

2017 01G 7490

IN THE SUPREME COURT OF NEWFOUNDLAND and LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN:

10718 NFLD. INC.

APPLICANT

AND:

THE CITY OF ST. JOHN'S

RESPONDENT

AFFIDAVIT OF JASON SINYARD

| SUMMARY OF CURRENT DOCUMENT | |
|--|---|
| Court File No. | 2017 01G 7490 |
| Date of filing of document: | December 6, 2017 |
| Name of filing party or person: | The City of St. John's |
| Application to which document being filed relates: | Originating Application for Declarations and Mandamus |
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I, Jason Sinyard, of the City of St. John's, in the Province of Newfoundland and Labrador, make oath and say as follows:

1. I am the Deputy City Manager - Planning, Engineering and Regulatory Services of the City of St. John's and have knowledge of the matters hereinafter deposed.

The Regulatory Process

2. Land use planning and subdivision and development control in the City of St. John's is primarily administered by the City's Department of Planning, Engineering and Regulatory Services.
3. In the mid-1980's, land use planning and subdivision and development control was brought under the provisions of the *Urban and Rural Planning Act*, now the *Urban and Rural Planning Act, 2000* ("URPA"). The relevant provisions governing subdivision and development control are now found in URPA, the St. John's Municipal Plan, the St. John's Development Regulations, and the St. John's Subdivision Development Policy.

4. Large scale subdivisions and developments of property often require a change in zoning to permit the development to proceed. This may require a change to both the Municipal Plan and the zoning designation in the Development Regulations.
5. Once the property is zoned to permit the development, the Developer submits a subdivision and/or development application. The application, including engineered drawings and computer models, is reviewed by City staff and comments are provided to the Developer. Once the engineered plans and models are satisfactory to the City staff, the City gives it approval to proceed with the development by letter approving the engineered plans, subject to any applicable conditions.
6. In addition, a separate building permit is required for each building in the development.
7. Two general principles govern subdivision and development in the City:
 - (a) First, any infrastructure required to support the development must be built at the cost and expense of the developer. This ensures that current taxpayers and property owners do not bear the cost of new development.
 - (b) Second, no building permits are issued until the required infrastructure has been built. This again ensures that the cost of development is borne by the developer, not by other taxpayers in the City. Further, it ensures that persons and entities buying properties from the developer will be able to occupy and use those properties with all necessary infrastructure in place.

8. The infrastructure for most developments consists primarily of internal local infrastructure such as roads, water and sewer systems and storm water systems within the development itself. This is common where the development adjoins an existing developed area where the required major trunk municipal services are already in place. Sometimes developers must also construct trunk municipal services to support their development, such as roadways, interchanges, trunk water and sewer systems, and other major infrastructure. This trunk infrastructure is necessary to support the internal local infrastructure within the development.
9. The number of development applications required for any project varies with the size of the project and the developer's approach to development. In a large development, a developer will often choose to proceed in a staged manner with respect to design and construction of infrastructure and the design and construction of buildings. This enables the developer to develop, build and sell part of a larger project, without first having to do all of the engineering design and infrastructure construction required for the entire project. The City seeks to work with developers in such staged developments while ensuring that all necessary infrastructure for each stage is constructed before building construction and occupancy occurs.
10. The number of development applications reflects the developer's approach to the development. A developer may choose to complete the engineering design for all the required infrastructure and submit one development application. Alternatively, a developer may choose to break up the engineering design and construction into various parts or stages and submit multiple development

applications for various pieces of the infrastructure. The City does not dictate the developer's approach to development, including whether the developer stages its development, or the manner in which the developer stages its development and submits development applications to the City.

11. URPA and the Development Regulations contemplate the use of development agreements for approval of subdivision and development of property where the development application involves:
 - (a) Discretionary Use;
 - (b) Conservation Plan;
 - (c) Mitigation Plan;
 - (d) Nonconforming Uses;
 - (e) Planned Development (Section 5.10); or
 - (f) Subdivision of ten (10) or more Lots or any Subdivision requiring the extension or construction of municipal services or public or private roads.
12. A development agreement is not a negotiated contract between parties. Rather, it sets out the terms of the City's approval of a development. The developer must execute the development agreement and develop the property in accordance with the development agreement, the Development Regulations, the Subdivision Development Policy, the City's Subdivision Design Manual, the City's Specification Book, and the approved plans.
13. A development agreement sets out the obligations of the developer and the standards required by the City. This is important to ensure the timely and effective control of development within the City. Development agreements also allow for specific conditions to be set for complex or unique developments or subdivisions.

14. Development agreements are an important regulatory mechanism which work in combination with the Development Regulations, the City's Subdivision Development Policy, the City's Subdivision Design Manual, the City's Specification Book, engineered plans approvals, building permits, and occupancy permits to enable the municipality to ensure proper land use planning and control of subdivision and development.
15. A development agreement is usually obtained and registered in the Registry of Deeds in relation to each development application where a development agreement is required by the Development Regulations. The number of development agreements varies depending upon the number of development applications made by the developer. There is no "correct" number of development agreements for a project nor is there any limit regarding land parcel size.
16. Some provisions of a development agreement may vary from one agreement to another to reflect the specifics of the work and/or the context of the development application within the overall development.
17. Development agreements and their application to the Galway Project are further discussed later in this Affidavit.

The Galway Project and Site Rezoning

18. The Galway Project is the largest subdivision and development project ever undertaken in the City of St. John's. It comprises approximately 970 hectares (2,400 acres) of proposed development expected to take place over many years. The Galway Project will consist of residential neighbourhoods, light

industrial/mixed use office space and retail areas. Ultimately, the Galway Project could contain as many as 5,000 residential units. A diagram showing the scope of the Galway Project area from the Galway website is attached as Exhibit "1".

