

WEST NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

West Newfoundland Regional Appeal Board

Appeal #	15-006-077-043
Appellant(s)	Carla Pearce-Martin
Respondent / Authority	Town of Kippens (Town)
Date of Hearing	May 16, 2023

BoardMembers

Chair	Lloyd Walters
Member	Boyd Noel
Member	Helen Reid

Also in Attendance

Developer	Mr. Wayne Young
Developer Representative	Mr. Keith Morgan
Witness	Mr. Don Dicesare
Representative for the Authority	Mr. Paul Noseworthy, Mayor
Secretary to the Boards	Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs
Technical Advisor to the Boards	Darren Randell, Planner III, MCIP. Municipal and Provincial Affairs
Interested Parties	
Start/End Time	9:15 am – 11:45 am

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

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 Kippens Municipal Plan and Development Regulations when it approved a 14 lot subdivision at McCarty's Lane, Kippens on February 16, 2023.

Hearing Presentations

Planner's Presentation

The role of the Planner is to act as a technical advisor to the Board and act as an expert witness.

Under the Rules of Procedure:

(a) there shall be a technical advisor to the Board who shall provide data relative to the Municipal Plan or other Scheme in effect and an interpretation on whether or not the proposal under appeal conforms, is contrary to, or could be discretionarily approved pursuant to the Municipal Plan, Scheme or Regulations.

A Planner from Municipal and Provincial Affairs shall provide the framework with respect to the appeals process under the Urban and Rural Planning Act, 2000 and provide an overview of how an application was received from a developer and processed by Council as prescribed in their roles and responsibilities.

The Board heard from the Planner that this appeal relates to a 2013 subdivision application which has been appealed to the Board on three occasions as well as being subject to a hearing of the Supreme Court of NL. The last appeal dated April, 2021, and the subject current appeal have been filed by a third party owning and occupying lands adjoining the proposed subdivision lands. The Board decision from the last appeal required the Authority to apply a condition to the issued Approval in Principle stipulating that the Town's engineer review and approve the subdivision concept for compliance with the Development Regulations prior to issuance of a final approval and permit for development. The Board specifically instructed that if the proposed cul-de-sac does not comply with the Development Regulations that the approval in principle must be rescinded.

On January 30, 2023 the town received correspondence from Meridian Engineering regarding the engineers review (assumed Town Engineer) of the proposed subdivision concept.

On February 16, 2023 at a Regular Council meeting the Authority made Motion #19/23 to approve a permit for the McCarthy's Land subdivision.

On February 27, 2023 the current appeal was filed with the Secretary of the Board.

The grounds of the appeal stated that the proposal is non-compliant to Development Regulation #86 – Subdivision Design Standards – regarding the length of the proposed cul-de-sac. The appellant claims the proposed cul-de-sac is approximately 600 m in length as opposed to the permitted 250 m without available emergency access or 300 m with emergency access, and that additional lands are not available to allow the creation of an emergency access. Further that the Town did not provide a consultation opportunity with residents to address concerns including; safety relating to access and connection to existing Route 460, ongoing water issues, and location of the indigenous cemetery. In addition minutes were not taken at meetings and there was no detailed discussion.

Section 12 of the Urban and Rural Act states that a plan and development regulations are binding on municipalities and councils and any person undertaking development.

The Kippens Municipal Plan and Development Regulations came into legal effect on September 14, 2012. According to the future land use maps, which form part of the Kippens Municipal Plan, most of the subject site is located within the Residential designation with a small portion located within the Mixed Development designation. Regulation 7 of the Kippens Development Regulations states that no development shall be carried out except in accordance with the Development Regulations.

Regulation 20 of the Kippens Development Regulations states that the Town may grant approval in principle for a subdivision development if it is satisfied that the proposed development is in compliance with the Development Regulations subject to the approval of detailed plans. An approval in principle is subject to subsequent approval of identified items which must be submitted no later than two years from the granting of the approval in principle.

