Eastern Newfoundland Regional Appeal Board Decision

Appeal #	15-006-067-005
Appellant(s)	Elaine Martin
Respondent / Authority	Town of Colliers
Date of Hearing	November 26, 2020
Board Members:	Clifford Johnston, Chair Paul Boundridge Carol Ann Smith
Solicitor for the Appellant(s)	
Representatives for the Appellant(s)	
Representatives for the Authority	Danielle Somerton, LL.B.
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Elaine Mitchell, MCIP
Interested Parties	Area Residents/Property Owners: Todd Newhook, Chantelle MacDonald Newhook, Neil Martin, Susan Murphy, Jason Parsons, Tracy Madore; Ian Hutton (Developer); and Martina Gallant (Manager, Farm Industry Review Board)

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 is to determine if the Town of Colliers (the Authority) acted in accordance with the *Urban and Rural Planning Act, 2000*and the Colliers Municipal Plan and Development Regulations when it:

- Issued a permit for a farm off Nine Island Pond Road (including the clearing of the land in preparation in preparation for the proposed farm

This is a third party appeal. Ian Hutton (the farm developer) acquired a Crown Land lease for agriculture and started clearing the land.

NOTE: Please be advised that there were two (2) appeals filed on this same development - one appeal filed by Todd Newhook and Chantelle MacDonald Newhook and a separate appeal filed by Elaine Martin. The Appeal Board made a decision to hear both appeals under one appeal hearing process; however the Board will issue separate written decisions for these two appeals. As the appeal is related

to Todd Newhook- Chantelle MacDonald Newhook file # 15-006-067-001 the Board considered the arguments regarding validity on both appeals. These decisions will appear similar in nature.

Validity

The solicitor for the Authority argued that the Eastern Regional Appeal Board has lost jurisdiction on this appeal to the Supreme Court of Newfoundland and Labrador (General Division). The Board heard arguments from both the Appellants and Solicitor for the Authority on this matter.

The Board took a brief recess to deliberate this matter. It was determined by the Board it had jurisdiction to hear the appeal, as per section Section 42(1) of the Urban Rural Planning Act, 2000.

> ***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;*
>
> *(b) a revocation of an approval or a permit to undertake a development;*
>
> *(c) the issuance of a stop work order; and*
>
> *(d) a decision permitted under this or another Act to be appealed to the board.*

Presentations during the Hearing

1. Planner's Presentation

During the hearing, the Board heard technical details about the subject property and the provisions from the Colliers Municipal Plan and Development Regulations from the Planner.

The Board learned from the technical report given by the planner at the hearing that the subject property is zoned "Rural Resource" under the Town's Development Regulation and that agriculture is a Permitted Use in this zone.

The property is located in a Provincially-designated Blueberry Management Area. In accordance with Section 37 of the Collier's Development Regulations, approval must be obtained from the Department of Fisheries, Forestry and Agriculture for the farm development.

2. Appellants' Presentation

The Appellants raised the following points of concern:

- The proposed farm directly abuts a residential area; therefore the Town should have required the developer to have adequate buffers.
- The Town should require the developer to provide a detailed development plan for review and consideration for approval by the Town.
- The clearing of the property has had very negative impacts on the Appellant's property and other properties in the area.

3. Authority's Presentation

The solicitor for the Authority advised that the Town of Colliers is limited with its staffing, financial and enforcement resources. The Authority keeps application requirements to a minimum given their level of resources, particularly where an application is a permitted use in the zoning of a property. The proposed farm is a permitted use in the Rural Resource zoning of the subject property.

The Applicant has met all planning and development requirements of the Town.

The solicitor for the Town indicated that there are other potential remedies for residential property owners in the area if they feel they are negatively impacted by the farm development. This could include approaching provincial agencies, such as the Department of Fisheries, Forestry and Agriculture, and the Farm Industry Review Board to ensure their departmental policies and regulations are being satisfied by the developer for the farm development.

