

Eastern Regional Appeal Board

Appeal #	15-006-067-032
Appellant(s)	Gordon Adams
Respondent / Authority	Town of Old Perlican
Date of Hearing	September 21 st , 2022

Board Members

Chair	Cliff Johnston, MCIP
Member	Carol Ann Smith
Member	Paul Boundridge, MCIP

Also in Attendance

Solicitor for the Appellant(s)	
Representatives for the Appellant(s)	Robert Hatcher, son-in-law of Appellant Gordon Adams
Representatives for the Authority	Sonya Durdle-Walsh, Town Clerk; Emily Button, former Acting Town Clerk; Darren Squires, former Town employee
Secretary to the Boards	Darren Randell, MCIP, Planner III
Technical Advisor to the Boards	Sean McGrath, Planner III
Interested Parties	Margaret Tizzard, neighbouring property owner

The authority for appeals comes from section 42 of the *Urban and Rural Planning Act, 2000* (The Act).

Board's Role

The role of the Regional Appeal Board (the Board) is to determine if the Authority acted in accordance with the *Urban and Rural Planning Act, 2000* and the Municipal Plan and Development Regulations, 2009, when it issued an Order to Gordon Adams (the Appellant) on August 27, 2020 ordering the removal of a fence at 2-4 Adams Beach Road, Old Perlican.

Presentations During the Hearing

The following is a synopsis/summary of the verbal representations made to the Board during the Appeal Hearing. The Board has also received and reviewed written submissions from the Technical Advisor as well as representatives for the Appellant and the Authority.

1. Planner's Presentation

Background

The Authority received a complaint about an erection of a fence at 2 Adams Beach Road. The Town determined that the fence was erected without a permit and wrote to the Appellant asking that the fence be removed. The Appellant submitted an application but the Town determined that the fence did not meet regulations and the application was denied. An order was subsequently issued by the Town on August 27, 2020. The order stated that the development of the property at 2 Adams Beach Road is deemed to be in non-compliance with the Old Perlican Municipal Plan, *Municipalities Act, 1999* and *Urban and Rural Planning Act, 2000* and ordered that the fence be pulled down or removed from the site within 30 days of the date of the order being served.

Chronology assembled from the material submitted by the Applicant, Appellant, and the Authority.

April 23, 2020	The Authority wrote the Appellant asking that the fence at 2-4 Adams Beach Road be removed as no permit had been issue and the fence did not comply with the Old Perlican Municipal Plan and Development Regulations.
May 13, 2020	An inspection report was completed

July 3, 2020	The Authority wrote the Appellant asking that the fence built at 2 Adams Beach Road be removed by July 29, 2020 as the application for the fence has not been approved. ...
July 10, 2020	The Appellant wrote to the Authority outlining grounds for a fence to enclose a property.
July 15, 2020	Authority acknowledged receipt of the Appellant's letter and asked that the fence be removed.
August 25, 2020	At a regular meeting, Council passed motion #2020-255 "Be it so resolved that the Town of Old Perlican issue an Order to remove a fence at 4 Adams Beach Road. This fence do not meet all requirements and regulations."
August 27, 2020	Order signed by the Town Clerk
September 21, 2020	Appeal registered by the Secretary of the Regional Appeal Boards

1. Grounds of Appeal

This appeal is based on the following section of the Act: Section 42.(1)(c) (the issuance of a stop work order).

42. (1) A person or an association of persons aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to

- (a) an application to undertake a development;*
- (b) a revocation of an approval or a permit to undertake a development;*
- (c) the issuance of a stop work order; and*
- (d) a decision permitted under this or another Act to be appealed to the board.*

The Appellant(s) is/are appealing the stop work order based on the following grounds:

- The fence is to enclose private property and is not development;
- The application was not dealt with and the letters from the Town did not provide information about the right to appeal;
- The Authority failed to provide reasons for its decision;
- The subject property is family land;
- The original fence was destroyed and the fence that was constructed was a replacement; and

- The 3 metre setback is unreasonable given the historical nature of the property.

