

**Building Accessibility Appeal Tribunal
Service NL**

**Castor River Holdings Limited - Director responsible for buildings accessibility with respect to
Inspector's Order #30548 on 1073 Topsail Road, Mount Pearl, NL
Appeal Hearing
Thursday, June 6, 2019**

**Residential Tenancies Hearing Room
Motor Registration Building
Mount Pearl, NL**

APPELLANT: CASTOR RIVER HOLDINGS LIMITED
CYRIL WHITTEN - DIRECTOR
WAYNE WHITE SOLICITOR FOR APPELLANT

RESPONDENT: MR. DENNIS EASTMAN, P. ENG.
DIRECTOR OF ENGINEERING & INSPECTION SERVICES
SERVICE NL

TRIBUNAL MEMBERS: MICHAEL H. DUFFY – CHAIR
DERRICK HOUSE (Via Teleconference)
EMILY FOUCHARD

BACKGROUND

This is an appeal to the Building Accessibility Appeal Tribunal of a decision by Dennis Eastman, Director of Engineering and Inspection Services upholding building accessibility inspection order 30548 which was issued on the 5th day of February, 2019 with respect to 1073 Topsail Road, Mt. Pearl, NL (herein the "Order")

The Order from which the appeal originates contains a total of 2 numbered paragraphs. Upon hearing the presentation of the Appellant, the Tribunal is satisfied that the Appellant has voluntarily agreed to complete 1 of those 2 items and has abandoned the appeal in respect to all but item 1 on the Order which reads, "(1) 5' x 5' (1500 mm x 1500 mm) level area required at front door as per section (8)(e).

The hearing convened at 3pm on June 6, 2019. A presentation was made to the Tribunal by Wayne White, Solicitor for the Appellant and Cyril Whitten a Director of the Appellant was available to provide information and answer questions. The Director of Engineering and Inspection Services; Dennis Eastman (the "Director") as well as Field Inspector, Mark Flemming (the "Field Inspector") were present and available to provide background information and answer questions. Justice Solicitor; Jessica Pynn was present to provide advice to the Director as necessary.

AGREED FACTS

The facts giving rise to this appeal were set out in a written submission from the Solicitor for the Appellant and that summary was agreed by the Appellant and Respondent to be accurate as follows:

1. The Building was constructed in 1988. An addition to the Building was made in 1991 and both the City of Mount Pearl (the "City") and the Province of Newfoundland and Labrador (the "Province") approved both the 1988 construction of the Building and the 1991 addition to it.
2. We believe that Service NL last completed an Inspection Report on the Building in 1994.
3. CRH has not performed any new construction or reconstruction on, or made any new additions to the Building since 1991, nor does it contemplate doing any new construction, reconstruction, or making any new additions to the Building at this time.
4. On or about November or December 2018 CRH agreed to lease about 4100 square feet (the "Leased Premises") of the Building to Tiffany's for the purpose of operation its business, being the sale of home decorating and giftware items and performing upholstery services (the "Business").
5. On or about November or December 2018 Tiffany's applied to the City for a permit to occupy (the "Occupancy Permit") the Leased Premises for the purpose of conducting the Business.
6. The City informed Tiffany's that prior to issuing the Occupancy Permit it was necessary for Service NL to conduct Fire and Life Safety and Buildings Accessibility inspections of the Leased Premises.
7. On or about January 14, 2019 Tiffany's submitted an "Application for Building Accessibility Design Registration or Exemption Registration" (the "Application") to Service NL for the Leased Premises.
8. By letter dated January 22, 2019 Service NL informed Tiffany's and the Applicant of their requirement to meet the Fire and Life Safety requirements and with respect to an Accessibility inspection wrote as follows:

"Under the authority of Section 6(1) of the Building Accessibility Act, before the appropriate permit issuing authority grants approval for this building to be occupied, a final buildings accessibility inspection must be carried out in accordance with Section 18(2) of the Buildings Accessibility Regulations by an inspector from this department".

9. On February 5, 2019 Service NL's inspector (the "Inspector") issued "Building Accessibility Inspector's Orders No. 30548" (the "Order") in response to the Application requiring the following installations at the Building:

1. 5' x 5' (1500 mm x 1500 mm) level area required at front door as per section (8)(e).
2. Accessible counter portion to be installed as per section (33) of the BA Schedule".

