

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-067-011
Appellant(s)	Melanie LaFosse
Respondent / Authority	Town of Witless Bay
Date of Hearing	March 23, 2021

Board Members

Chair	Clifford Johnston
Member	Carol Ann Smith
Member	Robert Warren

Also in Attendance

Solicitor for the Appellant(s)	
Representatives for the Appellant(s)	Noel O'Dea; Aiden Moss
Representatives for the Authority	Pat Curran, CAO; Stephen Penney, Solicitor for Town
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Kim Blanchard, MCIP
Interested Parties	Garry Churchill; Jim Miller; Ed Vickers

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 whether it has jurisdiction to hear the appeal and, if so, whether the Town of Witless Bay acted in accordance with the *Urban and Rural Planning Act, 2000*, the *Municipalities Act, 1999*, and the Town of Witless Bay Municipal Plan and Development Regulations when making its decision to issue a tender for a road development extension at Mallowney's Lane.

Presentations During the Hearing

Appeal Board's Information Note:

The following notes capture the key points from the following presentations made to the Board at this appeal hearing. The Board has also been provided with a written technical report, prepared by the Planner assigned to this appeal. Both the Appellant and the Authority provided written submissions to the Board prior to this appeal hearing.

1. Planner's Presentation

Where highways/ roads are vested in the Town Council, infrastructure works are not considered "development" as defined by legislation, and the Town does not complete applications or issue permits to administer such undertakings of its own.

Council has the authority for the construction and maintenance of public roadways, and for taking over privately developed roads to be used by the public and vested in the Town Council, as provided by Sections 163, 164, and 165 of the *Municipalities Act, 1999*.

According to the documents provided, there is no application as noted in 42(4) of the Urban and Rural Planning Act, 2000 triggering the filing of an appeal. There are Minutes of Council from the public meeting held May 19, 2020 at which it would appear that a unanimous decision of Council resolved to undertake municipal infrastructure work.

The May 19, 2020 Council Minutes indicate that the motion and decision cites the Town's Development Regulations without reference to the legislative authority councils derive for the construction of municipal public infrastructure under section 165 of the *Municipalities Act, 1999*. The citation from the development regulations refers to Council's consideration of development applications.

The Board must contemplate its jurisdiction respecting the matter under appeal, in accordance with Section 42(1) and 42(4) of Urban and Rural Planning Act, 2000.

2. Appellant's Presentation

The Appellant is appealing Council's decision to tender for road work to extend Mallowney's Lane and upgrade the right-of-way.

The grounds for appeal are outlined in detail in the Appellant's submission, ten categories of arguments with sub-bullets. These are contained in the package for review of the Board and Parties. In summary, the grounds are:

- The approval is not compliant with the intent of the Town's planning framework, or the public interest.
- Council acted beyond its authority, negligent in its duties, in violation of the rules of office.
- Council does not have authority to approve development on land it does not own.
- Required information is missing from Council's approval, including property survey, plot plan, legal description, and other specifications.
- Absent from Council's approval were conditions such as government approvals.
- Council's approval cited Regulation 10, Discretionary Powers of Authority, for which specific requirements are not met.
- Council's approval must be considered as part of a full development plan. The context of development in this area has involved dispute and appeals, including approvals to create a road and turnaround/parking lot at a cart path to vegetable gardens.
- The Appellant makes allegations of conflict of interest by members of Council that voted on the matter with potential financial gain (personal and/or family member).
- Council's control of development favours the interest of individual property owners over that of others and the public good.
- Council failed in its duty to control development in accordance with its Municipal Plan policies and its Development Regulations.

In their verbal comments to the Board, Mr. O'Dea and Mr. Moss advised the Board that this proposed extension of Mullowney's Lane "will go nowhere" and has no public use/purpose. It is being constructed to allow access to one individual's private property at public expense. In their view, the proposed extension of the road is in fact "Development" as defined under the Urban and Rural Planning Act, 2000 and the Board has the authority to hear this appeal and to make a ruling on the matter.

3. Authority's Presentation

The Solicitor for the Authority summarized the points outlined in his written brief submitted to the Board.

- The Town's own infrastructure work is not "Development" under the Urban and Rural Planning Act, 2000, and Town Council has no obligation to submit a development application to itself to extend a municipal road.

- Though Council was not considering any development application or request for a permit, the Council motion erroneously referenced the Town's Development Regulations.
- Council has not issued any permit to itself or any other body for this road work.
- Council has not issued any order in respect to this road work.
- Council's decision to tender for roadwork is not a decision which may be appealed under Section 42 of the Urban and Rural Planning Act, 2000. The Board has no jurisdiction to hear this Appeal.

Mr. Curran, CAO Town of Witless Bay, verbally advised the Board that the purpose of the proposed extension to the road is to allow access to multiple property owners, and to improve the general public access to the beach and hiking trails in the area.

4. Interested Parties

Mr. Churchill stated that the right of way where the road extension is planned will access a number of private properties.

Mr. Miller advised the Board that in his opinion the proposed road extension is not an efficient use of public funds.

Mr. Vickers advised the Board that it should be aware that two former Ministers of Municipal Affairs (Min. Kevin O'Brien and Min. Steve Kent) sent separate written correspondence to the Town regarding Mullowney's Lane. (Note: Subsequent to the Appeal Hearing, the Board requested and received from the Authority copies of said correspondence.)

Board's Analysis

- Q.** Does the Board have jurisdiction to hear this Appeal?
- A.** In accordance with Section 42 of the Urban and Rural Planning Act, 2000, the Board has determined that it has no jurisdiction to hear this Appeal. The matter being appealed does not involve an application to undertake development or a decision to allow/approve a development.

Section 42 of the *Urban and 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.*

Section 42(1)(a) of the Urban and Rural Planning Act, 2000 enables aggrieved parties to appeal a decision with respect to “an application to undertake a development”.

Reviewing the definition of development as defined by subsection 2(g) of the Urban and Rural Planning Act, 2000, creating and maintaining roads and highways by public authorities is excluded:

2. *In this Act*

(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 excludes the

(vi) carrying out by a highway authority of works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road reservation,

Where highways/ roads are vested in the Town Council, infrastructure works are not considered “development” as defined by legislation, and the Town does not complete applications or issue permits to administer such undertakings of its own.

Council has the authority for the construction and maintenance of public roadways, and for taking over privately developed roads to be used by the public and vested in the Town Council, as provided by Sections 163, 164, and 165 of the *Municipalities Act, 1999*.

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 is bound by Section 42 of the Urban and Rural Planning Act, 2000 and therefore must make a decision which applies with the applicable legislation, policy, and regulations.

As per Section 42 of the Urban and Rural Planning Act, 2000, a decision that can be appealed is limited to decisions based on an application. In this case, there was no application submitted to the Town as the Town does not need to submit an application to itself for the proposed extension of Mullowney’s Lane.

The Board has determined that it has no jurisdiction to hear this appeal.

Board's Order

The Board has determined that it has no jurisdiction to hear the appeal against the decision of Town Council of Witless Bay made on May 19, 2020 to tender for road work to extend Mullooney's Lane from the turnaround for 168 meters, and to upgrade the right of way to the existing standards of Mullooney's Lane.

The Authority 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 March 23, 2021.



Clifford Johnston, Chair
Eastern Newfoundland Regional Appeal
Board



Carol Ann Smith, Member
Eastern Newfoundland Regional Appeal
Board



Robert Warren, Member
Eastern Newfoundland Regional Appeal
Board