19. The Galway Project has had different partners, project managers, engineers and other consultants at different times and/or for different phases of the work. Development applications have been submitted to the City by different companies or entities. The term "Developer" is used herein to refer to the Applicant and/or those companies or entities associated with the Applicant from time to time which have dealt with the City.
20. The Galway site is located on the southwestern outskirts of the City of St. John's. The elevation of the majority of the site, and specifically the present development areas, is higher than 190 meters above mean sea level. Above 190 meters, development cannot be serviced by the City's existing water supply system. This poses a major impediment to development. Consequently, property above 190 meters was not initially considered appropriate for development. The Galway site, like other property above 190 meters (eg. Kenmount Hill), was zoned Rural (R).
21. The Developer applied for the rezoning of the Galway site to permit development. This required a change to both the Municipal Plan and the Development Regulations governing the zone designation of the property. The procedures under URPA and the Development Regulations to change the Municipal Plan and zoning took place between 2011 and 2013.

22. The Galway site was initially rezoned to the new CDA Southlands Zone in June, 2012 to accommodate future development above the 190 meter contour.
23. In 2013, four (4) large areas of land were rezoned from the CDA Southlands Zone to four (4) zones as follows:
 - 35.34 hectares CDA Southlands to Industrial General (IG) zone;
 - 39.29 hectares CDA Southlands to Commercial Regional (CR) zone;
 - 12.54 hectares CDA Southlands to Residential Low Density (R1) zone; and
 - 8.43 hectares CDA Southlands to Apartment Medium Density (A2) Zone.
24. In 2014, two (2) large areas of land were rezoned from the CDA Southlands Zone to two (2) zones as follows:
 - 22.54 hectares CDA Southlands to Commercial Regional (CR) zone; and
 - 23.52 hectares CDA Southlands to the Industrial General (IG) zone.
25. Further in 2014, 46.32 hectares of land zoned CDA Southlands Zone and R1 was rezoned to a newly created Planned Mixed Development-1 (PMD-1) zone.
26. In 2016, 14.9 hectares of land previously zoned R1, A2 and CR was rezoned to A3 and CR zones.
27. In 2017, 33.79 hectares was rezoned from CDA Southlands Zone to Commercial Retail (CR) zone.
28. The areas of the rezonings are shown on the map attached as Exhibit "2".

Galway Infrastructure Development Applications

29. Because of the size of the Galway site, its elevation, and its distance from existing trunk services, the Galway development has required and will require significant construction of major trunk infrastructure as well as internal local infrastructure. The services include, without limitation, water and sanitary sewer trunk/transmission and local pipes/conduits, stormwater trunk/transmission and local pipes/conduits, stormwater management devices such as detention ponds and outlet control structures, water reservoirs, a water supply booster pumping station, roads, interchanges and roundabouts, bridges, and snow storage site(s). This makes the Galway Project different than usual developments in the City.
30. Most of the 970 hectares (2,400 acres) of the Galway site is still only at the conceptual stage with the exception of the northeast area where engineering and design plans for infrastructure and some subdivision layouts have been submitted.
31. The Developer chose to submit multiple development applications for the Galway Project. The following table sets forth the rezoning applications and development applications submitted to the City to date in relation to the Galway Project. The table does not include applications for individual building permits for residential houses or other building structures.

| Application | Description | Submission Date | Approval Date (Subject To Conditions) |
|--------------------|---|------------------------|--|
| CP-11 | Rezoning 30.89 acres to Residential (R1) | January 14, 2013 | Gazette June 21, 2013 |
| CP-11 | Rezoning 20.84 acres to Apartment Medium Density (A2) | January 14, 2013 | Gazette June 21, 2013 |

| | | | |
|----------------|--|--------------------|--|
| CP-07 | Rezoning 97.09 acres to Commercial Regional (CR) | January 14, 2013 | Gazette June 21, 2013 |
| CP-03 | Rezoning 87.32 acres to Industrial General (IG) | January 14, 2013 | Gazette June 21, 2013 |
| CP-01 | Commercial Area Clearing and Grubbing | July 9, 2013 | October 18, 2013 |
| CP-03 | Industrial Park, Water Transmission Main, Sanitary Trunk Sewer – Phase 1 | October 25, 2013 | March 29, 2016 |
| CP-02 | Interchange at TCH /Access to Industrial Park. | April 4, 2014 | March 29, 2016 |
| N/A | Galway Master Servicing Design Brief | May 28, 2014 | |
| CP07 | Rezoning from CDA Southlands zone to Commercial Regional (CR) zone (Govern file REZ1400013) | June 13, 2014 | Gazette February 6, 2015 |
| CP-09 | Mass Excavation, Galway Commercial Area. | July 15, 2014 | September 4, 2014 |
| CP-03 (Future) | Rezoning from CDA Southlands zone to Industrial General (IG) zone (Govern file REZ140018) | August 1, 2014 | Gazette September 18, 2015 |
| CP11 | Rezoning from CDA Southlands zone and R1 zone to Planned Mixed Development (PMD-1) and Open Space zones REZ1400022 | August 29, 2014 | Gazette October 16, 2015 |
| CP-04 | Water Supply Booster Pump Station and site work | September 30, 2014 | April 24, 2015 |
| CP-05 & CP-06 | Dual Application for Water Transmission Main with servicing for Beaumont Hamel Way and Water Supply Reservoir | September 30, 2014 | CP05 (December 2, 2015), CP06 (March 21, 2017) |
| CP-07 | Application for Commercial Area | November 8, 2014 | See 7A, 7B, 7C below |
| CP-08 Stage 2 | Sanitary Trunk Sewer – Phase 2 | November 14, 2014 | August 21, 2015 |
| CP-07B | Commercial Regional Detention Pond | April 13, 2015 | See 7C below |
| CP-08 Stage 3 | Sanitary Trunk Sewer – Phase 3 | May 13, 2015 | August 21, 2015 |
| CP-07A | Section of CP-07 between Pitts Memorial and Beaumont Hamel Way with stub roads into Danny Drive and Southlands Boulevard | August 20, 2015 | September 22, 2016 |
| CP-07C | Section of CP-07 containing Danny Drive and Commercial retail area. | August 20, 2015 | See 7B below |
| CP-14B | Stormwater Detention Pond for CP05A, CP05B, and CP07A | November 6, 2015 | October 13, 2016 |
| CP-14A | Southlands Boulevard Servicing – CP11 to CP07A | January 19, 2016 | June 12, 2017 |
| CP-07C | CP07B renamed CP07C, Commercial Regional Detention Pond | January 27, 2016 | December 9, 2016 |

