

# Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-064-034
Board Members	Chair: Clifford Johnston Member: Carol Ann Smith Member: Robert Warren
Date of Hearing	October 2, 2020

## In Attendance

Appellant	Eldon Bessey
Solicitor for the Appellant(s)	
Representatives for the Appellant(s)	
Respondent/Authority	Town of Portugal Cove-St. Philip's
Representatives for the Authority	Ashley Linehan, Les Spurrell
Secretary to the Board	Robert Cotter
Technical Advisor to the Board	Tolulope Victoria Akerele
Interested Parties	

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

## 1. Board's Role

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Portugal Cove-St. Philip's acted in accordance with the *Urban and Rural Planning Act, 2000* and the Town of Portugal Cove-St. Philip's Municipal Plan and Development Regulations 2014, when it refused the development application of issued an order to Eldon Bessey to construct a berm on 870 – 876 Thorburn Road, Portugal Cove – St. Philips.

## 2. Background

On March 15, 2019, (the Appellant) submitted an application to construct a berm for tree planting on his residential property located on 870 - 876 Thorburn Road under the Town of Portugal Cove-St. Philip's. The application was refused during the regular Council meeting on August 20, 2019, citing that the City of St. John's, a referring agency under the development regulations, refused the application.

### Chronology

March 12, 2019	Appellant discussed his intention (to construct a berm and plant a tree) with a Town staff who advised him to proceed without obtaining a permit.
March 13, 2019	Appellant started constructing a berm on subject property.
March 19, 2019	Appellant was advised by David Beckett, Town's Development Control Officer, to stop the construction and apply for a permit to construct a berm.
May 31, 2019	Town received a development application to construct a berm and plant a tree at 870 - 876 Thorburn Road.
August 5, 2019	City of St. John's refused the applications during a regular Council meeting and directed the site remediated to its original state.
August 8, 2019	The City of St. John's wrote a notice to inform the Town of Portugal Cove-St. Philips that the application was rejected as per section 104(4) of the City of St. John's Act.
August 13, 2019	The Town received the City of St. John's decision.
August 20, 2019	Town of Portugal Cove-St. Philip's, during a regular council meeting, refused subject application, citing the proposal was in contrary to the Town's Municipal Plan and Development Regulations 2014-2024, specifically Plan Policy PW-1 and Schedule C: Protected Watershed as the application was rejected by the City of St. John's.
August 21, 2019	Council sent the written decision to the Appellant.
August 28, 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 August 28, 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 is appealing the decision based on the following grounds:

1. Appellant had previously been advised by a Town staff that he did not need an approval to construct a berm.

## 5. Planner's Technical Analysis

### Legislation and Regulations

The applicable legislation with respect to this appeal is:

*Urban and Rural Planning Act, 2000*

*City of St. John's Act*

*Town of Portugal Cove-St. Philip's Municipal Plan Development Regulations, 2014-2024*

### Land Use Planning

Based on the Authority's submission, the subject property is located within the Protected Watershed (PW) zone under the *Error! Reference source not found.* development regulations. The development



regulations provide for any development within the subject zone to be referred to the Department of Environment, Climate Change and Municipalities. Also, where the development is within the Windsor lake Protected Water Supply Area, an additional referral for comment and receipt of approval from City of St. John's is required.

*Refer to Town of Portugal Cove-St. Philip's Municipal Plan 2014-2024, Section 3.3: General Land Use Policies; and Section 3.4.7: Protected Watershed.*

*Terms & Conditions*

*(1) Development Approval*

*No development activity shall be undertaken within the designated protected watershed areas without the approval firstly of the Department of Environment and Conservation and then, by Council. Where the Windsor Lake Protected Water Supply Area falls within the Town's boundary, no development activity shall be undertaken without additionally the referral for comment and receipt of approval from the City of St. John's as authority for this watershed. Where the Great Pond Potential Water Supply Area falls within the Town's boundary, no development activity shall be undertaken without the referral to and approval of the Town of Torbay.*

#### **3.4.7 PROTECTED WATERSHED**

*General Intent*

*Three distinct watersheds are designated PW on the Generalized Future Land Use Map of the Municipal Plan to protect the quantity and quality of water in existing and proposed public drinking water supply areas, including:*

*☐☐The Blast Hole Protected Water Supply Area located to the north of Portugal Cove Road;*

*☐☐The Windsor Lake Protected Water Supply Area located to the south of the east entrance to the Town on Portugal Cove Road; and,*

*☐☐The Great Pond Potential Water Supply Area located within the northeast sector of the municipality to the north of Indian Meal Line.*

*Lands designated as Protected Watershed Areas on the Municipal Plan map are also zoned as Protected Watershed Areas (PW) on the zoning map of the Development Regulations, with land use and development terms and conditions requirements for this zone outlined within Schedule C of the Development Regulations.*

