

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-072-043
Appellant(s)	Ian Snook
Respondent / Authority	Town of Conception Bay South
Date of Hearing	November 30, 2022

Board Members

Chair	Cliff Johnston, MCIP
Member	Carol Ann Smith
Member	Lisa Slaney

Also in Attendance

Appellant(s)	Ian Snook, via teleconference
Representatives for the Appellant(s)	
Representatives for the Authority	Corrie Davis, MCIP, Director of Planning and Development; John Whelan, Planning and Development Coordinator; Melane Power, Development Control Co-ordinator; John Hayes, Building Inspector
Interested Parties	
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Darren Randell, MCIP
Start/End Time	9:00 am – 10:15 am

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 Eastern Newfoundland Regional Appeal Board (the "Board") is to determine if the decision made by the Town of Conception Bay South Council (the "Authority") on November 2, 2021 to reject an application from Ian Snook to install a retaining wall alongside the property at 103 Fowler's Road, Conception Bay South was in

accordance with the Urban and Rural Planning Act and the Town's Municipal Plan and Development Regulations.

LEGISLATION, MUNICIPAL PLANS AND REGULATIONS CONSIDERED BY THE BOARD

- Urban and Rural Planning Act, 2000
- Town of Conception Bay South Municipal Plan and Development Regulations

BACKGROUND

On November 04, 2021, the Authority (The Town of Conception Bay South) issued a letter notifying of Council's decision to refuse four Development Permit applications: Application No. 882 to construct a retaining wall, and Application Numbers 934, 935, and 936 for a deck, fence, and pool at 103 Fowlers Road, in the Town of Conception Bay South (CBS). The Authority states in its Planning and Development Committee minutes of October 26, 2021, the proposed structures would abut the road right of way for Fowlers Road and would have the effect of being in front of the dwellings at 103 and 101 Fowlers Road. The Committee determined the existing road right of way may not be wide enough to accommodate future widening as needed. The Committee also determined the cumulative impact of the proposed retaining wall, deck, and fence atop the deck would result in a structure as high as 3 to 4 metres above the street elevation. The Committee also considered the Development Regulations require pools to be located in the rear yards of dwellings. While no concept drawing was supplied by either the Appellant or the Authority, it is assumed the pool was being proposed in the side yard given it was refused.

On November 18, 2021, the Appellant (Ian Snook) filed an appeal with the Secretary of the Eastern Newfoundland Regional Appeal Board. While the Appeal Board application is incomplete (although signed by the Appellant), the intent of the submission is believed to be understood by the Technical Advisor. The Appellant is the owner of the property at 103 Fowlers Road, has completed the reconstruction of a dwelling on the property and has applied to the Town for the other property retrofits previously described. The Appellants submission acknowledges he is able to make concessions on the deck and pool, but states the retaining wall cannot be modified given it will undermine the homes foundation and construction costs would be in the amount of \$10,000.00 to retrofit. The Appellant also claims removing the wall would create hazardous conditions relating to the location of 70 year old trees. The Appellant also states in his submission that he also wanted to improve the aesthetics of the property.

Given the minimum information provided from both the Appellant and the Authority, a site visit was conducted by Departmental staff on September 9, 2022 to confirm site details.

Presentations During Hearing

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

The Board heard from the following:

Technical Advisor:

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

Sept 13 & 29, 2021	The Authority received applications to construct a retaining wall, deck, fence, and pool at 103 Fowlers Road.
Oct 26, 2021	The applications are considered by the Authority's Planning and Development Committee and refusal is recommended for Councils consideration.
Nov 2, 2021	The Authority resolved to refuse the applications vis-à-vis Resolution #21-374 at its regular Council Meeting of November 2, 2021.
Nov 4, 2021	The Authority mailed a letter, as notice of Council decision to refuse the applications. In the refusal the right of appeal and the procedures to file an appeal with the Secretary of the Eastern Newfoundland Regional Appeal Board were included.
Nov 18, 2021	The Appellant submitted an incomplete Appeal Application Form to the Secretary of the Eastern Newfoundland Regional Appeal Board (with supporting note), which established: <ul style="list-style-type: none"> • the facts of the appeal

Grounds of Appeal

The Appellant is appealing the decision of This appeal is based on the following provision of the Urban and Rural Planning Act, 2000: Section 42(1)(a) (an application to undertake a development).

