

West Newfoundland Regional Appeal Board Decision

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| Appeal # | 15-006-064-040 |
| Appellant(s) | Greg Sheaves |
| Respondent / Authority | Town of Channel-Port aux Basques |
| Board Members | Chair: Lloyd Walters Member: Derrick House Member: Boyd Noel |
| Date of Hearing | October 21, 2020 |

In Attendance:

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| Appellant | Greg Sheaves |
| Representatives for the Authority | Leon MacIsaac, Town Manager Mayor John Spencer |
| Secretary to the Boards | Robert Cotter |
| Technical Advisor to the Boards | Elaine Mitchell, MCIP |

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 if the Town of Channel-Port aux Basques acted in accordance with the *Urban and Rural Planning Act, 2000* and the *Municipalities Act, 1999* when it made an order on November 20, 2020 regarding unauthorized development and accumulation of scrap waste at 45-51 and 56-60 Grand Bay West Road, Channel-Port aux Basques.

Background

An orders, dated November 20, 2019, was made under section 404 of the *Municipalities Act, 1999* and section 102 of the *Urban and Rural Planning Act, 2000* regarding unauthorized development and the accumulation of scape waste at 45-51 and 56-60 Grand Bay West Road, Channel-Port aux Basques. The orders ordered that:

- Scrap waste and other waste materials be removed from the Town's road reservation;
- The properties be cleaned up to meet section 5 of the Industrial zone in the Channel-Port aux Basques Development Regulations (Regulations) and to the satisfaction of the Town; and
- The work be completed within 21 day of the date that the order is served.

Mr. Greg Sheaves (the Appellant) filed an appeal with respect to this order.

Chronology

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| July 10, 2003 | The Town wrote to the Appellant requiring removal of waste material from the rear of A-1 Auto and Greg Sheaves Construction properties |
| May 26, 2006 | The Town wrote to the Appellant requesting a time frame to complete the clean up of the property |
| May 4, 2007 | The Town wrote to the Appellant requesting a timetable for the removal of scrap metal at 45-51 and 56-60 Grand Bay West Road |
| May 26, 2008 | The Town wrote to the Appellant informing him that the Department of Environment has been requested to complete an assessment with respect to the storage, dumping and burying of metal and debris and ordering an immediate cleanup of the property |
| May 22, 2018 | At a regular meeting of Council, the report from the Public Works Committee was accepted. The report noted that the Public Works Committee had conducted a site visit and discussed the matter of clean-up with some property owners |
| June 25, 2008 | The Town wrote to the Appellant and informed him that no further storage of salvage, scrap metal, dumping and burying of debris could be undertaken until the site is cleaned up and permits/licenses obtained from Council and the Department of Environment |
| June 12, 2018 | At a regular meeting of Council, the issue of properties in the industrial park was discussed |

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| July 10, 2018 | At a regular meeting of Council, a Council committee recommended that letters be sent to property owners requesting cooperation related to property clean-up |
| March 29, 2019 | The Town wrote to the Appellant requesting that the required fence be completed by July 1, 2019 |
| April 16, 2019 | At a regular meeting of Council, the Appellant addressed Council |
| May 7, 2019 | At a regular meeting of Council, it was noted that the Appellant was in town and he should be contacted regarding the site clean up |
| June 18, 2019 | At a regular meeting of Council, the Town Manager was instructed to write to the individual property owners |
| July 4, 2019 | The Town wrote to the Appellant noting that non-compliance with respect to the March 29, 2019 request |
| July 17, 2019 | At a regular meeting of Council, the issue of properties in the industrial parking was discussed |
| August 20, 2019 | At a regular meeting of Council, Council passed a motion that the town undertake legal action to ensure compliance with regulations |
| September 11, 2019 | At a regular meeting of Council, the issue of properties in the industrial park was discussed |
| September 25, 2019 | At a regular meeting of Council, the issue of properties in the industrial park was discussed |
| November 12, 2019 | At a special meeting of Council, Council passed a motion to proceed to issue orders with respect to 45-51 and 56-60 Grand Bay West Road |
| November 20, 2019 | Order signed and dated |
| December 3, 2019 | Appeal filed by the Appellant |

Validity

Section 42 (4) and (5) of 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 December 3, 2019. The Appellant's submission included the appeal summary form and the required fee.

The documentation provided by the Appellant does not indicate when the order was served. The order was dated November 20, 2019 but may have been served at a later date.

Grounds of Appeal

This appeal is based on the following section of the Act: Section 42.(1)(c) (the issuance of a stop work order).

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 Appellant did not include a written statement outlining the grounds for appeal.

Planner's Technical Analysis

Legislation and Regulations

The applicable legislation with respect to this appeal is:

Urban and Rural Planning Act, 2000

Municipalities Act, 1999

Town of Channel-Port aux Basques Municipal Plan and Development Regulations

Land Use Planning

The Channel-Port aux Basques Municipal Plan shows that 45-51 Grand Bay West Road and the front portion of 56-60 Grand Bay West Road is located in the Commercial designation. The rear portion of 56-60 Grand Bay West Road is located in the Environmental Protection designation.