4. Other Parties

The Board learned from other parties/interested parties who reside/own property in the area that they feel they have been negatively impacted by the clearing of the land for the proposed farm, referred to as "the devastation of the local environment". These residents/interested parties do not feel the Town has acted responsibly in the approval of this development.

The developer Ian Hutton indicated he is a long-time resident of this area. He stated that he is following the Town's requirements, including all permits issued by the Town, as well as all applicable provincial agencies.

Board's Analysis

Q. What is the matter under consideration by the Board?

A. The matter under consideration by the Board is whether the Town of Colliers (the Authority) acted in accordance with the Urban and Rural Planning Act, 2000 and the Colliers Municipal Plan and Development Regulations when it:

- Issued a permit for a farm off Nine Island Pond Road.

The role of the Board is limited under section 42 (9) and (10) of the Act. The Board can only confirm, reverse or vary the decision being appealed.

> ***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.*
>
> *(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.*

Section 42 (11) of the Act states that the Board may not make a decision which overrules a discretionary decision of the Authority:

> *(11) Notwithstanding subsection (10), where a council, regional authority or authorized administrator may, in its discretion, make a decision, a board shall not make another decision that overrules the discretionary decision.*

Q. What is the subject property zoned?

A. The property is zoned "Rural Resource" under the Town of Colliers Development Regulations, 2001.

Q. Is the proposed farm permitted in the Rural Resource Zone?

A. An agricultural use is permitted in this zone.

Q. Does the decision of the Authority to permit/approve the proposed farm operation without buffers comply with the Town of Colliers Development Regulations?

A. The Board agrees that the proposed farm operation is a permitted use in the zoning of the subject property. The Board also agrees that the Authority has the development authority to allow the proposed farm use and the discretion to determine how much information was required from the applicant prior to making its decision to approve the application. The Board has further determined that the Authority has the discretionary authority under their Development Regulations to determine if buffers are required as part of a proposed development.

The Colliers Development Regulations establishes requirements with respect to applications and permits.

> *7. Compliance with Regulations*
> *No development shall be carried out within the Planning Area except in accordance with these Regulations.*
>
> *8. Permit Required*
> *No person shall carry out any development within the Planning Area except where otherwise provided in these Regulations unless a permit for the development has been issued by the Authority.*
>
> *9. Permit to be Issued*
> *Subject to Regulations 10 and 11, a permit shall be issued for development within the Planning Area that conforms to the requirements of these regulations.*

An application is required under Section 17 of the Colliers Development Regulations. The Authority may identify the plans and specifications to accompany the application.

> *17. Form of Application*

(1) An application for a development permit or for approval in principle shall be made only by the owner or by a person authorized by the owner to the Authority on such form as may be prescribed by the Authority, and every application shall include such plans, specifications and drawings as the Authority may require, and be accompanied by the permit fee required by the Authority.

Section 40 of the Colliers Development Regulations allows the Authority to determine whether a buffer strip is required where a non-residential use abuts a residential use or area.

40. Buffers – Non-Residential

Where any non-residential use abuts a residential use or area, the owner of the site of the non-residential development may be required to provide a buffer strip between any non-residential building or activity and the residential use. The buffer shall include the provision of grass strips, hedges, trees or shrubs, or structural barriers as may be required by the Authority, and shall be maintained by the owner or occupier to the satisfaction of the Authority.

Q. How does the Town of Colliers Municipal Plan speak to the issue of managing conflicts amongst different land uses and protection of the natural environment?

A. The Colliers Municipal Plan contains the objective of protecting the environment and natural and historic resources (3.2.1 B) and it is Council's policy to ensure that development will not adversely affect the environment by generating erosion or contaminating air, water, or soil.

(2) Policy: It is the policy of Council to ensure that development will not adversely affect the environment by creating or contribution to erosion or contamination of air, water or soil, and their systems.
(3) Policy: Development shall be sited and carried out in a manner that provides for proper site drainage and avoids erosion at levels below the site. Development shall not contribute to pollution of ponds, watercourses, low lying wet areas, and bogs.

