

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

<https://www.assembly.nl.ca/legislation/sr/statutes/u08.htm#40>

Appeal # : **15-006-087-013**

Adjudicator: Garreth McGrath

Appellant(s): Fishing For Success

Respondent / Authority: Town of Petty Harbour-Maddox Cove

Date of Hearing: 27 March 2024

Start/End Time : 9:00-10:00

In Attendance

Appellant: Fishing For Success

Appellant Representative(s): Leo Hearn, Kimberly Orren

Respondent/Authority: Town of Petty Harbour-Maddox Cove

Respondent Representative(s): Stephanie Stack, Mandy Dinn, Ed Dyke

Proponent/Developer: N/A

Developer Representative: N/A

Interested Party: Caitlyn Whelan, Meghan Meadus, Kelly Bruden

Appeal Officer: Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs

Technical Advisor: Faith Ford

Adjudicator's Role

The role of the Adjudicator is to determine if the Authority acted in accordance with the Urban and Rural Planning Act, 2000 and Town of Petty Harbour-Maddox Cove Municipal Plan and Development Regulations when it issued a removal order for a 2 meter section of fencing from the property located at 10D Main Road, Petty Harbour, NL.

Hearing Presentations

Planner's Presentation

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness.

Under the Rules of Procedure:

(a) there shall be a technical advisor to the Adjudicator who shall provide data relative to the Municipal Plan or other Scheme in effect and an interpretation on whether the proposal under appeal conforms, is contrary to, or could be discretionarily approved pursuant to the Municipal Plan, Scheme or Regulations.

The 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 Adjudicator heard from the planner that this appeal relates to an order to remove a 2 meter section of fencing that did not comply with the permit issued 5 April 2023 by the Town of Petty Harbour-Maddox Cove at 10D Main Road, Petty Harbour. The planner outlined the Appellant's grounds for appeal in the appeals package as:

- 1) Under Policy G-9(1) the fence is a utility for which no other route is possible and as such should be allowed on the property.
- 2) That the Department of Environment and Climate Change Water Resources Management has issued a permit that allows for a fence on the property and as such the Authority is bound to this decision.

While the Appellant also states that there is a right to build a fence out to the boundary of their property, this position cannot be found anywhere in the Town Plan, Regulations, Urban and Rural Planning Act or any jurisprudence that the Adjudicator is aware of. While persons own all parts of the property to which they are the registered owner, there is no law or legal principle that allows persons to use the property however they see fit. The Town of Petty Harbour – Maddox Cove has regulations that relate to where a fence may be situated on property. It is not the role of the adjudicator to determine the state of the law regarding property rights of a property owner, but whether the Authority did their job in applying the bylaws and regulations in their issuance of the removal order. This is a question for a court of competent jurisdiction and as such the Adjudicator is unable to determine this question.

The Appellant's Presentation and Grounds

The presentation of the Appellant focused on the fact that this fence was necessary to ensure that their property and programs were protected from the public coming on to their land. The

Appellant stated that they needed the fence to remain where it is, otherwise, trespassers and animals would continue to enter the property and trespass, stopping the business from ensuring that all persons who were there were able to have a safe space to learn. The Appellant also noted that because they state there is no other option available to place the fence, they should be allowed to have the fence within the 2 meter area for the river.

Authority's Presentation

The Authority's presentation focused on the fact the authority to issue this permit is discretionary and that within that discretion lies the authority to attach conditions to the construction of the fence. Specifically they state that it is within the Town Plan and their authority to issue an order that a fence is required to be 2 meters from the high water mark and this discretionary decision cannot be overturned by this board.

Adjudicator's Analysis

The Adjudicator reviewed The Urban and Rural Planning Act, 2000 as well as the Town of South River Municipal Plan and Development Regulations and determined the following:

Question/Answer .

Q: Does Policy G-9(1) allow the Appellant to leave the fence within the two meter area required under the conditions of the permit or is there a general private property right?

From the town plan, Policy G-9(1) states that:

Council intends to protect Petty Harbour River, the streams, ponds and wetlands in the community from adverse impacts from development, and to ensure that development which can be damaged by flooding is not located in flood prone areas. Providing a buffer of undisturbed lands along wetlands protect fish habitat, prevent erosion, retain natural drainage features, prevent siltation, preserve public areas, and take account of areas prone to periodic flooding which have not been mapped. 1. A buffer strip of undisturbed land shall be retained along rivers and major streams and ponds. Within the buffer, utilities for which no other route is feasible, low impact trails, and necessary bridging or other vehicle crossings may be permitted.