| | | | |
|-----------------|--|--------------------|-----------------------|
| CP-07B | CP07C renamed CP07B, Section containing Danny Drive and Commercial retail area. | August 20, 2015 | October 24, 2016 |
| CP-11 Stage 1 | 65 Lot Residential Subdivision | February 11, 2016 | December 15, 2016 |
| CP-03A | Temporary Road connection between CP03 and CP05A | April 14, 2016 | April 22, 2016 |
| CP-11 | Rezoning from previously rezoned parcels of land (R1, A2, and CR) to Apartment High Density (A3) and Commercial Regional (CR) REZ1600019 | November 26, 2016 | Gazette May 12, 2017 |
| CP-11 (CR20/21) | 10 Townhouses Claddagh Road | March 2, 2017 | No Approval Yet |
| CP-11 Stage 2A | 21 Lot Residential Subdivision – Terry Lane | March 3, 2017 | No Approval Yet |
| CP-07C | Rezoning from Southlands CDA to Commercial Regional (CR) REZ1700008 | March 29, 2017 | Gazette June 30, 2017 |
| CP14C | Southlands Boulevard Extension – CP14A to Tree Top Road (Southlands) | May 9, 2017 | No Approval Yet |
| N/A | Application to subdivide property in CP07 to accommodate Costco SUB1700024 | July 5, 2017 | July 24, 2017 |
| N/A | Application for Costco Site Servicing | August 14, 2017 | No Approval Yet |
| CP21 | Galway Roundabout “C” – Ruth Avenue | August 25, 2017 | October 20, 2017 |
| N/A | Application for Costco private roads and servicing | September 13, 2017 | No Approval Yet |
| N/A | Application for Costco Warehouse | September 25, 2017 | No Approval Yet |

32. The location of the work and the areas relating to the various development applications are shown on the plan attached as Exhibit “3”.
33. The City reviewed the various development applications and provided review comments to the Developer. Review comments relate to additional information required from the Developer or changes in design required to meet City standards or regulations. Upon submission of final plans meeting all City requirements, the City approved construction of the initial municipal servicing

infrastructure work, subject to any applicable conditions. The submission dates of the various development applications and the approval dates are set forth in the preceding table. Construction work progressed in stages from late 2013 and continues to date.

Residential Subdivision (CP-11 – Stage 1)

34. The Developer submitted its development application for a 65 lot residential subdivision (CP-11 – Stage 1) on February 11, 2016, including the plans for the internal local infrastructure for the subdivision. Following the usual review and any revisions, approval for construction of the infrastructure was given on December 15, 2016.
35. Ordinarily, all of the external and internal infrastructure necessary to service CP-11 – Stage 1 would be required to be fully constructed and accepted by the City, including commissioning and turnover, before any building permits would be issued for individual residential lots.
36. In late 2016, the Developer requested special permission to be issued a building permit for a model home notwithstanding that the required infrastructure was not yet constructed. The City agreed to the Developer's request. The building permit for the model home was issued in January 2017, subject to conditions.
37. The Developer then began to inquire with respect to the path forward to obtain building permits for houses in the subdivision. Annexed hereto as Exhibit "4" is an e-mail from the Developer dated January 24, 2017.
38. Notwithstanding that the required infrastructure remained incomplete, the Developer requested special permission to be issued a total of 25 building

permits for residential and industrial construction in CP-11 – Stage 1 and CP-03. The Developer proposed to proceed with the necessary infrastructure work simultaneously with building construction and to complete the infrastructure work within an agreed time period. A meeting was held between the Developer and the City on May 2, 2017 with respect to the Developer's proposal. The City agreed to the Developer's request, subject to terms and conditions. Annexed hereto as Exhibit "5" is an e-mail from the City to the Developer dated May 5, 2017 with letter dated May 4, 2017 and other attachments confirming the City's agreement to the issuance of the 25 building permits and the terms and conditions thereof.

39. The Developer then requested that the City agree to increase the number of allowed building permits to a total of 30 (25 residential permits in CP-11 – Stage 1 and 5 industrial permits in CP-03). The City agreed to the Developer's request. Annexed hereto are the following:

- Exhibit "6": letter from the Developer to the City dated May 5, 2017;
- Exhibit "7": e-mail from the City to the Developer dated May 5, 2017;
- Exhibit "8": e-mail from the Developer to the City dated May 5, 2017;
- Exhibit "9": e-mail from the City to the Developer dated May 8, 2017;
- Exhibit "10": e-mail from the Developer to the City dated May 10, 2017.

40. In effect, the Developer was granted special permission to obtain 25 building permits in CP-11 – Stage 1 upon the completion of certain specified infrastructure, the undertaking to complete certain other infrastructure within 45 days, the undertaking to complete certain road work within 120 days and the posting of security by the Developer. The outstanding infrastructure and

road work was outside CP-11 – Stage 1; however CP-11 – Stage 1 was dependent upon that infrastructure and road work. This included the roads to CP-11 – Stage 1 and the external water and sewer infrastructure to service the local water and sewer systems within CP-11 – Stage 1.

