in public liability or public cost.
6. The Town will continue to monitor and address the impacts of climate change and, where necessary, introduce new standards and operational approaches to reduce climate change impacts.

[Emphasis added.]

- k. Substantively similar requirements to those set out in section 4.3.14 of the *Municipal Plan* are found in section 5.10 of the *Development Regulations*.

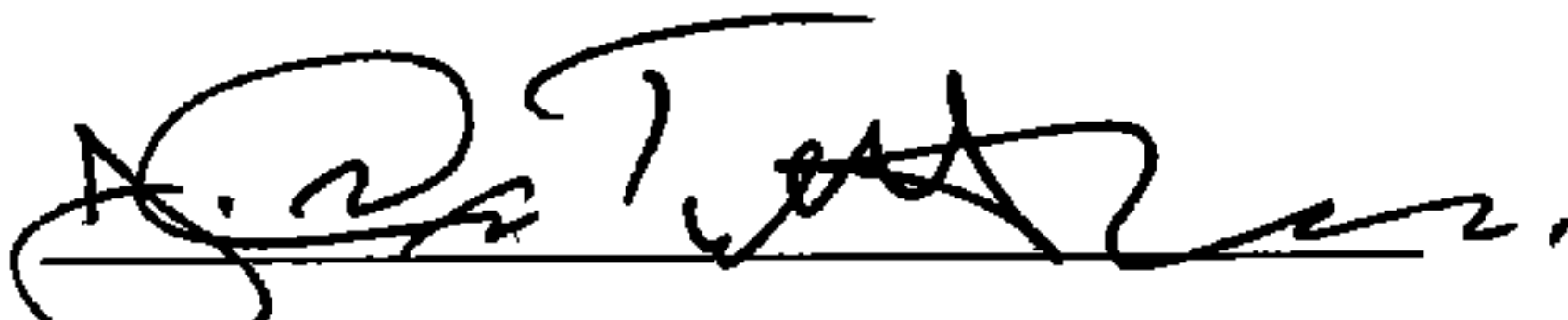
- I. Applying the foregoing to Omni's Application, the DCC and I determined that the Proposed Development is located within an Industrial General zone set out on the Schedule B Land Use Zoning Map. Specifically, the Proposed Development being one that falls within the Town's jurisdiction by constituting a permanent quay/wharf/structure "*touching the boundaries of a municipality*", we determined that the interpretation of the zone boundary that reasonably applies to the development is that of the land that it touches on the shoreline/high water mark of Long Pond Harbour, which is the Industrial General zone. We decided that determining the Proposed Development to fall within the Industrial General zone further accorded with:
 - i. The specific statement in section 5.5 of the *Municipal Plan* that "*the port at Long Pond is a recognized industrial area*";
 - ii. The specific goal stated in section 5.5.1 of the *Municipal Plan* of increasing the industrial tax base of the Town;
 - iii. The specific objective stated in section 5.5.2 of the *Municipal Plan* of encouraging and supporting further industrial development at the Port of Long Pond;
 - iv. The policies stated in section 5.5.3 of the *Municipal Plan*, that lands around the port of Long Pond are designated General Industry and are thereby intended to accommodate a mix of industrial uses, including specifically marine-related industrial uses;
 - v. The Schedule B Land Use Zoning Map reflects the boundaries for the Industrial General zone such that it mirrors the boundary for the Industrial General designation; and
 - vi. The fact that permitted uses specified for the Industrial General Zone in section 10.23.1 of the *Development Regulations* include "*ports, wharves and docks*".

- m. We further reasoned that by adopting the interpretation that the Proposed Development fell within the Industrial General zone boundary we were complying with the direction set out in section 10.3 of the *Development Regulations* that *"[w]here there is any uncertainty... concerning the intended location of a zoning boundary, the Authority shall interpret the exact location of the zoning boundary in a manner that is consistent with the intent and policies of the Municipal Plan without amendment to the Land Use Zoning Map."*
- n. The DCC and I further determined that because the Proposed Development is located within an area identified as High Hazard Vulnerability on the *Municipal Plan's* Environmental Overlay Map, it requires site-specific study in the form of a LUIAR as contemplated by parts 2.8.4, 4.3.8 and 4.3.14 of the plan. To account for this requirement, we decided the Approval in Principle should have as a condition the requirement that a LUIAR be prepared and accepted by the Town prior to final approval.
8. For the foregoing reasons, the DCC and I determined that issuance of the Approval in Principle was warranted on August 19, 2020. The Approval in Principle specified that a permit to proceed with the Proposed Development would be issued only upon compliance with the specified conditions, and that no construction and/or excavation was permitted prior to the issuance of a building or construction permit. The conditions included, among other things the condition that Omni have a LUIAR prepared and submitted to the Town for approval. A true copy of the Approval in Principle appears as Tab 2 of the Record included in the Appeal Package.
9. The issuance of the Approval in Principle was reported to the public in various news media reports published in September 2020. These included a September 3, 2020 report by Shoreline news, a radio interview on CBC East Coast Morning Show on September 16, 2020, and a CBC news article dated September 17, 2020. Copies of the online versions of these news stories and a transcript of the radio interview are attached as Exhibits "D" "E" and "F", respectively, of this Affidavit.
10. I am familiar with Water Lot Lease Policy No. 089, which only applies to certain and not all of the waters of Long Pond Harbour. Specifically, the policy does not apply to waters

and lands beneath the water owned by the Long Pond Harbour Port Authority Inc., with respect to tenure of land and ability to lease said lands. The policy does not apply to the waters and lands beneath the water in the location of the Proposed Development.

11. I have read and understand the submission of the Town dated November 24, 2020, and the supplementary submission of the Town dated January 11, 2021, and I make this Affidavit in support of those submissions as a response to the Appeal filed by Sunset Key Marina Inc. c/o Jerome Coady.

SWORN TO at the City of St. John's,
in the Province of Newfoundland and
Labrador, this 11th day of January, 2021,
before me:


Barrister, NL


CORRIE DAVIS