*The Windsor Lake Protected Water Supply Area watershed falls under the authority of the City of St. John's and its legislation, the City of St. John's Act. From the Town's perspective, there is a need to more precisely define by survey the watershed boundary in relation to the Town's Municipal Boundary. A request to the Minister has been recently forwarded by the Town of Portugal Cove-St. Philip's to assist the Town in dialogue with the City to more accurately define the boundary and to identify a survey definition that will enable adoption of a boundary as a gazetted Regulation, similar to most other watersheds in the Province.*

*Protected Watershed Policies*

*Policy PW-1 Within the Protected Watershed designated areas, the sole primary permitted use is for conservation; discretionary uses that may be*

considered by Council include antenna, forestry and recreational open space. The Town shall refer all development proposals and proposed new uses for land located within and immediately adjacent to the Windsor Lake (and Broad Cove River) watershed to the City of St. John's, as controlling authority for the watershed, for review and comment.

Policy PW-2 The following policies shall apply to the Protected Watershed Areas:

☐☐ The Town shall ensure that the location of any potential new conservation or approved discretionary use development does not conflict with the regional water supply agreement;

## Procedural Compliance

The *Urban and Rural Planning Act, 2000* defines 'Development' as '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 the...'. Based on this definition, the construction of a berm is considered a development. Under s.7 of the subject regulations, a permit is required for any development and s. 8 requires a permit is to be issued for a development that conforms to the standards set out in the subject regulations. Section 10 of the 'General Provisions for all use zones' under the subject regulations infers that development application is required for landscaping within all use zones.

### *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*

### *(10) Development with Pond Frontage*

*(a) Development shall be sited and landscaped to minimize the visual impact of buildings viewed from the pond and from other land fronting on the pond. Council shall require landscaping to meet this aim. The required landscaping*



*may include selective retention of trees and shrubs between shoreline and buildings and appropriate planting.*

*(b) Council may require a plan of subdivision or a development application to be accompanied by a professionally prepared landscape drawing or similar quality plan showing vegetation to be retained, areas to be graded, and areas of planting, including plants to be used.*

*(c) Council may require a landscape deposit to ensure the approved landscape proposal is carried out to its satisfaction.*

*(d) The front yard setback may be established anywhere upland from the pond setback standard of 30.0 metres (98.4 feet) provided the on-site septic system is approved by Services NL. The 30-metre buffer around the pond (refer to Schedule E) shall remain in place to protect water quality. No further subdivision of this approved lot will be allowed whereby a backlot situation may be created. Council will review each application based on its own merits.*

According to the conditions in Schedule C of the Development Regulations, any development within the PW zone are to be referred to the Department of Environment, Climate Change and Municipalities for approval. In addition, development within the Windsor Lake Protected Water Supply within the Town's boundary requires an approval from the City of John's. While the appeal submission do not show evidence of referral to the Department of Environment, Climate Change and Municipalities, the appeal package shows a referral to the City of John's and subsequent refusal by the City. The City refused to the application in pursuant to section 104 of City of John's Act and advised that the property must be remediated to its original state within 30 days of the written decision.

*Control of water bodies*

*104. (1) The council shall have possession and control of Windsor Lake, Round Pond, Newfound Pond, George's Pond, Petty Harbour Long Pond, Handy Pond and all lakes and ponds within the catchment area of the Broad Cove River above an elevation of 91.44 metres over mean sea level at the Harbour of St. John's and of the Crown lands within the watershed of those lakes and ponds.*

*(2) The council is empowered to construct a dam on the Broad Cove River and to impound and store the waters of that river and of the lakes and ponds within the catchment area of that river for the purpose of supplying water to the city or to an area outside the city.*

*(3) Notwithstanding subsection (1), this section shall not apply to Crown lands within the watershed of George's Pond other than the Crown lands with buildings on the land used by the council in connection with the supply of water to the city from George's Pond and any rights of way to those lands and buildings.*

*(4) A person shall not erect a building on land within the catchment area of the Broad Cove River above an elevation of 131.92 metres above mean sea level at the Harbour of St. John's but the council may permit the erection on the land of*

*(a) a building which is an accessory building to an existing private family dwelling, and for the purpose of this paragraph "accessory building" means*

*a detached building appurtenant to that dwelling and located on the same lot and providing better and more convenient enjoyment of that dwelling;*  
*(b) an extension to an existing private family dwelling where an extension is necessary to provide adequate living quarters for members of the household living in the dwelling, provided that the extensions shall not exceed in cubic content 1/2 the cubic content of the existing private family dwelling;*  
*(c) a building to replace an existing building destroyed by fire or an existing building dilapidated 50% or more; and*  
*(d) a building, or extension to an existing building, subject to the written recommendation of the city manager that a permit be issued for the building or extension.*

Section 23 (1) of the subject regulations requires Council to state the reasons for refusing an application. As seen in the appeal submission, Council stated that the proposed use was contrary to the Town's Municipal Plan and Development Regulations. However, the Appellant has argued that he was informed by a staff that landscaping do not require a permit. There is no evidence of the communication in the appeal package. Moreover, the referenced communication predates the subject of appeal and section 12 of the Act clearly states that the Municipal and Development Regulations are binding upon the Municipality, Council and everyone undertaking a development within the planning area.

