West Newfoundland Regional Appeal Board

15-006-037-064

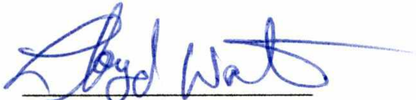
June 12, 2019

58663 Newfoundland and Labrador Limited
C/O Mr. Daniel Bennett
Robert R. Regular PLC Inc.
P.O. Box 14002
Stn. Manuels,
131 Conception Bay Highway
Conception Bay South, NL
A1W 3J1

Re. Decision of Justice George Murphy
Supreme Court of Newfoundland and Labrador
File # 201704G0195
January 16, 2019

Dear Mr. Bennett

In the matter referenced above, the West Newfoundland Regional Appeal Board met on June 12, 2019 and reviewed this matter. After hearing from both parties the board complies with the directive of Justice Murphy that the matter be referred back to the Town.



Lloyd Walters
Chair, West Newfoundland Regional Appeal Board

PC
Town of Kippens
C/O Mr. Mark Mills
Mills Law

2017 04G 0195

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

58663 NEWFOUNDLAND & LABRADOR LTD. **APPELLANT**

AND:

WEST NEWFOUNDLAND REGIONAL APPEAL BOARD **FIRST RESPONDENT**

AND:

TOWN OF KIPPENS **SECOND RESPONDENT**

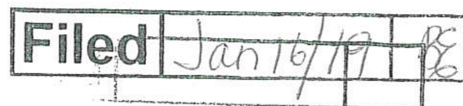
ORDER

BEFORE THE HONOURABLE MR. JUSTICE MURPHY

UPON HEARING Daniel Bennett, counsel for the Appellant, and Mark Mills, counsel for the Second Respondent **IT IS THIS DAY ORDERED** that pursuant to section 46(4) of the *Urban and Rural Planning Act, 2000,* SNL2000 Chapter U-8, the decision of the West Newfoundland Regional Appeal Board dated May 26, 2016 is vacated and the matter is referred back to the Board to be dealt with by the Board in accordance with the reasons set out in the written decision of Justice Murphy dated October 19, 2018 and appended hereto as Schedule "A". The Appellant shall have its costs in accordance with Column 3.

DATED at St. John's, Newfoundland and Labrador the 16 day of January, ~~2016~~ 2019.

Brenda Eldridge



Schedule "A"

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *58663 Newfoundland & Labrador Ltd. v. West Newfoundland Regional Appeal Board*, 2018 NLSC 208
Date: October 19, 2018
Docket: 201704G0195

BETWEEN:

58663 NEWFOUNDLAND & LABRADOR LTD.

APPELLANT

AND:

WEST NEWFOUNDLAND REGIONAL APPEAL BOARD

FIRST RESPONDENT

AND:

TOWN OF KIPPENS

SECOND RESPONDENT

Before: Justice George L. Murphy

On Appeal From: A Decision of the West Newfoundland Regional Appeal Board pursuant to the *Urban and Rural Planning Act*, File # 15-006-037-064 dated the 26th day of May, 2016.

Place of Hearing: Corner Brook, Newfoundland and Labrador

Date of Hearing: March 27, 2018

Summary:

An appeal from a decision of the Western Newfoundland Regional Appeal Board was allowed. The Court determined that a finding by the Appeal Board that an application for a development permit had been appropriately considered by the Second Respondent was unreasonable given that the Second Respondent had not considered the application in accordance with an earlier decision of the Appeal Board, the *Municipalities Act* or basic principles of procedural fairness.

Appearances:

Daniel Bennett	Appearing on behalf of 58663 Newfoundland & Labrador Ltd.
No appearance	On behalf of West Newfoundland Regional Appeal Board
Mark Mills	Appearing on behalf of Town of Kippens

Authorities Cited:

CASES CONSIDERED: *Petty Harbour-Maddox Cove (Town) v. Eastern Newfoundland Regional Appeal Board*, 2015 NLTD(G) 111; *French v. Newfoundland and Labrador (Eastern Regional Appeal Board)*, 2017 NLTD(G) 64; *Rose v. Stephenville (Town)*, 2017 NLTD(G) 48; and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

STATUTES CONSIDERED: *Municipalities Act, 1999*, S.N.L. 1999, c. M-24.

