

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-067-047
Appellant(s)	Asphalt Product Industries Inc.
Respondent / Authority	Town of Come by Chance
Date of Hearing	November 18, 2021

Board Members

Chair	Carol Ann Smith
Member	Paul Boundridge
Member	Lisa Slaney

Also in Attendance

Solicitor for the Appellant(s)	John Hood-Taylor Devin Drover
Solicitor for the Authority	Giles Ayers
Representatives for the Authority	Colin Holloway, Chief Administrative Officer
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Elaine Mitchell
Interested Parties	Rex Benson, Chair of the Boat Owners Association

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 Come by Chance (the "Authority") acted in accordance with the *Urban and Rural Planning Act, 2000* (the "Act") when it issuing a Removal Order to Asphalt Product Industries Inc. (the "Appellant") on December 9, 2020.

Board's Note

Prior to the commencement of the Appeal Hearing, the representative of the Appellant requested that the Board postpone the appeal on the grounds that there is an application recently submitted to the Town for approval of the barrier and gate which should be allowed to be processed; the existing marina is a non-conformity under the Town's Development Regulations; and that, legally, there already exists an easement by foot only for boat owners/operators. He stated that postponing the hearing will not prejudice the rights of boat operators.

The representative of the Authority maintained that the core issue is that the Town, as the legal development authority under the *Urban and Rural Planning Act, 2000*, is within its legal right to issue the Removal Order to compel API to comply with the Town's Development Regulations. The representative for the Authority also indicated that removal of the barrier and gate is the price IPA must incur for acting without approval.

After a short adjournment by the Board to deliberate on the request to postpone the hearing, the Board advised that the Appeal Hearing would proceed. It was the Board's determination that the information provided by the Appellant's representative was not relevant to the current matter before the Board.

Presentations During the Hearing

The following is a synopsis/summary of the verbal representations made to the Board during the Appeal Hearing. The Board also received and reviewed written submissions from the Technical Advisor, as well as representatives for the Appellant, and the Authority.

1. Technical Advisor's Report

Elaine Mitchell, MCIP, presented the technical report. She stated that the *Urban and Rural Planning Act, 2000* includes a definition of building which includes a "*structure, erection, alteration or improvement placed on, over or under land...*" and development which includes "*the carrying out of building, engineering, mining or other operations in, on or over land...*". A fence meets the definition of development. She explained that Regulation 2 of the Come By Chance Development Regulations requires that a permit for development be issued by the Authority and that Regulation 11 outlines the form of a permit. She stated that the information provided by the parties does not contain an application or a plan although a permit was issued on December 6, 2018. Without a site plan, she could not determine whether the fence and gate was within the scope of work allowed by this permit issued by the Authority. Ms. Mitchell stated that section 102 of the *Urban and Rural Planning Act, 2000* gives the Authority the authority to issue an Order where development has been undertaken contrary to the plan and development regulations in place within the planning area.

2. Appellant's Presentation

The Appellant's representative asserted bad faith on the Town's part and that the Town's Removal Order is just a mechanism to get something that it is not legally entitled to – public vehicular access to a private road (where there exists a private pedestrian easement) and a marina, which is a non-conformity under the Town's Municipal Plan and Development Regulations. To this end, the Appellant's representative asserted that the Town has made various misrepresentations and stated that it is irrelevant that the barrier and gate were erected without a permit from the Town.

The Appellant's representative also asserted that the Interim Court Orders recognized the legal the existence of the barrier and gate and that this rendered invalid the Town's order.

3. Authority's Presentation

The Authority's representative stated that the Appellant and the Town agreed that the barrier and gate were erected without a Permit from the Town. He argued that at the core of the issue before the Board is that the barrier and gate were erected without a permit and that, under the *Urban and Rural Planning Act, 2000* and the Town's Development Regulations, which are binding on the Town and property owners in the Town, the Town is legally entitled to issue the order. The Authority's representative stated that in exercising its duty of care as the Development Authority, the Town has not acted in bad faith.

4. Interested Parties

Rex Benson, Chair of the Boat Owners Association, stated that there has been a community marina/wharf in existence since the 1970's that boat owners and operators have been able to freely access with their vehicles. Over time, the Boat Owners Association had maintained and repaired the wharf.

Mr. Benson stated that following the sale of the property to API by the Province, the barrier and gate were erected and that this has interfered with the free access to the marina that people previously enjoyed.

Board's Analysis

Q. Did the erection of the gate and barrier constitute development?

A. The *Urban and Rural Planning Act, 2000* includes a definition of building which includes a "structure, erection, alteration or improvement placed on, over or under land..." and development which includes "the carrying out of building, engineering, mining or other

operations in, on or over land...". The Board accepts that the gate and barrier meet the definition of development.

Q. Did the development require a permit?

A. Regulation 2 of the Come By Chance Development Regulations requires that a permit for development be issued by the Authority and that Regulation 11 outlines the form of a permit.

Q. Did the Appellant have a permit from the Town to undertake the development?

A. No. Both the Town representative and the representative for the Appellant, stated and agreed that no permit was issued for the development of the gate and barrier.

Q. Did the Town have the authority to issue the Order under section 102(1) of the *Urban and Rural Planning Act, 2000* and the Come By Chance Development Regulations?

A. Yes. The Town did have the authority to issue the Order under section 102(1) of the *Urban and Rural Planning Act, 2000*

Orders"

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.*

Board's Conclusion

After reviewing the information presented to this Board, the Board concludes that the Authority was justified and acted in accordance with the *Urban and Rural Planning Act, 2000*, and the Town of Come By Chance Development Regulations when, on December 9, 2020, it issued to Asphalt Product Industries Inc. an Order to *"pull down, remove, and destroy the barricade on Wharf Road, and restore the site to its original state within 15 days of service of this Order."*

The Board derives its authority to make a decision under section 41 (10) of the *Urban and Rural Planning Act, 2000*:

42. (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.

Board's Order

The Board confirms that the Town of Come By Chance was justified and acted in accordance with the Urban and Rural Planning Act, 2000, and the Town of Come By Chance Development Regulations when, on December 9, 2020, it issued to Asphalt Product Industries Inc. the Order to *"pull down, remove, and destroy the barricade on Wharf Road, and restore the site to its original state within 15 days of service of this Order."*

The Authority and the Appellant(s) are bound by the decision of the Eastern Newfoundland 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).

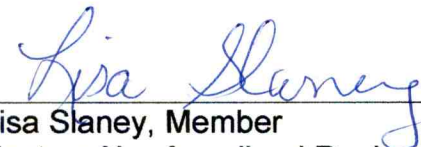
DATED at St. John's, Newfoundland and Labrador, this 18th day of November, 2021



Carol Ann Smith, Chair
Eastern Newfoundland Regional Appeal
Board



Paul Boundridge, Member
Eastern Newfoundland Regional Appeal
Board



Lisa Slaney, Member
Eastern Newfoundland Regional Appeal
Board