EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN	Marie Aisthorpe	**Appellant**
AND	Town of Carbonear	**Respondent**
RESPECTING	Order	
BOARD MEMBERS	Michelle Downey – Acting Chair Bruce Strong Harold Porter	
DATE OF HEARING	December 15, 2015	

IN ATTENDANCE

Cynthia Davis - Authority
Marie Aisthorpe – Appellant
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 a decision of the Town of Carbonear to issue an Order on June 21, 2011 to Marie Aisthorpe at 1 Russell Street. The Order required Ms. Aisthorpe remove a fence situated along the southern and eastern limits of her property. The Order stated that the fence is contrary to section 7 of the Town of Carbonear Development Regulations since no permit was issued for the erection of the fence.

Marie Aisthorpe appealed the Order to the Eastern Newfoundland Regional Appeal Board on June 24, 2011. That appeal was heard by the Eastern Newfoundland Regional Appeal Board on May 1, 2012. At that hearing, the Board vacated the Town's decision to issue the Order. The Town of Carbonear appealed the Eastern Newfoundland Regional Appeal Board's May 1, 2012 decision to the Supreme Court of Newfoundland and Labrador, Trial Division (General). Pursuant to section 46(4) of the *Urban and Ural Planning Act, 2000,* The Honourable Madam Justice Deborah J. Paquette referred the matter back to the Board for re-hearing and reconsideration as to:

- whether Ms. Aisthorpe's fence contravened the Town's Fence Regulations;
- whether issuance of the removal order was a valid exercise of the Town's discretionary authority; and
- whether, by virtue of the particular circumstances of this case, the doctrine of estoppel precludes enforcement of the removal order.

The Board reheard the matter on March 24, 2015 and vacated the Town's decision. The Town of Carbonear appealed the Board's March 24, 2015 decision to the Supreme Court of Newfoundland and Labrador, Trial Division (General). Justice David B. Orsborn vacated the Board's March 24, 2015 decision and referred the matter back to the Board with directions outlined in paragraph 76.

Legislation, Municipal Plans and Regulations Considered by the Board

The Urban and Rural Planning Act, 2000

The Carbonear Municipal Plan and Development Regulations, 2004

Matters presented to and considered by the Board

Did the Town issue a permit to Ms. Aisthorpe for the fence?

As determined in previous hearings and reconfirmed at the hearing today, the Board found that a permit was not obtained from the Town for the subject fence. The Board accepts that a permit is required for all development located within the Town of Carbonear's Planning Area boundary as outlined in section 7 of the Town's Development Regulations.

Did the Town have the authority to issue the Order to Ms. Aisthorpe?

The Board reviewed section 102 of the *Urban and Rural Planning Act, 2000* and found that the Town may issue an order to "pull down, remove" a development that has occurred contrary to the Town's Municipal Plan and Development Regulations. In this case, the Board found that Ms. Aisthorpe constructed the fence without a permit from the Town as required under section 7 of the Town's Development Regulations. Therefore, the Board found that the Town had the authority to issue the Order dated June 21, 2011 to Ms. Aisthorpe as the development existed contrary to the Town's Development Regulations.

Justice Orsborn states in paragraph 58 of the October 9, 2015 Supreme Court Decision that the Order was validly issued. The Appellant argued at the appeal hearing that the issuance of the Order was unfair. In reviewing Justice Orsborn's decision, the Board acknowledges Justice Orsborn's findings in paragraph 59, which state:

> *In my view, the operation of these provisions leaves no room for consideration of unfairness as a defence against a validly-issue s. 102(1) order.*

Therefore, since the Order was issued validly to Ms. Aisthorpe, the Board did not consider Ms. Aisthorpe's argument pertaining to fairness.

Did the Town properly issue the Order to Ms. Aisthorpe?

The Board reviewed section 102 of the *Urban and Rural Planning Act, 2000*, which states:

> *(1) Where, contrary to a plan or development regulations, a person has undertaken or commenced a building or other development, the council, regional authority or authorized administrator responsible for that plan or those regulations or the minister where he or she considers it necessary, may order that the person pull down, remove,*

stop construction fill in or destroy that building or development and may order that the person restore the site or area to its original state.

(2) A person ordered to carry out an action under subsection (1) shall be served with that order and shall comply with the order at the person's own expense.

(3) An order made under this section continues in force until revoked by the council, regional authority, authorized administrator, or minister that made the order.

(4) A council, regional authority, authorized administrator or the minister may, in an order made under this section, specify a time within which there shall be compliance with the order.

(5) Where a person to whom an order is directed under this section does not comply with the order or a part of it, the council, regional authority, authorized administrator or minister may take the action that it considers necessary to carry out the order and any costs, expenses or charges incurred by the council, regional authority, authorized administrator or minister in carrying out the order are recoverable against the person against whom the order was made as a debt owed to the council, regional authority, authorized administrator or the Crown.

The Board found that the Town had the authority to issue the Order under subsection (1). Additionally, the Board determined that the Town provided a time frame for which the work must be completed in accordance section 102(4) of the *Urban and Rural Planning Act, 2000.*

Additionally, as required under section 5 of the *Minister's Development Regulations,* NLR 3/01, the Board found that the Town notified Ms. Aisthorpe of the right and process to appeal the decision. Section 5 of the *Minister's Development Regulations,* NLR 3/01 states:

Where an authority makes a decision that may be appealed under section 42 of the Act, that authority shall, in writing, at the time of making that decision, notify the person to whom the decision applies of the

(a) person's right to appeal the decision to the board;

(b) time by which an appeal is to be made;

(c) right of other interested persons to appeal the decision; and

(d) manner of making an appeal and the address for the filing of the appeal.

Conclusion

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties along with the October 9, 2015 Supreme Court Decision of Justice David B. Orsborn.

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 Carbonear had the authority to issue the Order to Ms. Marie Aisthorpe and did so in accordance with *Urban and Rural Planning Act, 2000*. Therefore, the Board will uphold the Order issued on June 21, 2011 concerning the fence located at 1 Russell Street.

ORDER

Based on the information presented, the Board orders that the Order issued by the Town of Carbonear on June 21, 2011 to Ms. Marie Aisthorpe concerning the removal of a fence from 1 Russell Street, Carbonear, be confirmed.

The Town of Carbonear 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 Trial Division 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 15th day of December, 2015.

Michelle Downey

Michelle Downey, Acting Chair
Eastern Newfoundland Regional Appeal Board

Bruce Strong, Member
Eastern Newfoundland Regional Appeal Board

Harold J. Porter

Harold Porter, Member
Eastern Newfoundland Regional Appeal Board

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Carbonear (Town) v. Aisthorpe*, 2015 NLTD(G) 140
Date: October 09, 2015
Docket: 201501G2140

BETWEEN:

TOWN OF CARBONEAR

APPELLANT

AND:

MARIE AISTHORPE

RESPONDENT

Before: Justice David B. Orsborn

Place of Hearing: St. John's, Newfoundland and Labrador

Date(s) of Hearing: October 5, 2015

Summary:

In June 2011, the Town of Carbonear ordered Marie Aisthorpe to remove a fence she had built some eight years earlier. The fence was higher than allowed by regulation and had been built without the necessary permit. In 2012 the Eastern Newfoundland Regional Appeal Board set aside the removal order. On appeal to the Court, the Court set aside the Board order and remitted the matter to the Board with specific questions for determination. In 2015 the Board again set aside the removal order. The Town appealed.

Held:

The order of the Board was set aside and the matter referred back to the Board with specific directions. The responses of the Board to the questions set by the Court disclosed unreasonable findings of fact and law and an exercise of the Board's jurisdiction beyond that allowed by law.

Appearances:

J. William Finn, Q.C.	Appearing on behalf of the Appellant
Marie Aisthorpe	Appearing (by telephone) on her own behalf

Authorities Cited:

CASES CONSIDERED: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; **Dunsmuir v. New Brunswick**, 2008 SCC 9; **Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association**, 2011 SCC 61; **Newfoundland and Labrador Nurses' Union v. Newfoundland Labrador (Treasury Board)**, 2011 SCC 62; **Petty Harbour – Maddox Cove (Town) v. Newfoundland and Labrador (Eastern Newfoundland Regional Appeal Board)**, 2015 NLTD(G) 111; **Mt. Pearl (City) v. Mt. Pearl Local Board of Appeal** (1995) 131 Nfld. & P.E.I.R. 320, 56 A.C.W.S. (3d) 594 (Nfld. S.C.C.A.); **Paradise (Town) v. Newfoundland and Labrador (Regional Appeal Board)**, 2010 NLTD(G) 116; **3163083 Canada Ltd. v. St. John's (City)**, 2004 NLCA 42; **Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.**, [1994] 1 S.C.R. 80

STATUTES CONSIDERED: *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8

REASONS FOR JUDGMENT

ORSBORN, J.:

INTRODUCTION

[1] It has been said that good fences make good neighbours. In this case, the height of an otherwise excellent fence, but built without the necessary permit, caused one neighbor to complain about another and led to a 2011 municipal council order to remove the fence, two appeal board hearings and two court hearings.