10. By letter dated February 15, 2009 CRH appealed the Order.

11. By email dated March 5, 2019 the Director confirmed the Inspector's Order as follows:

"The intent of the Act is that buildings are accessible to persons with disabilities and that buildings are in compliance with the requirements of the Act and regulations. In accordance with section 12 of the Act, Service NL has the authority to inspect buildings at reasonable times to ensure compliance with the Act and regulations. On February 5, 2019 the inspector did inspect the building at 1073 Topsail Road pursuant to an application for buildings accessibility registration due to a change of occupant and change of occupancy at that location. At that time, the inspector found the entrance to the building to be non-compliant due to the absence of a level area adjacent to the entrance doorway of the building and the absence of at least one barrier free section and the counter serving the public"

DISCUSSION

The Tribunal considered the Building Accessibility Act RSNL 1990 Chapter B-10 (herein the "Act") as well as the Buildings Accessibility Regulations O.C. 96 - 865 (herein the "Regulations") made pursuant to the Act. During discussion before the Tribunal which involved: the Tribunal members; the Appellant; its representative; the Director; the Field Inspector and Solicitor Pynn it was determined that item 2 of order 30548 had already been completed and is therefore no longer relevant to this Appeal.

It was also determined that the deficiencies with respect to item 1 of Order 30548 identified by the Field Inspector include a concern regarding the change in elevation between the concrete area and the entrance referred to in the Order. In particular, the Tribunal was advised the tolerance normally expected for a change in elevation at an entrance is to be not greater than 13 millimetres. The Field Inspector reported the change in elevation encountered in the field was approximately 2 inches or approximately 50 millimeters. The Field Inspector commented that perhaps the difference was as a result of subsidence of the landing over time. Mr. Whitten expressed the view that the landing had not moved and the condition of the area as presently found was the same as approved when the building was originally constructed, inspected and approved.

POSITION OF THE APPELLANT

The nature of the appeal as expressed by the representative of the Appellant is that notwithstanding the powers conferred by ss. 6 and 12 of the Act, the ability of the Director to inspect a property and make orders should be limited by the reasons for the inspection. The Appellant has argued that if the Director is inspecting property where there has been no construction, reconstruction or addition to a building, the director is or ought to be limited in the orders which can be made. They have argued that where a feature of a building such as the entrance described in the Order 30548 was previously approved, the Director may not make orders requiring modification unless there is a new construction, reconstruction or addition to the building being undertaken or contemplated.

As support for this they refer to Section 15 of the Act and section 18 of the Regulations, these provisions read as follows:

15. *A person who owns a building shall notify the director of the construction, reconstruction of or addition to a building before and immediately after that construction, reconstruction or addition.*
18.
 - (1) *An inspector shall during the construction of, addition to, or reconstruction of a building make periodic inspections for the purpose of ensuring that the requirements of the Act and regulations are being complied with.*
 - (2) *Where the director receives notification under section 15 of the Act that the construction of, addition to, or reconstruction of a building has been completed, he or she shall order a final inspection to be made.*
 - (3) *Upon completion of a final inspection, the inspector shall issue, in a form prescribed by the director, an inspection report and provide the owner, the director and the appropriate permit issuing authority with copies.*

In their submission the Appellant suggests:

“However, taken as a whole, the Applicant states that the directives in the Order are not reasonable; are beyond the powers and thus the jurisdiction of the Inspector and the Director; are not in accordance with the objectives or requirements of the Act or the Regulations; and are otherwise unfair and unjust.”

ANALYSIS

We agree Section 15 of the Act requires a person who intends to construct, reconstruct or make an addition to a building to notify the Director before the work is done and after it is complete. We also agree that Section 18 of the Regulations clearly makes it mandatory for the Director to conduct an inspection where he or she receives notice required under section 15 of the Act.

Section 6 and 12 of the Act read as follows:

Prohibition

6.

- (1) A person shall not build, construct, occupy or own a building unless that building complies with the requirements of this Act and the regulations.*
- (2) A permit, licence or other authorization for the construction of a building shall not be issued unless the drawings and specifications of a building or part of them have been registered by the director as required by the regulations.*
- (3) Registration of drawings and specifications may be subject to terms and conditions in accordance with the regulations and as required by the director.*

Power of Inspector

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- (1) An inspector may, for the purposes of this Act and the regulations, and at all reasonable times, on production of proof of his or her appointments as an inspector, enter a building or property for the purpose of inspection or investigation to ensure compliance with this Act and the regulations.*
- (2) An inspector may by written notice, countersigned by the director, require the attendance before the director of a person at the noted time and place and examine that person under oath or affirmation in relation to an inspection or investigation carried out under this Act and the regulations.*

