

# Eastern Regional Appeal Board

Appeal #	15-006-072-031
Appellant(s)	Harry Mugford (Fishing for Success)
Respondent / Authority	Town of Petty Harbour-Maddox Cove
Date of Hearing	February 14 <sup>th</sup> , 2023

## Board Members

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

## Also in Attendance

Solicitor for the Appellant(s)	
Representatives for the Appellant(s)	Kimberley Orren Liam Duggan, Leo Hearn, Meghan Young
Representatives for the Authority	Stephanie Stack, CAO
Secretary to the Boards	Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs
Technical Advisor to the Boards	Sean McGrath, Planner III, Municipal and Provincial Affairs
Interested Parties	Jerry Hearn

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 Town of Petty Harbour-Maddox Cove Municipal Plan and Development Regulations, 2015 when the Authority refused on August 30, 2021 an application from Fishing for Success to erect a chain link fence at 10D Main Street, Petty Harbour-Maddox Cove.

## Presentations During the Hearing

### Planner's Presentation

On August 19th, 2021 the Appellant submitted application A2021-51 General Development Application for a chain link fence at 10 D Main Road. At a meeting of Council on August 30th, 2021 Motion No# 244 was passed refusing application (A2021-51) to build a chain link fence at 10D Main Road, Petty Harbour, due to the amount of negative feedback from residents of the community, citing a petition of 524 signatures. Appeal was filed September 13th, 2021 by the Appellant.

### Chronology

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

August 19, 2021

Fishing for Success made application A2021-51 General Development Application for a chain linked fence at 10 D Main Road. Application was referred for Councils consideration.

August 30, 2021

Public Council Meeting – August 30th, 2021

Motion No. 244 Lynn Hearn/Rick Raymond: Proposed not to approve the application to build a chain link fence at 10D Main Road, Petty Harbour (A2021-51) due to the amount of negative feedback from residents of the community.

[Councillor Raymond, Hearn and Chafe in favor. Mayor Lee and Deputy Mayor Stack not in favor. Application refused.]

August 31, 2021

The Appellant was sent a letter of refusal for application A2021-51 on August 31st, 2021

Sept 13, 2021

The Appellant filed an appeal.

## **Grounds of Appeal**

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;

## **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 and the ....

The Appellant is appealing under Section 42 (1)(a), the decision of the Town of Petty Harbour-Maddox Cove under Resolution No. 244 to refuse the application for the development of a chain link fence at 10D Main Road, Petty Harbour due to negative public response in correlation to the application.

Further the Appellant(s) are appealing the refusal on the following grounds:

- a. That the Town erred in interpreting and applying the Urban and Rural Planning Act, 2000, and the regulations thereunder;
- b. That the Town erred in denying the Appellant's application without proper interpretation, application, consideration, or justification of, the Town's Municipal Plan and Municipal Development Regulations;
- c. That the Town erred in failing to consider the purpose, function, and/or requirements of the chain-link fence as it applied to the Appellant and its unique business, cultural, tourism, or museum operations;
- d. That the Town erred in failing to provide the Appellant with procedural fairness in the unique circumstances of the Appellant's circumstances;
- e. That the Town erred in denying the Appellant's application by relying upon irrelevant considerations, including, inter alia, documentation irrelevant to the Applicant's application and irrelevant submissions by third parties;
- f. That the Town erred in failing to consider relevant considerations including, inter alia, Crown verification that there is no right to public access of the subject property, Crown verification of no shoreline reservation under the Lands Act, SNL 1991, c 3 6, documentation confirming private ownership of the subject property, the Appellant's need



to secure the subject property, and to address liability, workplace safety concerns, and COVID-19 protocol necessitating contact tracing, and the like;

g. That the Town erred in denying the Appellant's application based upon a reasonable apprehension of bias and/or the appearance of bias in the Decision-making process;

h. That the Town erred in denying the Appellant's application and rendered a Decision that was arbitrary, overly broad, and wholly without merit;

i. That the Town's Decision constituted an abuse of administrative discretion in the Decision-making process;

j. That the Town erred in denying the Appellant's application, when similar applications for the development of a chain-link fence had been approved by the Town, in similar circumstances of the Appellant;

k. That the Town erred in denying the Appellant's application by being wholly inconsistent, in that it initially endorsed the development, as revealed from the Regular Meeting Minutes, based upon the Appellant's compliances with Crown lands, private property status, the Town Plan, and other chain-link fences in close proximity, but, subsequently, the Town elected to deny the Appellant's application;

l. That the Town erred in concluding that the Appellant's proposed development to construct a chain-link fence, on or around 10 D Main Road, Petty Harbour; should be denied based on Motion #244