The approval in principle issued by the Authority on July 16, 2020 states that the final development permit is subject to the approval of Council and contains requirements about provincial permits or approvals that appear to have been satisfied based on correspondence provided in the Authority's submission.

Part IV of the Kippens Development Regulations sets out the requirements for the subdivision of land. Regulation 86 sets out subdivision design standards and includes standard design details specific to cul-de-sacs that must be adhered to when proposing cul-de-sac streets as part of a proposed development.

As part of the previous appeal, the West Newfoundland Regional Appeal Board indicated that the Town engineer had not provided review comments on the adequacy of the development concept, in particular to the length of the proposed cul-de-sac street. The Appeal Board directed in their decision that the Approval in Principle permit be amended to include a condition that the Town engineer review the plan to ensure full compliance with the Kippens Development Regulations, and that the Approval in Principle be rescinded if the proposed cul-de-sac is not compliant with the Development Regulations.

The Authority's submission includes correspondence from Meridian Engineering Inc. of Clarenville which indicates that engineering firm was reviewing the concept plan from the engineering technical perspective and in terms of compliance to the Town's Development Regulations.

In correspondence dated September 2021, the engineering representative stated, "the total length of the cul-de-sac exceeds the maximum length (including the existing portion of McCarthy's Lane), as per the Town's regulations. This regulation is meant to ensure that access to and egress from the cul-de-sac can be achieved in the event of an emergency, should the road be blocked for another reason. This requirement, however, is at the discretion of Council and given the close proximity of the new cul-de-sac to Kippens Road, this may not be as significant an issue. It should also be noted that the overall development plan does allow for the looping of McCarthy's Lane and Edwards Lane, which when completed, will eliminate this issue altogether."

The technical adviser noted that contrary to this interpretation the exercise of this discretionary power does not enable the Town to allow a permitted use or discretionary use which is not permitted under Schedule C or other Regulation.

In later correspondence, dated January 30, 2023, the engineer stated, "The length of McCarthy's Lane from the intersection with Route 460 to the cul-de-sac bubble is approximately 600m long, which does exceed the development regulations. However, the planned looping of McCarthy's Lane and Edwards Lane does address this...."

The technical advisor stated that while the engineer has expressed that the overall design would achieve the intent of the Development Regulations after all development phases are completed, the proposed phasing does not allow compliance with the Regulations during the initial phases of development.

The discretionary authority of council is derived from development regulations section 11 – discretionary powers of town, which clearly specifies that when considering an application for a permit or an approval in principle, the first order of business for the town is to ...take into account the policies expressed in the municipal plan and further scheme, plan or regulations pursuant thereto. Once a proposal is confirmed as compliant to the policies and regulations expressed in the municipal plan and development regulations, the town is then to proceed with assessing appearance, amenity, the availability of utilities, public safety, and any other considerations, which are, in council's opinion, material.

With respect to the process undertaken with the subject application, the town was essentially advised by its engineer that it was councils regulated alternative to accept a proposed cul-de-sac that was greater in length than that permitted by the town's development regulations.

However, as specified in section 12 of the act, council is bound to adhere to its development regulations. Therefore there is no option to deviate from the cul-de-sac specifications stipulated in the development regulations.

As per the board's direction, the approval in principle was to be rescinded where the cul-de-sac was found to be non-compliant to the development regulations.

Correspondence from Meridian Engineering Inc. of January 2023 also indicates that there may be an option to include an emergency access to the cul-de-sac as required by Development Regulations #86. There is no additional discussion pertaining to the inclusion of this feature. However, based on the Appellants submitted Grounds for Appeal, the emergency access is not included in the subdivision layout.

Jurisdiction of the Board

The solicitor for the developer raised the issue of the board's jurisdiction to hear the current appeal.

The Board heard arguments from Mr. Morgan, legal council for the developer that the Board having rendered a decision on a previous appeal regarding this matter it was now *functus* and without jurisdiction to entertain any further appeal in this matter.