Policy 3.6 states that the Commercial designation is applied to major commercial sites particularly those that required access or visibility from a major road or highway.

Policy 3.9 states that the Environmental Protection designation is intended to protected environmentally sensitive areas, areas of scenic or cultural value and areas that are hazardous to development. All development in the Environmental Protection designation requires approval from the Department of Environment and Conservation (which is now Department of Municipal Affairs and Environment). Permitted uses are limited to conservation and the number and type of discretionary uses are restricted to agriculture, mineral workings, recreational open space and water related transportation uses such as wharves and slipways.

According to the Regulations, the subject site is located in the Commercial and Environmental Protection zones.

In the Commercial zone, general industry is listed as a permitted use. Schedule A of the Regulations includes a definition of General Industry:

GENERAL INDUSTRY means the use of land or buildings for the purpose of storing, assembling, altering, repairing, manufacturing, fabricating, packing, canning, preparing, breaking up, demolishing, or treating any article, commodity or substance. "Industry" shall be construed accordingly.

Schedule B of the Regulations includes examples of General Industry including:

Factories, Cold Storage, Plants, Freight Depots, General Garages, Warehouses, Workshops, Laboratories, Laundries, Planning Mills, Printing Plants, Contractors' Yards

In the Environmental Protection zone, only conservation and recreational open space are listed as a permitted uses. Mineral exploration, mineral workings, transportation and utilities are listed as discretionary uses. As general industry is not listed as a permitted or discretionary use, it is prohibited in the Environmental Protection zone.

94. Uses Not Permitted

Uses that do not fall within the Permitted Use Classes or Discretionary Use Classes set out in the appropriate Use Zone Tables in Schedule C shall not be permitted in that zone.

The order requires that the property be cleaned up and meet Section 5 of the Commercial use zone table.

Section 5 is a condition with respect to open storage and allows for the open storage of materials and machinery provided that it does not occupy more than 50% of the site; that it is enclosed by a fence or wall; and there is a stable surface so that dust and other particulates are not created:

5. Open Storage

The Town may permit open dry storage of materials, goods and machinery provided the following conditions are met:

- a) open storage shall not occupy more than 50 percent of the site area and shall not be located in the front yard or in any required buffer areas.*
- b) open storage areas shall be enclosed by a wall or fence not less than 2 metres in height constructed of uniform materials approved by the Town.*
- c) open storage areas shall be maintained with a stable surface to prevent raising or movement of dust, clay, mud, and loose particles.*

In general terms, conditions in a Use Zone Table are applied as part of the permitting process. Such conditions cannot be applied to land not zoned Commercial. A portion of 56-60 Grand Bay West Road is located in the Environmental Protection zone.

Under section 102 of the Act, Council has the authority to issue an order where a person has undertaken development contrary to a plan or development regulations.

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.*

The definition of development in section 2 (g) of the Act identifies a number of activities including making a material change in the use, or the intensity of use of land, buildings or premises as development.

2 (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...

Section 7 of the Regulations specifies all development must comply with the Regulations and section 8 states that no one shall carry out any development unless a permit has been issued by the Town.

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 Town.

The order states that the intensity of the use of the property has been expanded to include scrap waste and waste material without a permit.

Municipalities Act, 1999

Under section 404 (1) (l) of the Municipalities Act, 1999, Council may make an order requiring the removal of structures or objects from a highway or sidewalks and/or requiring removal of waste, noxious substances and things that may be a public health and safety hazard or negatively affect surrounding properties.

404. (1) A council may make an order that...
(i) a fence, building, steps, erection or other object which projects into or over land reserved for a public highway or sidewalk be removed;...
(l) that the owner or occupier of real property remove from that property, solid waste, noxious substances and substances or things which may be a hazard to public health and safety or which adversely affects surrounding properties.

The order states that scrap waste and other materials encroaches on the road reservation for Grand Bay West Road.

Procedural Compliance

Section 107 (1) of the Act requires that an order be delivered personally or sent by registered mail.

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.

Section 406 (1) of the *Municipalities Act, 1999* states that an order is considered served if it is personally delivered or sent by registered mail.

406. (1) *A notice, order or other document required to be given or served under this Act or the regulations is sufficiently given or served where delivered personally or sent by registered mail addressed to the person to whom delivery or service is to be made at the latest address appearing on the records of the applicable council.*

Evidence about how the Order was served was not included in the information submitted to the Board.

The decision to issue an order was made at a special meeting of Council. Section 24 of the *Municipalities Act* is with respect to public meetings. Section 213 of the *Municipalities Act* states that a Council meeting shall be open to the public unless it a privileged meeting. Any decisions made a privileged meeting must be ratified at a public meeting in order to be valid.

Meetings

24. (1) *The mayor or 2 councillors shall request that the town clerk call and there shall be held, at least once a month, a meeting of the town council to which the public shall be admitted.*

Privileged Meetings

213. (1) *A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.*

(2) *Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.*

(3) *A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.*

There is no information provided to indicate whether the November 12, 2019 Special Meeting of Council was open to the public.

