

# Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-054-036
Board Members	Chair: Clifford Johnston Member: Carol Ann Smith Member: Robert Warren
Date of Hearing	October 7, 2020

## In Attendance

Appellant	Robert Stapleton for TRAK Developers Inc.
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	Christopher Hardy, MCIP
Interested Parties	

## 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 development regulations when it refused the Appellant's development application on March 14, 2017 related to 12-16B Mercers Road.

## 2. Background

An application to develop the subject property was refused by the Town of Portugal Cove-St. Philip's (the Authority). The refusal was appealed. On October 1, 2015, The Eastern Regional Appeal Board directed Council to reconsider the application in accordance with the Town Plan 2004 that was in effect at the time of application. On March 14, 2017, the Council reconsidered the application and refused it again. Correspondence to that effect dated March 15, 2017 was sent to the Appellant outlining that the proposal was contrary to Provincial

legislation and the Town's municipal plan and development regulations, specifically that:

- The application proposed housing within the 1:20 year flood zone in contravention of:
  - *Department of Environment and Climate Change's Policy for Flood Risk Management*
  - Policy 3.3 (viii) and Policy 3.3 (v) of the Town's Plan (2004);
- That contravention is relevant to Regulation 73 of the Town's Development Regulations when Council considered the application; and
- Council may refuse an application based on Development Regulation Section 10 (1)- Discretionary Powers of Authority if it feels the proposed development is not suitable in any of several key areas (e.g., public safety).

The correspondence also outlined that this decision of Council can be appealed and how to file an appeal.

## Chronology

January 15, 2014	Applicant submitted an application to develop the subject property
December 16, 2014	Council resolved at a regular meeting to issue an approval in principle relative to the initial application to develop the subject property and under the Town's "new" plan and development regulations (which came into effect on October 17, 2014)
January 5, 2015	Town sent a letter to inform Applicant of decision & associated conditions
January 21, 2015	Applicant appealed the decision as it was under the "new" plan and regulations whereas the application has been submitted to the Town while the "old" plan and regulations were in effect
August 14, 2015	New flood risk mapping released by the provincial Department of Environment and Conservation
October 1, 2017	Eastern Regional Appeal Board directed the Town to reconsider the application under the Town's 2004 plan and development regulations
March 7, 2017	Report provided to Council by the Town's Planning and Development Committee outlining its agreement with the Department of Environment and Conservation's concerns re: flooding
March 14, 2017	Council refused the application at a regular meeting and sent a letter to that effect to the Appellant
March 24, 2017	Appellant received the abovementioned letter
March 31, 2017	Appellant registered appeal with the Secretary of the Regional Appeal Board

### 3. Validity

For individuals or groups aggrieved by a development decision of Council, the provision for appeal to a Regional Appeal Board is enabled under S. 42 of the *Urban and Rural Planning Act, 2000* (URPA).

URPA s. 42(5) requires that an appeal must be made in writing and shall include a summary of the decision being appealed, the grounds for the appeal, as well as the required fee. According to the documents provided, the applicant received written notice of Council's decision on March 24, 2017 and appeal was filed on March 31, 2017. The Appellant's submission included the grounds for appeal and an appeal summary form.

### 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 refusal on the following grounds:

1. "The conditions outlined in the [approval in principle] letter are based on policies and regulations which fall under the Town's new Municipal Plan and Development Regulations 2014-2024. The [...] [subject] development application was submitted in January, 2014 and designed/reviewed under the previous [...] Municipal Plan and Development Regulations 2004-2014 therefore we are seeking that the approval in principle be granted with all conditions be based on policies and regulations which fall under the Town Municipal Plan and Development Regulations 2004-2014 which were in effect at the time that the application was submitted and designed by the Developer and reviewed by the Town."

