

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Eagleridge International Limited **Appellant**

AND Town of Holyrood **Respondent**

RESPECTING Refusal

BOARD MEMBERS Vicki Connolly – Chair
Harold Porter – Member
Mary Thorne-Gosse – Member

DATE OF HEARING July 22, 2015

ATTENDANCE

Appellant/Representative

Albert Chislett – President of Eagleridge International Limited

Colm Seviour – Solicitor

Bradley Chislett

Brian Luffman

Peter Ormn

Andrew Betts

Authority/Representative

Gary Corbett – CAO/Clerk for the Town of Holyrood

Paul Stokes – Solicitor

Meaghan McCain

Interested 3rd Party/Representative

Kelvin Marshall

Michael Crosbie - Solicitor

Interested Citizens

Aaron Felt

Steve Suttan

Kevin Ryan

Norm Mercer

Gordon Cooper

Mike Tubrett

Bill Penney

Jim Joy

Christa Turnbull

Reg Garland

Roger Myette

Staff from the Department of Municipal and Intergovernmental Affairs

Robert Cotter - Secretary to the Eastern Newfoundland Regional Appeal Board

Lindsay Church - Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

This appeal arises from the Town of Holyrood refusing to issue a permit to Eagleridge International Limited for mineral exploration near Big Triangle Pond and for the development of an 11 kilometer, Class C, resource access road. The Town received the appellant's application on November 13, 2013. Subsequently, both the Town and Eagleridge International Limited agreed to defer the application until the Department of Environment and Conservation completed its Environment Preview Report (EPR) and a decision was rendered by the Minister. The EPR was released from Provincial review in October, 2014. The Town published a discretionary use notice in the Shoreline Newspaper on December 4, 2014. A public briefing session was held on January 13, 2015 chaired by an independent planning consultant. The consultant submitted a briefing report to Council on January 23, 2015. Council considered and refused the subject application at the February 17, 2015 Regular Meeting of Council. The Town notified the applicant in letter dated March 2, 2015. The letter indicated that Council accepted the recommendations outlined in the briefing report submitted by the independent planning consultant and stated the applicant's right and process to appeal Council's decision.

In accordance with section 42 of the *Urban and Rural Planning Act, 2000* (the "Act"), Colm St. R Seviour, on behalf of Eagleridge International Limited ("Eagleridge"), filed an appeal with the Eastern Newfoundland Regional Appeal Board against Council's decision to refuse Eagleridge's application for mineral exploration and an access road. Eagleridge initiated the appeals process on March 2, 2015. As required under section 42(5) of the *Act*, the appellant included: a summary of the decision being appealed; grounds for the appeal; and the appeal filing fee.

In accordance with the *Urban and Rural Planning Act, 2000* a public notice of the appeal was published in *The Telegram* on May 6, 2015 and a notice of the time, date, and place of the Hearing was provided to the appellant and authority by registered mail sent on May 12, 2015.

Legislation, Municipal Plans and Regulations considered by the Board

Town of Holyrood Municipal Plan and Development Regulations, 2001

Urban and Rural Planning Act, 2000

Matters presented to and considered by the Board

How is the site zoned?

The Board reviewed the Town of Holyrood Municipal Plan and Development Regulations, 2001 and confirmed that the site is designated and zoned Watershed.

Are the proposed uses permitted or discretionary within the Watershed zone?

The Board accepts that the proposed uses, a resource access road and mineral exploration, were considered by the Town as mineral workings, which is listed as a discretionary use in the Watershed Use Zone Table in Schedule “C” of the Town’s Development Regulations. C

Does the Town have the authority to refuse a discretionary use application?

Section 10(1) of the Town’s Development Regulations provides Council with the authority to refuse a discretionary use application. Section 10(1) states:

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.

Did the Town properly consider the discretionary use application?

Section 32 of the Town’s Development Regulations requires Council to advertise a discretion use application in a “newspaper circulating in the area or by any other means deemed necessary”. The Town published a notice of discretionary use in the Shoreline Newspaper on December 4, 2015, which is the local newspaper for the Town of Holyrood. The Town demonstrated to the Board that the Town went above and beyond the minimum requirements of section 32 by holding a public briefing session on January 13, 2015, which was chaired by an independent planning consultant, Mr. Stanley Clinton. While a public briefing is not prescribed, section 32 certainly enables the Town to notify the public by any means deemed necessary by Council. Therefore, the Board accepts that the Town satisfied the public advertisement and consultation requirements under section 32.

