

West Newfoundland Regional Appeal Board

Appeal #	15-006-066-006
Board Members	Chair: Lloyd Walters Member: Boyd Noel Member: Derrick House
Date of Hearing	October 14, 2020

In Attendance

Appellant	Geoff Pittman
Respondent/Authority	Town of Stephenville
Representatives for the Authority	Ted Gracie, Director of Municipal Services and Permits
Secretary to the Board	Robert Cotter
Technical Advisor to the Board	Elaine Mitchell, MCIP
Interested Parties	Sandra Lewis

The provision for appeal is enabled under s. 42 of the *Urban and Rural Planning Act, 2000* (The Act).

Board's Role

The role of the West Newfoundland Regional Appeal Board is to determine whether the decision of the Town Council of Stephenville to issue a permit to Vernon and Sandra Lewis (the Applicants) for a 10 foot (3 metre) high fence at 5 Bayside Drive, Stephenville was in accordance with the Stephenville Municipal Plan and Development Regulations and/or fence regulations.

Geoff and Vina Pittman (the Appellants) residing at 1 Leo Drive filed a third-party appeal.

Background

The Applicants applied to build a fence 3 metres in height along a portion of the north and west property boundary at 5 Bayside Drive, Stephenville. Council, at its regulation meeting on July 25, 2019, denied the application on the basis of aesthetics and surrounding neighbours. At a Council meeting held on August 15, 2019, Council approved the fence application. This decision was appealed by a third party who reside on an adjacent property (1 Leo Drive, Stephenville) who submitted a letter of objection when the application was advertised by the Town.

At the hearing, no one contested the background information.

Validity

Section 42 (4) and (5) of the *Urban and Rural Planning Act, 2000* (the Act) state:

42. (4) An appeal made under this section shall be filed with the appropriate board not more than 14 days after the person who made the original application appealed from has received the decision being appealed.

42. (5) An appeal shall be made in writing and shall include

- (a) a summary of the decision appealed from;*
- (b) the grounds for the appeal; and*
- (c) the required fee.*

According to the documents provided, the appeal was filed on August 26, 2019. The permit was issued on August 15, 2019. The Appellant's submission included the grounds of appeal, an appeal summary form and the required fee.

Grounds of Appeal

This appeal is based on the following section of the Act: Section 42.(1)(a) (an application to undertake a development).

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.

The Appellants are appealing the application based on the following grounds:

1. The fence will be in front of the kitchen window and will block sunlight and view;
2. Aesthetics of the neighbourhood will be affected as there are no existing fences;
3. The fence does not comply with the Town's regulations; and
4. The fence will negatively affected the resale of 1 Leo Drive.

The Board's authority is restricted to those grounds with respect to compliance with legislation and regulations. The Board will determine whether Council's decision to approve an application for a 10 foot fence by Vernon and Sandra Lewis (the Applicants) at 5 Bayside Drive, Stephenville, was in accordance with the Stephenville Municipal Plan and Development Regulations and/or fence regulations. The consideration with respect to aesthetics, sunlight and resale are outside of the jurisdiction of the Board.

Planner's Technical Analysis

Legislation and Regulations

The application legislation with respect to this appeal is:

Urban and Rural Planning Act, 2000

Municipalities Act, 1999

Stephenville Municipal Plan and Development Regulations

Land Use Planning

The Board considered the following technical advice.

According to section 2 (g) of the Act, development is defined as carrying out of building as well or other operations in, on, over or under land.

(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,

According to the Stephenville Municipal Plan, the subject property is located in the Residential future land use designation. Section 3.1 of the Stephenville Municipal Plan states that this designation is designed to protect existing and future residential areas.

According to the Stephenville Development Regulations, the subject land is located in the Residential Medium Density zone. Although a fence is considered to be development, the Residential Medium Density zone does not contain any specific provisions governing the construction of fences.

In the material provided, the appellant's response to the notice quotes specific fence standards. There is no indication of the legislative authority for these standards.

Section 414 (2) (hh) of the *Municipalities Act, 1999* states that Council may make regulations with respect to fences.

(2) A council may make regulations...

(hh) prescribing the height and type of construction of fences and requiring the owner or occupier of a lot abutting on a public highway within the municipality to fence the lot and to keep and maintain the fence in repair to the satisfaction of the council;...

Section 5 of the Stephenville Development Regulations states that any municipal regulations regulating or controlling development in force shall apply to the entire Planning Area.

5. Municipal Code and Regulations

The Building Code including the Plumbing Code, the Fire Code, the Electrical Code, and any other ancillary code and any Building Regulations, Waste Disposal Regulation and/or any other municipal regulations regulating or controlling the development, conservation and use of land in force in the Town of Stephenville, shall, under these Regulations apply to the entire Planning Area.

