

**EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD
URBAN AND RURAL PLANNING ACT, 2000**

APPEAL

BETWEEN	Keith Lawlor	Appellant
	Brock Lawlor	Appellant
AND	Service NL	Respondent
RESPECTING	Refusal	
FILE NUMBER	15-006-044-024 (Keith Lawlor) 15-006-044-025 (Brock Lawlor)	
BOARD MEMBERS	Michelle Downey — Chair Colleen Hanrahan — Member Raelene Thomas — Member	
DATE OF HEARING	November 14, 2017	
IN ATTENDANCE		
Authority:	Teresa Murphy, Regional Support Supervisor, Service NL	
Appellant:	Keith Lawlor Brock Lawlor (represented by Keith Lawlor)	
Interested Party:	Rose Lawlor	
Secretary to the Eastern Newfoundland Regional Appeal Board:		Robert Cotter
Technical Advisor to the Eastern Newfoundland Regional Appeal Board:		Kim Blanchard

DECISION

Introduction

This appeal arises from the refusal of Service NL to grant permits to Mr. Keith Lawlor and Mr. Brock Lawlor for each to develop a cottage on two pieces of crown land located on the Old Witless Bay Line. Mr. Keith Lawlor represented himself and Mr. Brock Lawlor at the hearing.

The appeals were heard by the Eastern Newfoundland Regional Appeal Board on November 14, 2017. The Board assessed Service NL's decision to determine if Service NL acted in accordance with the *Urban and Rural Planning Act, 2000* and the *Butterpot-Witless Bay Line Environs Development Control Regulations (BWB Regulations)*. For the reasons stated below the decision of Service NL is upheld and the appeal is denied.

Facts/Background

In the summer of 2016 Mr. Keith Lawlor and Mr. Brock Lawlor each applied for a piece of Crown land located on the shore of Long Pond, which is accessible by the Old Witless Bay Line. In general terms the land is on the east side of the Witless Bay Line. Crown Lands advised the appellants because the Crown land was located in a regulated area the application must first be approved by Service NL.

Service NL refused to give approval for the application. In a letter dated August 18, 2016, Service NL stated the application was refused because "the subject property is zoned 'watershed protection' and a cottage is not a permitted use." Both appellants were also advised of their right to appeal this decision. In accordance with the *Urban and Rural Planning Act, 2000* Mr. Keith Lawlor and Mr. Brock Lawlor both filed appeals of the decision on August 29, 2016. The appeal was advertised in The Telegram on September 12, 2017 and appeal packages were distributed to all affected parties.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

Butterpot-Witless Bay Line Environs Development Control Regulations (*BWB Regulations*).

St. John's Urban Region Regional Plan, 1976 (the Plan)

Evidence considered by the Board

The Board heard from the technical advisor, Ms. Kim Blanchard, that a two step process is used when a person applies to develop Crown land: Service NL must first approve the application and then Crown land may choose to grant the land. Service NL controls the development of land and consults with other departments and agencies as necessary. The Crown land was located on the north side of the Old Witless Bay Line, along the southwest shore of Long Pond. A map provided with the Technical Information and Planning Report shows the land to be located within the Butterpot-Witless Bay Environs

and falling within the Watershed Protection Zone. The *BWB Regulations* allow some use of land zoned as Watershed Protection, but a cottage is not among the listed uses. In this case Service NL based its refusal on a contravention of the zoning.

In response to a question from the Board, Ms. Blanchard stated the generation of hydro in the area was not relevant to Service NL's consideration of the application. In response to a second question from the Board, Ms. Blanchard stated that a seasonal residence, such as a cabin, would not be included in the definition or Recreational Open Use.

The Board noted that Section F of the St. John's Urban Region Regional Plan, 1976, stated, in part:

Recreational uses of water shorelines and other land may be allowed at the discretion and control of provincial environment authorities and local municipal councils with the dual objectives of using regional water resources. Intensity and type of use may differ from watershed to watershed. More intensive recreational use will be allowed in future than in current watersheds.

and questioned whether that section could be applicable to the land Mr. Keith Lawlor and Mr. Brock Lawlor were seeking to develop. Ms. Blanchard interpreted the section to mean that in the future some councils may allow some use in future watersheds but current watersheds were regulated by the current regulations.

Mr. Keith Lawlor stated that the land he and Mr. Brock Lawlor had applied for was located between two pieces of land where cabins currently existed. Newfoundland Power had run a pole line along the Old Witless Bay Line which allowed cabin owners to have electricity and some cabin owners now lived year round in their cabins. Mr. Lawlor's brother and brother-in-law have cabins in the area. In all there are 23 cabins located on Long Pond. There have been plots of land as large as 10 acres "handed out" for agricultural developments, including one plot which is infringing on the watershed zone. There had been no prior development on the land for which he and Mr. Brock Lawlor had applied.

Mr. Lawlor noted there were several different definitions of watershed. There are ditches between the road and the watershed and the land he and Mr. Brock Lawlor were seeking to develop was below the watershed level and would not drain into the watershed. Mr. Lawlor stated there was a difference between watershed protection and protection of water for drinking. There has been a lot of housing developed on the eastern side of the Witless Bay Line which included servicing with water and sewer. That development appears to be at odds with protecting the watershed area. Mr. Lawlor noted that cabin owners in the area of Long Pond were now required to pay fees for garbage collection.

Mrs. Rose Lawlor stated that several cabins in the area did not have septic fields and greater regulation was required. In addition, several trailers were without services in gravel pits located on Witless Bay Line. Ms. Lawlor stated the cabin she and her husband planned to build would be used in their later years. Ms. Lawlor noted that Crown land given for strawberry growing was not being used in its entirety.

