



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *St. John's (City) v. 10718 Nfld. Inc.*,
2019 NLCA 41

Date: July 4, 2019

Docket Number: 201801H0061 & 201801H0073

BETWEEN:

THE CITY OF ST. JOHN'S

APPELLANT/RESPONDENT
BY CROSS-APPEAL

AND:

10718 NFLD. INC.

RESPONDENT/APPELLANT
BY CROSS-APPEAL

Coram: Welsh, White and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201701G7490
(2018 NLSC 82)

Appeal Heard: January 18, 2019

Judgment Rendered: July 4, 2019

Reasons for Judgment by: Welsh J.A.

Concurred in by: White and O'Brien JJ.A.

Counsel for the Appellant: Ian Kelly Q.C. and Danny Glover

Counsel for the Respondent: Jerome P. Kennedy Q.C.

Welsh J.A.:

[1] The Company, 10718 Nfld. Inc., has undertaken a significant development within the City of St. John's, and must obtain authorization for the project by means of development agreements. The Company has objected to the City's inclusion of an arbitration clause in an agreement. The applications judge's decision that the City does not have authority to include that term in the agreement is the subject of this appeal.

[2] By way of cross-appeal, the Company raises issues regarding the delegation of decision-making authority to City staff, the application of the City's regulations to signing a development agreement, and costs.

BACKGROUND

[3] Several development agreements have been required for the development undertaken by the Company. The applications judge summarized the position of the Company (2018 NLSC 82):

[9] The Developer asserts that the proposed arbitration clause precludes its ability to access courts to resolve conflicts between it and the City arising from the development agreements. Under the clause, once notice is given, the arbitration process is set in motion and is mandatory. There is no dispute that but for the proposed clause, should a disagreement arise between the parties, the Developer would have recourse to the Court to commence legal action.

...

[11] In the written brief, the nature of the relief sought evolved. The Developer no longer asserted that the City has no authority to include arbitration clauses in its development agreements, but instead sought an Order in the nature of *mandamus* to compel the City to include wording that confirms the Developer's right to access the courts.

[12] At the same time, the Developer also sought a declaration from the Court that, in these circumstances, the Developer is not required to sign the proposed development agreements, and a further Order of *mandamus* "compelling the city to address the issuance of development agreements". The Developer also seeks costs.

[4] The applications judge then outlined the position of the City:

[14] The City advises it is seeking only to ensure that the development proceeds effectively and efficiently. The City submits it has a duty to ensure the welfare of its citizens, by ensuring not only is any development in compliance with planning laws, but that it occurs in a cost-effective manner without unduly burdening its citizens. The City maintains that the proposed arbitration clause has been in use by the City for “approximately the past two decades” in several development agreements. The City submits to accede to the Developer’s request will mean there would be no requirement that the Developer seek arbitration, and would render the arbitration clause meaningless.

[5] While neither the Company nor the City framed the issue in terms of the City’s authority to include the arbitration clause in a development agreement, the applications judge decided that, in fact, that was the first issue to be determined:

[17] Notwithstanding the Developer advanced multiple complaints as to the City’s conduct and exercise of authority, the only issue to be decided is whether or not the City is acting within its jurisdiction in insisting on mandatory arbitration in the outstanding development agreements.

[6] The judge concluded that the City, in fact, did not have authority under the *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8 and the City’s *Development Regulations* to include the arbitration provision in the development agreement. In this Court, the City expressed a concern that the question of the City’s authority to include the arbitration clause in the development agreement was raised by the judge, not the parties, and that counsel was not satisfied that sufficient opportunity was given to make submissions. On appeal, since the issue is one of interpretation of the *Act* and *Regulations*, and the record was sufficient for that purpose, the parties were given full opportunity to make comprehensive submissions.

ISSUES

[7] The issue in the appeal is whether the applications judge erred by concluding that the City does not have authority unilaterally to include the arbitration clause in a development agreement.

[8] The issues in the cross-appeal are: (1) whether the City (a) improperly delegated its decision-making authority over development agreements to City staff, and (b) failed to comply with the regulations regarding signing

development agreements; and (2) whether the judge erred by failing to award costs to the Company.

