

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-064-027
Appellant(s)	Geoffrey Clarke/Fairview Investments
Respondent / Authority	Town of Paradise
Date of Hearing	January 20, 2021

Board Members

Chair	Cliff Johnston
Member	Robert Warren
Member	Paul Boundridge

Also in Attendance

Solicitor for the Appellant(s)	Michael Crosbie
Representatives for the Appellant(s)	Barry Clarke of Fairview Investments
Representatives for the Authority	Stephen Penney, Solicitor Town of Paradise Alton Glenn, Director of Planning and Enforcement Services
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Tolulope Victoria Akerele
Interested Parties	Jennifer Button, Curtis Beasley, Jason Hayes

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 Regional Appeal Board is to determine if Town of Paradise made errors when it refused an application for an approval in principle submitted by Geoffrey Clarke/Fairview Investments on August 6, 2019 citing the discretionary powers of authority. The Board must determine if the Town of Paradise acted in accordance with the *Urban and Rural Planning Act, 2000* and the Town of Paradise Municipal Plan and Development Regulations when the decision was made.

Presentations during the Hearing

1. Planner's Presentation:

The property which is the subject of this appeal is zoned Commercial Neighbourhood under the Town of Paradise Development Regulations. A commercial plaza and eating establishment with a drive-thru is considered a Discretionary Use within this zone.

There was a question whether the appeal was filed within the prescribed time period.

From the information submitted by the Authority to the Secretary of the Appeal Board, the Board has been advised that the Authority conveyed by e-mail on August 7, 2019 its decision to the Applicant/Appellant to reject/deny the application for a commercial plaza with an eating establishment/ with a drive-thru.

From the information submitted by the Appellant, which includes a sworn statement, the Secretary to the Appeal Board was advised that the Council decision was received on August 11, 2019.

Jurisdiction/Validity:

Was the appeal filed within the period prescribed by the Urban and Rural Planning Act, 2000 (URPA)?

Position of the Appellant:

The URPA and the Town of Paradise Development Regulations establish the period for submission of an appeal as being 14 days from the date that a decision on an application is received by the Applicant/Appellant. The legal representative for the Appellant maintains that the Appeal was submitted within the 14 day period dictated by URPA and the Town of Paradise Development Regulations.

Position of the Authority:

The Authority's preferred method of communications with applicants is by e-mail. Relying on the *Electronic Communications Act*, the Town maintains that the date of the e-mail letter advising the Applicant that the application was rejected, should be considered the same date that it was received.

Board's Reason for Proceeding:

The Board accepts the Appellant's written declaration on the Appeal Form that it received the notice of the Authority's decision on August 11, 2019. Therefore, the Appeal was filed within the prescribed period and within the scope of the Board to hear.

2. Appellant's Presentation

- The Appeal Board has the jurisdiction to review how the Town applied its discretionary authority to determine that it was done fairly and reasonably, in accordance with the principles of natural justice.
- Procedural Fairness was not followed by the Authority as it did not ask the Applicant/Appellant to comment on the principal issues and concerns raised through the public consultation process.
- The Authority gave no consideration to the 2017 Compensation Agreement negotiated and entered into by the Authority and Fairview Investments in arriving at its decision to deny the application.
- There is no evidence of the validity of the traffic issues raised in the written public representations received by the Authority.

3. Authority's Presentation

- The Town was obligated under its Development Regulations to consult with the public on the Discretionary Use application and to consider any representations received before making a decision on the application.
- The Board has no jurisdiction to interpret private agreements (i.e. the Compensation Agreement).
- The Compensation Agreement did not bind the Authority to approve any form of development on the application site without also complying with the requirements of the Town's Municipal Plan and Development Regulations.
- It would have been premature for the Town to have required a traffic study at this stage of the review process for this development application until/unless an approval in principle is granted.

4. Interested Parties

- The main concern was for the safety of students attending the nearby school and residents in the adjoining neighbourhood if the proposed drive-thru was allowed by the Town.

Board's Analysis

Q: Is the 2017 Compensation Agreement between the Town of Paradise and Fairview Investments relevant to this appeal?

R: The Board has determined that it has no jurisdiction under URPA to interpret the application of the Compensation Agreement to the matter under appeal. This is a civil matter that is external to the URPA, the Town's Municipal Plan and Development Regulations, and is solely between the two parties to apply and enforce.

Q: Did the Authority properly follow the procedure set out in its Development Regulations for considering Discretionary Use applications?

R: The Town's Development Regulations require that the public be consulted and that views (representations) received be considered by Council before the Council makes a decision on a Discretionary Use application. It has been clearly demonstrated that the Town followed due process in consulting with the public and considering views expressed before making its decision to deny the application from the Appellant.

Q: Did the Town have the authority to reject the application?

R: The Town has authority to approve, deny or conditionally approve an application for a Discretionary Use. Section 9.5 of the Town of Paradise Development Regulations states as follows:

"9.5 Discretionary Uses

Subject to these Regulations, the Uses that fall within the Discretionary Use classes set out in the appropriate Use Zones may be permitted in that Use Zone if Council is satisfied that the Development would not be contrary to the general intent and purpose of these Regulations, the Municipal Plan, or any further scheme or plan or regulation pursuant thereto, and to the public interest, and if Council has given notice of the application and has considered any objections or representations which may have been received on the matter.”

Board’s Conclusion

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.

After reviewing the information presented to this Board, the Board concludes that the Authority acted in accordance with its Municipal Plan and Development Regulations; and that it exercised its discretionary authority in a fair and reasonable manner.

Board's Order

Based on the information presented, the Board orders that the decision made by the Town of Paradise on August 6, 2019 to reject an application from Fairview Investments Limited for a commercial plaza with a drive-thru at Civic Number 1761-1793 Topsail Pond Road, be confirmed.

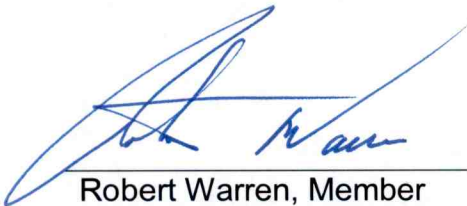
The Respondent and the Appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

According to Section 46 of the Urban and Rural Planning Act 2000, the decision of the Eastern 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.

DATED at St. John's, Newfoundland and Labrador, this January 20, 2021.



Clifford Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Robert Warren, Member
Eastern Newfoundland Regional Appeal Board



Paul Boundridge, Member
Eastern Newfoundland Regional Appeal Board