### Legislation and Regulations

The applicable legislation with respect to this appeal is:

- Urban Rural Planning Act, 2000
- Ministers Regulations under the Urban Rural Planning Act, 2000
- Town of Petty Harbour-Maddox Cove Municipal Plan, 2014
- Town of Petty Harbour-Maddox Cove Development Regulation, 2014
- Town of Petty Harbour-Maddox Cove Fence Regulations, 2021

### Land Use Planning

The Petty Harbour – Maddox Cove Municipal Plan and Development Regulations came into legal effect on January 16, 2015.

The subject site is located in the Harbour Front Zone of the future land use designation with a portion of its western flank in the Heritage Area Zone. According to Municipal Plan Policy 5.3.2 it is the intention of council to encourage a mix of uses, including tourism, services, markets, cultural, civic, commercial activities, museums and light and general industrial uses.

### 5.3.2 Policy H-1 Harbourfront Land Use

The Harbour Area is in transition. It is expected to serve several functions: as the continued site of fishery-related industrial and marine transportation uses, as a gathering place for community events, as the economic centre of the Town, and as the site of recreation and tourist development. It is the intention of Council to encourage a mix of uses, including tourism accommodations and services, outdoor markets, cultural and civic, museums, commercial activity, and light and general industrial uses. Examples of these uses are bed and breakfasts, marine centres, marinas, fish plants, storage warehouses, and other light industrial uses, transportation uses including wharves and docks, general assembly and retail and service businesses. Specific permitted and discretionary uses will be set out in the Development Regulations. Other uses within the Harbourfront land use designation may be considered, such as passenger assembly, food and catering businesses including take-out food service, retail businesses as outlined in the Development Regulations, indoor markets, hotels, office, medical, professional, personal and general service, and taxi stands

Municipal Plan Policy H-2 provides direction on new developments in the Harbourfront Land Use Designation.

### 5.3.2 Policy H-2 New Developments

1. Any development in the area shall be reasonably compatible with residential uses surrounding the harbour. Council may require siting or operation to reduce or eliminate expected negative impacts such as night lighting, noise, odour, fumes, or dust.
2. In considering proposals for development adjacent to the harbour, Council will require that existing access to the harbour and parking for fishing-related activities are retained.
3. In accordance with Policies G-10 and G-11, Council will manage development in accordance with the Provincial Floodplain Policy and ensure that where permitted, development is designed and constructed to reduce vulnerability to flooding.

Municipal Plan Policy H-3 Provides direction of the Petty Harbour Boardwalk



### 5.3.2 Policy H-3 Petty Harbour Board Walk

Council will continue to work with the Harbour Authority to extend harbourfront improvements, to create a continuous access around the harbour and give further consideration to a potential connection to "The Point" at Mad Rock.

Municipal Plan Policy 5.1. Heritage Area, provides that new developments in this designation will incorporate similar building styles, street right-of-ways and setbacks of Petty Harbour around 1900. Policy 5.1.1 lists the objectives of the Heritage Area:

#### 5.1.1 Objectives

- To protect and enhance the historic characteristic of Petty Harbour.
- To promote renovations of existing buildings that are consistent with historic design.
- To encourage infill and new developments that are sensitive in scale, design and consistent with traditional development patterns.
- To provide opportunities for adaptive re-use of heritage buildings

Municipal Plan Policy 5.1.2 HA-3 Describes policy with regards to new developments in the Heritage Zone:

#### 5.1.2 Policy HA-3 New Developments

1. Within the Heritage Area, development that includes new buildings, building additions, exterior alterations, accessory buildings, or fences must be compatible with the historic building form, scale, height, grading, setbacks and architectural features such as the scale and size of windows or doors that are unique to Petty Harbour.

2. Development of existing vacant lots, or redevelopment of developed lots through replacement or renovation of existing buildings, where a lot does not meet the required standards for lot size, may be considered provided the development can meet the required building setbacks specified in the Development Regulations. Subdivision of land to create new lots must conform to the standards set out in the Heritage Area Use Zone.