[2] The Town of Carbonear (the "Town") has ordered Ms. Aisthorpe to remove her 72 inch high fence located on her property on Russell Street in Carbonear. The Eastern Newfoundland Regional Appeal Board (the "Board") has on two occasions – in 2013 and 2015 – vacated the Town's order. It is the 2015 decision that the Town now appeals.

ISSUE

[3] Applying the appropriate standard of appellate review, should the decision of the Appeal Board be set aside?

[4] For the reasons that follow, the decision of the Board cannot stand. The Board must reconsider the matter.

BACKGROUND

[5] Ms. Aisthorpe and her late husband purchased the Russell Street property in 2002. The property has been described as a 'three-sided' lot in a busy area. In an effort to create some privacy, Ms. Aisthorpe replaced a dilapidated old fence with a

new six-foot high fence some time in 2003-2004. She did not apply for the required permit. Further, the fence did not comply with the existing Town Fence Regulations, which stipulated a maximum height of 42 inches for such a fence.

[6] All was fine until some eight years following construction of the fence, when, unexpectedly, Ms. Aisthorpe received a June 21, 2011 order from the Town giving her 30 days to remove the fence. Ms. Aisthorpe appealed (for the first time) to the Board established under the *Urban and Rural Planning Act, 2000,* S.N.L. 2000, c. U-8 (*URPA*).

[7] In the course of the (first) appeal hearing, Ms. Aisthorpe gave her assessment of the reasons for the order:

> So, I believe I was triggered as an issue because she triggered it as an issue because her neighbor had issues with her. I don't know how that fits in this and fits with me, but for me to be in compliance for eight-and-a-half years and all of a sudden I'm not, it's very devastating.
>
> (page 14 of the transcript of proceedings)

[8] The Board vacated the removal order on May 1, 2012, primarily because there was a concern over whether or not limitations legislation precluded issuance of the order.

[9] The Town appealed to this Court; the matter was referred back to the Board for rehearing and reconsideration as to:

> i) whether Ms. Aisthorpe's fence contravened the Town's Fence Regulations;
> ii) whether issuance of the removal order was a valid exercise of the Town's discretionary authority; and
> iii) whether, by virtue of the particular circumstances of this case, the doctrine of estoppel precludes enforcement of the removal order.

See **Carbonear (Town) v. Aisthorpe**, 2014 NLTD(G) 65.

[10] The Board held a second hearing on March 24, 2015. Ms. Aisthorpe lives in Nova Scotia and did not attend the hearing, either in person or by teleconference.

[11] The Board's decision, issued on March 24, 2015, in part:

> **Matters presented to and considered by the Board**
>
> **Was there a permit issued by the Town for the current fence?**
>
> The Board reviewed the Town of Carbonear Development Regulations as well as the Town's Fence Regulations and determined that a written permit is required prior to the construction of fence. The Board accepts that Ms. Aisthorpe did not have a permit for the fence located on her property.
>
> **Was Council aware of the fence prior to 2011?**
>
> The Board determined that Ms. Aisthorpe applied to the Town of Carbonear in 2002 for a permit to extend the dwelling and install a new access. Although the Town issued written permits with no reference to a new or replacement fence, a fence was illustrated on the site plans submitted with the extension and new access applications. Therefore, the Board concludes that Council must have been aware of the fence.
>
> **Does Ms. Aisthorpe's fence contravene the Town of Carbonear's Fence Regulations?**
>
> The Board confirmed at the hearing that Ms. Aisthorpe's fence contravenes the height requirements outlined in the Town's Fence Regulations. According to section 9 of the Town's Fence Regulations. According to section 9 of the Town's Fence Regulations, the maximum height allowance for a fence located on a corner lot is "42 inches from the front building line forward on the principle street and from the back building line forward on the secondary street". Ms. Aisthorpe's fence measures 72 inches.
>
> **Why did the Town issue the Removal Order to Ms Aisthorpe?**
>
> The Town indicated during the hearing that it was in 2011, while the Municipal Enforcement Officer (MEO) was investigating the construction of a neighbouring property's fence, when the Town discovered Ms. Aisthorpe's fence violated the Town's Fence Regulations. The Town stated that it required Ms. Aisthorpe remove her fence since it required the removal of the neighbour's fence. The Town conceded that the fact that the fence had existed on the property for a

number of years was not taken into consideration prior to the issuance of the Removal Order.

Is it reasonable to order the removal of Ms. Aisthorpe's fence?
The Town maintains that the Removal Order was issued to Ms. Aisthorpe in a matter of fairness. The Authority claimed that since the Town issued an order to remove a fence on a neighbouring property, the Town must then also issue a removal order to Ms. Aisthorpe whose property is located across the street. However, the Board is unsatisfied that this was a reasonable decision due to the following information that was not considered by Council:

- The Fence existed for at least eight (8) years.
- There were no previous complaints regarding the fence.
- The fence is clearly visible from the flanking streets.
- The fence was illustrated on previously approved plot plans submitted to the Town in 2002.
- The Town did not demonstrate that the fence had an adverse effect on public interest.

The Board accepts the fact that the appellant did not have a permit for her fence. Additionally, the Board acknowledges that the Town has the authority to issue an order when development exists without a permit. However, the Board found that it was not reasonable to issue the Removal Order due to the aforementioned.

Does the doctrine of estoppel preclude the Town from enforcing the removal order?
The Board learned from Justice Paquette's Supreme Court decision that, as a general rule, municipal rights, duties and powers cannot be vitiated by mere acquiescence, laches or estoppel. The Board acknowledges that this is a general rule and not an absolute one as outlined in the City of Toronto v. San Joaquim Investments Ltd. Et al. (1978), 18 O.R. 730, Steele J.

As directed by Justice Paquette, the Board reviewed the particular circumstances of this appeal and determined that the doctrine of estoppel was found to be operative and thus precludes the Town from enforcing the removal order that was issued to Ms. Aisthorpe. It was not demonstrated to the Board that the Town acted in the public interest. Rather, the Board is satisfied that the Town used its discretionary authority in an attempt to act fairly towards and in the best interest of one other resident.

ORDER
Based on the information presented, the Board orders that the Order issued by the Town of Carbonear on June 21, 2011 for the removal of a fence from 1 Russell Street, Carbonear be vacated.

STATUTORY FRAMEWORK – *URPA*

[12] The relevant sections:

> 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.
>
> …
>
> (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.
>
> (11) Notwithstanding subsection (10), where a council, regional authority or authorized administrator may, in its discretion, make a decision, a board shall not make another decision that overrules the discretionary decision.
>
> …
>
> 46.(1) A decision of a board may be appealed to the court not later than 10 days after that decision has been received by the appellant.
>
> (2) An appeal of a decision of a board under subsection (1) may be made on a question of law or jurisdiction.
>
> (3) A board may be represented by counsel and heard on an appeal under this section.
>
> (4) The court shall either confirm or vacate the order of the board and where vacated the court shall refer the matter back to the board with the opinion of the court as to the error in law or jurisdiction and the board shall deal with the matter in accordance with that opinion.

[13] The Board did not appear on this appeal.

DISCUSSION

[14] The grounds for appellate review in this Court are limited to errors of law or jurisdiction.

[15] The standard of appellate review is of course a different issue.

[16] Counsel for the Town argued that the standard of appellate review, either on a question of law or jurisdiction, is correctness. However, in light of decisions of the Supreme Court of Canada such as **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817; **Dunsmuir v. New Brunswick**, 2008 SCC 9; **Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association**, 2011 SCC 61; and **Newfoundland and Labrador Nurses' Union v. Newfoundland Labrador (Treasury Board)**, 2011 SCC 62, the ambit of review – either appellate or judicial - for correctness has been effectively narrowed to questions of pure jurisdiction – also construed narrowly – and to issues of law which are of central importance to the legal system as a whole – as opposed to issues relating to the tribunal's 'home statute'. As a result of these decisions, there are now only two standards of review – correctness and reasonableness. On this point, see also the comprehensive review of the law by Butler, J. in **Petty Harbour – Maddox Cove (Town) v. Newfoundland and Labrador (Eastern Newfoundland Regional Appeal Board)**, 2015 NLTD(G) 111.

[17] A judge reviewing for reasonableness is required to conduct an 'organic exercise' – reviewing the result and reasons as a whole in order to determine whether the decision and the decision-making process are justified, transparent and intelligible. The focus is on whether the result falls within a range of acceptable outcomes.

[18] But there may be occasions where, as here, separate analyses may be required of discrete aspects of the tribunal's decision.

[19] In this case, three separate questions were referred to the Board by the Court. It seems to me that, of necessity in such a situation, an appellate review analysis calls for separate attention to each question. For ease of reference, I will repeat the questions referred back to the Board as stated in the formal order:

> **(i) whether Ms. Aisthorpe's fence contravened the Town's Fence Regulations;**

[20] The Board found, as it did in 2012, that Ms. Aisthorpe's fence was built without a permit, contrary to the Town's Fence Regulations. The Board also found that the fence – at 72 inches high – contravened the 42 inch maximum height allowed for a corner lot fence.

[21] No issue was or could be taken with these conclusions.