REASONS FOR JUDGMENT

MURPHY, J.:

INTRODUCTION

[1] 58663 Newfoundland & Labrador Ltd. (hereinafter the "Appellant" or the "Corporation") appealed the decision of the West Newfoundland Regional Appeal Board (the "Board") dated May 26, 2016 in which the Board ordered that a decision made by the Town of Kippens (the "Town") on December 10, 2015, refusing a development application dated October 5, 2013 (the "Application") for a residential subdivision by the Corporation be confirmed.

BACKGROUND

[2] By this Application, the Appellant was seeking a permit to develop a residential subdivision on land owned by the Appellant and located on McCarthy's Lane in the town of Kippens. There were ongoing discussions between representatives of the Appellant and the Town after the submission of the Application which culminated in a decision by the Town on June 11, 2015 to deny the Application. On that same date, the Town Manager sent an email to Mr. Wayne Young, representative of the Corporation, advising that the Application had been denied and outlining the reason therefor. Subsequently, a letter dated June 16, 2015 was sent to the Appellant by the Town outlining the reasons for the refusal of the Application.

[3] The Appellant appealed the decision of the Town to deny the Application to the Board on or about June 18, 2015. A hearing was held on October 28, 2015 and the Board by written decision of November 13, 2015 vacated the decision of the Town. It further directed the Town to reconsider the Appellant's Application at a regular meeting of Council, render a decision on the Application and then issue a new letter to the Appellant clearly articulating the reasons for refusal if in fact the Town decided again to refuse the Application.

[4] In its decision of November 13, 2015, the Board found that while the Town had the authority to refuse the Appellant's Application, it had erred by not clearly providing reasons for the denial of the Application. The lack of clarity in providing reasons was based on the fact that the Board found that the reasons for the denial outlined in the June 11, 2015 email to Mr. Young from the Town Manager were not consistent with the reasons as outlined in the June 16, 2015 letter from the Town to the Appellant.

[5] The Appellant did not submit a new application to the Town but relied on the Application as originally submitted. On December 10, 2015, the Town tabled the Application as an item to be dealt with at a meeting of the Town Council on that date. When the Application came up for consideration, a councillor made a motion to grant the requested development permit; however, no councillor would second the motion and therefore it did not make it to a vote. The Town sent a letter to the Appellant dated December 11, 2015 in which it outlined the reasons why the Application was refused.

[6] The Appellant appealed the decision of the Town as outlined in its letter of December 11, 2015 to the Board. A hearing of the appeal was heard by the Board on May 26, 2016 and by Order of the Board of that same date the Board ordered that the decision of the Town made on December 10, 2015 refusing the Application of the Appellant be confirmed.

[7] It is this decision of the Board from May 26, 2016 which is the subject of the appeal before this Court.

GROUNDS OF APPEAL

[8] In its Notice of Appeal and its Factum, the Appellant outlined its grounds of appeal as follows:

1) The West Newfoundland Regional Appeal Board erred in law and/or exceeded its jurisdiction in determining that Council had sufficiently considered the Appellant's application.

2) The West Newfoundland Regional Appeal Board erred in law and/or exceeded its jurisdiction in its interpretation of section 10 of the Town of Kippens' Development Regulations, in determining that the Town had the authority to reject the proposed development due to inadequate road access [refined from the initial appeal notice].

3) The West Newfoundland Regional Appeal Board erred in law and/or exceeded its jurisdiction in its interpretation of section 11 of the Town of Kippens' Development Regulations, in determining that the Town adequately applied its discretionary authority when it refused the Appellant's application.

4) The West Newfoundland Regional Appeal Board erred in law and/or exceeded its jurisdiction in its interpretation of section 23 of the Town of Kippens' Development Regulations, in determining that the Town had provided adequate reasons for refusing the Appellant's application.