41. The development agreement for CP-11 – Stage 1 was provided to the Developer and was executed by the Developer and is dated May 11, 2017. The Developer did not make any objection or protest with respect to the arbitration provision. A copy of the executed development agreement for CP-11 – Stage 1 is annexed hereto as Exhibit “11”.
42. The development agreement for CP-11 – Stage 1 expressly recognized the risk of delays relating to the construction of necessary infrastructure. Paragraph 2 provides as follows:
 - 2) The Developer covenants and agrees to carry out all work on the Development in accordance with the approved Subdivision Plan as described in Schedule ‘A’ attached hereto which Schedule forms part of this Agreement. The Developer acknowledges that the larger Galway development, including major infrastructure, is not yet completed, accepted, or transferred to the City. The parties acknowledge that delays in completion of this infrastructure outside of CP-11 may result in delays in the issuance of building permits, occupancy certificates, or other approvals for CP-11. The City shall not be responsible for any delays resulting from failure to complete required infrastructure outside or inside CP-11.
43. The 25 residential building permits in CP-11 – Stage 1 were subsequently issued by the City.
44. The City took steps to ensure that third parties acquiring lots and building homes in CP-11 – Stage 1 (home builders and homeowners) were on notice that

not all required services were complete. The Developer later objected to (ii) and (iii) below.

- (i) The development agreement for CP-11 – Stage 1 was registered at the Registry of Deeds for the Province of Newfoundland and Labrador;
- (ii) Tax information and tax certificates issued for these lots stated that these lots were Vacant Land Partially Serviced or “There may be active building files and development files within this subdivision that may affect the issuance of a permit.”; and
- (iii) Compliance letters issued for these lots stated: “This lot is partially serviced. The developer has undertaken to complete services by July 31. Should the developer not complete the work, the City holds funds to complete the work. No occupancy certificate will be issued prior to services being completed.”

- 45. On August 7, 2017, the Developer wrote the City regarding the acquisition of the remaining building permits in CP-11 – Stage 1. Annexed hereto as Exhibit “12” is the letter from the Developer dated August 7, 2017.
- 46. On August 8, 2017, the City provided the Developer with a list of outstanding items in relation to the various Galway development applications, including items remaining to be completed prior to the issuance of further building permits in CP-11 – Stage 1 and CP-03. In usual circumstances, all of these items would have been completed prior to any building permits being issued, including the previous 25 residential building permits. Annexed hereto as Exhibit “13” is an e-mail from the City to the Developer dated August 8, 2017.

47. The issuance of further residential building permits in CP-11 is contingent on the completion of the construction, commissioning and turnover of the external and internal infrastructure work in CP-04, CP-05A, CP-05B, CP-06, CP-07A, CP-08, CP-11, CP-14A and CP-14B. Annexed hereto as Exhibit "14" is an e-mail from the City to the Developer dated August 8, 2017.
48. During August, 2017, the Developer wrote the City respecting multiple issues regarding the Galway Project. With respect to CP-11 – Stage 1, the Developer asserted that much of the outstanding work was completed, but acknowledged that some items remained outstanding. By e-mail of August 29, 2017, the Developer sought additional time (90 days – 120 days) to complete a list of items and purported to provide an undertaking to complete those items within that time frame. Annexed hereto as Exhibit "15" is an e-mail from the Developer to the City dated August 29, 2017.
49. On August 31, 2017, the City Manager responded to the Developer's various correspondence and e-mails. With respect to the status of the outstanding items in CP-11 – Stage 1, the City Manager indicated that these were being reviewed by City staff. Annexed hereto as Exhibit "16" is an e-mail from the City Manager to the Developer dated August 31, 2017.
50. On September 8, 2017, the City provided the Developer with an updated list of the 29 outstanding items to be completed prior to the issuance of the remaining 40 residential building permits in Galway CP-11 – Stage 1. As the Developer was again requesting the issuance of building permits prior to those items being completed, the e-mail also provided a mechanism to facilitate the issuance of additional building permits in CP-11 – Stage 1 by providing security for some

items and solicitor's undertakings with respect to some of the other items. The e-mail expressly stated as follows:

Should you or future purchasers of lots in CP11 apply to the City for some or all of the remaining 40 building permits then the City requires the following items to be provided before these permits are issued: (1) the development agreements for the contracts listed below signed and returned to the City for execution; (2) a signed agreement setting out the City's rights to use the one acre snow storage area adjacent to CP06 with an undertaking from you to have the site graded, accessible and ready within 60 days; (3) a security for the below items (colored in red) in the amount of \$100,000 to be paid immediately; (4) a solicitor's undertaking for a deed of conveyance for the nominal amount of \$1.00 for the transfer of the pump station, reservoir and associated lands to the City within 30 days; and (5) a solicitor's undertaking for a deed of conveyance for the nominal amount of \$1.00 for the transfer of the detention ponds, accesses, and associated infrastructure to the City within 30 days.

Annexed hereto as Exhibit "17" is an e-mail from the City to the Developer dated September 8, 2017.

51. On September 11, 2017, the Developer wrote to the City Manager in reply to the City's e-mail of September 8, 2017. The reply did not provide any additional information concerning the progress of the work or any agreement with respect to the 5 point mechanism to obtain additional building permits in CP-11 – Stage 1. Annexed hereto as Exhibit "18" is the letter from the Developer dated September 11, 2017.
52. A meeting took place on September 18, 2017 between the Developer and the City, including the Mayor and the Council Chair of the Planning Committee. By e-mail dated September 26, 2017, the City provided a further updated list of the outstanding items to be completed prior to the issuance of the remaining 40 residential building permits in CP-11 – Stage 1 as well as the status of the applications for CP-11 Stage 2A and CP-11 CR-20 and CR-21. The e-mail restated the previous 5 point mechanism to facilitate the issuance of additional

building permits in CP-11 – Stage 1. Annexed hereto as Exhibit “19” is an e-mail from the City to the Developer dated September 26, 2017.