> **ii) whether issuance of the removal order was a valid exercise of the Town's discretionary authority;**

[22] In its 2012 decision, the Board said:

> **Does the Council have authority to issue an order?**
> The Board determined that Council has a discretionary authority to enforce an action arising from Section 102 of the Urban and Rural Planning Act, 2000 when development occurs in the absence of a written permit. It is clear that no explicit permit had been sought or granted for the fence when it was built in 2003 or 2004.
>
> **Was the Order issued appropriately?**
> Council referenced its legislative and regulatory authority when it issued the Order and made its decision in an open Council meeting. The Board found that

> Council's Order does not appear to contradict any aspect of the Urban and Rural Planning Act, 2000.

[23] But in 2015, for the reasons reproduced above – no complaints, passage of time, etc. – the Board found that "it was not reasonable" for the Town to issue the removal order.

[24] I take this to mean that while the Board found that the Town had the authority to issue the order, it also concluded that, in the circumstances, it amounted to an invalid exercise of the Town's discretionary authority.

[25] A board has the jurisdiction to review a discretionary decision of a town council. Where the authority of a board to review a particular type of decision is circumscribed, there is specific provision in *URPA* – see for example, subsection 42(2).

[26] But subsection 42(11), reproduced above, makes it clear that the scope of the Board's remedial authority is limited. It would be helpful to have current appellate guidance on the relationship between the appeal provisions in s. 42 (Appeal Board) and s. 46 (Court), but s. 42(11) does suggest to me that, at best, an appeal board can only refer a discretionary decision back to a council for reconsideration. The Board cannot exercise its own discretion and make a new order or, as here, simply vacate the Council's order.

[27] A proper exercise of remedial authority assumes, of course, that the Board has first appropriately exercised its substantive appellate authority and found the Council decision to be wanting.

[28] The law is clear that there is only a limited scope for an appeal board to review a town council's discretionary decision.

[29] In **Mt. Pearl (City) v. Mt. Pearl Local Board of Appeal** (1995) 131 Nfld. & P.E.I.R. 320, 56 A.C.W.S. (3d) 594 (Nfld. S.C.C.A.), Gushue, J.A. spoke of the limited power of courts and of review (appeal) boards to interfere with discretionary decisions of municipal councils. At paragraphs 17-18:

> 17. The powers of courts to interfere with discretionary decisions of municipal authorities has been set forth clearly in the case of the City of Regina v. Cunningham (1994), M.P.L.R. (2d) 14 (Sask. C.A.) which admonitions would needless to say, as stated above, apply equally to review by appeal boards. In that case, Lane, J.A., quoting from various other cases on the subject, stated:
>
> > The Courts are loathe to interfere with decisions made in good faith by statutory bodies, the members of which are voted or appointed to office because others have confidence in their experience and integrity. But when such bodies err by acting in excess of their statutory powers, the Courts will control them.
> > .....
> >
> > The Courts have in recent years shown an increasing disposition to avoid interference with the legislative functions of municipal councils except in cases where there has been a clear excess or abuse of statutory authority or a disregard of some statutory condition upon which the right to exercise such authority is based.
> > .....
> >
> > What is in the public interest is for Council to decide and when there is no evidence of misconduct its action is not open to review by the Court.
> > .....
> >
> > In my opinion, a municipal council is a legislative body having a very limited and delegated jurisdiction. Within the limits of its delegated jurisdiction and subject to the terms of the delegation, its power is plenary and absolute and in no way subject to criticism or investigation by the Courts.
>
> 18 The above quotes make it very clear that before a court, or a review board, may overturn the actions of a municipal authority acting in the exercise of its discretionary power, it must be demonstrated that without question the municipal authority has acted in excess of those powers.

[30] Subsequently, in **Paradise (Town) v. Newfoundland and Labrador (Regional Appeal Board)**, 2010 NLTD(G) 116, Dunn, J. reviewed a number of authorities and provided a helpful summary of the law relating to an appeal board's review of a discretionary decision of a council.

[31] She said, at paragraph 30:

> 1) [The Board must s]how 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. …

[32] It is apparent that there is little, if any, room for an appeal board to consider the substantive aspects of a discretionary decision of a municipal council. Rather, what may be reviewed is the decision-making process – including bad faith, misconduct, improper motive and the like, together with the basic statutory authority for the council's decision.

[33] In the present case, the Board considered only the substantive decision and applied the Board's concept of reasonableness to that decision. There was no issue of bad faith, misconduct or the like, and no issue of any lack of statutory authority. Put another way, the Board, contrary to law, improperly substituted its own discretion for that of the Town.

[34] This could perhaps be characterized both as an error of law or an error of jurisdiction – the conduct of an analysis of the Board did not have the authority to undertake. If it is characterized as an excess of jurisdiction, the appropriate standard of review is correctness; if considered an error of law, it could be considered as resulting from the Board's interpretation or assessment of its appellate authority under *URPA* – specifically its authority to review discretionary decisions of a council.

[35] But even if, on appellate review, such a determination is reviewable on a reasonableness standard, I would view the Board's conclusion as unreasonable. Simply put, it cannot be reasonable for an appeal board to conclude, in the face of law clearly established by the courts, that a council's otherwise valid removal order should be vacated in the absence of any bad faith, misconduct or the like.

[36] The difficulty in settling on the proper legal framework for analysis of the question points out, as already mentioned, the need for appellate guidance. But however one structures the analysis, my conclusion is that the Board's finding that the Town's decision was unreasonable cannot stand – it is both unreasonable and an incorrect exercise of jurisdiction.

iii) whether, by virtue of the particular circumstances of this case, the doctrine of estoppel precludes enforcement of the removal order.

[37] The reference from the Court back to the Board required the Board to determine whether, on the facts, an estoppel had been established and, if so, to decide whether or not the circumstances precluded the use of estoppel to prevent enforcement of the removal order.

[38] The application of the doctrine of estoppel in a municipal context was dealt with by Paquette, J. in her decision referring the matter back to the Board. She referred in particular to the decision of the Court of Appeal in **3163083 Canada Ltd. v. St. John's (City)**, 2004 NLCA 42 (referred to as "**Labatt**").

[39] In **Labatt**, Welsh, J.A. reviewed authorities which discussed the establishment of estoppel by either convention or by representation.

[40] She wrote, primarily of estoppel by convention, at paragraph 32:

> 32. The concept of estoppel by convention was discussed by this Court in Ryan v. Moore (2003), 224 Nfld. & P.E.I.R. 181 (NLCA) (leave to appeal granted, [2003] SCCA No. 307), commencing at paragraph 69. In describing this type of estoppel, at paragraph 74, Wells C.J.N.L. referred to judicial consideration of the concept:
>
> > '[An estoppel by convention] is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.'
> >
> > . . .
> >
> > '... Estoppel by convention depends on a shared assumption which can be one of fact or law and not on either a representation as to a state of facts or a promise as to future obligations. Estoppel by convention is, as the law currently stands, therefore to be distinguished from equitable forbearance [including promissory estoppel] or estoppel by representation.'
>
> Chief Justice Wells continued, at paragraph 77:
>
> > ... From that excerpt I would conclude that while it is true that a party asserting estoppel by representation must have been induced to act to his detriment, in the case of estoppel by convention, "the real detriment or harm from which the law seeks to give protection

> is that which would flow from the change of position if the assumption were deserted that led to it" (Emphasis added). Thus it is not necessary to show detrimental reliance. It is sufficient if the party asserting estoppel by convention shows that resiling from the assumption would result in a detriment to that party.
>
> (emphasis in original)

Wells C.J.N.L. summarized:

> [79] While in some jurisdictions less may be required, a distillation of the foregoing authors and authorities indicates that, in Canada, estoppel by convention may be found where:
>
> (i) The evidence establishes an assumption in common between the parties as to a state of facts;
>
> (ii) The parties have adopted the common assumption as the conventional basis for a transaction into which they have entered;
>
> (iii) The dispute in respect of which the estoppel by convention is asserted arises out of that transaction; and
>
> (iv) A detriment would flow to the party asserting the estoppel if the other party is permitted to resile from the assumed stated facts.
>
> [80] While there may be some doubt as to whether all of the foregoing must be established in every case, I have no doubt that where the foregoing four elements are established, estoppel by convention may be found.

33 When the issue of estoppel arises in the municipal context, an additional factor must be considered. The general principle is stated in Rogers, The Law of Canadian Municipal Corporations, 2nd edition, looseleaf (Toronto: Carswell, 1999), at page 388.1:

> As a general rule municipal rights and powers are of such a public nature that they cannot be lost or vitiated by mere acquiescence, laches or estoppel.... It has also been said that the doctrine can never interfere with the proper carrying out by local authorities of the provisions of a statute and that there can be no estoppel or waiver of their public rights and duties. The doctrine of estoppel has no application to the law governing assessment and taxation of a property for municipal purposes.

> 34 However, the text goes on to qualify these broad statements, at page 389:
>
> > These are statements of the general rule and there is authority to the contrary that a municipal corporation may be bound by acquiescence the same as an individual may but that the rule should not be enforced against them as strictly and to the same extent as against other corporations and individuals.
> >
> > Judicial authority for this last proposition, cited in the Rogers' text, is Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd., [1994] 1 S.C.R. 80. The issue in that case related to the power of the municipality to collect arrears which resulted from a mistake in billing made by the Town. …

[41] The record before the Board discloses no evidence of a common assumption held by the Town and Ms. Aisthorpe, neither does it offer any evidence at all of a representation by the Town that was relied upon by Ms. Aisthorpe which may have induced her to build a 72-inch fence without a permit.

