

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-064-033
Appellant(s)	Darlene Anstey
Respondent / Authority	Town of Logy Bay-Middle Cove-Outer Cove
Board Members	Chair: Clifford Johnston Member: Carol Ann Smith Member: Robert Warren
Date of Hearing	September 9, 2020

Also in Attendance

Solicitor for the Appellant(s)	
Representatives for the Appellant(s)	Don Drew
Representatives for the Authority	Stephane Jewyck, Town Planner, Jennie Walsh, Town Clerk Manager
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Tolulope Victoria Akerele
Interested Parties	

The provision for appeal is enabled under s. 42 of the *Urban and Rural Planning Act, 2000* (The Act).

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Respondent / Authority	Town of Logy Bay-Middle Cove-Outer Cove

1. Board's Role

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Logy Bay-Middle Cove-Outer Cove acted in accordance with the *Urban and Rural Planning Act, 2000* and the Town of Logy Bay – Middle Cove – Outer Cove development regulations 2005, and when it refused the development application of Darlene Anstey to construct a single dwelling on 123-127 Pine Line.

2. Background

Darlene Anstey (the Appellant) submitted an application to develop a single dwelling on 123-127 Pine Line under the *Town of Logy – Middle Cove – Outer Cove's Development Regulations* on July 15, 2019. The application was considered during the Council meeting on September 16, 2019 and refused citing that subject property cuts across zones which do not permit a residential dwelling.

Chronology

July 03, 2013	Council conditionally approved a development application received by the previous property owner (Mr. Hudson) to construct a residential dwelling at 123-127 Pine Line. The development permit was valid for two years (July 2, 2013 – July 2, 2015)
June 10, 2014	Subject property was sold to current property owner and appellant.
August 2014 – January 2019	Submissions show record of communication between the Appellant, the Authority and Water Resources of Department of Municipal Affairs and Environment regarding subject property.
January 22, 2019	The Authority acknowledged the receipt of a permit to alter a water body from Water Resources Management Division. Appellant was advised that the conditional approval granted to the previous property owner expired in 2015. As such, a new development application will be required.
July 15, 2019	The Appellant completed a development application to construct a residential dwelling at 123-127 Pine Line.
August 28, 2019	The Town requested a current property survey and additional information on the proposed location of the subject property.
September 11, 2019	The application was considered by the planning and development committee who provided a recommendation to Council.
September 16, 2019	The Authority considered the application at a regular public meeting of the Council and decided to refuse the application based on the Committee's recommendation.

September 27, 2019	The appellant requested a re-consideration of Council's decision to refuse her development application.
October 2, 2019	The Appellant filed an appeal with the Eastern Newfoundland Regional Appeal Board.

3. 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 October 2, 2019. The Appellant's submission included the grounds of appeal, an appeal summary form and the required fee.

4. Grounds of Appeal

This appeal is based on the following section of the Act: Section 42.(1)(a) (an application to undertake a development).

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(s) is/are appealing the decision based on the following grounds:

1. Council had previously approved a development application for a single dwelling on the subject property. As such, there was a permit in place when the Appellant purchased the subject property.
2. There has been no amendments made to the building lot since the Town Plan and Development Regulations came into effect in 2005. Also the zoning of the subject property has not changed since the Plan was established.
3. There is a permit in place for the culvert on the subject property from the Department of Fisheries and Oceans. The Appellant has installed the fill to prepare the property and has complied with all Council has asked of her.

5. Planner's Technical Analysis

Legislation and Regulations

The applicable legislation with respect to this appeal is:

Urban and Rural Planning Act, 2000

Town of Logy Bay – Middle Cove – Outer Cove Development Regulations, 2005

Land Use Planning

Based on the Authority's submission, the subject property spans across three zones namely 'Open Space/Conservation', 'Residential Low Density' and 'Residential Subdivision Area' under the **Town of Logy Bay-Middle Cove-Outer Cove's** development regulations. A single dwelling use is permitted within the Residential Low Density but not permitted within the Open space Conservation zone and a residential subdivision area without a preparation of a comprehensive development scheme

Under s.7 of the subject regulations, a permit is required and s. 8 requires a permit is to be issued for a development that conforms to the standards set out in the subject regulations.

7. 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 Council.

8. Permit to be Issued

Subject to Regulations 9 and 10, a permit shall be issued for development within the Planning Area that conforms to:

(a) the general development standards set out in Part II of these Regulations, the requirements of Part V of these Regulations, and the use classes, standards, requirements, and conditions prescribed in Schedule C of these Regulations for the use zone in which the proposed development is located;

(b) the standards set out in the Building Code and/or other ancillary codes, and any Building Regulations, Waste Disposal Regulations, and/or any other municipal regulation in force in the Planning Area regulating or controlling development, conservation and use of land and buildings;

(c) the standards set out in Part III of these Regulations in the case of advertisement;

(d) the standards set out in Part IV of these Regulations in the case of subdivision;

(e) the standards of design and appearance established by the Council

Procedural Compliance

Section 21 of the subject regulations states that development permit is valid for two years and also prescribes what Council considers when issuing a development permit. The appeal submission shows that the initial development permit for the subject property was approved with conditions on July 3, 2013 and expired on July 2, 2015 after the two years timeframe noted on the permit. However, the

appeal submission show that some of the conditions included in the initial permit had been met by the appellant.

21. Development Permit

(1) A plan or drawing which has been approved by the Council and which bears a mark and/or signature indicating such approval together with a permit shall be deemed to be permission to develop land in accordance with these Regulations but such permission shall not relieve the applicant from full responsibility for obtaining permits or approvals under any other regulation or statute prior to commencing the development; from having the work carried out in accordance with these Regulations or any other regulations or statutes; and from compliance with all conditions imposed there under.