Construction of a fence meets the definition of development in the Act. Section 2 (g) defines development as the carrying out of building, engineering, mining or other operations in, on or over land.

Definitions

2. In this Act

(g) "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change in the use, or the intensity of use of land, buildings or premises...

2. Validity

Section 42 (4) and (5) of the Act state:

42. (4) An appeal made under this section shall be filed with the appropriate board not more than 14 days after the person who made the original application appealed from has received the decision being appealed.

42. (5) An appeal shall be made in writing and shall include

- (a) a summary of the decision appealed from;*
- (b) the grounds for the appeal; and*
- (c) the required fee.*

According to the documents provided, the appeal was dated September 8, 2021 and received on September 21, 2021. The Appellant's submission included the grounds of appeal, an appeal summary form and the required fee.

3. Legislation and Regulations

The applicable legislation with respect to this appeal is:

- Old Perlican Municipal Plan and Development Regulations
- *Urban and Rural Planning Act, 2000*

4. Land Use Planning

The Old Perlican Municipal Plan and Development Regulations came into legal effect on December 18, 2009.

The subject site is located in the Town Future Land Use Designation. According to Municipal Plan policy 4.1, the Town designation is intended to recognize the existing character of Old Perlican.

4.1 TOWN

The Town Designation is designed to sustain and develop the existing character of Old Perlican. This designation allows the

Town to zone for an array of assembly, residential, commercial, industrial, institutional, public and recreational uses, transportation and other compatible use classes as permitted or discretionary uses.

2. Municipal Plan policy 3.8 gives Council discretionary powers to ensure that development protects the interests of the community and individuals.

3.8 DISCRETIONARY POWERS

Under the Urban and Rural Planning Act, this municipal plan and the development regulations, the Town can exercise broad discretionary powers over development to ensure that such development occurs in a way that protects the basic interests of the community and individual in accordance with the other provisions of this municipal plan and in accordance with the applicable legislation.

Discretionary powers are exercise over a wide range of developments, including discretionary uses, variances and development which under the Act and in the opinion of the Town require the exercise of such powers.

The criteria for the exercise of discretionary powers are as follows:

- a) *the applicant and the likely affected parties, the general public and other persons or agencies (Provincial, Federal, non-profit) are given adequate notification and opportunity to comment on the application and the decision of the Town;*
- b) *the discretionary power is exercised in a clear and fair (unbiased) manner;*
- c) *the exercise of the discretionary power is properly documented.*

3. The subject site is located in the Town zone under the Town of Old Perlican Development Regulations. In the Town use zone table (schedule C) of the Old Perlican Development Regulations, the follow development standards are established for lots with municipal water and sewer.

<i>2. Development Standards - Municipal Water and Sewer</i>	
<i>Lot area (minimum)</i>	<i>600 m²</i>
<i>Frontage (minimum)</i>	<i>20 m</i>
<i>Building Line Setback (minimum)</i>	<i>8 m</i>
<i>Side Yard Width (minimum)</i>	<i>*3 m</i>
<i>Side Yard Width Flanking Road - 'Corner Lot' (minimum)</i>	<i>*6 m</i>
<i>Rear Yard Depth (minimum)</i>	<i>*10 m</i>
<i>Lot Coverage (maximum - all buildings combined)</i>	<i>33%</i>

4. This section allows for a reduction in side yard at Council's discretion.

Side Yard Width and Rear Yard Depth Reductions

The Town may in its discretion reduce the minimum side yard and rear yard by up to 50% provided that:

- a) every reasonable attempt has been made to accommodate the development on the property, including reducing the size of the development;*
- b) the Town is satisfied that the reduction will not hamper snow-clearing operations and vehicle access;*
- c) and where at least one of the following conditions is met:*
 - i) the reduction is needed in order to allow development of a site that due to slope, water bodies or other natural features cannot be otherwise developed;*
 - ii) an existing lot, that is a lot in existence at the time of the coming into effect of these Regulations, lacks sufficient depth to permit the development.*

5. Regulation 51 outlines the provisions for fences. This section includes no provision for the setback for fences from the building line, side and rear property lines.