[42] In its decision, the Board concluded, without reasons, that an estoppel had been established. I repeat that part of the Board's decision:

> As directed by Justice Paquette, the Board reviewed the particular circumstances of this appeal and determined that the doctrine of estoppel was found to be operative and thus precludes the Town from enforcing the removal order that was issued to Ms. Aisthorpe.

[43] This finding was not supported by any evidence, either from the 2015 hearing or the 2013 proceeding. I am prepared to assume – although it is not evident from the Board's decision – that the Board appreciated the law of estoppel that had to be applied.

[44] But the application of those principles to the facts of the case before the Board was an unreasonable application of the facts to the law. As noted, there was absolutely no evidence to suggest a finding of either a common assumption or a representation preceding the construction of defence.

[45] It is true, as mentioned in **Labatt**, that in a rare case, simple acquiescence – that is, without a representation – may operate to limit the enforcement capability of a municipality.

[46] In **Labatt**, the authority cited for this proposition is an extract from the text Rogers, *The Law of Canadian Municipal Corporations*, which in turn relied on **Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.**, [1994] 1 S.C.R. 80.

[47] **Kenora** was a 5:4 decision of the Supreme Court of Canada. It involved a claim for recovery of arrears of under-billed electricity charges accumulated over seven years.

[48] In the Supreme Court of Canada, all parties proceeded on the basis that the incorrect billings amounted to a representation of a certain state of facts intended to induce the Co-operative to act, and that the Co-operative in fact acted to its detriment throughout. That alone is sufficient to distinguish it from the present circumstances.

[49] The decision in **Kenora** turned solely on whether the application of the factually established estoppel was precluded by the governing utilities legislation.

[50] As noted in **Labatt**, the decisions in **Kenora** and other municipal estoppel cases confirm that the equitable doctrines of laches, acquiescence and estoppel – even if established on the facts – have an extremely limited area of permissible application in the context of the exercise of duties and powers by municipal authorities.

[51] The general principle is that the obligations of a municipality to act in the public interest and the public nature of its duties and powers preclude the application of equitable relief. This principle is not subject to a relaxed application even though a harsh result may follow.

[52] In **Labatt**, Welsh, J.A. said, at paragraphs 36 – 40:

> 36 … judicial authority demonstrates the potential for a harsh result when the general principle is applied to preclude reliance on the doctrine of estoppel. This was the case in Township of Langley v. Wood (1999), 173 D.L.R. (4th) 695 (BCCA). Wood placed a dwelling on property zoned for single family dwellings. Although the building permit included this stipulation, before the house was located on the property, Wood met with Township officials, including the building inspector and "plan checker", and obtained their approval to use the dwelling to house seasonal farm workers and then as accommodation for two families. The Court noted, at paragraph 4:
>
> > The learned judge below found that "the preponderance of evidence establishes that the owner at least had the Township's informal blessing when the building permit was issued".
>
> 37 Nonetheless, the Township submitted that it was entitled to rely on the zoning bylaw, regardless of any alleged condonation or acquiescence relied on by Wood. Citing judicial authority from 1859 and 1903, the Court concluded, at paragraph 12:
>
> > As a general rule, municipal rights, duties and powers, including the duty to carry out the provisions of a statute, are of such public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel.
>
> In the result, Wood was precluded from relying on the doctrine of estoppel.
>
> 38 A similar harsh result is found in Northern Alberta Agribusiness Ltd. v. Town of Falher (1980), 14 Alta. L.R. (2d) 97 (ABQB). In that case, the Town passed a resolution granting a tax abatement to Agribusiness. The abatement induced Agribusiness to build an alfalfa plant within the Town's boundary. Unfortunately, the resolution was inconsistent with the Municipal Government Act which precluded the Town from granting a tax abatement. Refusing to apply the doctrine of estoppel, Crossley J. concluded, at paragraph 11:
>
> > In that regard any such resolution by the defendant is clearly invalidated by s. 108 of The Municipal Government Act. As well, any agreement entered into by the parties is invalid, for it is ultra vires the powers of the defendant. Due to the public nature of a corporation such as the defendant, it cannot be estopped from showing that it had no power to enter into the agreement.

> [authority cited] These [decisions] establish that a person dealing with a public corporation does so at his peril and must take notice of the statutory limits within which the public corporation may operate.
>
> (emphasis added)

39 The same principle is also stated in Re James and Town of Richmond Hill (1986), 54 O.R. (2d) 555 (Ont. H.C.), at page 558:

> It is common ground that a municipality being a Corporation created by statute has only such authority as is granted by statute and when a municipality acts in excess of its powers, no other party can thereby acquire any legal right capable of being enforced against the municipality.

40 However, in that case, the harsh result, that would have obtained had the principle precluding operation of the doctrine of estoppel been applied, was avoided by a legislative interpretation which circumvented the need to rely on estoppel.

[53] In this case, it is acknowledged that under *URPA*, the Town had the discretion to make the order for removal of the fence. It is helpful to set out s. 102 in full:

> 102.(1) Where, contrary to a plan or development regulations, a person has undertaken or commenced a building or other development, the council, regional authority or authorized administrator responsible for that plan or those regulations or the minister where he or she considers it necessary, may order that the person pull down, remove, stop construction fill in or destroy that building or development and may order that the person restore the site or area to its original state.
>
> (2) A person ordered to carry out an action under subsection (1) shall be served with that order and shall comply with the order at the person's own expense.
>
> (3) An order made under this section continues in force until revoked by the council, regional authority, authorized administrator, or minister that made the order.

> (4) A council, regional authority, authorized administrator or the minister may, in an order made under this section, specify a time within which there shall be compliance with the order.
>
> (5) Where a person to whom an order is directed under this section does not comply with the order or a part of it, the council, regional authority, authorized administrator or minister may take the action that it considers necessary to carry out the order and any costs, expenses or charges incurred by the council, regional authority, authorized administrator or minister in carrying out the order are recoverable against the person against whom the order was made as a debt owed to the council, regional authority, authorized administrator or the Crown.

[54] In **Kenora**, Major, J. commented on the operation of equitable doctrines in a statutory context - at paragraph 55:

> 55. A statute can only affect the operations of the common law principles of restitution and bar the defence of estoppel or change of position where there exists a clear positive duty on the public utility which is incompatible with the operation of those principles. … The defence of estoppel is thus an expression of what the common law has considered to be sufficient justification to release a defendant from liability in the pursuit of fairness, …

[55] Iacobucci, J. made a similar comment at paragraph 27:

> 27. The principle that a plea of estoppel will not operate to negative a positive statutory obligation on a corporation or public body is both well accepted and sensible. The equitable doctrine of estoppel is a creation of the courts, and should not lead to the result that the utility, or the customer, is forced to break the law by contravening a statute.

[56] Do the provisions of s. 102, read as a whole, show a legislative intention to preclude the enforcement of a validly issued subsection 102(1) order because it would not be fair to the recipient? In my view they do.

[57] The issuance of the order is, in the first place, left to the discretion of the council. It is at this stage – at the deliberative stage when a council is considering whether or not to issue an order – that fairness to the person(s) involved may, if appropriate, be considered.

[58] But once the order is validly issued, as it was here, s. 102 provides a full code covering compliance, timing and enforcement. I note also the offence provisions of s. 106 of *URPA*, which provide for fines, imprisonment and removal orders in the case of the contravention of an order such as that passed by the Town in June 2011.

[59] In my view, the operation of these provisions leaves no room for consideration of unfairness as a defence against a validly-issued s. 102(1) order.

[60] But if I am incorrect in my interpretation of legislation, is the availability of estoppel in this case precluded by common law principles? Again I consider the answer to be yes.

[61] I was not provided with any authority that has prevented a municipality from enforcing a valid by-law on equitable grounds. The general common law rule, as confirmed in **Labatt**, is that municipal duties and powers, including the enforcement of regulations, are of such a public nature that they cannot be lost or diminished by the operation of court-created equitable doctrines such as estoppel.

[62] In **Kenora**, Iacobucci, J., albeit in dissent and in a different context, spoke of the public interest in equality of treatment in a regulated environment. He said at paragraph 41:

> 41. This policy of equality cannot be overlooked simply because it imposes hardship on an individual consumer.

[63] That observation is equally applicable to the enforcement of regulations. There is a public interest in equal treatment.

[64] In this case, the Board said:

> It was not demonstrated to the Board that the Town acted in the public interest. Rather, the Board is satisfied that the Town used its discretionary authority in an attempt to act fairly towards and in the best interest of one other resident.

[65] This conclusion flowed from the fact that, faced with the need to issue a removal order for a close-by offending fence, and following a complaint, the Town considered that it should issue a similar order to Ms. Aisthorpe.

[66] There are a number of problems with the Board's conclusion.

[67] Firstly, and assuming that an absence of public interest is a factor in determining the availability of estoppel, it was not for the Town to demonstrate that its action was in the public interest. In the context of raising estoppel as a defence to enforcement of the regulation and removal order, it was for Ms. Aisthorpe to demonstrate an absence of public interest.