In examining the property from the provided pictures as well as public maps available, we can see that the river that passed by the Subject Property would fit the definition of "Undisturbed." While the Appellant has submitted that the property is disturbed, the disturbances that can be seen are the nearby roadway and bridging which is allowed for under Policy G-9(1). The rest of the riverbank is undisturbed rocky shore. The Adjudicator is unable to see how, other than the fence, anywhere else within the 2 meter reservation has been or is currently disturbed. As such, the Adjudicator finds that it is rational for the Authority to decide to continue their policy of ensuring that there is a undisturbed buffer zone.

While the Appellant states that the fence is a utility, the Adjudicator cannot agree. In reading the policy, it is clear that the intention of the Authority is not to allow any structure or construction that may have a utility in the reserved area on the riverbank. To take the interpretation of the Appellant would mean that any structure or building that served some “utility” could be built along the riverbed. Within the context of the other allowed disturbances, such as low impact trails, necessary bridging or other vehicle crossings, it is clear that this section refers to the “utilities” such as power, water, sewage or other such, typically public, utilities as may be necessary to develop in an area where no other route is feasible. While a fence may have utility to the person using it to stop people from entering their property, it is not in and of itself a “utility.”

While the Appellant has stated that there is a requirement for the fence to be directly on the legal boundary of the property, the Adjudicator cannot agree. There was no authority provided by the Appellant either within the bylaws and regulations of the Authority, the Urban and Rural Planning Act, jurisprudence, or any other persuasive body to show that there is a general right by a property owner to build a fence upon their property line. Many municipalities have regulations around where fences can go, often restricting them to some setback from the property line or to deny them to ensure that natural access to shorelines are preserved. Here the Town has exercised their discretion to set the fence line back two meters to ensure that the goals of policy G-9(1) were met. As this is a discretionary exercise of the Authority’s power, the Adjudicator cannot substitute their own discretion and overrule the Authority.

Q: Does the authorization of the Department of Environment and Climate Change allow for the fence within the two meter setback?

The permit provided from the Department of Environment and Climate Change addresses the issue in full. When we look at the permit at page 41 of the Appeal Package, the Permit provided by the Department clearly states:

This Permit does not release the Permit Holder from the obligation to obtain appropriate approvals from other concerned municipal, provincial and federal agencies.

The permit from the Department of Environment and Climate Change explicitly carves out and notified the Appellant that there would be other approvals required from other municipal, provincial, and federal agencies. The Appellant was required to comply with the conditions of any permit before they were allowed to continue construction. It is clear to the Adjudicator that the Appellant was required to also meet any conditions of the Authority before construction would be allowed.

Adjudicator’s Conclusion

Urban and Rural Planning Act, 2000 Decisions of adjudicator

44. (1) In deciding an appeal, an adjudicator may do one or more of the following:

- (a) confirm, reverse or vary the decision that is the subject of the appeal;
- (b) impose conditions that the adjudicator considers appropriate in the circumstances; and

(c) direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have the adjudicator's decision implemented.

(2) Notwithstanding subsection (1), a decision of an adjudicator shall not overrule a discretionary decision of a council, regional authority or authorized administrator.

(3) An adjudicator shall not make a decision that does not comply with

(a) this Act;

(b) a plan and development regulations registered under section 24 that apply to the matter being appealed; and

(c) a scheme, where adopted under section 29.

(4) An adjudicator shall, in writing, notify the person or group of persons who brought the appeal and the council, regional authority or authorized administrator of the adjudicator's decision.

After reviewing the information presented, the Adjudicator concludes that the Authority acted within the scope of their authority when they issued the removal order for the two-meter section of fence that fell within the two meters from the high water mark of the river. The permit from the Department of Environment and Climate Change did not authorize the Appellant to construct within that area and the Appellant does not have a right to construct within that area contrary to the discretionary conditions of the Authority.

That is to say that the Authority may proceed with any lawful action to enforce their stop work order. The Appellant's construction was not permitted by the Authority and order of the Authority regarding the section of fence is valid.

Order

The Adjudicator orders that the decision of the Town of Petty Harbour-Maddox Cove is to be confirmed.

The Authority and the Appellant(s) are bound by this decision.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this adjudicator 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 Adjudicator's decision has been received by the Appellant(s).

DATED at St. John's, Newfoundland and Labrador, this 13 April 2024.

Garreth McGrath
Adjudicator

Urban and Rural Planning Act, 2000