ANALYSIS

The Act, Regulations and Agreement

[9] Section 35 of the *Urban and Rural Planning Act, 2000* provides for the City to make regulations regarding municipal development:

(1) A council ... shall, to ensure that land is controlled and used only in accordance with the appropriate plan or scheme, make development regulations

...

(d) respecting the development of and requirements for subdivisions;

(e) respecting development permits including

...

(vi) conditions applicable to a permit or type of permit,

...

(viii) the discretion and variance powers available to the council ... with respect to the issuance of a permit;

...

(l) respecting appeals of decisions to boards; and

(m) respecting the enforcement of permit requirements.

(2) Regulations made under subsection (1) shall be administered and enforced by the appropriate council ... and shall conform to the requirements of this Act.

A council is defined in section 2(d) of the *Act* to include the City of St. John's.

[10] The City's *Development Regulations*, implemented pursuant to section 35 of the *Act*, address "Development Control Procedures" in part five. Clause 5.1.2 sets out the requirement for a permit for development:

No person shall carry out any Development controlled by these Regulations unless a permit, Development Permit, or Development Agreement under these Regulations has been issued

Clause 5.4.1, which specifies the circumstances when a development agreement is required, applies to the type of development at issue here.

[11] Regarding the terms of a development agreement, clause 5.4.2(1) provides:

A Development Agreement shall set out the terms of Council's approval, and shall be signed by the applicant and the City Clerk within six (6) months of the approval granted by Council.

Clause 5.4.3 provides:

Council, after considering an application for approval made under these Regulations and being satisfied that the proposed Development, subject to the approval of detailed plans, is in compliance with these Regulations, may grant an Approval-in-Principle for any application requiring a Development Agreement.

[12] The arbitration clause which was included as a term in the development agreement in this case provides:

The Developer agrees to the following arbitration process for conditions contained in the Agreement:

(a) Where a difference arises between the parties bound by this Agreement, and where the difference arises out of the interpretation, application, administration or alleged violation of the Agreement, and including any questions as to whether a matter is arbitrable, one of the parties may notify the other party in writing of its desire to submit to arbitration the difference or allegation for arbitration and the notice shall contain the name of the person appointed to be an arbitrator by the party giving the Notice;

...

(e) The decision of the arbitration board shall be given within fourteen (14) days following the appointment of the Chairperson. It is understood, however, that the arbitration board shall not be authorized to make any decision inconsistent with the stipulation of this Agreement not to delete, alter, or amend any part thereof;

(f) Notwithstanding section (e), the decision of the arbitration board shall be binding on the parties;

...

[13] Section 36(1) of the *Act* requires the minister to make development regulations addressing particular issues which must be included in municipal development regulations:

The minister shall, as follows, make development regulations that shall be included in the development regulations of councils and regional authorities with respect to

- (a) appeals made under the Act;
- (b) allowable variances in development standards ...;
- (c) the non-conforming development and use of land; and
- (d) the enforcement of violations under the Act.

[14] Regarding appeals, the *Act* and *Regulations* address the appointment and mandate of an appeal board. Section 40(2) of the *Act* provides for an appeal board:

Notwithstanding subsection (1), the City of Corner Brook, the City of Mount Pearl and the City of St. John's may, for the planning areas under their jurisdiction and in accordance with the development regulations, appoint a local appeal board and this Part, with the necessary changes shall apply to those boards.

[15] Section 42(1) of the *Act* provides for an appeal to the board:

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.

[16] Section 46(1) of the *Act* provides for appeal to the Supreme Court, General Division from a decision of the board on a question of law or jurisdiction:

(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.

(3) A board may be represented by counsel and heard on an appeal under this section.

(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.