*23. 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.*

Section 54 of the subject regulations makes provision for screening and landscaping while section 55 of the subject regulations states that landscaping of any development of any land shall be reviewed by the municipality.

*54. SCREENING AND LANDSCAPING*

*Council may, in the case of existing unsightly development, order the owner or occupier to provide adequate and suitable landscaping or screening; and for this purpose may require the submission of an application giving details of the landscaping or screening, and these Regulations shall then apply to that application. The provision of adequate and suitable landscaping or screening may be made a condition of any development permit where, in the opinion of Council, the landscaping or screening is desirable to preserve amenity, or protect the environment. Where a property owner of an unsightly property or premises does not comply to remedy the deficiency, Council may proceed to take other action, including upon failure of the property owner to comply with further notice from the Town, Council may enter the site and clean up the property and place the cost of such municipal work on the annual taxation levy for the property and/or building.*

*55. SERVICES AND MUNICIPAL INFRASTRUCTURE*

*Within any zone, the provision of public or municipal services, infrastructure and utilities are permitted, subject to Regulation 89. This applies to electrical services, light standards, traffic control devices, utility poles, highways and municipal directional signage, municipal water, sewer and storm water systems and associated underground utilities and pump houses, group mail*

boxes, roads and highways, and similar such infrastructure, services and utilities required to service a growing community. The proposed design of the works and landscaping of any development of any land so used shall be reviewed by the municipality for its adequacy to protect the character and appearance of the area where the works are to be installed. Private utilities such as major pipelines and transmission lines should be discussed with local authorities early in the planning stages; fibre optic services are similarly to be communicated to the local authority, prior to Council consideration of support for installation of these utilities.

***There was no evidence of the communication from the Town staff asking the appellant to proceed with the construction of the berm without a permit.***

***There was evidence of referral to the City of St. John's and subsequent refusal from the City of St. John's regarding the subject matter but no evidence of referral to the Department of Environment, Climate Change and Municipalities.***

Technical analysis prepared by:



**Tolulope Victoria Akerele**

Technical Reviewer for the Newfoundland and Labrador  
Regional Appeal Boards



## 6. Presentations during the Hearing

### Planner

The planner prepared a technical report on the appeal which was distributed prior to the Appeal Hearing. The Appellant and the Authority advised that they had reviewed the technical report and had no questions or concerns regarding it.

### Appellant

The appeal was based on the grounds that the appellant was advised by an employee of the Authority that his project was considered landscaping and a permit was not necessary. Furthermore, the appellant advised he was told at that time by the employee to go ahead and construct a berm and plant trees.

The Appellant proceeded to start work but was subsequently advised by the Town's Development Control Officer that a permit was required.

At the appeal hearing, the Authority questioned the validity of the appeal on the basis that it does not fall within the grounds of an appeal under Section 42(1) of the Urban Rural Planning Act 2000. The Board called for a brief recess to discuss the validity question. After deliberation, the Board determined that the appeal should proceed.

### **What is the zoning of the subject property?**

The Board learned the subject property is located in the Protected Watershed Zone, as per the Town of Portugal Cove St. Philip's Development Regulations.

### **Is the property in a protected water supply?**

The property at 876 Thorburn Road, Portugal Cove St. Philips is located within the Broad Cove watershed which is a protected watershed under the City of St. John's Act.

### **Is the proposed use permitted under the Town's zoning for the property?**

Applications for development within the Broad Cove Watershed must, in accordance with the City of John's Act, be referred to the City for review and consideration of approval. The City reviewed this application and the St. John's Municipal Council made a decision on August 5, 2019 to reject pursuant to Section 104(4) of the City Act as the proposed development is not contemplated within the Act.

## 7. Conclusion

### Legislation Used by the Board

The Board has determined that the Town was within its authority to refuse the application to construct a berm at Civic No. 870-876 Thorburn Rd.

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.

## 8. Board's Order

Based on the information presented, the Board orders that the decision by the Town of Portugal Cove-St. Philips on August 20, 2019 to reject the application for the construction of a berm and tree planting at Civic N0. 870-876 Thorburn Road, be confirmed.

The Respondent and the Appellant(s) 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(s).

DATED at St John's, Newfoundland and Labrador, this 7 of October, 2020.



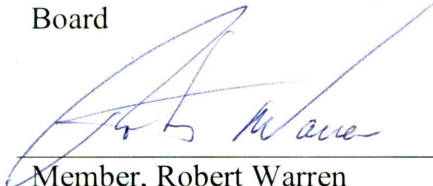
---

Chair, Cliff Johnston  
Eastern Newfoundland Regional Appeal  
Board



---

Member, Carol Ann Smith  
Eastern Newfoundland Regional Appeal  
Board



---

Member, Robert Warren  
Eastern Newfoundland Regional Appeal  
Board