53. On October 12, 2017, the Developer wrote to the City, but again did not provide any additional information concerning the progress of the work or any agreement with respect to the 5 point mechanism to obtain additional building permits in CP-11 – Stage 1. Annexed hereto as Exhibit “20” is the letter from the Developer dated October 12, 2017.
54. On October 13, 2017, the City Manager replied to the Developer reiterating the 5 things required to obtain additional building permits in CP-11 – Stage 1. Annexed hereto as Exhibit “21” is the e-mail from the City to the Developer dated October 13, 2017.
55. On October 16, 2017, the Developer wrote to the City regarding one of the five points relating to the snow storage area. Annexed hereto as Exhibit “22” is the letter from the Developer dated October 16, 2017.
56. By e-mail of October 19, 2017, the City Manager confirmed the City’s position with respect to the snow storage area. In addition, the City Manager advised the Developer that occupancy permits for the homes already being constructed cannot be issued “...until the required land conveyance of the pump station, reservoir, and the associated lands takes place. The City needs unrestricted access to these sites.” Annexed hereto as Exhibit “23” is the e-mail from the City dated October 19, 2017.

57. On October 19, 2017, the Developer responded by letter with respect to the occupancy permits and snow storage site. Annexed hereto as Exhibit "24" is the letter of October 19, 2017.
58. On October 20, 2017, the Developer wrote to the City indicating that of the five conditions set out in the e-mail from the City dated September 8, 2017, "conditions (2), (3), (4) and (5) can be resolved immediately". Annexed hereto as Exhibit "25" is a copy of the letter from the Developer dated October 20, 2017.
59. On October 23, 2017, the City confirmed its position with respect to the outstanding items to be completed prior to the issuance of additional residential building permits in CP-11 – Stage 1. The City indicated it "looked forward to receiving the documentation that these items are complete". Annexed hereto as Exhibit "26" is an e-mail from the City Manager to the Developer dated October 23, 2017.
60. On October 25, 2017, the Developer made a further request for special permission to vary the previous allocation of allowed building permits from 25 residential permits and 5 industrial permits to 29 residential permits and 1 industrial permit. The City agreed to that request on the same day. Annexed hereto as Exhibit "27" are e-mails between the Developer and the City on October 25, 2017.
61. Subsequently, the Developer applied for and was issued one of the four additional residential building permits; three of the residential building permits remain available for issuance.

62. Despite the Developer's assertion in its letter of October 20, 2017 that certain items would be dealt with immediately, all five of the outstanding items remained incomplete.
63. The Developer issued this Court application on November 9, 2017.
64. On November 19, 2017, the Developer requested a meeting for November 22, 2017 for the purpose of discussing the issuance of additional building permits in CP-11 – Stage 1, CP-11 – Stage 2 and CP-11 - CR-20-21. Annexed hereto as Exhibit "28" is an e-mail from the Developer to the City dated November 19, 2017 and an e-mail from the City to the Developer dated November 21, 2017.
65. The meeting between the City and the Developer took place on November 22, 2017. Following that meeting, the Developer wrote to the City on November 23, 2017. Annexed hereto as Exhibit "29" is the letter from the Developer to the City dated November 23, 2017 and an initial e-mail reply from the City to the Developer dated November 23, 2017.
66. By e-mail of November 24, 2017, the City provided the Developer with an updated list of the requirements to obtain the remaining residential building permits in CP-11 – Stage 1 and residential building permits in CP-11 – Stage 2A and CP-11 – CR-20/CR-21, as the Developer had requested in the meeting of November 22, 2017. Annexed hereto as Exhibit "30" is the e-mail from the City to the Developer dated November 24, 2017.
67. By e-mail of November 29, 2017, the Developer advised of the status of some of the items required for the issuance of CP-11 – Stage 1 building permits.

Annexed hereto as Exhibit "31" is the e-mail from the Developer dated November 29, 2017.

68. By e-mail of November 30, 2017, the City confirmed that the conditions outlined in the e-mail of November 24, 2017 are required to be completed prior to the issuance of additional building permits. Annexed hereto as Exhibit "32" is the e-mail from the City to the Developer dated November 30, 2017.
69. The homes for which the building permits were issued in the spring of 2017 have now reached, or are reaching, substantial completion. Builders and/or homeowners will be seeking occupancy permits for these homes. The City is not in a position to issue occupancy permits until the conveyance of the pump station, reservoir and associated lands takes place.
70. In summary, the Developer requested and was granted special permission to obtain 29 residential building permits in CP-11 – Stage 1 before all required infrastructure was complete. The infrastructure construction, commissioning and turnover remains incomplete. The City has repeatedly informed the Developer of the work that needs to be completed to obtain the remaining building permits in CP-11 – Stage 1.

Industrial CP-03

71. The building permit for the one industrial facility was issued on July 5, 2017.
72. The issuance of further industrial building permits in CP-03 is contingent on the completion of the construction, commissioning and turnover of the external and internal infrastructure work in CP-02, CP-03, CP-04, CP-05A, CP-05B, CP-

06, CP-07A, CP-08 and CP-14B. Annexed hereto as Exhibit "14" is an e-mail from the City to the Developer dated August 8, 2017.

73. In summary, the Developer was granted special permission and 1 building permit was issued in CP-03 before all required infrastructure was complete. The infrastructure construction, commissioning and turnover remains incomplete. The City has informed the Developer of the work that needs to be completed to obtain further building permits in CP-03. The Developer has not yet requested further building permits in CP-03.

Costco Applications

74. In late 2016-early 2017, the Developer approached the City with respect to potential development of a Costco wholesale facility. Informal plan submissions and informal review discussions took place between the Developer and the City.
75. On July 5, 2017, the Developer applied to subdivide property in CP-07 for the proposed Costco development. The subdivision approval was granted on July 24, 2017.
76. The Developer requested special permission to perform privately owned commercial site servicing work prior to the completion of the public infrastructure required to service the site. The City agreed with this request, subject to conditions, yet to be fulfilled.
77. The Developer filed an application for Costco site servicing on August 14, 2017, an application for the Costco private roads and servicing on September 13, 2017 and an application for the construction of the Costco warehouse on September 25, 2017.