[17] An appeal board, as authorized by the *Act*, has been appointed pursuant to the City's *Development Regulations*. Clause 4.3.2 provides for an appeal to the board regarding the same matters as are set out in section 42(1) of the *Act*:

(1) The Appeal Board shall hear appeals from any decisions of Council, ..., made under these Regulations 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;

... and

the Appeal Board shall either confirm or reverse the decision of Council The decision of Council to adopt, approve or proceed with a municipal plan, development scheme, development regulations and amendments and revisions of them is final and not subject to an appeal.

[18] Subject to an appeal pursuant to section 46 of the *Act*, a decision of the board is binding on all parties (clauses 4.3.3 and 4.3.6 of the *Regulations*). Finally, under clause 4.3.4:

Where an appeal is made, the Development concerned shall not proceed pending a decision of the appeal and the subsequent issue of all required permits.

Interpretation of the *Act* and *Development Regulations*

[19] I begin with the statement by the applications judge regarding access to the courts for dispute resolution:

[9] ... There is no dispute that but for the proposed clause, should a disagreement arise between the parties, the Developer would have recourse to the Court to commence legal action.

[20] While that issue is not before this Court on the appeal, I would note that, where arbitration is not engaged, the parties' recourse to the courts would be limited by the operation of section 42 of the *Act* and the *Regulations* insofar as disputes and other issues arising from a development agreement would fall to be decided by the appeal board, subject to an appeal to the Supreme Court, General Division on a question of law or jurisdiction. In *Sun Life Assurance Company of Canada v. St. John's (City)*, 2006 NLCA 62, 261 Nfld. & P.E.I.R. 55, at paragraphs 14, 26 and 27, Mercer J.A., for the Court, discussed the relevance of an appeal process provided by statute and the possible availability of the prerogative remedies of *certiorari* and *mandamus* as an alternative remedy. (See also *Service NL v. Penney*, 2019 NLCA 27.)

[21] Turning to consideration of the arbitration clause, the *Act* and *Development Regulations* provide authority in general terms for the City to enter into development agreements. The statutory granting of powers to a municipality using broad language, rather than a detailed itemization, is discussed in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. Bastarache J., for the Court, referring to a "notable shift in the nature of municipalities", wrote:

[6] The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. ... The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo* [2000 SCC 13, [2000] 1 S.C.R. 342], at para 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters. ... This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.

[22] I would apply the same rationale and conclusion to regulations made by a municipality pursuant to a statutory grant of authority. (See, for example, *Sun Life Assurance Company of Canada v. St. John's (City)*, *supra*.) However, defining the nature and breadth of the authority exercised pursuant to either a statute or regulations involves consideration of the purpose of the provisions

being interpreted. In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, Sopinka J., for the majority, wrote, at pages 275 to 276:

...

The “purposes of the corporation” or “municipal purposes” are determined by reference to not only those that are expressly stated but those that are compatible with the purpose and objects of the enabling statute.

...

In most cases, as here, the problem arises with respect to the exercise of a power that is not expressly conferred but is sought to be implied on the basis of a general grant of power. It is in these cases that the purposes of the enabling statute assume great importance. ...

[23] Section 5.4.2(1) of the *Development Regulations* is consistent with the approach discussed in *United Taxi Drivers’*, specifying, without particulars, that a development agreement “shall set out the terms of Council’s approval”. Based on this language and the broad authority granted under section 35 of the *Act*, the nature and extent of the authority to determine the terms of a development agreement are at the heart of this appeal.

[24] The Company submits that a development agreement is a contract and that the City has limited authority to refuse an application by a developer. The Company concedes that issues such as compliance with zoning, access to properties, and water and sewer requirements fall within the scope of the City’s authority to refuse a development application. However, the Company submits that the City does not have authority to impose an arbitration clause and to refuse to enter into a development agreement if the Company objects to inclusion of the clause.

[25] A premise on which the Company relies is that the arbitration clause, which may be triggered by notification by one party, may operate to interfere with the other party’s access to justice through the courts. (I note, in passing, as set out above, access to the courts may be limited by the operation of the jurisdiction of the appeal board.)