Ms. Teresa Murphy, on behalf of Service NL, stated the application had been refused by Service NL on the grounds that the land was located in the watershed protection area and no development was allowed in that area. Ms. Murphy noted the decision had been made by the previous holder of her position. Ms. Murphy stated Service NL receives and reviews applications and send applications other departments for their comments on health inspections, environmental issues and planning issues. In response to a question from the Board, Ms. Murphy stated there was no evidence in the two application files that the factors to be considered as listed in Section 6 of the *BWB Regulations* when reviewing an application had been considered.

Analysis

The role of the Eastern Newfoundland Regional Appeal Board is to assess the processes undertaken by authorities in reaching their decisions to determine if the authority acted in accordance with the applicable legislation, regulation and policy. Section 42(3) of the Urban and Rural Planning Act, 2000, requires that "An appeal board shall not make a decision that does not comply with a plan, scheme and development regulations that apply to the matter being appealed."

Did Service NL have the authority to refuse an application to build a cabin on the land?

In considering whether Service NL has the authority to refuse the application the Board considered the testimony of Ms. Blanchard and Ms. Murphy that Service NL was the authority responsible for administering the *BWB Regulations*. Section 3 of the *BWB Regulations* states:

A person, corporation, partnership, association or other organization shall not carry out any development in the environs area unless a permit for the development has first been issued in writing by the authority.

In light of the forgoing, the Board finds Service NL had the authority to accept, review and approve or reject the applications of Mr. Keith Lawlor and Mr. Brock Lawlor to build a cottage on land located on the Old Witless Bay Line on the shores of Long Pond.

Did Service NL exercise its authority appropriately in its refusal to authorize the building of a cabin on the land?

Ms. Murphy, on behalf of Service NL, testified that applications for development on Crown land would typically be reviewed by Service NL and sent to other government departments for comments. Ms. Murphy stated in this case the applications were rejected as the land was regulated by the *BWB Regulations*, was zoned watershed protection under those Regulations and a cottage was not a permitted use for that zone. Ms. Murphy, noted there was no evidence in the application files that the factors contained in Section 6 of the *BWB Regulations* had been considered when assessing the applications. Ms. Murphy was not responsible for assessing the applications.

The Board notes that at Section 6 of the *BWB Regulations* the factors that guide the consideration of an application are as follows:

Factors to be considered

6. (1) The authority shall, when considering an application for a permit to develop, be guided in his or her decision by the **regional plan and Schedule A and shall consider**
- (a) the topography, physical condition and natural features of the land;
 - (b) the use or the proposed use of the land, and the use of the land in the immediate vicinity;
 - (c) the number, location, safety and convenience of accesses;
 - (d) the design, location and construction of the proposed development;
 - (e) the adequacy of the method and the suitability of the land for the type of water and sewage disposal required;
 - (f) the adequacy and suitability of the methods proposed for the disposal of waste material; **and**
 - (g) the shape and size of each lot or parcel of land.
- (2) The authority shall consult with all government departments, agencies, officials and persons considered necessary with respect to the considerations referred to in subsection (1).

(emphasis added)

The Board finds the use of the word “and” as emphasized above requires Service NL to consider the regional plan, Schedule A of the *BWB Regulation* (which lists the zones and permitted uses) and the 7 factors listed from (a) to (g). In this case the regional plan is the St. John’s Urban Region Regional Plan (the Plan). Based on the testimony received, the Board finds that while Service NL did consult with the appropriate government department on this application to determine the zoning, Service NL based its decision solely on the zoning requirement listed in *BWB Regulations* and did not establish that Service NL considered all the factors listed section 6 of the *BWB Regulations*.

The Watershed Protection Zone in Schedule A of the *BWB Regulations* states:

Permitted Use Classes:	Agriculture, conservation and accessory building
Discretionary Use Classes:	Forestry, recreational open space, mineral working, antenna and education.

The Board finds that failure to consider the factors does not provide the Board with sufficient grounds in this case to overturn Service NL’s decision. This is so because the Board cannot make a decision “does not comply with a plan”

The Board notes the Plan, at Section F(e) states, in part, “The Policy in Watershed Protection Areas is to tolerate and allow the maintenance, continuation, and limited extension of existing uses, ... and to prohibit new permanent structure ...”

With respect to the existing cabins and cottages in the area the Board notes that these buildings may also be considered as non-conforming use under the *Urban and Regional Planning Act, 2000* and are allowed to remain in place and be maintained in accordance with Section 108 of that Act.

Conclusion

For the reasons outlined above the Board finds Service NL had the authority to accept, review and approve or reject the applications of Mr. Keith Lawlor and Mr. Brock Lawlor.

The Board further finds that while Service NL did not demonstrate it had assessed the applications in accordance with all the factors listed in section 6 of the *BWB Regulations* Service NL acted in accordance with the *BWB Regulations* to the extent that it rejected the applications on the basis the proposed use was not permitted within the Watershed Protection Zone.

Order

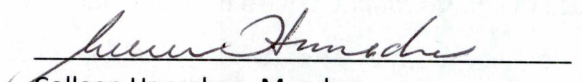
Based on the information presented, the Board orders that the decision made by Service NL to reject the application to build a cabin on the requested parcel of land be upheld.

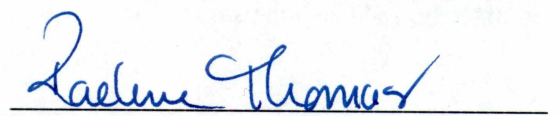
Service NL and the appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

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

DATED at St. John's, Newfoundland and Labrador, this 27th day of November, 2017.


Michelle Downey, Chair
Eastern Newfoundland Regional Appeal Board


Colleen Hanrahan, Member
Eastern Newfoundland Regional Appeal Board


Raelene Thomas, Member
Eastern Newfoundland Regional Appeal Board