The Act establishes the types of decisions that may be appealed to the Board:

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;*

Council to refuse the application, specifically for a proposed retaining wall at 103 Fowler's Road in Conception Bay South, NL on the following grounds:

- *That the Town's refusal will result in undermining of the foundation, cause tree falling hazards, and result in additional \$10,000 to address undermining of the foundation.*

Validity

Sections 42(4) and (5) of the Urban and Rural Planning Act, 2000 establish that:

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.*

The appeal submission package establishes that appeal was filed on November 18, 2021 which is not more than 14 days from the date of receipt of the Council decision. The Appellant's submission included the following, per the requirements of the Act:

- incomplete appeal application form – *signed only*
- appeal/decision summary - *missing*
- grounds of appeal, and
- required fee.

Legislation and Regulations

The applicable legislation, policies, and regulations with respect to this appeal are:

- Urban and Rural Planning Act, 2000
- The St. John's Urban Region Regional Plan, 1976
- Town of Conception Bay South Municipal Plan, 2011-2021
- Town of Conception Bay South Development Regulations, 2011-2021

Land Use Planning

The Urban and Rural Planning Act, 2000

The Town's Development Regulations, 2011-2021 do not contain a definition for building or retaining wall, however, the Urban and Rural Planning Act, 2000 (URPA), houses a definition that the Development Regulations must adhere, which states in section 2 of the Act :

2. *In this Act,*

(c) *"building" means*

(i) a structure, erection, alteration or improvement placed on, over, or under land or attached , anchored, or moored to land.

"Retaining wall" also equates to a "building" based on this URPA definition given that a retaining wall is a structure that is anchored or moored to land.

The St. John's Urban Region Regional Plan

The site is situated with the Urban Development designation of the St. John's Urban Region Regional Plan which divides the region into sub-regions including the Regional Centre, the Sub-Regional Centres, and the Local Centres where residential and accessory uses are permitted. The Town of Conception Bay South is designated as a Sub-Regional Centre in the Regional Plan.

Conception Bay South Municipal Plan and Development Regulations, 2011-2021

The Towns Municipal Plan and Development Regulations came into effect in July, 2012. The subject property is located within the 'Residential Medium Density' land designation, as established in the Future Land Use Map.

The Residential Medium Density policy states that the land use designation applies to the largely built up and serviced or newly serviceable areas of the Town. Within the Residential Medium Density land use designation, the single detached dwelling will remain the predominant housing form.

The Development Regulations, 2011-2021 establishes the subject property as being located in the 'Residential Medium Density' use zone. Residential and accessory uses are each permitted in both the land use designation and the land use zone.

The Residential Medium Density (RMD) use zone table in Part 10 of the Development Regulations, 2011-2021, specifies a minimum building line setback of 10 metres for single detached dwellings in the RMD zone. The Town has identified the proposed retaining wall on the front, left side of the dwelling encroaches within the 10 metre minimum building line setback.

The Development Regulations allow for certain items and conditions to be constructed in the minimum building line setback as per Development Regulation 5.17- Minor Front

and Flanking Yard Projections on a Residential Lot, however a retaining wall is not listed here. Regulation 5.17 - specifies the following:

5.17 Minor Front and Flanking Yard Projections on a Residential Lot

1. No portion of a dwelling shall project into the minimum front and flanking yard of a building except in accordance with the following provisions:

a) The following projections shall be permitted:

i. chimney breast, eaves, sills or cornices not projecting more than one metre (1 m) into a required front yard depth;

ii. unenclosed steps with or without a landing;

iii. an unenclosed or enclosed porch, patio or veranda that projects no more than two metres (2 m) into the established building line setback for the lot;

iv. wheelchair ramps or other accessibility devices as approved by the Authority.

2. The projection does not encroach upon or reduce the minimum amount of parking required for the lot.

3. The projection does not encroach upon or create an obstruction in the sight triangle for corner lots.

Development Regulations section 4.3 requires that development shall only be carried out where it is in accordance with the Municipal Plan and Development Regulations.

4.2 Compliance with Regulations

Development shall be carried out and maintained within the Planning Area in accordance with the Municipal Plan, these Regulations, conditions stated in a Development Approval, and any other by-law or regulation enacted by the Authority.

It appears the retaining wall was removed during reconstruction of the new dwelling. Reinstating the retaining wall would result in non-conformance to section 5.17 and Part 10 (the Use Zone Tables) of the Development Regulations as previously described.