[26] The City submits that it has an interest in the expeditious resolution of disputes in respect of development projects in order to avoid development delays, expense and inconvenience which may have an impact on the City and its residents as well as on the developer. Accordingly, it is the City’s view that,

where one of the parties considers arbitration to be an appropriate mechanism to address a dispute, that option should be available. Therefore, the City submits it has authority to require inclusion of the arbitration clause in a development agreement.

[27] The analysis of the City's authority begins with a consideration of the special nature of an agreement between a company and a municipality. While the development agreement is a form of contract, the regulatory and public policy aspect of the City's interest in development within the municipality provides a particular overlay. I agree with the view expressed by Slatter J.A., for the majority, in *Focaccia Holdings Ltd. v. Summer Village of Parkland Beach*, 2014 ABCA 132:

[30] The "development agreement" mandated by the *Act* is clearly a contract, and normal contractual remedies are available. However, it is also a specialized type of contract which has a public law or regulatory aspect. Development agreements do not just represent a bargain struck between the developer and the municipality, but are also one of the regulatory tools by which the municipality controls subdivision and development. ...

[28] In considering the nature and type of terms that may be included in a development agreement at the instance of the City, without the agreement of the applicant, the decision in *Sun Life Assurance Company of Canada v. St. John's (City)*, *supra*, is of assistance. In that case, in interpreting the *Act* and *Development Regulations*, the Court considered their purpose. Mercer J.A., for the Court, explained:

[55] The purpose of the [*Urban and Rural Planning Act, 2000*], considered in the light of accepted interpretative principles, is to provide the statutory basis for development control throughout the Province. In respect of urban planning it establishes a structural framework for the development, adoption and amendment of municipal plans, and regulations to implement the same. Section 13 of the [*Act*] states the requirements for a municipal plan in terms which, on their face, are comprehensive. Section 35, respecting development regulations, likewise details a myriad of matters which must be addressed "to ensure that land is controlled and used only in accordance" with the municipal plan. One of those matters is "the discretion and variance powers available to the council ... with respect to the issuance of a permit". Section 12 of the [*Act*] clearly states that a municipal plan and development regulations adopted pursuant to the [*Act*] are binding upon the municipality and its council.

...

[57] Turning to the specifics of this case the Municipal Plan, and specifically the *Development Regulations*, do not confer upon the City or Council wide discretionary powers to reject development applications that conform to that plan and the *Development Regulations*. The *Development Regulations* confer a limited discretion respecting property uses within zones. ...

[58] It is clear from the foregoing that the [Act], Municipal Plan and the *Development Regulations*, on their face, comprise a detailed and comprehensive planning regime for development within the City. [The Appellant] contends that Council retains discretion under the *City of St. John's Act* to reject development proposals that comply with the Municipal Plan and *Development Regulations*. In my view that contention is contrary to the wording and intent of s. 12 of the [Act] which states that the Municipal Plan and *Development Regulations* bind the City and Council. An example may serve to illustrate. The *Development Regulations* list permitted uses in each of the use zones set forth in s. 10. The subsistence of a discretion in Council to refuse an application that was for a permitted use in the affected zone (and was otherwise compliant) would effectively negate the concept of permitted uses. Acceptance of [the Appellant's] contention would undermine the general intent of the [Act] which is to provide the structure for the development and implementation of detailed planning controls. ...

[29] The Court concluded that provisions of the *City of St. John's Act*, 1990 RSNL, c. C-17, would have no application insofar as they authorized the City council to exercise a discretion to reject an application that was compliant with the requirements of the *Urban and Rural Planning Act, 2000* and the City's *Development Regulations*. For example, section 354(2) of the *City of St. John's Act*, which the Court found to be inapplicable due to a conflict with provisions of the *Urban and Rural Planning Act, 2000* and *Development Regulations*, provided:

The council may, in its sole discretion, refuse to issue a permit for a building or an extension or an alteration or repair of a building the size, design or appearance of which, or the location of which is, in the opinion of the council, unsuitable for the locality in which it is proposed to be erected or constructed or inferior in general character to other buildings in that locality.

