

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Kyle Rees on behalf of Aaron Blake **Appellant**

AND Town of Hant's Harbour **Authority**

RESPECTING Matter under appeal Respecting Removal Order for a platform on property at 88 Custard's Road, Hant's Harbour (MAE File #:15-006-044-040)

BOARD MEMBERS Chair – Cliff Johnston
Member – Paul Boundridge
Member - Robert Warren

DATE OF HEARING October 25, 2018

IN ATTENDANCE

Appellant: Aaron Blake; Kyle Rees, Lawyer for Appellant

Respondent: Town of Hant's Harbour – Betty Tuck, Town Clerk; Donald Green, Mayor;
Christopher Lewis, Lawyer for the Town

Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board

Christopher Hardy, Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

This appeal arises from the Town of Hant's Harbour Council issuing a letter on October 21, 2016 to George and Fronnie Blake ordering the removal of a platform as the platform constructed is located on a public right of way. This letter advised the Blakes of their right of appeal and the process to appeal the removal order.

The subject property is unzoned as the Town of Hant's Harbour does not have a Municipal Plan and Development Regulations. In the absence of a Municipal Plan and Development Regulations, the Town controls development and construction under the *Municipalities Act, 1999*. Section 404(1)(i) of the *Municipalities Act, 1999* allows the Town to issue a removal order when "a fence, building, steps, erection or other object which projects into or over land reserved for a public highway or sidewalk be removed". The *Highway Traffic Act, 1990* defines "highway" as a "place or way [...] designed and intended for, or used by, the public for the passage of traffic or the parking of vehicles and included all the space between the boundary lines of the place or way".

On October 26, 2016, Kyle Rees, solicitor for Aaron, George and Fronnie Blake, filed an appeal against the issuance of the Removal Order with the Eastern Newfoundland Regional Appeal Board. The grounds of appeal presented were:

1. "...the Blakes complied with all municipal procedures necessary to construct the platform. They were informed by the Town that a permit was not required. The allegation that the platform is too close to an adjoining boundary is unsubstantiated and false."
2. "...the Town has no evidence to substantiate the claim that there is a public right of way that runs through the Blake property. The Blake family has researched this matter as can find no basis for this claim."
3. "...there is no authority referenced in the September 14, 2016 letter under which Council purports to be able to require the removal of the constructed platform. In order to file this appeal, we have assumed that the Town is relying under s. 404(1)(i)..."

In accordance with the *Urban and Rural Planning Act, 2000*, a public notice of appeal was published in *The Compass* newspaper on April 24, 2018; and a notice of the time, date and place of the hearing was provided to the appellant and the authority as required by the *Urban and Rural Planning Act, 2000*.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

The Municipalities Act, 1999

The Highway Traffic Act, 1990

Matters presented to and considered by the Board

Q: Has it been established that a public right of way exists in the area where the subject platform is located?

A: The Town Clerk consulted with the Jeffrey Nickerson, Land Management Officer, Land Management Division of the Department of Municipal Affairs and Environment in August of 2016 and was advised that:

“I estimate the path at 16.5 feet, it is not clearly defined in the descriptions. It does appear to (be) left as a right of way to the garden in the back. Since squatters rights requires a minimum of 20 years prior to 1977, it’s possible that someone could make a claim, but the Crown would likely not issue anything if it landlocked another claim (the gardens). The fact that it has remained a path for so long would likely eliminate any squatters claims. This could be viewed differently if there was a house built over the path for 60 years or something like that.”

The Town’s representatives, both long-time town residents, informed the Appeal Board that there had always been public access to nearby peoples’ gardens via the disputed right of way, though it appeared that this pathway had not been used much in recent years.

Based on consultation with the Land Management Division of the Department of Municipal Affairs and Environment, which included land ownership information (cadastral mapping) for Hant’s Harbour and the local knowledge of Town representatives, the Town concluded that there is a historical public right of way which continues to exist.

Q: How is construction within a public right of way viewed under *the Municipalities Act, 1999*?

A: Section 168(1) of the *Municipalities Act, 1999* states that:

“A person shall not construct or place steps, a fence, building, erection or other projection on or over land reserved for a public highway or sidewalk.”

Q: Has the Town established that the subject platform is located within the alleged public right of way?

A: The Town Council directed a Town worker on July 27, 2016 to measure the area from the adjoining property owner's fence to where the platform is placed. This field check was done and it estimated that the platform is located approximately 5 feet from the neighbour's fence in the front and approximately 2 feet from the neighbour's fence in the back. However, from the information presented to the Board, it is uncertain where the lateral boundaries of the right of way are or from where the platform should have been placed in the minds of the respective parties.

Q: Did the Town have the authority to issue the Removal Order?

A: The Board agrees that the Town had the authority to issue the Removal Order under Section 168 (1) of the *Municipalities Act, 1999* and Section 404(i) of the *Municipalities Act, 1999*.

Conclusion

In arriving at its decision, the Board reviewed the submissions and comments given by all parties present along with the technical information and planning advice.

The Board is bound by section 42 of the *Urban and Rural Planning Act, 2000* and therefore must make a decision that complies with the applicable legislation, policy and regulations.

Based on its findings, the Board determined that the Town was acting within its authority under the Municipalities Act, 1999 to order the removal of the subject platform within the alleged historic right of way. In the Board's opinion, the Town made reasonable efforts to establish the existence of the right of way and felt that it had valid reason and authority to issue the Removal Order to the Appellant. Therefore, the Board confirms the Respondent's decision.

The Board strongly recommends that in the interests of all parties, it would be beneficial for a survey of the historic right of way under discussion be undertaken by the Town.

ORDER

Based on the information presented, the Board orders that the decision of the Town of Hant's Harbour as communicated in a letter to Fronnie Blake and George Blake on October 21, 2016 to remove the platform on property at 88 Custard's Road, Hant's Harbour be confirmed.

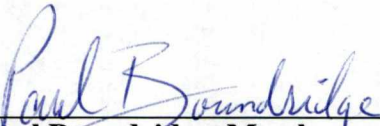
The Respondent and the Appellant(s) are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Eastern Newfoundland Regional Appeal Board may be appealed to the Supreme Court of Newfoundland and Labrador 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(s).

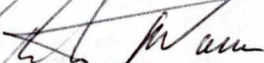
DATED at St. John's, Newfoundland and Labrador, this 5th day of November, 2018.



Cliff Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Paul Boundridge, Member
Eastern Newfoundland Regional Appeal Board



Robert Warren, Member
Eastern Newfoundland Regional Appeal Board