Section 90 of the Town's Development Regulations provides guidelines for Council regarding discretionary use applications. Section 90 states:

Subject to these Regulations, the uses that fall within the Discretionary Use Classes set out in the appropriate Use Zone Table in Schedule C may be permitted in that Use Zone if the Authority is satisfied that the development would not be contrary to the general intent and purpose of these Regulations, the Municipal Plan, or any further scheme or plan or regulation pursuant thereto, and to the public interest, and if the Authority has given notice of the application in accordance with Regulation 32 and has considered any objections or representations which may have been received on the matter.

The Board learned at the hearing that the Town considered the following when it made its decision on the subject application: the Municipal Plan, namely section 3.2.10, Watershed; the Development Regulations, specifically section 10, 32, 90 and the Watershed Use Zone Table; the Environmental Preview Report for Big Triangle Pond Mineral Exploration Access Road, Eagleridge International Limited; a petition opposing the proposed development signed by 866 individuals; a petition from cabin owners in the area opposed to the proposed development; and the Public Briefing Report submitted to the Town by Stanley Clinton. In reviewing section 90, the Board is satisfied that the Town sufficiently considered its Municipal Plan and Development Regulations; the public's interests; and satisfied section 32 of the Town's Development Regulations.

Did the Town exercise its discretionary authority appropriately when it refused the subject application?

When contemplating whether the Town exercised its discretionary authority appropriately, the Board reviewed two Supreme Court cases to assist their analysis. The two Supreme Court cases included: *Yates v. Central Newfoundland Regional Appeal Board, 2013 NLTD(G) 173*; and *Paradise (Town Council) v. Eastern Newfoundland Regional Appeal Board, 2010 NLTD 116*. In the *Yates* case, Justice Whalen offered a list of five (5) circumstances where a review board may overturn a discretionary decision of council. These circumstances are found in paragraph 26 and include:

- 1) The council was acting in excess of its legislative powers or acting in abuse of its statutory authority,
- 2) Acting in disregard to some statutory condition upon which its authority is based,
- 3) Fails to follow procedural guidelines,
- 4) Acting upon an erroneous view of the facts, or
- 5) Acting in a biased manner.

Similarly, in the *Paradise* case, Justice Dunn provided a number of items for the Eastern Newfoundland Regional Appeal Board to consider when reviewing a discretionary decision made by a town council.

This list is found in paragraph 30 and includes the following:

- 1) Show a high level of deference to the decision of the town council and/municipal authority, being ever cognizant that it is not a matter of agreeing or disagreeing with council's decision.
- 2) The Board is not permitted to substitute the exercise of its own discretion for that of the council.
- 3) A decision of a town council and/or municipal authority may be overturned in instances where the Board finds the town council and/or municipal authority:
 - i. Acted in clear abuse of statutory authority or disregarded a statutory condition upon which a right to exercise such authority is based.
 - ii. There is evidence of misconduct on the part of the town council and/or municipal authority.
 - iii. The town council and/or municipal authority has failed to act in good faith.
 - iv. There is evidence of improper motive or illegality in the actions of the town council and/or municipal authority.
 - v. The town council and/or municipal authority has failed to understand the request contained in the application before it.

The Board heard arguments from the appellant that the Town of Holyrood acted in excess of its legislated powers, failed to follow procedural guidelines, acted on an erroneous view of the facts, and acted in a bias manner. However, the appellant failed to demonstrate to the Board that the circumstances outlined in the Yates case applied.

There was much discussion regarding the accuracy of the Public Briefing report, commonly referred to as the Clinton Report during the hearing. The Board accepts that the Town did not base its decision solely on the Clinton Report and while there may have been factual errors within the Clinton Report regarding levels of arsenic in the subject area, the Town conveyed to the Board that the report was tabled and reviewed by Council but not adopted in its entirety and not exclusively relied upon. Additionally, levels of arsenic were not a point of contention with Council according to the minutes from the February 17, 2015 Regular Meeting of Council. Additionally, the Board accepts that the Town maintained an unbiased position throughout the review and decision process. The fact that an independent consultant was hired to chair a public briefing, rather than the Chief Administrative Officer who would normally chair such meetings, illustrated to the Board Council's determination to remain objective.

The Board carefully reviewed each list of circumstances and situations where the Board may overturn a discretionary decision and determined that not one applies to this appeal based on the information submitted and presented to the Board. Therefore, the Board determined that it cannot overturn the Town of Holyrood's decision to refuse the subject application.

Did the Town notify the appellant appropriately?

