

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

Appeal #	15-006-072-037
Appellant(s)	Bell Mobility Inc.
Respondent / Authority	Town of Torbay
Date of Hearing	February 22, 2023

Board Members

Chair	Cliff Johnston, MCIP
Member	Lisa Slaney
Member	Paul Boundridge, MCIP

Also in Attendance

Appellant(s)	
Representatives for the Appellant(s)	Paul Greene, Senior Advisor Real Estate
Representatives for the Authority	Julia Schwarz, MCIP, CSLA Director of Planning & Development Jason Slade, Planning Technician
Interested Parties	Michael Manning, Colin Hearn – Area Residents
Secretary to the Board(s)	Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs
Technical Advisor to the Boards	Darren Randell, Planner III ,MCIP, Municipal and Provincial Affairs
Start/End Time	9: 00 am – 10:10 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 of the Town of Torbay made on September 7, 2021 to reject an application from Bell

Mobilty Inc. to construct a cell tower at 81 Camp Carey Road was made 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 Torbay Municipal Plan and Development Regulations
- The Radio Communication Act, 1985
- Industry Canada's CPC-2-0-03 (Issue 5) – the Client Procedures Circular: Radiocommunication and Broadcasting Antenna Systems

Background:

Mr. Mike Kirkland applied to the Town of Torbay on behalf of Bell Mobility Inc. for a permit to construct a cell tower at 81 Camp Carey Road, Torbay, on June 14, 2021. The Town refused Mr. Kirkland's application and issued a letter on October 31, 2021. The refusal letter indicated that the application was tabled at the Sept 07, 2021 regular public meeting of Council. The letter also noted that Council exercised their discretionary authority after receiving public objections, including a petition and refused Mr. Kirkland's application in light of the concerns predominately based around location, aesthetics, viewscape impedance, land use compatibility, and property values.

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:

Planner's Presentation:

The Town's Development Regulations lists antenna as discretionary in the subject Agriculture zone and the appellant concurred to advertise as required by the Town's Notice of Application process. The Town adhered to its Development Regulation requirements and Council acted in its discretion to refuse the application, however, Council does not have the authority to regulate cell towers which fall under the federal jurisdiction of the Department of Innovation, Science, and Economic Development - ISED.

Section 92(10) of the Constitution Act, 1867, also known as the works and undertakings power, grants the provincial legislatures of Canada, unless otherwise noted in section (c), the authority to legislate on:

92 (10). Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Roads, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Section 92(10) (a) and (b) grants federal jurisdiction over modes of interprovincial and international transportation and communication, leaving intraprovincial transportation and communication to the provinces.

The Radio Communication Act, 1985

The Minister of Industry, and by extension, the Department of ISED's authority to approve the siting of communications infrastructure is granted through section 5(1)(f) of the Radio Communication Act, 1985. Section 5 of the Radiocommunication Act states that the Minister may, taking into account all matters the Minister considers relevant for ensuring the orderly development and efficient operation of radiocommunication in Canada, issue radio authorizations and approve each site on which radio apparatus, including antenna systems, may be located.

ISED has an official established procedure for managing the development of wireless communication facilities that proposes to gather and consider local interests through CPC-2-0-03 – the Client Procedures Circular. A cell tower proponent, in this case Bell Mobility Inc., is required to adhere to established municipal approval processes for wireless communications facilities where such processes are in effect, but where they are not in effect, a proponent is required to adhere to the process specified in the CPC-2-0-03. Based on communications in the Towns appeal submission, the appellant appears to have informed the Town of the procedural requirements, and that the Town failed to respond in a manner timely to the requirements of CPC-2-0-03.

The Urban and Rural Planning Act, 2000.

The Eastern Newfoundland Regional Appeal Board is subject to appeals specified under Section 42 (9) of the Urban and Rural Planning Act, 2000, which states;

42 (9) A board shall consider and determine appeals in accordance with this Act and a plan, scheme and regulations that have been registered under section 24 and having regard to the circumstances and merits of the case.