5) The West Newfoundland Regional Appeal Board erred in law and/or declined jurisdiction in failing to consider/address whether the proper procedure was followed under section 82 of the Town of Kippens' Development Regulations.

6) The West Newfoundland Regional Appeal Board erred in law and/or declined jurisdiction in failing to consider/address whether the proper procedure was followed under section 86 of the Town of Kippens' Development Regulations.

7) The West Newfoundland Regional Appeal Board erred in law and/or declined jurisdiction in failing to consider whether the Town had breached the duty of procedural fairness owed to the Appellant.

8) Such other grounds upon which this Honourable Court may permit counsel to be heard.

LEGAL BASIS OF THE APPEAL

[9] The appeal of the decision of the Town made on December 10, 2015 to the Board was authorized by section 42(1) of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8 (the "*Act*") which provides:

> 42. (1) A person or an association of persons aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to
>
> (a) an application to undertake a development;
> (b) a revocation of an approval or a permit to undertake a development;
> (c) the issuance of a stop work order; and
> (d) a decision permitted under this or another Act to be appealed to the board.

[10] Sections 42(10) of the *Act* outlines the options open to the Board in determining an appeal. It provides:

> 42. (10) In determining an appeal, a board may confirm, reverse or vary the decision appealed from and may impose those conditions that the board considers appropriate in the circumstances and may direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have its decision implemented.

[11] However, section 42(11) of the *Act* restricts the power of a board on appeals from discretionary decisions of councils. The specific wording is as follows:

> 42. (11) Notwithstanding subsection (10), where a council, regional authority or authorized administrator may, in its discretion, make a decision, a board shall not make another decision that overrules the discretionary decision.

[12] The *Act* also provides the statutory basis for an appeal to this Court by an aggrieved party from decisions of boards such as the Western Regional Appeal Board. Section 46(1) provides:

> 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.

[13] Section 46(2) limits appeals to questions of law or jurisdiction and section 46(4) outlines the powers of this Court on an appeal. It states:

> 46. (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.

STANDARD OF REVIEW

[14] Counsel for the Appellant and the Town were in agreement that the applicable standard of review is reasonableness in a case such as this dealing with the review of a decision of a board on an appeal where the underlying issue involved the exercise of discretionary power by a municipal council.

[15] I agree that reasonableness is the correct standard in such circumstances. This is supported by the decisions of Butler, J. in *Petty Harbour-Maddox Cove (Town) v. Eastern Newfoundland Regional Appeal Board*, 2015 NLTD(G) 111 and *French v. Newfoundland and Labrador (Eastern Regional Appeal Board)*, 2017 NLTD(G) 64 and Burrage, J. in *Rose v. Stephenville (Town)*, 2017 NLTD(G) 48.

[16] As a result, the role of this Court on an appeal such as this is to assess whether the decision of the Board was reasonable. The Supreme Court of Canada in the case of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, which originates from this province, explained what was meant by the reasonableness standard. I refer in particular to paragraphs 11, 14 and 15 from that decision:

> 11 It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" . . . . [Emphasis added; citations omitted; paras. 47-48.]

14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47

15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find

> it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[17] In essence, what a reviewing court must decide is whether the decision of an administrative body such as the Board falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

Was the Board's decision reasonable?

[18] As noted earlier, the Appellant did not submit a new development application to the Town after the Board decision of November 13, 2015. Instead, it relied on the initial Application which had been denied by the Town on June 11, 2015.

[19] The Board found that the Town had considered the Application appropriately. It said:

> **Did Council consider the subject application sufficiently?**
>
> The Board heard from the Town at the hearing that Council discussed the application during the pre-meeting, made a decision on the application, and then formalized that decision during the Regular Meeting of Council held on December 10, 2015. The Board also learned that Council felt it had discussed the application sufficiently considering this was the second time it was before Council. The Board is satisfied that Council considered the subject application appropriately.