The Town's rejection letter to the applicant, dated March 15, 2017, indicates that the

"application was reviewed under the 2004 Municipal Plan & Development Regulations

in accordance with a directive from the Eastern Newfoundland Regional Appeal Board on October 1st, 2015 that required the Town to reconsider this application under the 2004 Town Plan. The proposal submitted to the Town is contrary to Provincial Legislation and the Town's 2004 Municipal Plan & Development Regulations...”

The letter then states the various reasons for Council’s refusal as they relate to aspects of the relevant Municipal Plan and Development Regulations at the time of the application (2004).

## 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 Portugal Cove-St. Philip’s Municipal Plan and Development Regulations (2004)*

### Land Use Planning

#### **Town of Portugal Cove-St. Philip’s Municipal Plan, 2004**

##### **3.3 General Policies**

The policies outlined in this section can be categorized as general in scope in that they can be applied to more than one land use designation and to different sections of the Municipality.

##### **ii) Subdivision Policies**

All proposed subdivision developments will be subjected to a comprehensive evaluation by Council. The content of this evaluation will be detailed in the Portugal Cove-St. Philip's Development Regulations and will include:

- a full investigation of all physical features of the site and the opportunities and constraints to development that they represent. Where possible, the layout of proposed lots and roads shall conform to the topography,
- a demonstration of how the proposed subdivision will integrate with existing development and roads and services on adjacent lands and provide for future access to undeveloped lands in the area,
- an investigation to ensure compatibility between the subdivision and surrounding land uses, both existing and future,
- a close look at the municipal servicing proposals of the developer and the public costs of providing and maintaining these services in the long term.

##### **iii) Subdivision Agreement**

As a condition of approval, Council may require the developer to enter into a subdivision agreement with the Municipality.

##### **viii) Soils and Drainage**

Development shall only be permitted on lands having soil and drainage conditions that are suitable to permit the proper siting and development of the proposed uses.

No development shall be permitted within 15 metres of the high water mark of rivers or streams or within 30 metres of the shoreline of ponds within the Planning Area, with the exception of conservation structures such as those designed to control flooding and erosion and utility structures. Such structures shall only be permitted if they are considered to be a necessary public work, meet Provincial environmental guidelines and are approved by the Department of Environment and Lands and Council.

## **Town of Portugal Cove-St. Philip's Development Regulations, 2004**

### **10. Discretionary Powers of Authority**

(1) In considering an application for a permit or for approval in principle to carry out development, the Authority 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 Authority 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) An authority may, in its discretion, determine the uses that may or may not be developed in a use one and those uses shall be listed in the authority's regulations as discretionary, permitted or prohibited uses for that area.

### **21. Development Permit**

(1) A plan or drawing which has been approved by the Authority 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 thereunder.

(2) The Authority 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 Authority 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 Authority 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 Authority 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 Authority 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 Authority.

(8) There shall be kept available on the premises where any work, matter or thing in being done for which a permit has been issued, a copy of the permit and any plans, drawings or specifications on which the issue of the permit was based during the whole progress of the work, or the doing of the matter or thing until completion.

## **22. Reasons for Refusing Permit**

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

## **70. Permit Required**

No land in the Planning Area shall be subdivided unless a permit for the development of the subdivision is first obtained from the Authority.

## **73. Issue of Permit Subject to Considerations**

A permit shall not be issued when, in the opinion of the Authority, the development of a subdivision does not contribute to the orderly growth of the municipality and does not demonstrate sound design principles. In considering an application, the Authority shall, without limiting the generality of the foregoing, consider:

- (a) the location of the land;
- (b) the availability of and the demand created for schools, services, and utilities;
- (c) the provisions of the Plan and Regulations affecting the site;
- (d) the land use, physical form and character of adjacent developments;
- (e) the transportation network and traffic densities affecting the site;
- (f) the relationship of the project to existing or potential sources of nuisance;
- (g) soil and subsoil characteristics;
- (h) the topography of the site and its drainage;
- (i) natural features such as lakes, streams, topsoil, trees and shrubs;
- (j) prevailing winds;
- (k) visual quality;
- (l) community facilities;
- (m) energy conservation;
- (n) such other matters as may affect the proposed development.

