

Labrador Regional Appeal Board

Appeal #	15-006-066-005
Appellant(s)	Carol Colbert
Respondent / Authority	Town of Wabush
Date of Hearing	November 30, 2021

Board Members

Chair	Karen Oldford
Member	Gary O'Brien
Member	Nina Pye

Also in Attendance

Representatives for the Appellant(s)	Carol Colbert
Representatives for the Authority	Melanie LaFosse, Director of Planning and Land Use Brian Lilly, Director of Public Works
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Elaine Mitchell, MCIP
Interested Parties	Charlie Perry, Town Manager

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 the Town of Wabush (the Authority) acted in accordance with the Wabush Development Regulations and the Wabush Fence Regulations when it issued a development permit, with conditions, for a retaining wall at 23 Banting Street on July 11, 2019.

Presentations During the Hearing

1. Planner's Presentation

Elaine Mitchell, MCIP, summarized the technical report. She stated that on July 9, 2019, the Authority issued a permit for a retaining wall at 23 Banting Street. A letter from the Authority, dated July 2, 2019, specified that the retaining wall be located a minimum of 10 feet (3 metres) inside of the property boundary to avoid potential damage during snow clearing.

Ms. Mitchell explained that the subject property is located in the Residential Medium Density zone and that the Wabush Development Regulations outline a minimum building line setback of 5 metres and side yard width of 1 metre and that corner lots are required to maintain a building line setback on the primary and flanking street. She explained that the Wabush Fence Regulations contain provisions for rear yard and side yard fencing and noted that a minimum setback for 1.82 metres was established for side yard fences adjacent to the street.

Ms. Mitchell stated that, according to Regulation 1.4 of the Wabush Development Regulations, other municipal regulations regulating or controlling development in force apply within the municipal planning area. This would include the Town's Fence Regulations which gives Council the right to reject or modify applications for purposes such as snow clearing.

2. Appellant's Presentation

Ms. Colbert stated that she applied for a permit to build a retaining wall to enhance and beautify the enjoyment of her yard for herself and her grandchildren. She expected a permit with the requirement of a 1 foot setback because she thought it would be located in a side yard.

She indicated that Town staff placed a peg at 6 foot but after she appealed to the town in writing, Mr. Lilly visited the property and moved the peg to a 12 foot setback. When Council made this decision, she was not notified or given an opportunity to present her case to Council.

She stated that the retaining wall will not impact snow clearing any more than her neighbours who park in their back yards behind their sheds. She felt she was being treated differently than her neighbours.

Ms. Colbert believes that there is an apprehension of bias against her development.

3. Authority's Presentation

Ms. LaFosse, on behalf of the Authority, explained that a retaining wall is a permanent structure and will interfere with snow clearing, where as vehicles at the backs of property can be moved.

She stated that the application was initially assessed using the aerial survey because there is no legal survey of the property. The town staff conducted a site visit and

determined that a 10 foot to 12 foot setback lined up with existing sheds and was required so that no damage would be done to snow removal equipment or to the retaining wall itself.

Ms. LaFosse indicated that allegations were removed from Ms. Colbert's letter before it was presented to Council.

Board's Analysis

What is the matter under appeal?

The matter under appeal is the Wabush Council's approval, with conditions, of a retaining wall at the corner lot of 23 Banting Avenue, Wabush.

The Town received an application on May 31, 2019 where the Appellant applied to construct a retaining wall at subject property.

How did the Authority process the application?

The Board heard that the Authority initially used the aerial survey and approved a 6 foot setback. The Appellant was informed in writing about the 6 foot setback. She expressed her dissatisfaction with the decision and was informed she should appeal in writing to Council. After a site visit to the property, Council adjusted the setback to 10 foot to 12 foot.

Can Council attached conditions to a permit?

Council is granted a degree of latitude to accommodate for public service issues such as snow clearing. According to Wabush Fence Regulations section 4 (e), "*Council retains the right to reject, or modify applications which will restrict access to neighbouring properties for the purpose of fire fighting, delivering of utilities, snow removal, etc.*"

Section 3.5 Discretionary Powers of Council of the Wabush Development Regulations states:

1. *In considering an application for a permit or for approval in principle to carry out development, Council 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, and any other considerations that are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, Council 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.*

2. Council may, in its discretion, determine the uses that may or may not be developed in a use zone and those uses shall be listed in Council's regulations as discretionary, permitted or prohibited uses for that area.

4.6 Building Line and Setback

1. Council, by resolution, may establish building lines on an existing or proposed street or service street and may require any new buildings to be located on those building lines, whether or not such building lines conform to the standards set out in Section 8 of these Regulations.

2. A building situated on a corner lot shall be required to observe the building line setback set out in Section 8 of these Regulations on both the primary and flanking (secondary) streets.

8.6.9 Corner Lots

1. Properties situated on existing or proposed corner lots shall be deemed to have two street frontages and shall be required to maintain the minimum building line setback on both the primary and flanking streets as prescribed in the use zone table.

What is the zone of the property?

According to the Wabush Development Regulations, the property is zoned Residential Medium Density.

What are the sideyard requirements under the Town Regulations?

The Town's development regulations include the following definition:

c. YARD, SIDE means a yard extending between the front yard and the rear yard between a side lot line and the nearest main wall of any building on the lot; and

d. YARD FLANKAGE means side yard of a corner lot, which side yard abuts a street.

In the case of a corner lot, Section 8.7.4.15 of the Wabush Development Regulations provides standards for corner lots:

Properties situated on existing or proposed corner lots shall be deemed to have two street frontages and shall be required to maintain the minimum building line setback on both the primary and flanking streets as prescribed in this use zone.