In this case the applicable regulations for development of communications facilities are legislated under the Radio Communications Act, 1985, as opposed to the Urban and Rural Planning Act, 2000, therefore the Eastern Regional Appeal Board does not have the jurisdiction to respond to the subject appeal.

The Appellant:

Mr. Green outlined for the Board, Bell Mobility's position on the Appeal. Among his points:

- The regulatory authority for radiocommunications, including antenna systems and structures, is Innovation, Science, Economic Development Canada, "ISED", a department of the Federal Government (formerly known as Industry Canada).
- The Town of Torbay is not the approving authority for wireless facilities; local regulations cannot override federal jurisdiction, or be more restrictive than the Client Procedures Circular CPC-2-0-03 Issue 5 (2014) guidelines.
- The Town of Torbay has no adopted tower siting policy.
- The siting of the proposed communication tower under appeal exceeds industry requirements/standards.
- The appellant consulted with the Town on the location of the proposed tower before the Town advertised the application.
- The appellant believes the Town's reasons for refusal of the application are not in keeping with federal guidelines.

The Authority:

- The Eastern Newfoundland Regional Appeal Board has no jurisdiction to issue orders on matters of federal jurisdiction. It can solely rule on matters being considered under the Urban and Rural Planning Act, 2000.
- The Town indicated that it followed all applicable steps of the Town's Municipal Plan and Development Regulations prior to arriving to its decision on the Bell Mobility application.
- In accordance with Section 42(11) of the Urban and Rural Planning Act, 2000, an Appeal Board shall not make another decision that overrules the discretionary decision of Council. Thereby, the Town feels that Council's decision to reject the proposed tower should be upheld by the Appeal Board.

Interested Parties:

Mr. Mike Manning and Mr. Colin Hearn are both property owners/residents living in the vicinity of the proposed tower. They both expressed similar comments/concerns to the Board respecting health issues, property values, impact on private views and other more appropriate locations for the tower.

BOARD ANALYSIS

Q. Is the proposed communication tower "Development" as defined under the Urban and Rural Planning Act, 2000?

A. Yes. The Board has reviewed the definition of "Development" as defined under the Urban and Rural Planning Act, 2000 as and has determined that the proposed communication towers, meets the definition.

(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 and the

(i) making of an access onto a highway, road or way,

(ii) erection of an advertisement or sign,

(iii) construction of a building,

(iv) parking of a trailer, or vehicle used for the sale of refreshments or merchandise, or as an office, or for living accommodation,

and excludes the

(v) carrying out of works for the maintenance, improvement or other alteration of a building, being works which affect only the interior of the building or which do not materially affect the external appearance or use of the building,

(vi) carrying out by a highway authority of works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road reservation,

(vii) carrying out by a local authority or statutory undertakers of works for the purpose of inspecting, repairing or renewing sewers, mains, pipes, cables or other apparatus, including the breaking open of street or other land for that purpose, and

(viii) use of a building or land within the courtyard of a dwelling house for a purpose incidental to the enjoyment of the dwelling house as a dwelling;

Q. What is the zoning of the application/appeal site at 81 Camp Carey Road, Torbay and is a communications tower allowed in this zone?

A. The site is zoned as "Agriculture" under the Towns Development Regulations and this zone permits "antenna" as a discretionary use.

Q. In reaching its decision to reject the application for the proposed communications tower, did the Town satisfy the requirements of its Municipal Plan and Development Regulations?

A. Yes. The Board acknowledges that the proposed tower is a “Development” as defined under the Urban and Rural Planning Act, 2000 and would normally be subject, as other “developments” are, to the Town’s Municipal Plan and Development Regulations. The Town satisfied the requirements of its Development Regulations for discretionary use applications in the processing of this specific application.

Q. In making its decision to reject the application, did the Town Council acknowledge the ultimate/overriding authority/role of the Federal Government in the placement of communication towers?