78. Additional information with respect to the site servicing application was requested on August 21, 2017 and subsequently provided by the Developer.
79. On August 25, 2017, the City provided its review comments with respect to the Costco site servicing application, including infrastructure required prior to the issuance of the building permit for the Costco warehouse. With respect to the building permit, the e-mail stated:

We expect that at some point in the future the City will receive an application for the Costco building and associated structures. Please be advised that no building permits will be issued until said plans are acceptable to the City, all fees have been paid, and the following outstanding items in the Galway area have been completed and accepted by the City:

- A. Galway CP-21 Roundabout "C" at the Ruth Avenue Interchange must be approved by the City of St. John's, City of Mount Pearl and the Province of Newfoundland & Labrador and constructed in accordance with the approved plans; it must be fully operational, and the as-built package for Galway CP-21 must be reviewed and accepted by the City.
- B. Danny Drive must be fully serviced and constructed with base course asphalt and curb/gutter at least as far as the unnamed access road (which contains MH.7160R) into "New Shared Road (A)" – reference Interim Grading Plan, sheet number C-104, Costco site servicing plans. The as-built package for Danny Drive must be submitted to the City and accepted.
- C. The private roads [Shared Road (A), Shared Road (B), and unnamed access road between Danny Drive and Shared Road (A)] and associated servicing referenced in the Costco civil work and site servicing plans must be fully constructed.
- D. The Regional Detention Pond in Galway CP07C must be completed, fully operational and the as-built package reviewed and accepted by the City.

Annexed hereto as Exhibit "33" is the e-mail to the Developer dated August 25, 2017.

80. On August 31, 2017, the Developer wrote to the City with respect to the requirements for the issuance of the Costco warehouse building permit. The Developer requested that the City remove the conditions for obtaining the building permit and requested that the City allow the building construction to proceed concurrently. Annexed hereto as Exhibit "34" is a letter from the Developer dated August 31, 2017.
81. On September 7, 2017, the City responded refusing the Developer's request. Annexed hereto as Exhibit "35" is the e-mail from the City dated September 7, 2017.
82. Further discussions and communications took place between the Developer and the City. The Developer submitted revised engineered plans for the Costco site servicing. These plans were reviewed by the City. The City provided review comments by e-mail on November 10, 2017 regarding site servicing and reiterated the infrastructure requirements prior to the issuance of the building permit for the Costco warehouse. Annexed hereto as Exhibit "36" is the e-mail of November 10, 2017.
83. The Developer has questioned the need for a development agreement for the Costco retail site. A development agreement is required because municipal infrastructure must be constructed to service the site and the site will include an internal road network.
84. In summary, the Costco applications are proceeding through the development review process. The City has informed the Developer of the work that needs to be completed to obtain the building permit for the Costco warehouse.

Development Agreements/Arbitration Provision

85. Development agreements are required in those circumstances set forth in the Development Regulations. Not every development in the City requires a development agreement. The City has sometimes not required a development agreement even where it may technically be required by the Development Regulations.
86. Development agreements are essential for the Galway Project because of the scale of the development, the requirement for major trunk infrastructure, and the number of interrelated development applications. The Galway Project will ultimately consist of many thousands of lots for individual homes, stores, commercial buildings and industrial buildings. The Developer has chosen to proceed with the development in a staged approach, including breaking the external and internal infrastructure required for each stage into multiple development applications. In the Galway Project, it is therefore essential that development agreements in relation to the various applications be in place to ensure that necessary infrastructure is constructed, commissioned and turned over to the City for each stage of the development.
87. Third parties acquiring lots and building homes or other structures in each stage of the Galway Project must be able to obtain building permits and occupancy permits. The City cannot be in a position where third parties are unable to obtain services because the required infrastructure has not been constructed, commissioned or turned over to the City.

88. It is common for developers to be allowed to proceed with infrastructure construction once their engineered plans have been approved, before a development agreement is executed. This is especially true in the Galway Project where the concept plan has changed over time and multiple infrastructure applications have been submitted. The understanding of the infrastructure components required to service a particular stage of the Galway development becomes clearer as the Developer's plans evolve. Each agreement can then be structured to ensure that the particular details of each application are taken into account when setting out the obligations of the Developer.
89. The City's development agreements contain an arbitration clause which has been standard for approximately the past two decades. The arbitration provision provides as follows:

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 this 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;
- (b) The party to whom notice is given shall within five (5) days after receiving the notice, name the person whom it appoints to be an arbitrator and advise the party who gave the notice of the name of its appointee;
- (c) The two arbitrators named in accordance with its provisions shall within five (5) days after the appointment of the second of them, name a third arbitrator who shall be the Chairperson of the Arbitration Board;
- (d) Each party who is required to name a member of the Arbitration Board shall pay the remuneration and expenses of that member and

the parties shall pay equally the remuneration and expenses of the Chairperson;

- (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, nor to delete, alter, or amend any part thereof;
- (f) Notwithstanding Section (e), the decision of the Arbitration Board shall be binding upon the parties;
- (g) The arbitration shall be conducted in accordance to the rules set out under the Arbitration Act, Chapter 8, R.S.N. 1990, c. A-14 as amended for the Province of Newfoundland.

90. An arbitration provision is important to ensure that there is timely resolution of any dispute concerning the development agreement, including any alleged breach thereof, either by the developer or the City. This ensures that disputes are resolved in a cost effective and timely manner, that development can proceed in accordance with an arbitrators' ruling, and that appropriate remedial action will be taken by the developer or the City, as the case may be. This ensures the protection of the public interest and the developer's interest. The arbitrator determines whether or not a matter is arbitrable under the development agreement.

