

# Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-072-032
Appellant(s)	Advocates for the Responsible Development of Long Pond
Respondent / Authority	Town of Conception Bay South
Date of Hearing	October 8, 2021

## Board Members

Chair	Cliff Johnston
Member	Carol Ann Smith
Member	Lisa Slaney

## Also in Attendance

Solicitor for the Appellant(s)	Scott Lynch, Solicitor, Budden & Associates
Representatives for the Authority	Alex Templeton, Solicitor, Mc Innes Cooper; Corrie Davis; Director of Planning and Development
Representatives for the Applicant	Jonathon Dale, Solicitor, Stewart Mc Kelvey; Jim House, General Manager, Long Pond Harbour Authority
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Christopher Hardy, MCIP
Interested Parties	Andrea Canning; Paul Connors; Pierre Gauvreau; Margo Soucy; Nora Cahill; Theodore Perrin;

The authority for appeals comes from section 42 of the *Urban and Rural Planning Act, 2000* (The Act).

## Board's Role

The role of the Regional Appeal Board is to determine if the Town of Conception Bay South made an error when it issued a development permit to the Long Pond Harbour Authority on September 2, 2021 to undertake repairs/reconstruction of the East Breakwater at the mouth of Long Pond.

The Board must determine if the Town of Conception Bay South acted in accordance with the *Urban and Rural Planning Act, 2000*, the *Town of Conception Bay South Municipal Plan and Development Regulations* when the decision was made.

## Presentations During the Hearing

The following is a synopsis/summary of the verbal representations made to the Board during the Appeal Hearing. The Board has also received and reviewed written submissions from the Technical Advisor, as well as representatives for the Appellant, the Authority, and the Applicant.

### 1. Technical Advisor's Report

In March of this year, Long Pond Harbour Authority (LPHA) submitted an application to the Town of Conception Bay South to repair a breakwater at the mouth of Long Pond Harbour. An approval in principle was granted on May 7, 2021. A development permit was granted on May 31, 2021 for "Phase I" (to "stockpile material to be used for the repair of the East Breakwater", as per permit 21-C-037 from the Town). A second development permit (for "Phase II") was granted on September 2, 2021 (to "undertake repairs/reconstruction of East Breakwater", as per permit 21-C-063).

The Appellant is appealing the development permit based on the following grounds:

1. No public notice was given to the residents around Long Pond Harbour;
2. The proposed development area is considered high-hazard yet a land use impact assessment report was not prepared;
3. Materials that will be used in the project are known to be polluting; and
4. The proposed development may impact sensitive areas thus contravening the Town's municipal plan.

Section 4.14 of the Development Regulations indicates the time periods over which the Authority (i.e., the Town) will provide public notice for variances, change in non-conforming uses, proposal of a discretionary use, and accessory buildings. The proposed work on the breakwater does not fall into those categories.

Section 4.15 outlines that the Authority may require a land use impact assessment be prepared. However, the subject breakwater has been designated 'high hazard vulnerability' and section 5.10.1(c) of the Regulations indicates:

*"the Authority shall require a site specific study in the form of a Land Use Impact Assessment, prepared by suitably qualified person(s) to evaluate the level of hazard risk, taking into consideration the susceptibility of the proposed development to storm surges, coastal erosion or flooding. Such studies will consider elevation, topography and geomorphology;"*

Section 4.16 indicates the Authority may request an environmental site assessment at its discretion:

“The Authority may require an environmental site assessment as a condition of approval for development of lands where site contamination is known or reasonably believed to have occurred”

Section 5.28 outlines extra conditions regarding removal and placement of soil and the impact on watercourses or neighbours, steep slopes, unapproved ground disturbance, and financial guarantees that may be required for rehabilitation purposes. It is required that the Authority consider those matters when making a land use decision.

### **Town of Conception Bay South Municipal Plan**

Section 5.8 of the Town’s municipal plan indicates that coastline should be preserved and that it is a goal of the Authority to:

*“enhance and encourage environmental protection and the preservation of the community’s special natural areas”*

The goals of the Town’s municipal plan, including preservation of the coastline, would be achieved through development regulations (e.g., section 5.28 of the Town’s development regulations, outlined above). Section 5.8 applies to areas of the Town that have been designated ‘Open Space/Conservation’.