3. Proposals for new development or alterations to existing buildings and structures shall be reviewed for consistency with, and impact upon, those features that contribute to the historic appearance of Petty Harbour. Such as:

- the coastal setting and views from the water;

- the presence, scale and visibility of prominent buildings, including Town Hall, St. George's and St. Joseph's Churches;
- the compatible scale of buildings and structures; and
- the historic street pattern

Section 3.1 of the Town's Development Regulations provide the Town's authority to permit development:

### 3.1. Permit to Develop Required

No person shall carry out any development within the Planning Area, unless a permit for the development has been issued by the Council.

The Municipalities Act, 1999 provides a municipality the authority to draft and adopt fence regulations under Section 414 (v)(ii) and 414 (hh). Section 3. of the Town's Fence Regulations, 2021 states:

### 3. Conformity with Regulations

No fences shall be erected until a permit in writing has been issued by the Town Council of Petty Harbour/Maddox Cove.

Section 4. of the Town's Fence Regulations, 2021 states:

### 4. Construction Materials

The materials used in the erection and repair of a fence shall only be of a material that is approved by Council.

Regarding the removal of the chain link fence, Section 102 of the Urban and Rural Planning Act, 2000 provides the Authority the ability 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.



(2) A person ordered to carry out an action under subsection (1) shall be served with that order and shall comply with the order at the person's own expense.

(3) An order made under this section continues in force until revoked by the council, regional authority, authorized administrator, or minister that made the order.

(4) A council, regional authority, authorized administrator or the minister may, in an order made under this section, specify a time within which there shall be compliance with the order.

(5) Where a person to whom an order is directed under this section does not comply with the order or a part of it, the council, regional authority, authorized administrator or minister may take the action that it considers necessary to carry out the order and any costs, expenses or charges incurred by the council, regional authority, authorized administrator or minister in carrying out the order are recoverable against the person against whom the order was made as a debt owed to the council, regional authority, authorized administrator or the

Section 107 of the Urban and Rural Planning Act, 2000 provides the Authority the ability to service an order:

#### Service

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.

(2) Where a person to whom a notice, order or other document is to be given, delivered or served as described in subsection (1) is a corporation, it shall be considered sufficiently given, delivered or served where delivered personally to a director or chief executive officer of that corporation.

(3) Where an order that can be made under this Act cannot be given, delivered or served under either subsection (1) or (2), that order is considered given, delivered or served if it is posted in a conspicuous place on the property to which the order relates.

Section 3.5 of the Town's Development Regulations provides for Council's Discretionary Powers:

#### 3.5. Discretionary Powers

In considering an application for a permit or for approval in principle to carry out development, Council 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, Council 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 Appellant submitted an updated application, A2021-51 General Development Application, to the Authority on August 19th, 2021 for a chain linked fence at 10 D Main Road. The authority deferred the application to obtain further information under Section 3.8 of the Development Regulations.

### 3.8. Deferment of Application

1. Council may, with the written agreement of the applicant, defer consideration of an application

Council may have used their discretionary powers under section 3.5 of the Town's Development Regulations to refuse the application at a Public Council Meeting – August 30th 2021.

### Public Council Meeting – August 30th, 2021

Motion No. 244 Lynn Hearn/Rick Raymond : Proposed not to approve the application to build a chain link fence at 10D Main Road, Petty Harbour (A2021-51) due to the amount of negative feedback from residents of the community.

Councillor Raymond, Hearn and Chafe in favor. Mayor Lee and Deputy Mayor Stack not in favor. Application refused.

The Appellant was sent a letter of refusal for application A2021-51 on August 31st, 2021, compliant with Section 3.2 of the Towns Regulations and Section 42 of the Urban and Rural Planning Act:

### 3.2. Decisions of Council

Decisions made by Council with respect to a permit shall be made in writing, and state the reasons for a refusal of, or conditions attached to a permit. Council 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 Regulation 3.21 of these Regulations.

### **Appellant's Presentation**

- Ms. Orren outlined for the Board the functions and purpose of the Fishing For Success organization.
- Ms. Orren indicated that the application site is private property and for the benefit/safety of both the Fishing For Success organization, and the public, a fence is required for the property. Her organization would prefer that the fence not be chain link, but for technical/practical reason, it is necessary.
- There is no documented, established public access to the harbour across the subject property.
- Ms. Orren questioned the validity of the online petition of opposition to the proposed fence that was presented to Council given that a number of signatures may not be from the community and that it contained the false assertion about a historic right of public access to the harbour through the property.
- Liam Duggan and Mary Hearn outlined reasons why they felt the proposed fence was needed.