91. As the Developer's plans evolved for the Galway Project, the Developer requested the development agreement for the residential subdivision CP-11 – Stage 1 in early 2017. The development agreement for CP-11 – Stage 1 dealing with the internal infrastructure for the subdivision was provided to the Developer in May 2017. The CP-11 – Stage 1 development agreement was executed by the Developer without objection or protest regarding the arbitration clause. If the Developer executed the agreement "reluctantly" as it now alleges,

no such reluctance or reservation was made known to the City at that time. The development agreement for CP-11 – Stage 1 contained the City’s usual arbitration provision.

92. Development agreements in relation to other development applications were prepared and provided to the Developer in August 2017. These development agreements contained the same arbitration clause as was included in CP-11 – Stage 1.
93. The development agreements for the Galway Project will be submitted to Council for approval once the engineered plans and the terms and conditions of the development agreements are satisfactory to the City staff following review by the Department of Planning, Engineering, and Regulatory Services, and the Legal Department. It is unreasonable to expect that Council itself will determine the content of the development agreements, including the engineered plans attached thereto. Consequently, the development agreements will be submitted to Council for approval once they are satisfactory to City staff.
94. The Developer objected to signing development agreements drafted in a manner consistent with the development agreement for CP-11 – Stage 1, as expressed in its letters of September 8, 2017 and September 11, 2017. (Exhibits “K” and “O” to the Williams Affidavit).
95. The City Manager responded to the Developer setting forth the City’s position by two emails of September 12, 2017. (Exhibits “P” and “Q” to the Williams Affidavit).

96. On September 15, 2017, the Developer wrote to the City and delivered a redrafted development agreement, executed by the Developer, for one of the development applications. The Developer had taken the unusual step of redrafting the development agreement for CP-02 to its own liking, executing it and sending it to the City Clerk for Council approval. CP-02 was a development application with limited technical complexity. Annexed hereto as Exhibit "37" is a letter from the Developer dated September 15, 2017 with the re-drafted development agreement.
97. This approach by the Developer attempting to write its own development agreements was, of course, rejected by the City.
98. On September 18, 2017, a meeting was held between the Developer and the City to discuss this issue, amongst others. The Developer stated that it would not agree to the City's usual arbitration clause and was prepared to go to Court. It was decided that the Developer's solicitor and the City Solicitor would discuss the arbitration clause to see if agreement could be reached on the wording.
99. Subsequent thereto, a series of discussions and meetings took place between the Developer's solicitor and the City Solicitor, with the exchange of various drafts of the development agreement, including the arbitration clause. However, no agreement was reached.
100. On October 13, 2017, the Developer declared an impasse and expressed its intention to proceed to Court. (Exhibit "Y" to the Williams Affidavit).
101. On November 8, 2017, Mr. Williams on behalf of the Developer met with the Mayor and the City Manager. The Developer advised that it would proceed with

Court action unless the matter was resolved to its satisfaction. Annexed hereto as Exhibit "38" is an e-mail from the Developer to the City dated November 8, 2017.

102. The Developer issued the Originating Application in this matter on November 9, 2017.
103. During the course of the negotiations, the parties discussed alternative wording for a more limited arbitration provision than usual. The City did not agree that its usual arbitration clause was illegal or contrary to law. This Court application will now determine whether the City's usual arbitration clause is illegal or contrary to law.
104. In order to facilitate the issuance of residential building permits, the City has advised the Developer that the required development agreements can be executed containing the City's usual arbitration provision pending the determination of the Developer's Court application. The arbitration provision would be revised should the Court determine that the provision is illegal or contrary to law, in accordance with the Court's decision. The Developer has rejected that approach. The City views this Court application as a useful mechanism to obtain a judicial determination with respect to the Developer's objection that the City's usual arbitration provision is illegal or contrary to law. This will provide certainty with respect to the City's power to establish the terms of a development agreement, not only for this development, but also for other developments within the City.
105. Annexed hereto are the following:

- Exhibit “39”: e-mail from the City to the Developer dated November 21, 2017;
- Exhibit “40”: e-mail from the City to the Developer dated November 22, 2017;
- Exhibit “41”: letter from the Developer to the City dated November 23, 2017;
- Exhibit “42”: e-mail from the City to the Developer dated November 24, 2017;
- Exhibit “43”: e-mail from the City to the Developer dated November 28, 2017.

106. The City recognizes that the Development Regulations require the development agreements to be approved by City Council. However, as with all parts of development agreements, including the attached engineered plans, the development agreement must first be approved by City staff. The Developer has commenced legal action asserting, in effect, that the City’s usual arbitration provision is illegal or contrary to law. The development agreements will be submitted to Council for approval once the Court rules on the legality of the City’s arbitration provision.

The Developer’s Other Allegations

107. The City has acted honestly and in good faith in its various dealings with the Developer. The following is a brief response to the “concerns” raised by the Applicant in paragraph 15 of the Originating Application:

- (a) The Developer requested the first development agreement in early 2017 preliminary to the issuance of building permits for building construction. Required infrastructure remained incomplete at that time. The development agreement was executed in May, 2017 following an agreement with respect to the issuance of 30 building permits. The City made a significant concession to the Developer by agreeing to issue building permits before all required infrastructure was completed. The development agreement for CP-11 – Stage 1 was executed by the Developer without objection or protest as to the arbitration clause. The development agreement contains the usual arbitration provision contained in City development agreements. The remaining development agreements were prepared in a timely manner and provided to the Developer in August, 2017. A Development Agreement is not a negotiated contract between parties.
- (b) Every developer is required to build the infrastructure considered necessary to accommodate its development in the service area. The City cannot assess third parties to pass on the costs of one developer to a future developer.
- (c) The roundabout is required to service the Galway development. The requirement for and the location of the roundabout were determined by the Developer's own traffic study. The Developer knowingly proceeded to call tenders before the engineered plans had received final approval by the City. The City acted to ensure that the roundabout was appropriately designed and constructed.