[20] The Board went on to consider whether the Town had adequately applied its discretionary authority and said:

> **Did the Town adequately apply its discretionary authority?**
>
> The Board accepts that the Town has the discretionary authority to refuse a permitted use pursuant to section 11 of the Town's Development Regulations, which states:

> *In considering an application for a permit or for approval in principle to carry out development, the Town shall take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto, and shall assess the general appearance of the development of the area, the amenity of the surroundings, availability of utilities, public safety and convenience, and any other considerations which are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, the Town may, in its discretion, and as a result of its consideration of the matters set out in this Regulation, conditionally approve or refuse the application. However, the exercise of this discretionary power does not enable the Town to allow a permitted use or discretionary use which is not permitted under Schedule C or other Regulation.*

The Town refused the Appellant's application under the authority of section 10 of the Town's Development Regulations as the proposed development lacks adequate road access. Section 10 states:

> Neither a permit nor approval in principle shall be issued for development within the Planning Area when, in the opinion of the Town, it is premature by reason of the site lacking adequate road access, power, drainage, sanitary facilities, or domestic water supply, or being beyond the natural development of the area at the time of application unless the applicant contract to pay the full cost of construction of the services deemed necessary by the Town and such cost shall attach to and upon the property in respect of which it is imposed.

The Solicitor for the Appellant, as well as Mr. DiCesare, provided arguments suggesting the width of McCarthy's Road and the intersection of McCarthy's Road and Route 460 was adequate, but not ideal. Additional arguments from the Solicitor for the Appellant suggested Council acted in a procedural unfair manner. The Solicitor provided the Board with several examples of other subdivisions with road widths of 7.5 metres or less which all accessed Route 460.

However, the Authority indicated that he latest development on McCarthy's Lane of 8 lots maximized capacity of McCarthy's Lane, in the opinion of Council. The Board is satisfied that the Town came to its decision based upon recommendations from the Department of Transportation and Works as well as a professional engineer. The Authority indicated that Council based its decision on safety concerns and the Town is willing to work with the developer to alleviate the concerns expressed by Council.

Therefore, the Board confirms that Council used its discretionary authority appropriately when it refused the subject application.

[21] Finally, the Board found that the Town had provided adequate reasons for refusing the Application. It said:

> **Did the Town provide adequate reasons for refusing Mr. Young's application?**
>
> The Board reviewed the December 11, 2015 decision letter to 58663 Newfoundland and Labrador Limited c/o Wayne Young and found that the Town clearly expressed its reasons for refusing the application to develop McCarthy's Lane.

[22] I will now move on to assess the various grounds of appeal which in essence are arguments by the Appellant as to why the decision of the Board was not reasonable.

Was the decision of the Board that the Town had sufficiently considered the Appellant's Application reasonable?

[23] The Appellant argues that the Board erred in finding that the Town had considered the Application appropriately. This argument is based on the fact that at the Council meeting of December 15, 2015, there was no discussion or debate on the Application. This was because when the matter of the Application came before the Meeting there was a motion to approve the permit but no seconder and therefore the motion failed and did not get to the point of debate or discussion. Further, it is based on the fact that Council considered, discussed and made a decision on the Application at a pre-meeting of Council and then considered it to have been formalized at the regular meeting of Council when a motion to approve the Application failed because no councillor seconded the motion. The Appellant argued that this exhibited bias on the part of the Town.

[24] The Town argued that the Board's decision that it appropriately considered the Application was both reasonable and correct. It argued that the Board in its initial decision had found that Council had acted in a procedurally fair manner when it first considered and voted upon the Application in June of 2015. The Town went on to argue that given this finding there was no additional requirement for Council to

rigorously debate the matter on a vote when it came before Council for consideration a second time on December 10, 2015.

[25] The Town also argued that it could not be said that it had refused to consider the Application when it had already considered it thoroughly and appropriately when it was initially before Council.

[26] In my view, the position taken by the Town on this issue is not tenable. It ignores the legal effect of the initial decision of the Board dated November 13, 2015. That decision was that the first decision of the Town of June 11, 2015 denying the Application was vacated. This meant that the Town had to go back and start over from the beginning. The Application had to be properly brought back before Council. All relevant documentation and information available to the Town pertaining to the Application should have been made available to each councillor as it presumably would be when any similar application for a development permit came before Council. Then, after discussion and debate of Council, a vote should have been held on whether to grant or deny the development permit at a regular public meeting of Council.