Section 22 of the Town's Development Regulations requires Council to provide reasons for refusal, in writing, when an application has been refused. Section 22 states:

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.

The Board acknowledges that the Town provided a letter to Eagleridge International Limited dated March 2, 2015 notifying the appellant of Council's decision on the subject application. The board reviewed the letter and determined the following:

- Paragraph 1 of the letter outlines the purpose of the application and when it was received by the Town.
- Paragraph 2 states that the Town deferred making a decision on the application until the Environmental Assessment process was completed and a decision was made by the Minister of the Department of Environment and Conservation.
- Paragraph 3 advises the appellant of Council's decision and when the application was discussed.
- Paragraph 4 begins by stating that the majority of the site is located within the Town's Watershed. However, based on evidence presented at the hearing, the Board learned that the site is not located within the Town's Watershed but indeed located within a Watershed zone. The Board presumes the letter meant to indicate the majority of site is located within the Town's Watershed *zone* because the paragraph continues on by stating how Council classified the proposed use and that the proposed use is considered discretionary in the Watershed zone. This paragraph also indicated that Council considered the proposed uses as mineral working which is considered discretionary in the Watershed zone.
- Paragraph 5 outlines the Town's public notification process it underwent while reviewing the application. This paragraph references "Condition 33 of the Town's General Development Regulations" with respect to public notification requirements. The Board assumes the Town intended to reference section 32, Notice of Application, of the Town's Development Regulations

however, this was never clarified at the hearing.

- Paragraph 6 states that the facilitator of the Public Briefing recommended the application be refused and advised the appellant that Council accepted that recommendation.
- The remainder of the letter provided the appellant notice of their right and process to appeal Council's decision.

While the Authority described the reasons included in the decision letter to be "sparse", as illustrated above, the Board found that there were no reasons for refusal included at all. Whether the appellant was present at Public Briefing and/or at the February 17, 2015 Regular Meeting of Council, does not negate the Town's responsibility to provide a clear statement of reasons as to why the Town refused the application. Therefore, with respect to section 22 of the Town's Development Regulations, the Board found that the Town failed to notify the appellant of Council's decision appropriately.

Conclusion

In arriving at its decision, the Board reviewed the submissions and comments given by all parties present along with the technical information and planning advice.

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 its findings, the Board determined that the Town of Holyrood had the authority to refuse the subject application. The Board acknowledges the following: the Town did its due diligence in reviewing the application in accordance with the Town's Development Regulations; understands why the Town refused the application based on testimony heard from Mr. Gary Corbett at the hearing and submissions from the Town; and believes the Town acted in good faith when deciding to refuse the application. However, the Board found that the Town erred by not including reasons for refusal in the March 2, 2015 decision letter as required under section 22 of the Town's Development Regulations. Therefore, the Board will vacate the Town's decision to refuse the application made at the February 17, 2015 Regular Meeting of Council. That is to say, taking into consideration the contents of this Decision of the Eastern Newfoundland Regional Appeal Board, the Town must reconsider the application at a Regular Meeting of Council, render a decision on the application, and then issue a new decision letter to Eagleridge International Limited. If the Town decides to refuse the application again, then the decision letter issued

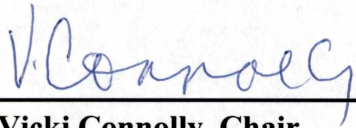
to Eagleridge International Limited must clearly articulate the reasons for Council's refusal in accordance with section 22 of the Town's Development Regulations.

Order

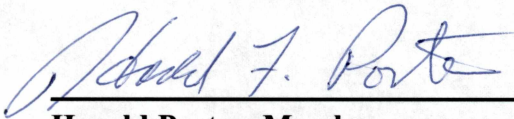
Based on the information presented, the Board orders that the decision made by the Town of Holyrood on February 17, 2015 to refuse the application submitted by Eagleridge International Limited for mineral exploration and an 11 kilometre Class C resource access road in the Big Triangle Pond area, be vacated.

The Town of Holyrood and the appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

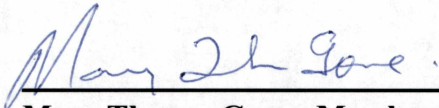
DATED at St. John's, Newfoundland and Labrador, this 23rd day of July, 2015.



Vicki Connolly, Chair
Eastern Newfoundland Regional Appeal Board



Harold Porter, Member
Eastern Newfoundland Regional Appeal Board



Mary Thorne-Gosse, Member
Eastern Newfoundland Regional Appeal Board