The Colliers Municipal Plan contains the objective of minimizing land use conflicts (3.2.1 D) and it is Council's policy to ensure that new development will not negatively affect existing and future residential and other land uses by creating a nuisance or hazard and by required buffers between uses that may create nuisance and residential uses.

(1) Policy: Council shall ensure that new development will not negatively affect existing and future residential and other land uses by creating a hazard or nuisance such as noise, dust, odour, unsightly appearance, and excessive traffic, and/or will otherwise inhibit desired developments.
In addition to the objectives and policies for specific designations, Council shall require:
- buffers and/or screening between certain types of commercial, industrial public and resource based uses that are likely to create nuisances, and residential uses;...

Board's Decision

In arriving at its decision, the Board reviewed the submissions and comments given by parties present at the hearing along with the technical information. The Board notes that the Authority did not provide any supporting documentation, such as Council minutes or staff reports.

The Board is bound by Section 42 of the *Urban and Rural Planning Act, 2000, which* provides the following for the Eastern Newfoundland Regional Appeal Board:

> (3) *An appeal board shall not make a decision that does not comply with a plan, scheme and development regulations that apply to the matter being appealed.*
>
> *(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.*
>
> *(11) Notwithstanding subsection (10), where a council, regional authority or authorized administrator may, in its discretion, make a decision, a board shall not make another decision that overrules the discretionary decision.*

Section 12 of the Urban and Rural Planning Act states:

> *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 Board accepts that the *Town of Colliers Municipal Plan and Development Regulations* are binding upon the Authority. In this case, the Board finds the proposed development meets the standards, conditions and requirements of the *Town of Colliers Development Regulations.* However the Board has determined that the Town did not consider the Town's Municipal Plan Policies that would be applicable to the proposed farm development, with the objective of minimizing land use conflicts and Council's policy to ensure that new development will not negatively affect existing and future residential and other land uses, and protection of the environment (Sections 3.2.1B and D).

It is the role of a municipality's development regulations to implement the goals, objectives and policies of a municipal plan. The Board has determined that there is an absence of documentation from the Authority to verify that Council adequately considered potential negative impacts of the farm development on nearby residential and non-residential uses; and the policies of the Municipal Plan which guide Council in such circumstances. Therefore, it is not apparent to the Board that there was a conscious decision on the Authority's part to exercise discretion in not requiring the developer to provide buffers.

It is the consensus of the Board that the Town's Development Regulations need to be more closely aligned with the Town's Municipal Plan to more accurately reflect and implement the policies of the Municipal Plan. This could perhaps be accomplished during the next statutory review of the Town's Municipal Plan and Development Regulations.

The solicitor for the Authority has noted to the Board the lack of resources available to the Town of Colliers to review development applications. The Board suggests that in the case of future larger/more complex

development applications, the Authority consider engaging applicable consultants – planning, engineering and architectural services, etc. – to assist in the review of development applications and the costs of these consulting services could be charged back to the applicant/developer.

Board's Order

Based on the information presented, the Board orders that the decision by the Town of Colliers on April 28, 2020 to issue a permit to Ian Hutton for the development of a farm in the area of Nine Island Pond and Whalen's Lane area, be reversed. Therefore, the permit dated April 28, 2020 is no longer valid. All work shall cease pending issuance of a permit by the Authority. The Board further orders that the application be referred back to the Town of Colliers for a detailed review by Council against their Municipal Plan's objectives and policies respecting minimizing land use conflicts between existing and future land uses (Section 3.2.1 D) and any other applicable objectives and policies of the Municipal Plan respecting this application.

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

The Respondent 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 Board's decision has been received by the Appellant(s).

DATED at St. John's, Newfoundland and Labrador, this 4 of December, 2020.

Clifford Johnston, Chair
Eastern Newfoundland Regional Appeal Board

Carol Ann Smith, Member
Eastern Newfoundland Regional Appeal Board

Paul Boundridge, Member
Eastern Newfoundland Regional Appeal Board