A. No. The Board has been advised in the technical report prepared for this appeal that the regulatory authority for radio- communications, including antenna systems and structures, is a Federal Government Department known as “Innovation, Science, Economic Development Canada”. While the Town of Torbay has indicated in a written submission to the Board that the Board has no jurisdiction to issue orders of Federal jurisdiction and the Board can rule solely on matters being considered under the Urban and Rural Planning Act, 2000, the Town Council itself proceeded to reject the application and to advise Bell Mobility of its right and process to appeal the decision to the Eastern Newfoundland Regional Appeal Board.

BOARD’S CONCLUSION

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.

The Board was advised by the Town of Torbay that the Board does not have the authority to overrule the discretionary of the Town Council to reject the application for the communications tower. In response to the Town’s position, the Board has reviewed and takes guidance from the following decision of the Supreme Court of Newfoundland and Labrador:

Supreme Court Stroud v CNRAB

Stroud v. Newfoundland and Labrador (Central Regional Appeal Board),

NLTD 2010 25

Date: 20100211 Docket: 200903T0199

“[12] While the Board must act in the manner described above in considering a discretionary decision made by a regional authority, this does not mean that every such decision is absolutely immune from review and possible reversal. Any decision made by a town council or other regional authority that involves an exercise of discretion must be made on the basis of a proper understanding of the request. Where, as here, the Town proceeds to make its decision not knowing the location where the development is to occur, or at the least, having an erroneous understanding of the location, the Board is entitled to exercise its appeal function to override the decision made. If the authority makes its decision based upon an erroneous view of material circumstances, the discretion exercised is not immune from being overruled. The same can be said where the authority acts with bad faith or improper bias or fails to follow procedural guidelines that permit proposals to be appropriately considered. The Board's role then is not merely to "rubber stamp" the decision solely on the basis it was one made within the discretion of the authority. The process leading up to the exercise of the discretion is important. Where that process is appropriate, it is then that the Board is not permitted to override the discretion exercised.”

Based on its findings, the Board determined that the regulation of communication towers, such as the one being proposed for construction by Bell Mobility Inc. at 81 Camp Carey Road, Torbay ultimately falls under Federal Government jurisdiction. Proponents for communication towers have an obligation to consult with and obtain the concurrence of local municipalities on the proposed siting/location of communication towers as part of the Federal Government approval process. As the decision to approve or deny the proposed communications tower at 81 Camp Carey Road, Torbay will ultimately be made under Federal Government jurisdiction, the Board has determined that the Town of Torbay incorrectly applied its discretionary authority in making its decision on September 7, 2021 to formally reject the application. The application needs to be referred back to the Town Council.

To note, the concerns expressed by area residents to the Town regarding the tower, can be considered by the Town Council in its reconsideration of the application and referred by the Town to the Department of Innovation, Science, Economic Development Canada.

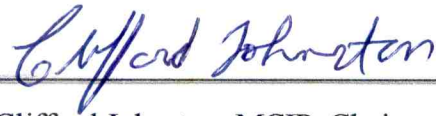
BOARD'S ORDER

The Board orders that the decision made by the Town of Torbay on September 7, 2021 to reject the application from Bell Mobility Inc. to construct a communications tower at 81 Camp Carey Road, be varied. Specifically, the Board orders that the application be referred back to the Town Council for consideration in respect of acknowledgement of the Federal Government Department of Innovations, Science, Economic Development's regulatory authority for radio communication towers.

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.

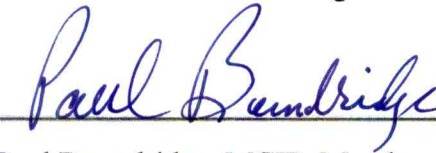
DATED at St. John's, Newfoundland and Labrador, this 22nd of February, 2023.



Clifford Johnston, MCIP, Chair
Eastern Newfoundland Regional Appeal Board



Lisa Slaney, Member
Eastern Newfoundland Regional Appeal Board



Paul Boundridge, MCIP, Member
Eastern Newfoundland Regional Appeal Board