[68] Secondly, in making its own assessment of the public interest, or lack thereof, the Board simply substituted its view for that of the Town. It did not have the authority to do so, particularly in light of the evidence before it.

[69] The evidence from the 2015 hearing – and the 2012 hearing – shows that the Council was well aware of both the need for even-handedness and of the potential for hardship. The Town's representative said at the 2015 hearing, pages 10 – 11 of the transcript:

> In most situations, and I feel you'd find that in most municipalities, investigations occurs as a result of report to the Town that there is a violation. This is forwarded

> to the enforcement officers for investigation, and this is the way things like this would be handled in the Town of Carbonear. The situation that was identified in 2011 when a neighbouring property owner constructed a fence in violation of the Town's regulations. This was brought to the attention of the Council, and obviously it's the staff's role to investigate any reports of any violations in the regulations. As a result, this particular fence was investigated. At that time, during that particular investigation, the neighbouring property was 1 Russell Street, and it was identified that this particular property also had erected a fence in violation of the Town's regulations. Once this was discussed with Council, it was felt that the Town had a duty to respond when this violation was identified. It wasn't something that they could ignore, especially when they were dealing with a neighbouring fence, felt it would not be appropriate or acceptable for the Town to require removal of one fence knowing the other fence was in violation of the same regulations. So the fence at 1 Russell Street was identified to be in violation of our fence regulations, …

[70] Based on the foregoing, I am satisfied that the Board erred in:

(i) finding, implicitly, that an estoppel had in fact been established;

(ii) finding, implicitly, that the application of the doctrine of estoppel to enforcement of the Council's removal order was not precluded by the provisions of *URPA*, in particular s. 102;

(iii) finding that the onus of establishing the public interest in issuing the removal order rested on the Town;

(iv) substituting its own view of the public interest for that of the Town; and

(v) finding that, in any event, public interest is a factor properly considered in assessing the availability of estoppel as a defence to a valid removal order.

[71] The error in (i) above is an unreasonable finding of fact, there being no evidence of any representation, common assumption or inducement upon which Ms. Aisthorpe relied to her detriment. A finding of fact not supported by any evidence at all is an error of law which, in these circumstances, I would characterize as unreasonable.

[72] The error in (iv) above is, in essence, an error of jurisdiction since it engages a substitutionary authority an appeal board does not in law enjoy.

[73] Errors (ii), (iii) and (v) are, in my view, errors of law that, viewed either against a standard of correctness or reasonableness, cannot stand. They are conclusions of the Board that are both unreasonable and incorrect.

SUMMARY AND DISPOSITION

[74] For the reasons set out above, the Board's vacating of the Town's removal order of June 21, 2011 cannot stand. The order of the Board must be vacated.

[75] The remedial authority of the Court is limited by subsection 46(4) of *URPA*.

[76] Accordingly:

1. The order of the Eastern Newfoundland Regional Appeal Board of March 24, 2015 is vacated and the matter referred back to the Board with the following directions:

    (i) Any review by the Board of the June 21, 2011 discretionary decision ("Order") of the Town is limited to grounds relating to, or similar to, an excess or abuse of statutory authority, bad faith, or misconduct. The Board will not review the Order for reasonableness.

    (ii) As a matter of law, the doctrine of estoppel is not available to be used as a defence to the enforcement of the Order. Further, based on the record before and available to the Board up to and including its hearing in March 24, 2015, the facts do not support a finding that an estoppel – even if otherwise legally available – has been established.

2. The Board may conduct the reconsideration as it deems appropriate, subject to the directions set out above.

3. There is no order as to costs.

_____

DAVID B. ORSBORN
Justice

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN	Marie Aisthorpe	**Appellant**
AND	Town of Carbonear	**Respondent**
RESPECTING	Issuance of an Order	
BOARD MEMBERS	Victoria Connolly - Chair Michelle Downey Harold Porter	
DATE OF HEARING	March 24, 2015	

IN ATTENDANCE

Cynthia Davis - Town of Carbonear
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 a decision of the Town of Carbonear to issue an Order on June 21, 2011 to Marie Aisthorpe at 1 Russell Street. The Order required Ms. Aisthorpe remove a fence situated along the southern and eastern limits of her property. The Order stated that the fence is contrary to section 7 of the Town of Carbonear Development Regulations since no permit was issued for the erection of the fence.

Marie Aisthorpe appealed the Removal Order to the Eastern Newfoundland Regional Appeal Board on June 24, 2011. That appeal was heard by the Eastern Newfoundland Regional Appeal Board on May 1, 2012. At that hearing, the Board vacated the Town's decision to issue the Removal Order. The Town of Carbonear appealed the Eastern Newfoundland Regional Appeal Board's May 1, 2012 decision to the Supreme Court of Newfoundland and Labrador, Trial Division (General). Pursuant to section 46(4) of the *Urban and Ural Planning Act, 2000,* The Honourable Madam Justice Deborah J. Paquette referred the matter back to the Board for re-hearing and reconsideration as to:

- whether Ms. Aisthorpe's fence contravened the Town's Fence Regulations;
- whether issuance of the removal order was a valid exercise of the Town's discretionary authority; and
- whether, by virtue of the particular circumstances of this case, the doctrine of estoppel precludes enforcement of the removal order.

In accordance with the *Urban and Rural Planning Act, 2000* a public notice of the appeal was published in *The Compass* on November 8, 2011 and a notice of the time date and place of the Hearing was provided to the appellant and respondent by registered mail sent on February 2, 2015.

Legislation, Municipal Plans and Regulations Considered by the Board

The Urban and Rural Planning Act, 2000

The Carbonear Municipal Plan and Development Regulations, 2004

The Carbonear Fence Regulations, 2002

Matters presented to and considered by the Board

Was there a permit issued by the Town for the current fence?

The Board reviewed the Town of Carbonear Development Regulations as well as the Town's Fence Regulations and determined that a written permit is required prior to the construction of fence. The Board accepts that Ms. Aisthorpe did not have a permit for the fence located on her property.

Was Council aware of the fence prior to 2011?

The Board determined that Ms. Aisthorpe applied to the Town of Carbonear in 2002 for a permit to extend the dwelling and install a new access. Although the Town issued written permits with no reference to a new or replacement fence, a fence was illustrated on the site plans submitted with the extension and new access applications. Therefore, the Board concludes that Council must have been aware of the fence.

Does Ms. Aisthorpe's fence contravene the Town of Carbonear's Fence Regulations?

The Board confirmed at the hearing that Ms. Aisthorpe's fence contravenes the height requirements outlined in the Town's Fence Regulations. According to section 9 of the Town's Fence Regulations, the maximum height allowance for a fence located on a corner lot is "42 inches from the front building line forward on the principle street and from the back building line forward on the secondary street." Ms. Aisthorpe's fence measures 72 inches.

Why did the Town issue the Removal Order to Ms. Aisthorpe?

The Town indicated during the hearing that it was in 2011, while the Municipal Enforcement Officer (MEO) was investigating the construction of a neighbouring property's fence, when the Town discovered Ms. Aisthorpe's fence violated the Town's Fence Regulations. The Town stated that it required Ms. Aisthorpe remove her fence since it required the removal of the neighbour's fence. The Town conceded that the fact that the fence had existed on the property for a number of years was not taken into consideration prior to the issuance of the Removal Order.

Is it reasonable to order the removal of Ms. Aisthorpe's fence?

The Town maintains that the Removal Order was issued to Ms. Aisthorpe in a matter of fairness. The Authority claimed that since the Town issued an order to remove a fence on a neighbouring property, the Town must then also issue a removal order to Ms. Aisthorpe whose property is located across the street. However, the Board is unsatisfied that this was a reasonable decision due to the following information that was not considered by Council:

- The fence existed for at least eight (8) years.
- There were no previous complaints regarding the fence.
- The fence is clearly visible from the flanking streets.
- The fence was illustrated on previously approved plot plans submitted to the Town in 2002.
- The Town did not demonstrate that the fence had an adverse effect on public interest.

The Board accepts the fact that the appellant did not have a permit for her fence. Additionally, the Board acknowledges that the Town has the authority to issue an order when development exists without a permit. However, the Board found that it was not reasonable to issue the Removal Order due to the aforementioned.

Does the doctrine of estoppel preclude the Town from enforcing the removal order?

The Board learned from Justice Paquette's Supreme Court decision that, as a general rule, municipal rights, duties and powers cannot be vitiated by mere acquiescence, laches or estoppel. The Board acknowledges that this is a general rule and not an absolute one as outlined in the City of Toronto v. San Joaquim Investments Ltd. et al. (1978), 18 O.R. 730, Steele J.

As directed by Justice Paquette, the Board reviewed the particular circumstances of this appeal and determined that the doctrine of estoppel was found to be operative and thus precludes the Town from enforcing the removal order that was issued to Ms. Aisthorpe. It was not demonstrated to the Board that the Town acted in the public interest. Rather, the Board is satisfied that the Town used its discretionary authority in an attempt to act fairly towards and in the best interest of one other resident.

Conclusion

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties along with Justice Paquette's Supreme Court decision.