### **Authority's Presentation**

- Ms. Stack referenced a number of sections of the Town's Municipal Plan, Development Regulations and Fence Regulation which the Town apparently feels justify the refusal of the development application.
- Ms. Stack, in response to questions from the Board, advised that no formal staff reports had been prepared for Council prior to its decision to reject the application.

### **Interested Parties**

- Mr. Jerry Hearn shared a history of his ownership of adjoining land and his belief that the Lands Act prevents the proposed fencing of the subject property and lack of public access to the harbour.

## **Board's Analysis**

Q. Did the Town Council of Petty Harbour have the Authority to reject the application for the proposed chain link fence at the subject property?

A. Section 3.5 of the Town's Development Regulations indicates that:

"In considering an application for a permit or for approval in principle to carry out development, Council 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, Council 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."

Q. Did the Town correctly apply its discretionary authority under Section 3.5 of the Town's Development Regulations?

A. No. The Board has reviewed Section 35(g) of the Urban and Rural Planning Act, 2000 which requires that a decision of a Council with respect to a permit be in writing and state reasons for a refusal of or conditions placed on a permit.

The Board reviewed the letter dated August 31, 2021 from the Town of Petty Harbour/Maddox Cove to the Appellant, advising of Council's decision of August 30, 2021 to reject the application for the proposed chain link fence. The Board notes that this letter did not indicate that the Town Council had used its discretionary authority under Section 3.5 of the Town's Development Regulations to reject the application; further, this is reflected in the minutes of the Council Meeting of August 30, 2021.

The letter of rejection from the Town simply indicated that the Application was denied solely due to the amount of negative feedback from residents of the community. The rejection letter does not indicate or explain what this negative feedback specifically consisted of.



Further, in response to a question from the Board, the Town's CAO advised the Board that no staff reports had been prepared for Council outlining how the proposed fence was not in conformity with the specific sections of the Town's Municipal Plan and Development Regulations that were verbally identified by the Town's CAO at the appeal hearing.

Additionally, the Board considered **Justice George Murphy's** decision in **Supreme Court of NL, 58663** Newfoundland and Labrador dated January 16, 2019:

"Councillors are elected to make decisions and to do so in an open, public and transparent manner. A person, such as the appellant, is in my view lawfully entitled to have a clear decision made in the foregoing manner on whether their application for a development permit is approved or denied."

### **Board's Conclusion**

After reviewing the information presented to this Board, the Board concludes that the Authority failed to satisfy the requirements of Section 35(g) of the Urban and Rural Planning Act, 2000 and Section 3.2 of the Town's Development Regulations (decisions of Council) in that Council's reasons for rejecting the proposed chain link fence were not clearly or completely articulated to the Appellant..

### **Urban and Rural Planning Act, 2000**

Section 42. (10) In determining an appeal, a board may confirm, reverse or vary the decision appealed from and may impose those conditions that the board considers appropriate in the circumstances and may direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have its decision implemented.

## Order

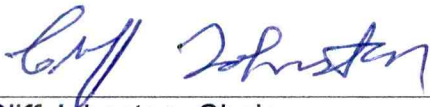
The Board orders that the decision of the Town Council of Petty Harbour-Maddox Cove made on August 30, 2021 to reject the application from Fishing for Success to construct a chain link fence at 10D Main Road, Petty Harbour Maddox Cove, be vacated. The Board further orders that the Application be referred back to the Town Council for re-consideration and processing in accordance with the full requirements of the Town's Municipal Plan and Development Regulations and Fence Regulations and Section 35(g) of the Urban and Rural Planning Act, 2000.

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

In accordance with section 44(3) of the *Urban and Rural Planning Act, 2000*, the Board further orders the Authority pay an amount of money equal to the appeal filing fee of \$230.00 to the Appellant.

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 21<sup>st</sup> day of February, 2023.



Cliff Johnston, Chair  
Eastern Regional Appeal Board



Carol Ann Smith, Member  
Eastern Regional Appeal Board



Paul Boundridge, Member  
Eastern Regional Appeal Board