While we note the Act and Regulations contain provisions allowing for a particular property to be exempted from application of the Act and Regulations in particular circumstances, none of these circumstances are relevant to this case. In the discussion the representative of the Appellant correctly acknowledged the property was not entitled to an exemption. We find that s.6 of the Act requires that where a property is not exempt then it must fully comply with the Act and Regulations. The powers of the Inspector set out in s. 12 are not limited by any other provision of the Act or the Regulations. It seems clear to us that in order to be in a position to enforce the prohibition set out in s. 6 of the Act the framers of the legislation quite correctly intended to confer the broad powers conferred by s. 12.

Service NL referred to s. 18(2) of the regulations on January 22, 2019 when advising the Appellant of a need for an inspection. While the reason the inspection was being carried out may have originated with a notice to the Director under s. 15, we find the reason for the inspection being carried out is not tied by the Act and Regulations to the scope of the inspection. The Director by application of s. 12 has a right to inspect any property in this Province *“for the purposes of this Act and the regulations, and at all reasonable times”* and where the Inspector finds a feature of the building which does not comply with the Act or Regulations may make order(s) accordingly. We also find that whether or not a particular property was previously inspected the Field Inspector and Director are charged with enforcement of the Act and Regulations as they exist at the time of inspection. If a prior inspection failed to discover an item of non-compliance or there was a change in the Act or Regulations intervening between the prior inspection and the current inspection, the Director is to be guided in his or her decisions by the current Act and Regulations in force at the time of inspection, subject only to any transitional provisions which the legislators may choose to include in the legislation. We find no transitional provisions in the current Act or Regulations limiting or delaying application of any provision.

In practical terms the carrying out of inspections and making of orders by the Director appears to necessarily contain an element of discretion on the part of the Director. Except in cases where an inspection is mandatory it is the Director who determines when and what to inspect.

While we agree, as stated *supra*, that s. 18 makes an inspection mandatory where notice has been given pursuant to s. 15, we do not accept that when an inspection is carried out in accordance with the requirement of s. 18 that such inspection should be any less comprehensive than an inspection which may be carried out by the Director for any other reason. We therefore find that the inspection giving rise to Order 30548 was reasonable and within the jurisdiction of the Director.

Turning now to the specific order made, Order 30548 which is the subject matter of this appeal refers to non-compliance with Section 8(e) of Schedule contained in the Regulations.

Sections 8(e) and 8(k) and 8(l) of the regulations read as follows:

- 8(e) have a level area adjacent to the entrance doorway at least 1500 millimetres by 1500 millimetres that extends at least 600 millimetres beyond the latch side of the door opening;*
- (k) have changes in elevation between 6 millimetres and 13 millimetres bevelled with a slope not greater than one in 2;*
- (l) have changes in elevation greater than 13 millimetres accomplished by means of a ramp.*

As part of discussions during the Appeal Hearing, discussed *supra*, the Inspector indicated the area adjacent to the doorway in question was found to be approximately 4.5 feet which is 1375mm. That is less than the 1500 required by Section 8(e) of the Schedule to the Regulations. There was no argument made by the Appellant that the area in question was larger than 1375mm.

DECISION

We therefore find the area does not comply with s.8(e) of the Schedule and confirm the Order in that regard.

ADDITIONAL COMMENTS

The Inspector also indicated, as stated *supra*, that the change in elevation was greater than the 13mm required by Section 8(k) of the Schedule to the Regulations and that change in elevation is not accomplished by a ramp as required by Section 8(l) of the Schedule to the Regulations. It may have been more helpful to the Appellant in understanding the Order if the Inspector had also referred to Section 8(k) and/or 8(l) in the Order. However, as the Order under 8(e) will necessitate replacement or adjustment of the concrete landing the omission of reference to 8(k) and or 8(l) is not fatal to the Order and was arguably not strictly necessary.

Respectfully Submitted,


Michael H. Duffy,
Chairman, Building Accessibility Appeal Tribunal Council

_____ - I concur.
Emily Fouchard
Building Accessibility Appeal Tribunal Council

_____ - I concur.
Derrick House
Building Accessibility Appeal Tribunal Council

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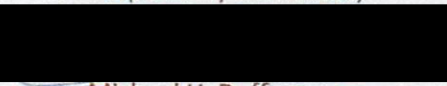
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