The Board understands that Council has the discretionary authority to issue an order when development exists contrary to the Town's regulations. However, based on its findings, the Board determined that the issuance of the Removal Order was not a valid exercise of the Town's discretionary authority due to the lack of reasonableness. Additionally, due to the fact the Town did not demonstrate to the Board that it used its discretionary powers to issue the Removal Order in the public interest, the Board found that in in this particular case, the doctrine of estoppel precludes the Town from enforcing the Removal Order. That is to say, the Removal Order issued to Ms. Aisthorpe on June 21, 2011 is vacated.

ORDER

Based on the information presented, the Board orders that the Order issued by the Town of Carbonear on June 21, 2011 for the removal of a fence from 1 Russell Street, Carbonear be vacated.

The Board further orders that the Town of Carbonear pay an amount of money equal to the appeal filing fee of $113.00 paid by the appellant to the appellant.

The Town of Carbonear is bound by this decision of the Eastern Newfoundland Regional Appeal Board which is binding on all parties.

DATED at St. John's, Newfoundland and Labrador, this 24th day of March, 2015.

Victoria Connolly, Chair
Eastern Newfoundland Regional Appeal Board

Michelle Downey
Eastern Newfoundland Regional Appeal Board

Harold Porter
Eastern Newfoundland Regional Appeal Board

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Carbonear (Town) v. Aisthorpe*, 2014 NLTD(G) 65
Date: 20140613
Docket: 201201G2647

BETWEEN:

TOWN OF CARBONEAR

APPELLANT

AND:

MARIE AISTHORPE

RESPONDENT

Before: The Honourable Madam Justice Deborah J. Paquette

Place of Hearing:	St. John's, Newfoundland and Labrador
Date(s) of Hearing:	25 September 2013 and 11 December 2013

Appearances:

J. William Finn, Q.C.	Appearing on behalf of the appellant
Marie Aisthorpe	Appearing on her own behalf

Authorities Cited:

CASES CONSIDERED: Paradise (Town) v. Newfoundland and Labrador (Regional Appeal Board), 2010 NLTD(G) 116; **Clarenville (Town) v. Eastern Regional Appeal Board**, 2004 NLSCTD 101; **Wnek v. Witless Bay (Town)**, 2003 NLSCTD 17; **Mount Pearl (City) v. Mount Pearl Local Board of Appeal** (1995), 131 Nfld. & P.E.I.R. 320, 56 A.C.W.S. (3d) 594 (Nfld. C.A.); **George (Re)**, 2012 NLTD(G) 196; **Sign-O-Lite Plastics Ltd. v. Kennedy** (1983), 48 B.C.L.R. 130, 29 R.P.R. 155

(S.C.); **3163083 Canada Ltd. v. St. John's (City)**, 2004 NLCA 42; **Fraser Valley (Regional District) v. Petrie**, 2005 BCSC 1385; **Aubrey v. Prince (Township)**, [2001] O.J. No. 123, 52 O.R. (3d) 274 (Sup. Ct.)

STATUTES CONSIDERED: *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8; *Limitations Act*, S.N.L. 1995, c. L-16.1; *Municipalities Act, 1999*, S.N.L. 1999 c. M-24

TEXTS CONSIDERED: Jay Brecher & Sheila Nemet-Brown, eds., *Halsbury's Laws of Canada, 1st ed., Administrative Law, 2013*, (LexisNexis Canada Inc., 2013); *Black's Law Dictionary*, revised 4th ed., *s.v.* "statutory obligation"

REASONS FOR JUDGMENT

PAQUETTE, J.:

BACKGROUND

[1] In 2002, Ms. Aisthorpe and her late husband purchased a home in the Town of Carbonear. Soon after purchase, they received approval from the Town of Carbonear (the "Town") to change the main access to their property to a different street, Church Street, with the result that the civic address, 1 Russell Street, now aligned with their backyard.

[2] Ms. Aisthorpe described the location of the house as "a very busy area":

> There's a school bus turnaround and two public schools and churches all around the area, and there's a five-point intersection on one corner of my property. So, because I am in a three-sided lot, my house didn't have much curbside appeal when I bought it in '02
>
> (pages 10 and 11 of the transcript of proceedings)

[3] The evidence at the appeal hearing disclosed that in an effort to create privacy, Ms. Aisthorpe replaced an old fence with a six-foot fence on the Russell Street side of her home, aesthetically incorporating it into large trees on the property. She and her husband intended to live in Carbonear on a permanent basis, but when her husband died, she moved with her two children to Dartmouth, Nova Scotia.

[4] Ms. Aisthorpe was deeply aggrieved when eight and one-half years later, the Town sent correspondence to her home in Dartmouth enclosing a removal order to "pull down" the fence within 30 days, citing that it had been built without a permit.

[5] She appealed the removal order to the Eastern Newfoundland Regional Appeal Board (the "Board") and a hearing pursuant to subsection 42(1) of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8 (the "*URPA*") was convened:

> Appeal
> 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.
>
> (2) A decision of a council, regional authority or authorized administrator to adopt, approve or proceed with a plan, scheme, development regulations and amendments and revisions of them is final and not subject to an appeal.
>
> (3) An appeal board shall not make a decision that does not comply with a plan, scheme and development regulations that apply to the matter being appealed.

(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.

(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.

(6) A board may meet as often as it considers necessary to conduct its work in an expeditious manner.

(7) A person or group of persons affected by the subject of an appeal or their representatives may appear before a board and make representations concerning the matter under appeal.

(8) A board may inform itself of the subject matter of the appeal in the manner it considers necessary to reach a decision.

(9) A board shall consider and determine appeals in accordance with this Act and a plan, scheme and regulations that have been registered under section 24 and having regard to the circumstances and merits of the case.

(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.

(11) Notwithstanding subsection (10), where a council, regional authority or authorized administrator may, in its discretion, make a decision, a board shall not make another decision that overrules the discretionary decision.

(12) The decision of a majority of the members of a board present at the hearing of an appeal shall be the decision of the board.

(13) A board shall, in writing notify the appellant and the appropriate council, regional authority or authorized administrator of the decision of the board.

[6] During the appeal hearing, Ms. Aisthorpe acknowledged that she did not apply for a permit specifically for the fence, but stated that she had received permission to develop the new access to her property and undertake a major renovation:

> The front of the house is—the permit gave me new access and I put a new front entry on that side of the house. So to me, that makes Church Hill my primary street. They gave me permission to do it, I've got a beautiful new front entry on that street and that became the front of my house.
>
> I needed some—I doubled the size of the house with the permission of the Town. I had to buy land from the Town to be able to build it and they allowed that. And during the construction of this extension to the house and changing the front of the house to Church Street, I had fenced in the backyard, giving privacy to the rear of the property, which does align with Russell Street, as they say, but it's—the fence is not along the front of the house on Russell Street, it's behind the house on Russell Street and nowhere is it in front on the house on Russell Street. And Russell Street, to me, is my secondary street, Church Hill is my primary street. So, with that being said and the regulations that were put in place in '04, or '02, I meet code with those regulations.
>
> So my argument is the fence was there when they issued the building permit and they drove by every day for all these years and I was in compliance; there was no issues for eight and a half years, I have issues now. So I believe I'm grandfathered, because no word to me is—compliance and agreement. The fact that they issued a permit to make the front of my house to be Russell Street—or, I'm sorry, Church Hill indicates that that's the front of the house. So, according to their laws and regulation, I am in compliance with that every which way. So those are the two main points, and the third point is that there's nothing in the regulations that covers a three-sided lot.
>
> (page 10 of the transcript of proceedings)

[7] Ms. Aisthorpe further described the notoriety of her fence within the Town, stating to the Board that the Town's workers even installed a stop sign post adjacent to her property "when I did the fence. They worked with me" (page 20 of the transcript of proceedings).

[8] Ms. Aisthorpe believes that the Town targeted her property after eight and one-half years for the sole reason that a new neighbour had felled large trees on her property and constructed a six-foot fence without seeking a permit:

> So, I believe I was triggered as an issue because she triggered it as an issue because her neighbor had issues with her. I don't know how that fits in this and fits with me, but for me to be in compliance for eight-and-a-half years and all of a sudden I'm not, it's very devastating.
>
> (page 14 of the transcript of proceedings)

[9] In its reasons filed 1 May 2012, the Board emphasized the lengthy delay preceding the issuance of the removal order. They relied upon the potential application of the *Limitations Act*, S.N.L. 1995, c. L-16.1 in vacating the Town's order:

> Does the Limitation Act apply?
>
> At the Hearing, the Board attempted to determine if there was a time limit under which Council could retroactively consider something that has been built in the absence of a permit. The Board reviewed Section 6(f) of the Limitations Act that prevents enforcement of an obligation arising from a statute aftger six years have elapsed.
>
> The Board is unaware if Section 6 of the Limitations Act applies to Council's consideration to issue an Order. It is clear that Council was aware that the fence existed in excess of six years prior to that consideration. Given the wording of the Limitations Act, the Board finds that there is a reasonable doubt as to the validity of Council's decision to issue the Order. Therefore, the Board will vacate Council's Order so that Council can undertake the necessary inquiries to determine if they have authority to issue such an Order.
>
> (Board Decision - 1 May 2012)

[10] The Town appealed the Board's decision by way of Notice of Appeal filed with the court on 14 May 2012. The Town directed the Notice of Appeal to Ms. Aisthorpe and the secretary of the Eastern Newfoundland Regional Appeal Board. The Board did not participate in these proceedings.