## **87. Use Zones**

- (1) For the purpose of these Regulations, the Planning Area is divided into Use Zones which are shown on the Zoning Map attached to and forming part of these Regulations.
- (2) Subject to Regulation 87(3), the permitted use classes, discretionary use classes, standards, requirements and conditions applicable to each Use Zone are set out in the Use Zone Tables in Schedule C of these Regulations.

(3) Where standards, requirements and conditions applicable in a Use Zone are not set out in the Use Zone Tables in Schedule C, the Authority may in its discretion, determine the standards, requirements and conditions which shall apply.

Technical analysis prepared by:

Prepared by:



**Christopher Hardy, MCIP**

Technical Reviewer for the Eastern Newfoundland  
Regional Appeal Board

October 4, 2018

Date

## 6. Analysis

### **Did the Authority reconsider this application under the provisions of the 2004 Town's Municipal Plan and Development Regulations as per the Order dated October 1, 2015 from the Eastern Newfoundland Regional Appeal Board?**

In accordance with the Order from the Eastern Newfoundland Regional Appeal Board, the Authority did subsequently reconsider the application in accordance with the 2004 Municipal Plan and Regulations.

### **Is the subject property located in a Flood Risk Area?**

As per the information provided to the Board by the Authority, proposed residential building lots within the subdivision will be partially located within both the 1:20 year flood risk area as well as the 1:100 year flood risk area, as identified on the most recent mapping prepared by the Department of Environment and Climate Change.

### **Does the Authority have the jurisdiction to deny the Appellant's subdivision application?**

The Board has determined the Town has the authority to deny the application as per the rationale set out in the Authority's letter to the Appellant, dated March 15, 2017, including, but not necessarily limited to the following:

- Policy 6.04 of the Department of Environment and Climate Changes Policy for flood risk management, which does not permit residential projects in the 1:20 year flood zone.
- Municipal Plan Policy 3.3 (VIII) (Soils and Drainage) which states that the development shall only be permitted on lands having soil and drainage conditions that are suitable to permit the proper siting and development of the proposed uses. The proposed subdivision will be partially located within 1:20 and 1:100 year flood risk areas identified on the Department of Environment and Climate Changes Flood Risk Mapping.
- Municipal Plan Policy 3.3 (V) Environmental Preservation and Enhancement
- Development Regulation 73 (issue a permit subject to considerations)
- Development Regulation 10 (1) Discretion Powers of Authority



## 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.

The Board has been advised by the Authority that a portion of the proposed residential subdivision would be partially located within 1:20 and 1:100 year flood risk areas identified on the Department of Environment and Climate Changes Flood Risk Mapping. The Authority's Municipal Plan and Development Regulations do not permit residential development in flood risk areas.

Based on its findings, the Board has determined that the Authority had the power/authority to deny the application for the proposed residential subdivision at 12-16B Mercer's Road, Portugal Cove-St. Philips.

## 8. Board's Order

Based on the information presented, the Board orders that the decision by the Town of Portugal Cove-St. Philips on March 15, 2017 to reject an application from TRAK Developers Inc. to develop a residential subdivision at 12-16B Mercer's Road, be confirmed.

The Respondent and the Appellant 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 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.

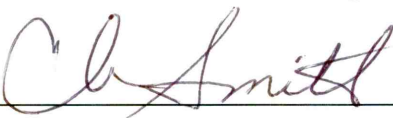
DATED at St. John's, Newfoundland and Labrador, this 8 of October, 2020



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Clifford Johnston, Chair

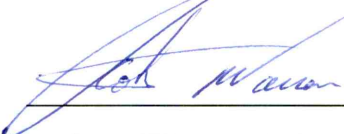
Eastern Newfoundland Regional Appeal Board



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Carol Ann Smith, Member

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Robert Warren, Member

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