[27] The Board in its initial decision of November 13, 2015 did find that Council had acted fairly when it first considered the Application. Despite this finding, it vacated Council's initial decision because the Town had not clearly provided reasons for the decision to the Appellant as required by section 23 of the Town of Kippens Development Regulations. As to what should happen as a result of the vacating of Council's initial decision, the Board in its November 13, 2015 decision said:

> . . . Therefore, the Board vacates the Town's decision to refuse the application for a residential subdivision on McCarthy's Lane made at the June 11, 2015 Regular Meeting of Council. That is to say, taking into consideration the contents of this Decision of the West Newfoundland Regional Appeal Board, the Town must reconsider the application at a Regular Meeting of Council, render a decision on the application, and then issue a new decision letter to Mr. Young. If the Town decides to refuse the application again, then the decision letter issued to Mr. Young must clearly articulate the reasons for Council's refusal in accordance with section 23 of the Town's Development Regulations and note the right and process to appeal

Council's decision in accordance with section 5 of the *Minister's Development Regulations*.

[28] There was no appeal to this Court from this decision of the Board.

[29] As a result of the first decision of Council of June 11, 2015 being vacated, the finding of the Board that Council had acted fairly when first considering the Application was of no legal consequence. While the finding could have possibly provided some guidance to Council as to how to consider the Application the second time around, it did not legally effect the manner in which Council had to deal with the matter the second time around. In particular, the fact of the Board finding that Council had acted fairly on first consideration of the Application in no way diminished the obligation to properly, fully and fairly consider it the second time around. In defending itself from attack on the manner in which it considered the Application the second time around, it is of no benefit to the Town that the Board found it acted fairly in consideration of the Application the first time around.

[30] Thus, in reviewing this issue, it is only necessary to examine what happened when the Application came before Council for the second time on December 10, 2015. At the regular meeting of Council on that date a motion was made to grant the permit; however, no councillor seconded the motion thus there was no discussion or debate at the regular meeting and the motion was considered to have failed.

[31] We also know from the Board's decision of May 26, 2016 what happened prior to the meeting on December 10, 2015. I refer back to paragraph 19 of this decision where I included an excerpt from the Board's decision dealing with Council's consideration of the Application. A pre-meeting was held prior to the regular public meeting of Council and the Application was discussed at the pre-meeting and a decision made. It is obvious from what happened once the matter came before Council at the regular public meeting that the decision made at the pre-meeting was to deny the Application.

[32] I see no problem with members of Council discussing any issue it has to decide at a pre-meeting prior to a regular public meeting of Council where the actual decision is to be made. However, in my view, it is improper to make a decision on a matter at such a pre-meeting as occurred here. The reason this is improper is that any debate and discussion on the particular issue is shielded from public view and there is no proper record of what occurred. I note as well that section 213 of the *Municipalities Act* provides as follows:

> 213. (1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.
>
> (2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.
>
> (3) A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.

[33] The presumption is that all meetings of Council are open to the public. While the *Act* does allow for privileged meetings where all members of the public must leave, any decision made at a privileged meeting is not valid until that decision has been ratified by a vote of the councillors at a public meeting.

[34] There is nothing in the record here to indicate that the pre-meeting that was held was a privileged meeting. I would not think that an issue such as an application for a development permit would warrant a privileged meeting. Further, even if it was a privileged meeting, what occurred at the regular meeting of Council following the pre-meeting was not in compliance with section 213(3) of the *Municipalities Act*. That section requires a decision made at a privileged meeting to be ratified at a public meeting. Thus, if a decision was made at a privileged meeting to deny a permit then the appropriate course of action would be for a motion to be brought forward to deny the permit and then for the motion to be seconded, debated and discussed as appropriate and voted upon in the normal course. Assuming that on a vote the motion was passed then this would constitute ratification of the decision made at the privileged meeting.