The Wabush Fence Regulations, 2008 establish standards for fences:

3. All fences must conform with the following standards:
a) Rear Yard Fences

Shall be of a material approved by Council
Shall not detract from the immediate or surrounding properties.
Shall not exceed 182 cm (6 feet) in height
Shall be placed a minimum of 30cm (1 foot) inside the property line

c) Side Yard Fences

May be permitted at the owners risk in relation to damages that may be caused by snow clearing or other municipal works.
Shall be of a material approved by Council
Shall not detract from the immediate or surrounding properties
Shall be placed a minimum of 30 cm (1 foot) inside the property line except where the side yard is adjacent to a street, in that case the fence shall be placed a minimum of 182 cm (6 feet) inside the property line.

4. e) Council retains the right to reject, or modify applications which will restrict access to neighbouring properties for the purpose of fire fighting, delivering of utilities, snow removal, etc.

Are retraining walls considered a fence in these situations?

Under the Wabush Development Regulations Section 2.0 defines Landscaping to include a fence and a retaining wall.

LANDSCAPING means the development of land by altering the topography and ground cover and may include the use of turf, plants, shrubs, trees, retaining walls and fences.

What did Authority consider when making its decision?

Regulation 1.4 of the Wabush Development Regulations indicates that *“any other municipal regulations regulating or controlling the development, conservation and use of land in force in the Town of Wabush, shall, under these Regulations apply to the entire Planning Area.”* This includes the Wabush Fencing Regulations, 2008, which were enacted under Section 414(2)(hh) of the Municipalities Act, 1999.

Under the Town’s Fencing Regulations, setbacks are specified according to the type of yard the fence is being constructed in. ~~There are specific considerations for flanking yards~~ where a property abuts a public road or service road. In particular, fence regulation 3(c) indicates an exclusion to the typical 1 foot setback from the property line and states, *“except where the side yard is adjacent to a street, in that case the fence shall be placed a minimum of 182 cm (6 feet) inside the property line.”*

Council is also granted a certain degree of latitude to accommodate for public service issues such as snow clearing. According to fence regulation 4 (e), *“Council retains the right to reject, or modify applications which will restrict access to neighbouring properties for the purpose of fire fighting, delivering of utilities, snow removal, etc.”*

Was the peg mentioned in the grounds of appeal an official survey peg?

The Board was informed that no official survey exists.

Did the Town confirmed that they moved the peg from six feet to the 10 foot mark?

The Authority stated they did not move the peg. The Appellant said that she did not move the peg.

How does the Town deal with snow in the area?

The Authority stated that town crews plows the lane way creating a wind row and pushing the snow onto corner lots until it is removed and trucked away.

Was there an apprehension of bias?

The Board heard that permits have been issued for fences or retaining walls with lesser set backs on other corner lots. The Board also learn that once the Appellant filed a complaint with Council, a greater setback was required although other properties received approval with lesser setbacks.

The Board learned from the Appellant that her full complaint in her letter of dissatisfaction (Appeal set back of Retaining Wall Permit (6ft) 23 Banting Ave.) dated June 7, 2019, was not shared in full with Council.

Based on this information, the Board determined that there was a reasonable apprehension of bias.

Why did staff remove allegations of bias in a letter by the appellant to Town Council?

The Authority indicated that some comments were removed from the letter because they were not relevant to the matter at hand.

Did staff have the right to remove allegations of bias before a public record was presented to Council?

From the information the Board received, the Board is unclear if Council had received all information from the Appellant to make an informed decision as it was indicated by the Director of Planning and Land Use that portions of the Appellant's letter were removed prior to being sent to Council.

The Board understands that under the natural law of justice and procedural fairness, Council should have received the full package from the Appellant. Further, the Appellant should have been notified that her matter was coming before Council.

Board's Conclusion

While the Board recognizes that the Authority does have discretionary powers in this matter, after reviewing the information presented to this Board, the Board concludes that the Authority's use of its discretionary power may not have been appropriate because Council did not have all the information from the Appellant including Ms. Colbert's full

letter of complaint and other recent developments regarding permits for setbacks in the Town of Wabush since 2018. The Board reviewed Supreme Court of Newfoundland and Labrador Trial Division **Stroud v. Newfoundland and Labrador (Central Appeal Board)** NLTD 2010 25 Date 20100211 Docket: 200903T0119 in determining this decision.

The Board is bound by section 42 (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.

In this case, the Board is reversing Council's decision. That is to say, Council shall review all permits for development since 2018 and the Appellant's complete appeal letter dated June 7, 2019 to ensure they have used their discretionary power appropriately and applied its regulations consistently for all residents of the community. In addition, the Appellant should be informed when her application is being considered by Council so she may attend.

Board Order

Based on the information at the appeal, the Board orders that the decision of the Authority to add conditions in a letter dated July 2, 2019 to a permit dated July 9, 2019 requiring that the retaining wall be setback at least 10 feet from the rear property line be reversed.

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

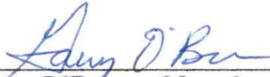
In accordance with section 44(3) of the *Urban and Rural Planning Act, 2000*, the Board further orders the Authority pay an amount of money equal to the appeal filing fee of \$230.00 to the Appellant.

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 Happy Valley-Goose Bay, Newfoundland and Labrador, this the 1st day of December, 2021.



Karen Oldford, Chair
Labrador Regional Appeal Board



Gary O'Brien, Member
Labrador Regional Appeal Board



Nina Pye, Member
Labrador Regional Appeal Board