Presentations during the Hearing

Planner

During the hearing, the Board heard technical details about the two subject properties and the provisions from the *Town of Channel-Port aux Basques Municipal Plan and Development Regulations*, the *Urban and Rural Planning Act, 2000* and the *Municipalities Act, 1999*. In particular, the technical advisor noted that both the *Urban and Rural Planning Act, 2000* and the *Municipalities Act, 1999* give Council the authority

to issue orders. The technical advisor stated that an order must be sent by registered mail or personally served. In addition, an order must be authorized by Council.

Appellant

At the hearing, the Appellant explained that he started his scrap and construction business in 1978 and moved to Grand Bay West Road shortly after. He explained that the scrap materials on the properties are his business inventory. The Appellant stated that he was targeted by Council as he was the only business in the area served with orders. He explained that other businesses are using the road reservation for storage and the Authority has not taken any action against them. The Appellant also objected to the requirement that he build a fence noting that a fence will allow for snow build up and provide an opportunity for vandalism of his stock. He stated that the requirements for a fence were not in place when he started his business on Grand Bay West Road. The Appellant indicated that he had made some improvements to his properties.

Authority

At the Hearing, the Authority confirmed that it arranged for the sheriff to personally deliver the orders as the Appellant refused to accept registered mail.

The Authority stated that the cleanup of several properties on Grand Bay West Road was a Council priority. The Town Manager explained that Council had written to a number of property owners in the area and other businesses have made arrangements to comply. However, the Appellant had not made any contact with the Authority and Council proceeded to issue orders.

With respect to the procedure followed, the Town Manager noted that the resolution to issue the order was made at a privileged meeting of Council and that the minutes of that privileged meeting were ratified at the next public Council meeting.

Conclusion

What is the matter under consideration by the Board?

The matter under consideration by the West Newfoundland Regional Appeal Board is whether the Town of Channel-Port aux Basques acted in accordance with the *Urban and Rural Planning Act, 2000* and the *Municipalities Act, 1999* when it made an order on November 20, 2020 regarding unauthorized development and accumulation of scrap waste at 45-51 and 56-60 Grand Bay West Road, Channel-Port aux Basques. For details of the sections quoted below, please refer to the planner's technical analysis report.

Does Council have the authority to issue orders?

Yes. Both section 102 of the *Urban and Rural Planning Act, 2000* and section 404 (1) of the *Municipalities Act, 1999* give Council the authority to issue orders.

Did Council follow proper procedures for serving the order?

Yes. The Board learned that the Town arranged for the sheriff to personally serve the order to the Appellant. This is in accordance with 107 of the *Urban and Rural Planning Act, 2000* which requires that an order be sent by registered mail or personally delivered.

Did Council follow legislation when it issued the orders?

No. The Board learned from the Town's submissions that the matter was discussed at a special meeting of Council on November 12, 2019. The Board heard from the Town Manager at the hearing that this was a privileged meeting of Council which was not open to the public.

The Board reviewed section 213 (3) of the *Municipalities Act, 1999* which states that:

A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.

The Board heard that Council adopted the minutes of the privileged meeting at the subsequent Council meeting. The Board was provided with no evidence that the motion to issue the orders with respect to 45-51 and 56-60 Grand Bay West Road was ratified at a public meeting as required by section 213 (3) of the *Municipalities Act, 1999*. The Board, therefore, determined that the resolution made at the November 12, 2019 privileged meeting to proceed to issue orders with respect to 45 -51 and 56-60 Grand Bay West Road was not ratified at a public meeting as required by legislation. As a result, the Board finds that the Town did not act in compliance with legislation when issuing the orders.

Decision

In arriving at its decision, the Board reviewed the submissions received prior to the hearing and comments given by all 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. In addition, the Board also derives its powers from section 42(10):

(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.

The Board accepts that Council has the authority to issue orders with respect to these matters. The Board reviewed the grounds of appeal presented by the Appellant and found that there was no evidence of bias or discrimination. Rather Council has the Authority to require improvements with respect to the appearance of properties on the Grand Bay West Road area and to ensure materials are not stored on its road reservation. Other than bias or discretion, the grounds of appeal by the Appellant, while reviewed, are outside the mandate of this appeal board.

However, it is the decision of the Board that the Authority did not follow legislation as Council did not ratify the resolution to issue the orders with respect to 45-51 and 56-60 Grand Bay West Road at a subsequent public meeting. That is to say, the Council erred when it simply adopted the minutes of the privileged meeting rather than passing a separate motion at a later meeting to confirm the decision to issue the order as required. The Council must now either ratify the original decision in a public meeting and provide new timelines for compliance or issue a new order with applicable timelines and ratify it at a subsequent public meeting.

Board's Order


Based on the information presented, the Board orders that the order issued by the Town of Channel-Port aux Basques on November 20, 2019 with respect to 45-51 and 56-60 Grand Bay West Road, Channel-Port aux Basques be reversed.

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

The Board further orders the Authority to pay the Appellant an amount equal to the appeal fees of \$400 plus HST.

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 21st day of October, 2020.



Lloyd Walters, Chair
West Newfoundland Regional Appeal Board



Derrick House, Member
West Newfoundland Regional Appeal Board



Boyd Noel, Member
West Newfoundland Regional Appeal Board