The Town did not provide any evidence of fence regulations in effect.

Council has discretionary powers under section 11 of the Stephenville Development Regulations.

11. Discretionary Powers of Town

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, 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.

Section 42 (11) of the *Urban and Rural Planning Act, 2000* states that the Board may not make a decision that overrules a discretionary decision of Council.

42. (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.

Presentations during the Hearing

Planner

During the hearing, the Board heard technical details from the planner with respect to fences under the Act, the *Municipalities Act, 1999* and from the Stephenville Municipal Plan and Development Regulations.

Appellant

The Appellant stated that he filed an appeal because the decision to refuse the application for the 10 foot fence was re-considered by Council without public notice. Council subsequently approved the application but the Appellant was not notified that the application was under re-consideration. The Appellant also stated that he was told that he had to file an appeal yet Council re-considered the application without an appeal being filed with respect to the decision to refuse the application. The Appellant also stated that the fence has been completed even though an appeal had been filed.

Authority

The Board heard that the Authority approved the application for a 10 foot fence along the north and west boundaries of 5 Bayside Drive, Stephenville, after re-considering the application at the written request of the Applicant.

The Authority indicated that there were guidelines for fences and Council must consider any application for a fence over 8 feet high. The Board learnt that adjacent properties were given notice of the application for a 10 feet fence at 5 Bayside Drive and that the Appellant filed a letter of objection which the Council took into consideration when it refused the application.

At the hearing, the Board learned that the Town issued a stop work order after the appeal was filed but the fence was completed in violation of that order.

Other Parties

There was no presentation from the Applicant who was present at the hearing.

Conclusion

What is the issue under consideration by the Board?

The property owners of 5 Bayside Drive, Mr. and Mrs. Lewis, applied for a 10 foot fence. Council initially refused the application. On August 15, 2019, Council approved the application for a 10 foot fence at 5 Bayside Drive.

Under section 42 (1) of the Urban and Rural Planning Act, a decision with respect to an application for development may be appealed. The Appellants filed an appeal on August 26, 2019. For details of the sections quoted below, please refer to the planner's technical analysis report.

Does a fence require a permit?

A fence is development as defined in section 2 (g) of the *Urban and Rural Planning Act, 2000*. The Board determined section 8 of the Stephenville Development Regulations requires a permit for all development.

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 Town.

Does the Town of Stephenville have standards for fences?

The Board heard at the hearing that the Town of Stephenville only has guidelines for fences. The Board determined that guidelines are not regulations made under the Municipalities Act nor form part of the Stephenville Development Regulations which is a legally binding document. On these grounds, the Board found that there are no legally existing standards for fences in the Town of Stephenville.

Did Council make a discretionary decision?

The Board determined that Council has the authority to make a discretionary decision on development applications under section 11 of the Stephenville Development Regulations where no standards exist. As there are no legally existing standards for fences in Stephenville, Council has the authority to make a discretionary decision with respect to the application for the fence at 5 Bayside Drive.

11. Discretionary Powers of Town

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, 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.

Should Council have stopped development when the appeal was filed?

The Board learnt that the Town issued a stop work order but failed to enforce it and the fence was completed. The Board determined that section 45 of the Act and section 8 of the Minister's Development Regulations require that development stop when an appeal is filed.

Development may not proceed

45. (1) Where an appeal is made under section 42, the development with respect to the appeal, work related to that development or an order that is under appeal shall not proceed or be carried out, pending a decision of the board.

The Town has powers under existing legislation to ensure that development stopped pending the appeal hearing and the Town should have acted under section 102 (5) or section 106.

102 (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 Crown.

106. (1) A person who contravenes this Act or a regulation, order, municipal, regional, local area, protected area or other plan made under this Act, who interferes with or obstructs a person in the discharge of duties under the preceding or who tears down, removes or damages a notice posted or published under this Act is guilty of an offence and liable on summary conviction...

Decision

The Board determined Council could only make a discretionary decision as there are no legally existing standards for fences. As Council made a discretionary decision, the Board has no authority to insert its discretion for that of the Authority under section 42 (11) of the Act.

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 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.

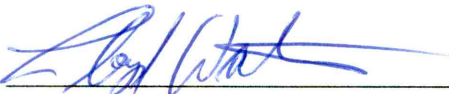
Board's Order

Based on the information presented, the Board orders that the decision by the Town Stephenville on August 15, 2019 to issue a permit for a 10 foot fence at 5 Bayview Drive, Stephenville, be confirmed.

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


According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the West Newfoundland 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 Deer Lake, Newfoundland and Labrador, this 16th day of October, 2020.



Lloyd Walters, Chair

West Newfoundland Regional Appeal Board



Boyd Noel, Member

West Newfoundland Regional Appeal Board



Derrick House, Member

West Newfoundland Regional Appeal Board