Section 3.0 of the Development Regulations houses the Provincial (Ministers) Development Regulations and section 3.16 states that buildings shall not be expanded where the expansion would increase the non-conformity with respect to the development standards for the zone.

3.16 Non-conformance with standards

Where a building, structure or development does not meet the development standards included in development regulations, the building, structure or development shall not be expanded if the expansion would increase the non-conformity and an expansion must comply with the development standards applicable to that building, structure or development.

Council's motion states that the resolution was made in accordance with Council's discretionary authority, as implied by section 4.6 of the Development Regulations, as per below.

4.6 Discretionary Powers

In considering an application to carry out development, the Authority 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 Authority 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.

Procedural Compliance

The Authority's appeal package outlines the Town received four development applications for 103 Fowlers Road on September 13 and 19, 2021. On October 2, 2021, the Towns Planning and Development Committee recommended Council's refusal of the applications.

103 Fowlers Road

The Committee discussed applications to construct a retaining wall, fence, deck and pool at the noted property. The Committee noted that the proposed location of the structures would abut the road right of way for Fowlers Road and have the effect of being in front of the dwelling at 103 Fowlers Road and the adjacent dwelling at 101 Fowlers Road. The Committee also noted that although recently re-paved, this portion of Fowler Road has not been fully upgraded. The existing road right of way for Fowlers Road in this area may not be wide enough to accommodate future upgrading of the road. The Committee considered the cumulative impact of the retaining wall, deck and fence atop the deck and noted that the structure could be as high as three to four meters above the elevation of the street. The Committee also considered Town regulations that require pools to be located within the rear yard of dwellings. In consideration of the proposal and the regulations, the Committee recommended that the application be refused.

Recommendation:

Be it so resolved that, in accordance with Council's discretionary authority, Application No. 882 received on September 13, 2021 and Application Nos. 934, 935 and 936 received on September 29, 2021 seeking approval of a retaining wall, fence, pool and

deck at 103 Fowlers Road be refused due to the location of the structures in the front and side yard of the property which is contrary to the requirements of Town Regulations.

On November 2, 2021, Council at its regular meeting motioned to refuse the applications as per Resolution #21-374.

Resolution #21-374

Councillor Hillier / Councillor Connors

Be it so resolved that, in accordance with Council's discretionary authority, Application No. 882 received on September 13, 2021 and Application Nos. 934, 935 and 936 received on September 29, 2021 seeking approval of a retaining wall, fence, pool and deck at 103 Fowlers Road be refused due to the location of the structures in the front and side yard of the property which is contrary to the requirements of Town Regulations.

- carried unanimously

The Town provided to the Appellant written confirmation, dated November 04, 2021 that Council refused the Development Permit application with stated reasons and advised of the right to appeal as per Section 42 of the URPA, as required by Development Regulation section 4.3.

4.3 Decisions of the Authority Decisions made by the Authority with respect to a Development Approval required by these Regulations, shall be made in writing and state the reasons for a refusal of, or conditions contained within the Development Approval. The Authority shall also advise the person to whom the decision applies of their right to appeal, in accordance with Section 42 of the Act and the requirements of Section 3, Regulation 5 of these Regulations.

The Development Regulations section 3.5 - the Provincial Development Regulations also refers to Council's obligation to notify of the right to appeal.

3.3. NOTICE OF RIGHT TO APPEAL

Where Council makes a decision that may be appealed under Section 42 of the Urban and Rural Planning Act, Council shall, in writing, at the time of making that decision, notify the person to whom the decision applies of the: (a) person's 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 Appellant:

- Mr. Snook advised the board that his house is quite old and cannot meet the current requirements for building line setbacks.
- He understands that this portion of Fowlers Road adjacent to his property may need to be widened at some time in the future.
- His house was the first constructed on the street and has a number of mature trees.
- The Town's refusal for the retaining wall he proposes to build will dramatically increase the cost of stabilizing his property.
- He would be willing to sign an agreement with the Town of Conception Bay South to bear the cost of removing whatever portions of a retaining wall as required by the Town should this portion of Fowlers Road need to be widened in the future.
- Mr. Snook feels there are unique circumstances regarding his property and his application.

The Authority:

The Town submitted a detailed submission to the Board several days prior to the date of the meeting.