Subsection 5 allows Council to issue an order to remove a fence or a portion of a fence where it creates a safety hazard or obstruction or impedes snow clearing.

(5) Order to Remove Fence - When in the opinion of the Town, a fence creates a safety hazard or obstruction or impedes snow-clearing due to its location height or construction material, the Town may issue an order to the property owner stating that the fence or portions thereof be removed, reconstructed or repaired within a specified time in order to correct the safety hazard or obstruction and the cost to remove, construct or repair said fence or part thereof will be at the owner's expense. In the event that the property owner does not remove the fence within the specified time as ordered, the Town may remove the fence and the cost to remove, reconstruct or repair said fence will be at the owner's expense.

6. Regulation 11 gives Council discretionary powers to approve a development application with conditions or refuse an application.

11. Discretionary Powers of Town

No person shall carry out any development within the Planning Area except where otherwise provided in these Regulations

unless a permit for the development has been issued by the Town. Permit to be Issued Subject to Regulations 10 and 11, a permit shall be issued for development within the Planning Area that conforms to the requirements of these regulations. Permit Not to be Issued in Certain Cases Neither a permit nor approval in principle shall be issued for development within the Planning Area when, in the opinion of the Town, it is premature by reason of the site lacking adequate road access, power, drainage,

sanitary facilities, or domestic water supply, or being beyond the natural development of the area at the time of application unless the applicant contracts to pay the full cost of construction of the services deemed necessary by the Town and such cost shall attach to and upon the property in respect of which it is imposed. Discretionary Powers of Town In considering an application for a permit or for approval in principle to carry out development, the Town shall take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto, and shall assess the general appearance of the development of the area, the amenity of the surroundings, availability of utilities, public safety and convenience, and any other considerations which are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, the Town may, in its discretion, and as a result of its consideration of the matters set out in this Regulation, conditionally approve or refuse the application.

7. Both the Old Perican Municipal Plan and Development Regulations give Council the authority to exercise its discretion. In addition, section 102 (1) of the *Urban and Rural Planning Act, 2000* (the "Act") gives the Authority the discretion to issue an order.

Order

102. (1) Where, contrary to a plan or development regulations, a person has undertaken or commenced a building or other development, the council, regional authority or authorized administrator responsible for that plan or those regulations or the minister where he or she considers it necessary, may order that the person pull down, remove, stop construction fill in or destroy that building or development and may order that the person restore the site or area to its original state.

8. Section 42 (11) of the Act specifies that the Appeal Board cannot override a discretionary decision of Council.

Appeal

42 (11) Notwithstanding subsection (10), where a council, regional authority or authorized administrator may, in its discretion, make a decision, a board shall not make another decision that overrules the discretionary decision.

Procedural Compliance

The Appellant submitted an updated application to the Authority. There is no evidence that the Authority considered this application and made a decision to refuse it. The letter dated July 3, 2020 references the application and indicates that it has not been approved but does not provide reasons for its decision nor outlines the right of appeal.

Regulation 22 of the Old Perican Development Regulations requires reasons be given when an application is refused.

22. Reasons for Refusing Permit

The Town shall, when refusing to issue a permit or attaching conditions to a permit, state the reasons for so doing.

In addition, section 5 of the Development Regulations made under the *Urban and Rural Planning Act, 2000* (the "Act") requires the Authority to notify the applicant of their right of appeal and the details for filing such an appeal.

Notice of right to appeal

5. Where an authority makes a decision that may be appealed under section 42 of the Act, that authority shall, in writing, at the time of making that decision, notify the person to whom the decision applies of the

(a) persons right to appeal the decision to the board;

(b) time by which an appeal is to be made;

(c) right of other interested persons to appeal the decision; and

(d) manner of making an appeal and the address for the filing of the appeal.

The July 3, 2020 letter from the Authority did not include the right of appeal.

Council issued an order, dated August 27, 2020, to the Appellant. An order must be served in accordance with section 107 of the Act.