The appellant, then stated that the previous appeal was in regard to an approval in principal for a development and this appeal was in fact related to the approval for development issued by the Town of Kippens on February 16th, 2023. She reiterated that the town had approved a development that was in contravention of its development regulations and therefore subject to appeal. It was her contention that the Board had the jurisdiction to hear this appeal and it should proceed.

Does the Board have the authority to hear this appeal?

The Board called a recess to consider this matter after hearing from all parties. During the recess the Board reviewed the presentations from all parties, its previous decision of April 21, 2021, and the materials presented by the appellant and the respondent for the current appeal.

After its review the Board determined that the subject matter of the April 2021 appeal was the issuance of an approval in principal of a development permit whereas the subject matter of the current appeal was the approval by the Town of Kippens on February 16, 2023 of a full development permit for a subdivision off McCarthy's Lane contrary to its development regulation.

The Board therefore determined that since it was a development decision and a motion rendered by council the current appeal is in order and it is within the jurisdiction of the Board to hear this appeal under URPA 2000, section 42.

The Appellant's Presentation

The appellant reiterated the grounds for appeal was that the town had approved a permit for development of a subdivision that contained a cul-de-sac which was not in compliance with the towns development regulation #86 which states that the maximum length of a cul- de- sac can be 250 meters without an emergency exit and 300 meters with an emergency exit.

The appellant further stated that the previous town planner, Andrew Smith indicated that safety should be the priority when developing this subdivision and the town has not taken the safety of citizens into consideration when approving this development.

The appellant also further indicated the proposed development is in close proximity to an indigenous cemetery and this should have been taken in consideration by the town.

Authority's Presentation

The Board heard from Mr. Paul Noseworthy mayor of the Town of Kippens that the town referred the safety issues to a company for a traffic study and were advised that there were no adverse traffic issues associated with the development.

After referring the matter to the towns consulting engineer (Meridian Engineering) the town had no issue with the subdivision and were advised that they could use their discretionary powers regarding the cul-de-sac and approve a permit for development. The town therefore followed the advice of the engineer when approving the application.

Developer Presentation

Counsel for the developer had consulting engineer Mr. Don Dicesare present information on his involvement with the project.

Mr. Dicesare stated that his firm has been involved with this development since its beginning and all standards and regulations have been applied. That all required approvals had been received from the appropriate government departments and final drawings have been issued for the development. He stated that the length of the cul-de-sac is an issue but solutions were looked at and future development will mean the project will be in full compliance in the future if the subdivision is developed in phases. It does not have to be immediately compliant as long as the requirements are met in the future.

Board's Analysis

The Board reviewed The Urban and Rural Planning Act, 2000

Town of Kippens Municipal Plan and Development Regulations and determined the following:

The Urban and Rural Planning Act, 2000

Application of plan

s. 12. A plan and development regulations are binding upon

(a) municipalities and councils within the planning area governed by that plan or those regulations; and

(b) a person undertaking a development in the area governed by that plan or those regulations.

The Town of Kippens Development Regulations 2011

s. 7. Compliance with Regulations

No development shall be carried out within the Planning Area except in accordance with these Regulations.

s. 86. Subdivision Design Standards

Except as otherwise specified in a Subdivision Policy adopted by the Town, no permit shall be issued for the development of a subdivision under these Regulations unless the design of the subdivision conforms to the standards below.

- (2) Every cul de sac shall be provided with a turning circle of a diameter of not less than 30 m.
- (3) The maximum length of any cul de sac shall be 250 m where no emergency access is provided; or 300 m where emergency access is provided.
- (4) The 250 m under clause (3) is measured from the mid- point of the intersection to the beginning of the cul de sac bulb, or the beginning of the loop in a p-loop.
- (5) Emergency vehicle access to a cul de sac shall be not less than 3 m wide and shall connect the head of the cul de sac with an adjacent street.

Section 11- discretionary powers of Council under the Town of Kippens Development Regulations

Decision of Justice George Murphy, Supreme Court of Newfoundland and Labrador

File # 201704G0195 January 16, 2019

West Newfoundland Regional Appeal Board decision of April 21, 2021

What is proposed?

The developer in the application proposed a residential subdivision off McCarthy's Lane in the Town of Kippens.