(2) The Council may attach to a permit or to approval in principle such conditions as it deems fit in order to ensure that the proposed development will be in accordance with the purposes and intent of these Regulations.

(3) Where the Council deems necessary, permits may be issued on a temporary basis for a period not exceeding two years, which may be extended in writing by the Council for further periods not exceeding two years.

(4) A permit is valid for such period, not in excess of two years, as may be stated therein, and if the development has not commenced, the permit may be renewed for a further period not in excess of one year, but a permit shall not be renewed more than once, except in the case of a permit for an advertisement, which may be renewed in accordance with Part III of these Regulations.

(5) The approval of any application and plans or drawings or the issue of a permit shall not prevent the Council from thereafter requiring the correction of errors, or from ordering the cessation, removal of, or remedial work on any development being carried out in the event that the same is in violation of this or any other regulations or statute.

(6) The Council may revoke a permit for failure by the holder of it to comply with these Regulations or any condition attached to the permit or where the permit was issued in error or was issued on the basis of incorrect information.

(7) No person shall erase, alter or modify any drawing or specifications upon which a permit to develop has been issued by the Council.

Section 22 (1) of the subject regulations requires Council to state the reasons for refusing an application. The appeal submission shows that Council stated that the proposed use was incompatible with the uses permitted in with the subject zones. However, the Appellant has argued that there had been no changes in the intended use of the subject property or the land use zone since the previous development permit was issued in 2013 or when the Town Plan came to effect in 2005. While, the initial permit is not the subject of this appeal, it is unclear from the Authority's submission if the initial development permit was issued in error since all the situation surrounding the subject property and regulations have remained unchanged.

22. Reasons for Refusing Permit

The Council shall, when refusing to issue a permit or attaching conditions to a permit, state the reasons for so doing.

While section 10 (1) of the subject regulations states that Council may use its discretionary powers when considering a development application, the Council's decision on September 16, 2019 which is being appealed did not specify that Council had used its discretionary power. The appeal submission shows Council re-issued another letter on October 4, 2019, after the appeal was filed noting an error in the previous refusal letter.

10. Discretionary Powers of Council

(1) In considering an application for a permit or for approval in principle to carry out development, the 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 which are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, the 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.;

The appeal submission shows that the appellant had fulfilled some of the conditions based on the initial approval, and continued to communicate with the Authority even after the initial approval had expired. Although the submission reveal that the appellant obtained a permit from the Department of Municipal Affairs to alter water body, the Town's development regulations still require a permit to be issued prior to carrying out a development. As such, it is unclear why Council continued its communication with the appellant regarding culvert installation on subject property when there was technically no current approval or permit in place.

Evidence that the previous development permit was valid for two years was found in the information submitted to the Board.

It was not clear in the information submitted to the Board why Council's decision on the same property for the same intended use with the same development regulations showing no amendment to zone type would be different.

Submission shows Council re-issued another refusal letter after an appeal was filed.

Technical analysis prepared by:



Tolulope Tolulope Victoria Akerele

Technical Reviewer for the Newfoundland and Labrador
Regional Appeal Boards

6. Presentations during the Hearing

Planner

During the hearing, the Board heard technical details about the subject property and the provisions from the Town of Logy Bay-Middle Cove-Outer Cove's Municipal Plan and Development Regulations from the Planner.

The Board learned from the technical report given by the planner at the hearing that the property is located in three zones – Residential Low Density (RLD), Open Space-Conservation Zone (OS-C). and Residential Sub-division Area (RSA). Approval was previously given by the Authority for the construction of a single detached dwelling on the property for the previous property owner. According to the Authority, the previous approval is no longer valid.

Appellant

The Board learned that the Appellant filed an appeal on October 2, 2019. The grounds for appeal were included in the Technical Report. The Appellant noted that there is an approved residential development adjacent to her property which allows single detached homes which may also be in the flood plain. The Appellant and her representative noted that the zoning lines on her property have not changed since the previous owner's approval.

Authority

The Authority advised that the application from the Appellant for the construction of a single detached house is a new application and was reviewed and considered with the aid of new information, specifically regarding the flood plain of Soldier's Brook which crosses the Appellant's property.

7. 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.

Based on the information presented, the Board determined that the Town of Logy Bay-Middle Cove-Outer Cove has the authority, and exercised it appropriately, to reject the application to construct a single detached dwelling on property located at 123-127 Pine Line. The application is contrary to the Authority's Municipal Plan and Development Regulations, specifically the property is situated within three (3) land use zones, namely Residential Low Density (RLD), Open Space-Conservation Zone (OS-C). and Residential Sub-division Area (RSA). The proposed development is unable to meet the building line setbacks for the RLD Zone, and, the OS-C Zone and the RSA Zone do not permit a single detached dwelling. The proposed building lot is also situated near a significant water body (Soldier's Brook) and may be subject to flooding. The Authority's Municipal Plan restricts development in flood risk areas for the purpose of public safety purposes and environmental conservation.

Board's Order


Based on the information presented, the Board orders that the decision by the Town of Logy Bay-Middle Cove-Outer Cove on September 16, 2019 to refuse an application to construct a single detached dwelling at Civic No. 123-127 Pine Line, be confirmed.

The Board notes the initial letter of rejection to the Appellant dated September 24, 2019 did not reference the use by the Authority of Regulation 10 of the Town's Development Regulations in making the decision to refuse the Application. The Board also notes that the Authority sent a second letter of rejection dated October 4, 2019 to the Appellant referencing their use of Section 10 of the Development Regulations. Due to the fact that the Appellant filed her appeal on October 2, 2019, the Board hereby advises all parties that its review and decision in reference to this appeal is based on the information provided to all parties in the initial letter of rejection.

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 11 of September, 2020



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