[35] What occurred at the regular meeting here was rather unorthodox and is a practice which in my view is unwise to follow. While a decision had been made at the pre-meeting to deny the Application, the motion that was made at the regular meeting was to approve it. No councillor seconded the motion and thereby it did not make it to the point of being debated, discussed and voted upon. Council thereupon considered that the decision made was to deny the permit. While the councillor who made the motion to approve the Application was entitled to make it, I would have thought that once the motion failed for lack of a seconder some other councillor would have made a motion to deny the Application. Presumably, there would have been a seconder for such a motion and it would then have been subject to debate, discussion and a vote. There would have been no doubt about the legal effect of a motion to deny the Application.

[36] I see the approach of Council in this case to be problematic. The approach is to treat the failure of a motion to approve an application as a denial of an application. While on its face such an approach seems appropriate, upon further analysis a flaw becomes apparent. Consider a situation where the motion that comes forward in a given situation is to deny an application. If such a motion fails because of the lack of a seconder, what is the legal effect of that failure? If the failure of a motion to approve a permit equates to a denial of that permit, shouldn't the failure of a motion to deny equate to an approval of the permit?

[37] The foregoing logic reveals why the approach of the Town in this case was flawed. The approach is cowardly in that it allows Council to "make a decision" without really making one. Councillors are elected to make decisions and to do so in an open, public and transparent manner. A person, such as the Appellant, is in my view lawfully entitled to have a clear decision made in the foregoing manner on whether their application for a development permit is approved or denied. That did not occur in this case.

[38] In summary, it is my determination that it was improper for Council to make a decision on the Appellant's Application at a pre-meeting. Further, even if that were not fatal, it is also my determination that the manner in which the Application was dealt with at the regular Council meeting was also improper.

[39] Simply because I have made the foregoing determination does not end my analysis. I must go on to consider whether the Board's decision that the Town had appropriately considered the Application was reasonable or within the range of possible, acceptable outcomes.

[40] In my view, the Board's decision does not fall within the range of possible, acceptable outcomes. The Board in its initial decision of November 13, 2015 vacated the first decision of Council from June 11, 2015. It went on to direct that the Town reconsider the Application at a regular meeting of Council and render a decision.

[41] For the reasons outlined earlier, that is not what happened. The Board's decision the second time around seems to be in part based on an assessment of the overall manner in which Council dealt with the Application on the two occasions that the Application came before Council for decision. Such an approach by the Board is inconsistent with its earlier decision to vacate the initial decision of Council and order Council to reconsider. The effect of the vacating of the decision is that what happened initially was of no legal importance and was not to be considered when the matter came before Council again. It was therefore improper for the Board when reviewing the manner in which Council dealt with the Application the second time around to take into account the fact that the Application had been considered previously or anything about how it had been considered previously.

[42] Further, the Board's decision that Council had considered the Application appropriately implicitly accepts that making a decision on the Application at the pre-meeting was appropriate and that the manner in which the Application was dealt with at the regular meeting was also appropriate. Such a finding by the Board is in my determination not within the range of possible, acceptable outcomes. Both the making of the decision at the pre-meeting and the manner in which the matter was handled at the regular meeting were not in accord with what is required by the *Municipalities Act* or basic principles of procedural fairness. It was also not in accord with the initial decision of the Board from November 13, 2015.

[43] As a result, it is my determination that the decision of the Board of May 26, 2016 is unreasonable and must be vacated. As a result of my determination on this

issue, it is not necessary for me to go on to consider the other grounds of appeal raised by the Appellant.

SUMMARY AND CONCLUSION

[44] The finding by the Board in its decision of May 26, 2016 that Council had appropriately considered the Application of the Appellant on December 10, 2015 is found to be unreasonable. As a result, pursuant to section 46(4) of the *Act*, the decision of the Board of May 26, 2016 is vacated and the matter is referred back to the Board to be dealt with by the Board in accordance with the reasons set forth in this decision.

COSTS

[45] The Appellant shall be entitled to its costs as against the Second Respondent on the basis of Column 3 of the Scale of Costs.

GEORGE L. MURPHY
Justice