- Mr. Davis advised the Board that the Town has no indication that there previously was a retaining wall located on the subject property.
- It is the Town's position that the Appellant has not shown/demonstrated where the Town erred in making its decision to reject the application for the retaining wall.
- The Town contends that a retaining wall is ancillary to the main use of the property, which is a single detached dwelling.
- The Municipalities Act, 1999 provides the Town with the Authority to implement regulations respecting fences and snow clearing. Under the Town's Fence Regulations, fences would include retaining walls.
- The Town determined that the proposed retaining wall would be located within 6.12 meters of the center of Fowlers Road. Further, the Town determined that the proposed retaining wall would potentially interfere with Town's snow clearing operations, and any damage to the retaining wall could lead to public safety concerns (concrete and other debris in the road).

BOARD ANALYSIS

Q. Is a retaining wall "Development"?

A. Yes, a retaining wall is a Development. The Town's Development Regulations, 2011-2021 do not contain a definition for building or retaining wall, however, the Urban and Rural Planning Act, 2000 (URPA), houses a definition that the Development Regulations must adhere, which states in section 2 of the Act :

(c) "building" means

(i) a structure, erection, alteration or improvement placed on, over, or under land or attached , anchored, or moored to land.

"Retaining wall" also equates to a "building" based on this URPA definition given that a retaining wall is a structure that is anchored or moored to land.

The definition of "Development" as defined under Section 2(g) of the Urban and Rural Planning Act would include retaining walls.

Q. Does the construction of a retaining wall require approval and a permit?

A. Yes. Section 4.1 of the Town's Development Regulations requires that any Development within the Town's jurisdiction only proceed upon approval of the Town.

Section 4.2 of the Town's Development Regulations requires that Development within the Town's jurisdiction comply to the policies of the Town's Municipal Plan and Development Regulations, and any other by-law enacted by the Town.

Q. Did the Town have the authority to reject the Application for the retaining wall?

A. Yes. Although the policy at the Town's Municipal Plan Section 4.25.3(1) and Section 5.4 of the Town's Development Regulations allow for accessory, incidental, or ancillary uses of land associated with an approved or discretionary use, that allowance is not unfettered. In the context of the current application for the retaining wall, the Town also considered the requirements of both the Fence Regulations and Snow Clearing Regulations. Sections 414(2)(hh) and (nn) of the Municipalities Act, 1999 provide the Town with authority to implement regulations respecting fences and snow clearing.

As part of its review of the application, the Town reviewed the proposed retaining wall in the context of municipal operations, including snow clearing and ice control. Town staff determined that the proposed retaining wall would be located within 6.12 meters from the center of Fowler's Road. For any new or upgraded in the Town, the Town requires a minimum of 6.12 meters either side of the center of the

road. The eastern side of Fowlers Road is approximately 5 meters from the center of the roadway in the vicinity of Fowlers Road.

The Town determined that there was a probability that the retaining wall would interfere with snow clearing and ice control operations and that the retaining wall would be damaged through snow clearing operations.

The Town determined that the application is contrary to the Town's Fence Regulations and thereby contrary to Section 4.2 of the Town's Development Regulations. The Board concurs with the Town's conclusion.

BOARD'S CONCLUSION AND DETERMINATIONS

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties 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 Council of Conception Bay South had the authority under Section 4.2 of the Town's Development Regulations to reject the Application from Ian Snook to construct a retaining wall at 103 Fowlers Road and that the Town applied its authority correctly.

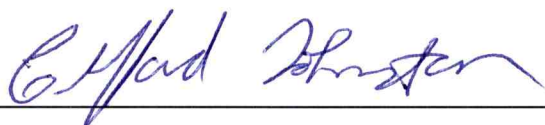
BOARD'S ORDER

The Board orders that the decision made by the Town of Conception Bay South on November 2, 2021 to reject the application from Ian Snook to construct a retaining wall at 103 Fowlers Road, Conception Bay South, be confirmed.

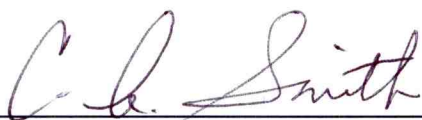
The Authority and the Appellant(s) are bound by the decision of this Regional Appeal Board.

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 Appellant have received the Board's decision.

DATED at St. John's, Newfoundland and Labrador, this 30th day of November, 2022.



Clifford Johnston, MCIP, Chair
Eastern Newfoundland Regional Appeal Board



Carol Ann Smith, Member
Eastern Newfoundland Regional Appeal Board



Lisa Slaney, Member
Eastern Newfoundland Regional Appeal Board