When the subject area (the breakwater) became part of the Town’s planning area in June of this year, the land use in the newly added planning area is subject to the Province’s *Interim Development Regulations, 2003*.

The breakwater is an existing structure and permit 21-C-063 was for the “repair/reconstruction” of that structure.

The Town’s municipal planning area was expanded in June of this year. At that time, the Town gained the authority to control land use development related to the subject breakwater. The applicant applied to (re)develop the breakwater, an existing use at the subject location, and the Town (the land use authority) granted a permit to develop.

Though section 4.14 outlines public consultation periods, it does not require public consultation for this particular development.

As per the Hazard Vulnerability 2011 map on the Town’s website, the subject breakwater is considered high vulnerability. Section 5.10.1(c) of the Town’s development regulations requires the Town to require a “site specific study in the form of a Land Use Impact Assessment, prepared by suitably qualified person(s) to evaluate the level of hazard risk”; the cost of which is to be borne by the applicant. This document was not found in the material submitted to the Department.

The application was reviewed by the Federal Department of Fisheries and Oceans, Federal Department of Transport (Navigable Waters Protection Division), and

Provincial Department of Environment and Climate Change<sup>i</sup> (Water Resources Division and Environmental Assessment Division). The various government agencies provided conditions/permits or indicated approval was not required from that agency.

## 2. Appellant's Presentation

- The Town's Municipal Plan and Development Regulations do apply to the area where the breakwater is located.
- The breakwater is located in a high hazard zone.
- The Town's Municipal Plan and Development Regulations (Section 5.10 of the Development Regulations) require that a Land Use Impact Assessment Report (LUIAR) be undertaken for development in a high hazard zone. No LUIAR was undertaken for the repairs to the breakwater project, prior to the issuance of the permit by the Town on September 2, 2021.
- Proposed terms of reference for an LUIAR must, according to the Town's Development Regulation, be made available for public review and comment.
- It is incorrect to state that the Town's Municipal Plan and Development Regulations are no longer in effect throughout the entirety of the Town. The Town is still considering re-zoning amendments to properties in the boundaries of the Town.

## 3. Authority's Presentation

- The Town has jurisdiction regarding development planning within the Conception Bay South Municipal Planning Area. The Conception Bay South Municipal Planning Area was recently redefined by the Minister of Municipal and Provincial Affairs to include the site of the breakwater.
- It is the *Interim Development Regulations, 2003* that apply to the Conception Bay South Municipal Planning Area, at the time of the Permit Decision; not the Town's Municipal Plan and Development Regulations.
- The Minister of Municipal and Provincial Affairs chose to include the entire Conception Bay South Municipal Planning Area in the list in the Schedule of the *Interim Development Regulations, 2003*.
- Section 5 of the *Interim Development Regulations, 2003* provides for the submission and consideration of development applications. Under Subsection 5(1)(b) of the *Interim Development Regulations, 2003*, the Town is conferred broad discretion to determine the information required of the proponent for the purpose of the Town's consideration of the proposed development.

- The *Interim Development Regulations, 2003* authorize the Town to approve the development application for the breakwater subject to terms and conditions; approve the development application without terms and conditions; or reject the development application.
- The application for the repairs to the breakwater was reviewed by number of Provincial and Federal agencies who have supported the project.
- Under the *Interim Development Regulations, 2003*, the Town was not required to ask the proponent to undertake a LUIAR nor to publically advertise the proposed terms of reference for a LUIAR.
- The Town's Development Control Co-ordinator (DCC) was authorized with decision-making authority regarding the permit for the repair of the breakwater.
- The DCC decided the Permit Decision according to, and within the limitations of, his discretionary authority.
- The Town submits that the Eastern Newfoundland Regional Appeal Board is required to show the Town a high level of deference in the circumstances of the permit decision.

#### 4. Applicant's Presentation

- The representatives for the Long Pond Harbour Authority made a number of points similar to those of the representatives for the Town of Conception Bay South.
- The permit issued by the Town on September 2, 2021 is for repair and mediation only, and there is urgency to have this work completed as soon as possible.
- A detailed environmental analysis of the breakwater project has been undertaken by the applicable Provincial and Federal agencies. These reviews could "constitute" a LUAIR.
- If the Town were to require the Long Pond Harbour Authority to undertake a LUAIR, what other environmental issues would need to be considered that have not already been dealt with by the Town and the applicable Provincial and Federal agencies?