[11] The Town maintains that the Board erred in law and/or jurisdiction in vacating the order without having first made a decision as to whether subsection 6(f) of the *Limitations Act* was applicable. Alternatively, the Town submits that by vacating the removal order, the Board incorrectly decided that the *Limitations Act* was applicable.

[12] The Town seeks to have the matter referred back to the Board for re-hearing and/or re-consideration and determination aided by such direction as the court may deem appropriate.

STANDARD OF REVIEW

[13] The Town's statutory appeal is authorized pursuant to subsection 42 of the *URPA*:

> Appeal to court
>
> 46.(1) A decision of a board may be appealed to the court not later than 10 days after that decision has been received by the appellant.
>
> (2) An appeal of a decision of a board under subsection (1) may be made on a question of law or jurisdiction.
>
> (3) A board may be represented by counsel and heard on an appeal under this section.
>
> (4) The court shall either confirm or vacate the order of the board and where vacated the court shall refer the matter back to the board with the opinion of the court as to the error in law or jurisdiction and the board shall deal with the matter in accordance with that opinion.

[14] Dunn, J., in **Paradise (Town) v. Newfoundland and Labrador (Regional Appeal Board)**, 2010 NLTD(G) 116, stated that the standard of review for appeals pursuant to subsection 46(2) of the *URPA* was correctness. At paragraph 11 of her decision, she cites Adams, J. in **Clarenville (Town) v. Eastern Regional Appeal Board**, 2004 NLSCTD 101 for his articulation of the ambit of the statutory appeal:

> 11 In **Clarenville (Town) v. Newfoundland and Labrador (Eastern Regional Appeal Board)**[1], Adams, J., of this Court set out a succinct statement of the law at paragraphs 19-21, inclusive:
>
> > 19 It is worth pointing out that this is an appeal from the decision of the Board, not an application for judicial review of the decision of the Council. As a statutory appeal body, the Board has only that jurisdiction granted to it by the legislature, together with such ancillary powers as are by necessary implication required for it to fulfill its mandate.
> >
> > 20 An appeal to this Court from a decision of a board must be based on a question of law or jurisdiction, that is, a decision of the board by which it makes a legal interpretation or one which brings into question its jurisdiction to make any particular decision it has made.
> >
> > 21 The standard of review of such a decision on jurisdiction is correctness: Quigley v. Town Council of the Town of Torbay (2003 01T 2829, filed 20040304, unreported, decision of Orsborn, J. of the Newfoundland Supreme Court, Trial Division); Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982.

[15] Within the framework of this appeal, the court does not re-hear the proceedings before the Board and render its own decision. A determination is made as to whether the Board erred in law and/or jurisdiction in its decision. If so, the decision is vacated and the Board is provided direction as to the correct legal and jurisdictional principles to be applied to the particular circumstances arising in the context of its decision-making.

The Removal Order

[16] The Board was unsure whether the Town's delay in issuing the removal order was barred by the *Limitations Act*. Without deciding the matter as required under section 42 of the *URPA*, the Board instead directed that one of the parties to the Appeal, the Town, "undertake the necessary inquiries to determine if they have authority to issue such an Order" (Board Decision - 1 May 2012).

[17] The *URPA* provides the Board with the powers necessary to render a decision. By vacating the order under appeal by Ms. Aisthorpe without first deciding the merits of the appeal, it failed to render a decision in conformity with its statutory authority. If the Board was unsure of the legal effect of the *Limitations Act*, it was empowered under *URPA* to have the parties make representations to aid the Board to "reach a decision" and "inform itself of the subject matter of the appeal in the manner it considers necessary to reach a decision" (ss. 42(7-9)). It is the Board alone which must review the factors it considers necessary to make its decision. This principle is discussed by Jay Brecher & Sheila Nemet-Brown, eds., *Halsbury's Laws of Canada, 1st ed., Administrative Law, 2013*, (LexisNexis Canada Inc., 2013) at 234-235:

> **HAD-80 – Nature and significance of rule.** The rule of "he who hears must decide" is generally cited to prohibit any discussion in the decision-making process by people who haven't heard the matter, its evidence and arguments. It is a principle of fundamental importance in administrative law[1]. The principle requires that the decision-maker evaluate the relevant evidence, consider the arguments of the parties and direct its mind to the issues at hand to render the appropriate decision. There is no doubt that if an individual presents his or her case before the decision-maker makes a final determination, then the decision-maker to whom the presentation was made must be the one who actually decides the matter[2] and must have been present during the hearing to base the decision on the evidence.

[18] In failing to make a decision prior to vacating the order, the Board erred in law and jurisdiction.

[19] The Town also maintains that the Board erred in law in implicitly finding that the *Limitations Act* barred its issuance of the fence removal order. In addressing this argument, I will examine the statutory framework pursuant to which the Town exercised its regulatory authority.

[20] The Town is a municipal corporation, limited to its statutory powers. It follows that it must rely upon statutory provisions in the making and enforcement of orders affecting the property of its residents.

[21] On 2 December 2002, the Town adopted fence regulations pursuant to subsection 414(2)(hh) of the *Municipalities Act, 1999*, S.N.L. 1999 c. M-24 which provides:

> 414 (2) A council may make regulations …
>
> (hh) prescribing the height and type of construction of fences and requiring the owner or occupier of a lot abutting on a public highway within the municipality to fence the lot and to keep and maintain the fence in repair to the satisfaction of the council; ...

[22] The Town referred the court to the following sections of the *Town of Carbonear Fence Regulations*:

> S. 3 - A person shall not erect or start to erect a fence; extend or repair an existing fence; unless the location and building plans of fence is approved by the Council and a permit for the erection or repair of the fence has been issued by Council.
>
> S. 6 - Where a fence has been erected or started to be erected; or an existing fence is repaired or an extension added, without a permit from the Council, the Council may order the owner or builder to stop construction or pull down the fence within the time specified in the order

[23] The Town did not assert that the fence constituted a public safety concern in the sense that it obscured a "clear view" of streets or walkways as contemplated by section 5 of the *Fence Regulations*:

> S. 5 - No fence shall be permitted to be erected that obscures a clear view of street intersection, pedestrian pathways, driveways or other points of access or egress of vehicles or pedestrian traffic.

[24] *Town of Carbonear Development Regulations* came into effect in 2004. Section 7 of those regulations states:

> 7. 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 Authority.

[25] Under subsection 102(1) of the *URPA*, a council has discretion as to whether or not it will issue a removal order in relation to fences. The legislation does not require that the Town do so:

> Order
>
> 102.(1) Where, contrary to a plan or development regulations, a person has undertaken or commenced a building or other development, the council, regional authority or authorized administrator responsible for that plan or those regulations or the minister where he or she considers it necessary, may order that the person pull down, remove, stop construction fill in or destroy that building or development and may order that the person restore the site or area to its original state.
>
> (2) A person ordered to carry out an action under subsection (1) shall be served with that order and shall comply with the order at the person's own expense.
>
> (3) An order made under this section continues in force until revoked by the council, regional authority, authorized administrator, or minister that made the order.
>
> (4) A council, regional authority, authorized administrator or the minister may, in an order made under this section, specify a time within which there shall be compliance with the order.
>
> (5) Where a person to whom an order is directed under this section does not comply with the order or a part of it, the council, regional authority, authorized administrator or minister may take the action that it considers necessary to carry out the order and any costs, expenses or charges incurred by the council, regional authority, authorized administrator or minister in carrying out the order are recoverable against the person against whom the order was made as a debt owed to the council, regional authority, authorized administrator or the Crown.

[26] Pursuant to subsection 42(11) of the *URPA*, a Board is precluded from substituting its discretion for that of a Council:

42. …

(11) Notwithstanding subsection (10), where a council, regional authority or authorized administrator may, in its discretion, make a decision, a board shall not make another decision that overrules the discretionary decision.

…

[27] This court has had occasion to consider municipal discretion in the enforcement of removal orders. In **Wnek v. Witless Bay (Town)**, 2003 NLSCTD 17, Mercer, J. (as he then was) considered an order to remove commercial vehicles from a residential property as being in contravention of the Town of Witless Bay's Development Regulations. At issue was the Town's decision not to enforce its own removal order. Wnek sought a court order to require the Town to do so. Mercer, J. declined Wnek's request, finding that the Town had a discretionary authority relating to the enforcement of its own Development Regulations. The court would not interfere with that, absent proof that the Town's decision not to enforce its order was made for an improper purpose. Mercer, J. explained:

25 … The Court cannot order a specific outcome where discretionary power has been exercised unless, as noted above - para. 16, the only reason for failing to exercise the discretion in a particular manner was improper.

Wnek at para. 25

[28] At paragraph 27, Mercer, J. notes the factors taken into consideration by the Town in deciding not to enforce the Order, including the grandfather provisions of the Act, the impact upon the resident and the lack of complaint from adjoining landowners other than Wnek:

27 I find no impropriety in the Town's advertence to the foregoing factors. These factors would have been relevant in determining initially whether to issue the Order and are also relevant in assessing what enforcement steps, if any, are warranted in prevailing circumstances. The Town is entitled to reflect upon the appropriateness of the Order, to consider its repeal, and to decline to enforce the same in the situation described in the affidavit filed on its behalf.