- (d) As with all developments, security must be provided for the estimated cost to the City to perform the work by public tender in the event of default by the developer. The Developer is being treated in the same manner as other developers.
- (e) Phase 2 subdivision work (surface course asphalt and construction of sidewalks) takes place after 80% of the homes are built in the subdivision. However, the City assumes snowclearing of the subdivision upon acceptance of phase 1 work and prior to the completion of phase 2 work. The developer is responsible for repairing all damage to infrastructure until the end of the applicable maintenance period, whether caused by construction activity, home building, freeze/thaw action, workmanship, City snowclearing, or otherwise. These requirements apply to all developers and all subdivisions.
- (f) The City has acted in accordance with the Development Regulations with respect to the release of any security posted for the construction of infrastructure. Securities are released in the case of maintenance periods and warranties when the stipulated maintenance period or warranty period has elapsed. Other securities are held until the specified deficiencies have been corrected or the necessity for holding the security no longer exists.
- (g) The City needs to know the owner of lands governed by a particular development agreement in order to properly ensure that the developer's obligations contained in the development agreement, such as the City's ability to utilize the securities for the development, are fulfilled. This is

especially true in a large development like Galway where multiple corporate entities are involved.

- (h) The City granted the Developer a significant concession enabling the Developer to proceed with the construction of 29 residential buildings and 1 industrial building prior to the completion of all required infrastructure. There remain outstanding items regarding construction, commissioning and turnover of this infrastructure. The sections of this Affidavit entitled *Residential Subdivision (CP-11 – Stage 1)* and *Industrial CP-03* set forth what the Developer must do in order to obtain the remaining building permits for CP-11 – Stage 1 and further permits for CP-03. The infrastructure outside CP-11 that is required for additional residential building permits in CP-11 is only the infrastructure required to service CP-11 and not other aspects of the Galway Project.
- (i) The City's Subdivision Policy and Subdivision Design Manual requires a 1 year warranty/security for the infrastructure referenced therein for the usual subdivision. However, the Galway Project requires additional infrastructure not found in a usual subdivision and not referenced in the Policy or Manual, including a booster pump station and water reservoir tank. Because this type of infrastructure is not found in the standard subdivision, the City's Subdivision Policy and Subdivision Design Manual do not address the applicable standards. The Developer was advised in July 2014, prior to the City's approval of the Developer's engineered plans in March 2015, that a 10 year warranty/security on the water reservoir tank was required. This was confirmed to the Developer with

the approval of the plans in March 2015. The City has required a 10 year warranty on other tanks when they were constructed. However, while the City advised the Developer that a warranty/security would be required for the pump station, the City did not specifically advise the Developer of the length of the required warranty/security prior to the approval of the engineered plans for the pump station. The City has therefore agreed to reduce the warranty/security for the pump station to 1 year.

(j) This allegation is dealt with in the section of this Affidavit entitled *Development Agreements/Arbitration Provision*.

(k) This allegation is dealt with in the section of this Affidavit entitled *Development Agreements/Arbitration Provision*.

108. The following is a brief response to the allegations of "bad faith" contained in paragraphs 29-31 of the Originating Application:

29. (a) The Developer submitted a request for information under the *Access to Information and Protection of Privacy Act* to the City Clerk for development agreements for a list of areas in the City. The City provided a series of responses to that request and has not refused to provide information to the Applicant.

(b) The City's position with respect to access to the Courts will be set forth in its Memorandum of Fact and Law to be filed in this matter. The number of development agreements has essentially been determined by

the Developer's approach to development and the number of development applications it has filed with the City.

(c) The City has not attempted to "coerce" the Applicant into executing development agreements. The Court will determine if the City's usual arbitration clause is illegal or contrary to law.

(d) The development agreements will be submitted to Council for approval once the terms thereof are satisfactory to City staff and the Court has ruled on whether the usual arbitration clause is illegal or contrary to law.

(e) The roundabout is required to service the Galway Project and was identified in the Developer's own traffic study. The Applicant is required to bear the cost of infrastructure required to service its development.

30. The Applicant has not been treated unfairly or inherently different than other developers in similar circumstances. The number of development agreements is due to the scale of the Galway Project, the requirement for trunk infrastructure and the number of interrelated development applications. Indeed, the Developer has been granted significant concessions by the City in allowing the Developer to obtain building permits for 29 residential properties and 1 industrial property prior to the completion of construction, commissioning and turnover of required infrastructure.

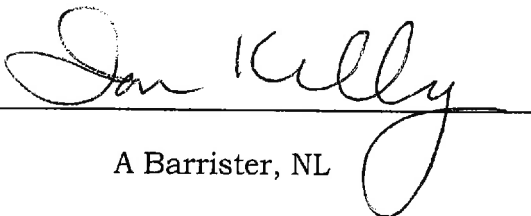
31. The City has not caused any delay to the Developer. Any delay which the Developer perceives it has encountered is the result of its own decisions

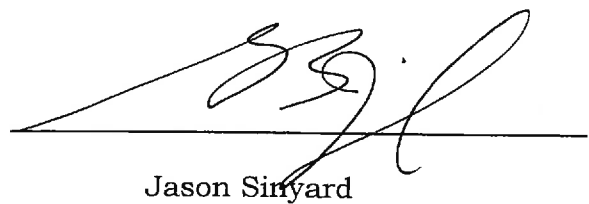
and actions regarding how it has chosen to proceed with the Galway Project generally and its various development applications specifically. The Developer has yet to complete all the outstanding items necessary for the issuance of building permits. The development agreements are just one of those outstanding items.

Concluding

109. This affidavit is filed in response to the Originating Application and the Affidavit filed by the Applicant in this proceeding.
110. This affidavit refers to events and circumstances to November 30, 2017. A supplementary affidavit may be filed to update for subsequent events and circumstances, if necessary.

SWORN before me at St. John's, in the
Province of Newfoundland and Labrador,
this 5th day of December, 2017.


A Barrister, NL


Jason Sinyard