107. (1) Unless otherwise stated in this Act, a notice, order or other document required to be given, delivered or served under

this Act is sufficiently given, delivered or served where delivered personally or sent by registered mail addressed to the person at the latest known address of that person.

There is no evidence provided regarding the service of the Order to the Appellant.

Appellant's Presentation

- Mr. Hatcher acknowledged that his father-in-law, the Appellant, Gordon Adams, did construct the fence in question without first receiving a permit from the Town.
- The fence is intended to replace the previously existing fence on the property.
- In order to meet the Town's requirement for fences, Mr. Adams would need to give up a portion of his property. This is a nonsensical requirement.
- Written correspondence from the Town requesting the removal of the constructed fence was received by the Appellant; this prompted the Appellant to submit an application for a permit to erect the fence.
- Mr. Hatcher advised the Board that to the best of the Appellant's knowledge, the fence in question has constructed on the Appellant's property.

Authority's Presentation

- The Town Representatives advised the Board that the Town relied on historical photos in making its decision to not approve the proposed fence and to issue the Order for removal of the fence.
- Prior to the decision to issue the Removal Order, the Town had sent two (2) letters to the Appellant requesting that the fence be removed in order to achieve compliance with the Town's Municipal Plan and Development Regulations.
- There is no record of a decision having been made by the Town on Mr. Adams application for a permit to construct a fence on the subject
- The Town representatives could not confirm for the Board how the Town's Order was served to the Appellant – they believe that it was by Canada Post.

Interested Parties

- Ms. Tizzard, a neighbouring property owner, advised the Board that she believes the subject fence is located on her property and she noted the fence is curtailing access to her house. She believes there may have been property boundary adjustments to her family property and the Appellant's property over time.

Board's Analysis

Q. What is the subject matter of this Appeal?

A. All participating parties have agreed that the subject of this hearing is the Appellant's decision to appeal the Town Council's decision of August 25, 2020 to issue an Order to the Appellant to remove the fence at 4 Adams Beach Road.

Q. Why did the Authority decide to issue the Order to the Appellant?

A. Upon investigation by Town Staff, it was determined that said fence was erected without a permit, and two written requests from the Town to the Appellant to remove the fence failed to have the required effect. Subsequently, the Town Council made the decision to issue a Removal Order.

Q. Does the Authority have the power to issue Removal Orders for fences constructed without a permit?

A. Yes. Section 102 (1) of the *Urban and Rural Planning Act, 2000* (the "Act") gives the Authority the discretion to issue an order.

Order

102. (1) Where, contrary to a plan or development regulations, a person has undertaken or commenced a building or other development, the council, regional authority or authorized administrator responsible for that plan or those regulations or the minister where he or she considers it necessary, may order that the person pull down, remove, stop construction fill in or destroy that building or development and may order that the person restore the site or area to its original state.

Q. **Was the Removal Order properly served by the Authority to the Appellant?**

A. Yes. Based on the evidence provided to the Board by the Authority and the Appellant, the Board has determined that the Removal Order was properly served by the Authority to the Appellant. Further, the Order did provide Notice to the Appellant of his right to appeal the decision respecting the Removal Order to the Eastern Newfoundland Regional Appeal Board.

Board's Conclusion

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

The Board has determined that the Authority, the Town of Old Perlican, had the authority under Section 102(1) of the Urban and Rural Planning Act, 2000 to issue the Removal Order to the Appellant, Gordon Adams, to remove the existing fence at 2-4 Adams Beach Road. Further, the Board has determined that the Authority utilized this authority correctly.

Board's Order

The Board orders that the decision made by the Town of Old Perlican on August 25, 2020 to issue a Removal Order to Gordon Adams to remove a fence at 2-4 Adams Beach Road, be confirmed.

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

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of this 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 21st day of September, 2022



Clifford Johnston, MCIP, Chair
Eastern Newfoundland Regional Appeal
Board



Carol Ann Smith, Member
Eastern Newfoundland Regional Appeal
Board



Paul Boudridge, MCIP, Member
Eastern Newfoundland Regional Appeal
Board