### Board's Analysis

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 site of the breakwater and as noted 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 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 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 these Regulations further details that the Town has discretion to impose conditions "*in the interest of the proper development of an area or a specific locality within an area*".

**"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.

(4) Notwithstanding subsections (1), (2), and (3) and subject to section 108 of the Act, these regulations shall not

(a) prevent the completion of a structure or the use of land prohibited by a plan authorized under the Act where that development was lawfully commenced before the area was defined under section 11 of the Act, and where that development is completed within a reasonable time after the coming into force of that plan;

(b) prevent the rebuilding or repair of a building or development prohibited by a plan or a plan referred to a council or regional authority by the department if the building or development suffers damage to an extent less than 50% of its replacement value provided the owner of the structure within one year of the damage taking place, submits an application for a permit to reconstruct for the same purpose as its original use at the date the area was defined under section 11 of the Act and initiates construction of the building not later than one year after receiving that permit; or

(c) prevent the extension of a non-conforming use by an amount not exceeding 50% of the existing floor area provided the council or regional authority is satisfied that appropriate setback will be maintained and that there will be no adverse effect on adjoining properties.

(5) An application for a permit that is properly submitted in accordance with the regulations that has not been determined by the council or regional authority within 8 weeks after receipt by the council or regional authority shall be considered to be refused unless an extension of time has been requested by the council or regional authority and agreed upon in writing by the applicant for the permit.

(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.

#### **Conditions for development**

6. (1) A council or regional authority may impose conditions on a permit issued under section 5 in the interest of the proper development of an area or a specific locality within an area.

(2) Developments shall be carried out in accordance with conditions prescribed under subsection (1).

(3) A council or regional authority may cancel a permit for failure by the holder to comply with these regulations or conditions imposed under the permit.”

Q. Was a LUIAR required for the breakwater repair project and was the Town required to make Terms of Reference for an LUIAR available for public review and comment?

A. No. The Board has determined that under the provisions of the *Interim Development Regulations, 2003* that the Town has the authority to determine what information is required to make a decision on an application. The Town determined that the information it had from its own review of the application and the information provided by the applicable Provincial and Federal agencies enabled the Town to make a decision to approve the permit for the breakwater repairs/reconstruction.

Q. Was the Town's Development Control Co-ordinator (DCC) authorized to issue the permit for the repair/reconstruction of the breakwater?

A. Yes. The Board has been advised by the Town that the DCC is authorized to issue construction permits (as well as approvals in principle) on behalf of the Town by virtue of the Town's *Delegation of Planning Authority Policy*.



## Board's Conclusion

In arriving at its decision, the Board reviewed the submissions and comments, given by the parties present at the hearing, along with the technical information. The Board is bound by Section 42 of the Urban and Rural Planning Act, 2000 and therefore must make a decision that complies with the applicable legislation, policy and regulations.

The Board has determined that the site of the subject breakwater in Long Pond Harbour is in the Town's Municipal Planning Area and is subject to the provisions of the Province's *Interim Development Regulations, 2003*. These Regulations authorized the Town to issue a permit on September 2, 2021 to the Long Pond Harbour Authority, with conditions, for the repair/reconstruction of the breakwater.

The Board has also determined that the application from the Long Pond Harbour Authority was correctly processed by the Town in accordance with the requirements of the *Interim Development Regulations, 2003*.

## Board's Order

The Board orders that the decision made by the Town of Conception Bay South on September 2, 2021 to issue a permit (# 21-C-063) to the Long Pond Harbour Authority for the repair/reconstruction of the existing breakwater at the mouth of Long Pond Harbour, be confirmed.

The Authority and the Appellant(s) are bound by the decision of this Regional Appeal Board.

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of this Regional Appeal Board may be appealed to the Supreme Court of Newfoundland and Labrador on a question of law or jurisdiction. If this action is contemplated, the appeal must be filed no later than ten (10) days after the Board's decision has been received by the Appellant(s).

DATED at St. John's, Newfoundland and Labrador, this October 19, 2021.



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Clifford Johnston, Chair  
Eastern Newfoundland Regional Appeal  
Board



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Lisa Slaney, Member  
Eastern Newfoundland Regional Appeal  
Board



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Carol Ann Smith, Member  
Eastern Newfoundland Regional Appeal  
Board