[30] The premise underlying the *Sun Life* decision is that it is beyond the authority of the City to include a provision in a development agreement that imposes a term having the effect of denying an applicant a development agreement where the application is in compliance with the requirements of the *Urban and Rural Planning Act, 2000* and the *Development Regulations*. The broad authority of the City to determine the terms to be included in a development agreement must be construed in light of the purpose underlying the

requirement for a development permit, which is to ensure that land is controlled and used only in accordance with the municipal plan and regulations.

[31] In the result, the City's authority to permit or deny development is limited to those terms and conditions that relate to the purpose and general intent of the *Act* and *Regulations* which is to provide the structure for the development and implementation of municipal planning controls and uses in accordance with the municipal plan and regulations. The arbitration clause is not sufficiently connected to that purpose so as to be included within the broad authority granted by the *Act* and *Development Regulations*.

[32] Finally, I would note that, while the *Act* and *Development Regulations* address the question of appeals to an appeal board, no mention is made of arbitration. It could be expected that, if it was intended that the City would have authority to refuse to issue a development permit, that was otherwise compliant with the *Act* and *Regulations*, on the basis that the applicant would not agree to inclusion of an arbitration clause, that authority would have been specified.

[33] In the result, I would dismiss the appeal.

Cross-appeal

[34] The applications judge did not decide the issues of whether the City (a) improperly delegated its decision-making authority over development agreements to City staff, and (b) failed to comply with the regulations regarding signing development agreements. Having found that the City did not have authority to include the arbitration clause in the development agreement, the judge concluded that, nonetheless, the City had not acted in bad faith:

[71] ... It was clear that the City's deponents in their affidavits strongly contested many of the factual assertions in support of bad faith or improper conduct alleged by the Developer.

[72] Neither party sought to cross-examine the other's deponents on their affidavits.

[73] On the material that was before the Court, the Developer's contention cannot be sustained. To the contrary, on a review of all the materials placed before the Court, it is evident that the City has gone to great lengths to accommodate the Developer. In particular, the City agreed to implementing the development agreement related to CP-11 and permitting the Developer to build multiple residential units in that area, notwithstanding that the necessary infrastructure had yet to be completed.

[74] The City's desire to use arbitration as a means to resolve disputes arising in a development agreement is not in bad faith but is reasonable. As discussed earlier, there are many reasons why arbitration would be agreeable to both any municipality and Developer. As the City advised, it has used arbitration in development agreements for over 20 years. As the cases show, arbitration is ubiquitous in all areas of contract, including development agreements.

[75] Likewise, the application for *mandamus* to compel the City to address the issuance of development agreements is without merit and is dismissed. There was no basis in the material provided to establish that there was an "issue" to be addressed (beyond the jurisdictional issue of whether or not the City possessed the necessary authority to require arbitration as part of a development agreement). It is unclear what the Developer was seeking with this request.

[35] On the cross-appeal, the Company is asking this Court to make a determination on broadly stated questions that were not decided by the applications judge, and which do not have either a proper contextual foundation or an adequate record. In the result, I would decline to address these issues.

[36] The Company also submits by means of the cross-appeal that the applications judge erred by failing to award costs to the Company. The judge gave reasons for her decision on costs including the mixed success of the parties. There is no basis on which to interfere with the exercise of her discretion in ordering the parties to bear their own costs.

Costs of the Appeal and Cross-appeal

[37] The Company was successful on the main issue before both this Court and the Court appealed from. However, it was not awarded its costs in the court appealed from. In the circumstances, I would exercise my discretion to grant the Company its costs of the appeal, including the cross-appeal which was dealt with as a component of the entire matter, under column 3 of the scale of costs in the *Court of Appeal Rules*.

SUMMARY AND DISPOSITION

[38] In summary, the applications judge did not err in concluding that the City does not have authority to include the arbitration clause in a development agreement in circumstances where the applicant objects to the clause and is otherwise in compliance with the requirements of the *Act* and *Development Regulations*.

[39] Accordingly, I would dismiss the appeal, with costs of the appeal and cross-appeal to the Company under column 3 of the scale of costs in the *Court of Appeal Rules*.

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

F. P. O'Brien J.A.