What was the recommendation by the Town's engineer?

The towns consulting engineer advised that the length of the cul-de-sac was approximately 600 meters and therefore beyond the maximum allowed by the towns development regulations. However, he advised that the town had discretionary power to approve the application for development. While the towns engineered provided a recommendation, the elect body has a responsibility to ensure that development is in accordance to the Town's Municipal Plan and Development Regulations.

What does Discretionary Powers of a Town mean?

The Board reviewed Section 11 - the discretionary powers of Town under the Town of Kippens Development Regulations. .

"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. However, the exercise of this discretionary power does not enable the Town to allow a permitted use or discretionary use which is not permitted under Schedule C or other Regulation.”

From the above regulation, the Board understands that once a proposal is confirmed as compliant to the policies and regulations expressed in the municipal plan and development regulations, the Town can consider approval in this regard. The property is zoned Residential where subdivision development is permitted. Regulation 7 of the Kippens Development Regulations states that no development shall be carried out except in accordance with the Development Regulations. As residential development is listed as permitted in the Development Regulations, a subdivision application can be accepted.

Did Council consider Regulation 86?

In this case, Council approved the residential subdivision based upon future land acquisition to meet the requirement of Regulation 86 regarding the requirement for an emergency access. There are no standards defined in Regulation 86 that allow deviating or discretion with regard to the Regulation.

By negating regulations 86 with reference to cul du sac length and emergency access, Council erred in regards to exercising their discretion with respect to public safety and full compliance through all phases of subdivision development. Furthermore there is no guarantee the developer can acquire remaining lands for future development.

The Board determined that the exercise of council’s discretionary powers was not made in accordance to Regulation 11 above and the decision based upon the engineers recommendation is not supported by the towns development regulations. The town does not have discretionary power in this matter to ignore Regulation 86. The town must make a decision that is in compliance with its development regulations.

Does phasing of development allow for compliance with the Development Regulations?

The Board has determined that a development must be in compliance with the towns development regulations from the beginning phase and must remain in compliance through any additional phase. As proposed without emergency access the phase one would be non-compliant.

While future development may achieve compliance there are no guarantees that the land will be available to complete the future development.

Did the Town process or consider the application appropriately when approving a development permit for the subdivision at McCarty's Lane?

No. The Board reviewed the information presented and determined that while all appropriate approvals had been received from various government agencies and departments; however on the advice of its engineer the town misinterpreted its discretionary power when reaching its decision.

Board's Conclusion

After reviewing the information presented to this Board, the Board concludes that the Authority erred in approving this application by issuing a permit for a subdivision development with a cul-de-sac longer than 250 meters. From the evidence provided at the hearing the proposed cul-de-sac is at least 600 meters without an emergency access and is not in compliance with the town regulations. Therefore the Board reverses the Town's decision.

That is to say, the Board has reversed the towns approval which means that the current permit dated February 2023 does not exist. This matter is referred back to the Town of Kippens for reconsideration. The Board directs (section 42(10) URPA 2000) Council to make a decision with respect to the subdivision proposal which complies with the towns development regulations specifically regarding the maximum length of the cul-de-sac.

The Urban and Rural Planning Act, 2000 states

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

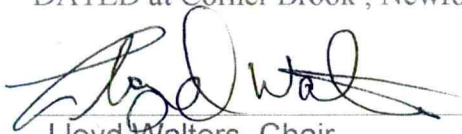
The Board orders that the decision of the Town of Kippens of February 16, 2023 to approve the permit for a subdivision development off McCarthy's Lane be reversed.

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 Corner Brook , Newfoundland and Labrador, this 16 May, 2023.



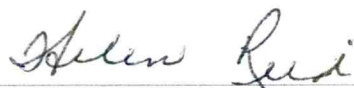
Lloyd Walters, Chair

West Newfoundland Regional Appeal
Board



Boyd Noel, Member

West Newfoundland Regional Appeal
Board



Helen Reid, Member

West Newfoundland Regional Appeal
Board