Wnek at para. 27

[29] Dunn, J. in **Paradise (Town)** at para. 21, cited the Newfoundland and Labrador Court of Appeal's decision in **Mount Pearl (City) v. Mount Pearl Local Board of Appeal** (1995), 131 Nfld. & P.E.I.R. 320, 56 A.C.W.S. (3d) 594 (Nfld. C.A.) to explain the role of the courts regarding discretionary decisions of municipalities:

> 21 … Gushue, J.A. makes the following observations regarding discretionary decisions of municipal authorities commencing at paragraph 16:
>
> > 16 It is not a matter of the Board agreeing or disagreeing with the Council's decision. That is not the test. Neither is the Board permitted to substitute the exercise of its own discretion for that of Council. That essentially is what it did in overturning the decision for the reasons stated by it. With respect, it is the view of this Court that the Board has misconstrued and misapplied its powers as granted it under the Act.
> >
> > 17 The powers of courts to interfere with discretionary decisions of municipal authorities has been set forth clearly in the case of the City of Regina v. Cunningham (1994), 19 M.P.L.R. (2d) 14 (Sask. C.A.) which admonitions would needless to say, as stated above, apply equally to review by appeal boards. In that case, Lane, J.A., quoting from various other cases on the subject, stated:
> >
> > > The Courts are loathe to interfere with decisions made in good faith by statutory bodies, the members of which are voted or appointed to office because others have confidence in their experience and integrity. But when such bodies err by acting in excess of their statutory powers, the Courts will control them.
> > >
> > > .....
> > >
> > > The Courts have in recent years shown an increasing disposition to avoid interference with the legislative functions of municipal councils except in cases where there has been a clear excess or abuse of statutory authority or a disregard of some statutory condition upon which the right to exercise such authority is based.
> > >
> > > .....
> > >
> > > What is in the public interest is for Council to decide and when there is no evidence of misconduct its action is not open to review by the Court.
> > >
> > > .....
> > >
> > > In my opinion, a municipal council is a legislative body having a very limited and delegated jurisdiction. Within the

> limits of its delegated jurisdiction and subject to the terms of the delegation, its power is plenary and absolute and in no way subject to criticism or investigation by the Courts.
>
> 18 The above quotes make it very clear that before a court, or a review board, may overturn the actions of a municipal authority acting in the exercise of its discretionary power, it must be demonstrated that without question the municipal authority has acted in excess of those powers. ...

[30] At paragraph 30 of her decision in **Paradise (Town)**, Dunn, J. summarizes case law relating to the exercise of discretion by municipalities in order to provide guidance to the Board:

> 30 The Board, in future, may wish to consider the items enumerated hereafter, in its review of discretionary decisions made by town councils and/or municipal authorities:
>
> 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.
> (See: **Mount Pearl v. Mount Pearl Local Board of Appeal**, *supra*, paragraph 22)
>
> 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.
> (See: **Stroud v. Newfoundland and Labrador (Central Regional Appeal Board**, *supra*, paragraph 24)
>
> (ii) there is evidence of misconduct on the part of the town council and/or municipal authority.
> **(See: Stroud v. Newfoundland and Labrador (Central Regional Appeal. Board**, *supra*, paragraph 24 and **Mount Pearl v. Mount Pearl Local Board of Appeal**, *supra*, paragraph 22)

(iii) the town council and/or municipal authority has failed to act in good faith.
(See: **Stroud v. Newfoundland and Labrador (Central Regional Appeal Board**, *supra*, paragraph 24)

(iv) there is evidence of improper motive or illegality in the actions of the town council and/or municipal authority.
(See: **Clarenville (Town) v. Newfoundland and Labrador (Eastern Regional Appeal Board)**, *supra*, paragraph 23)

(v) the town council and/or municipal authority has failed to understand the request contained in the application before it.
(See: **Stroud v. Newfoundland and Labrador Central Regional Appeal Board**, *supra*, paragraph 24)

The foregoing listing is not exhaustive of situations which are worthy of consideration by a Board but are intended to assist it in its analysis.

Applicability of the *Limitations Act*

[31] The relevant provisions of the *Limitations Act* are subsections 2(a) and 6(1)(f) which provide:

> 2. In this Act
>
> (a) "action" includes a proceeding in a court and an exercise of a self-help remedy; …
>
> 6.(1) Following the expiration of 6 years after the date on which the right to do so arose, a person shall not bring an action …
>
> (f) to enforce an obligation arising from a statute; …

[32] The Town argues that the *Limitations Act* is inapplicable to the fence removal order. The Town referred the court to the definition of 'statutory obligation', as provided in *Black's Law Dictionary*, revised 4th ed., *s.v.* "statutory obligation":

> An obligation – whether to pay money, perform certain acts, or discharge certain duties – which is created by or arises out of a statute, as distinguished from one founded upon acts between parties or jural relationships.

[33] The Town submits that structures built without permission in contravention of the Town's Bylaws constitute a continuing offence pursuant to section 419 of the *Municipalities Act* and section 106 of the *URPA* and are not captured by the definition of "statutory obligation" as used in subsection 6(1)(f). Section 419 of the *Municipalities Act* states:

> 419. (1) A person
>
> (a) on whom an order has been served under this Act who refuses or fails to comply with the order within the time specified by the council;
>
> …
>
> (j) contravenes this Act or a regulation made under this Act,
>
> commits an offence.
>
> (2) Each day upon which the same offence is committed or continued is a separate offence.
>
> …

[34] Section 106 of the *URPA* states:

> 106.(1) A person who contravenes this Act or a regulation, order, municipal, regional, local area, protected area or other plan made under this Act, who interferes with or obstructs a person in the discharge of duties under the preceding or who tears down, removes or damages a notice posted or published under this Act is guilty of an offence and liable on summary conviction
>
> (a) for a first offence, to a fine of not less than $500 and not more than $1,000 and in default of payment to imprisonment for a period not exceeding 3 months or to both the fine and imprisonment; and

> (b) for a subsequent offence, to a fine of not less than $2,000 and not more than $5,000 or to a period of imprisonment not exceeding 6 months or to both the fine and imprisonment.
>
> (2) The conviction of a person for failing to comply with a requirement or obligation referred to in subsection (1) shall not operate as a bar to further prosecution under this Act for the continued failure on the part of the person to comply.
>
> (3) In addition to the penalty prescribed under subsection (1) a Provincial Court judge who convicts a person of an offence referred to in that subsection may order that person to remove or restore to its former state a building, structure or thing erected or placed on land or land dealt with contrary to this Act or regulations made under this Act and, if that person does not carry out that order within the time prescribed by the Provincial Court judge, he or she may designate a person to carry out the order and the cost of carrying out the order shall be borne by and may be recovered as a civil debt from the person convicted.

[35] The Town also submits that "action" as defined by the *Limitations Act* fails to capture the making of a municipal order:

> 2.(a) "action" includes a proceeding in a Court and an exercise of a self help remedy.

[36] The Town referred the court to a decision of Handrigan, J. in **George (Re)**, 2012 NLTD(G) 196 for clarification of the meaning of both "self help remedy" and "action" as that term is used in the *Limitations Act.*

[37] The court in **George** considered subsection 7(1)(g) of the *Limitations Act*, which provides:

> **7**.(1) Following the expiration of 10 years after the date on which the right to do so arose, a person shall not bring an action or proceeding
>
> …
>
> (g) to recover land.

[38] At issue was whether "action" within the meaning of subsection 2(a) of the *Limitations Act* had been taken by an individual seeking to recover land, prior to the expiration of 10 years. Mr. George claimed that he took the requisite action by retaining legal counsel and filing a statutory declaration in the Registry of Deeds describing his interest in the land. In finding that the "actions" relied upon by **George** did not constitute a "court proceeding" or "self help remedy" within the meaning of subsection 2(a) of the *Act*, Handrigan, J. stated:

> 43. Earl George instructed Hughes, Q.C. to send a letter to his brother and to file a statutory declaration at the Registry of Deeds so he could assert a claim to the property. Neither the letter nor the statutory declaration Earl George filed in the Registry is an "action" to recover land, as readily appears from simply considering the first part of the definition of "action" in our **Limitations Act** - "a proceeding in a court". "Proceeding" is not defined in the **Limitations Act** but it is defined in section 2(p) of our **Judicature Act**[21] as "a civil or criminal action, suit, cause or matter, or an interlocutory application, including a proceeding formerly started by a writ of summons, 3rd party notice, counterclaim, petition, originating summons, originating motion or in another manner". I say no more about whether the letter or the statutory declaration could be considered "a proceeding in a court".
>
> 44. Did Earl George "exercise a self-help remedy" when he either instructed his lawyer to write the letter to his brother or he registered the statutory declaration in the Registry of Deeds? Arguably, he did; but to what effect? If, as he did, Gerald George ignored the letter he received from Hughes, Q.C., Earl George did not benefit from the letter since it would have taken a proceeding in a court to enforce it. Similarly, Earl George did not invoke any extra-judicial enforcement procedures simply by registering a statutory declaration in the Registry of Deeds that he claimed an interest in the land. In fact, the statutory declaration did not form a charge on the property or prevent Gerald and Gwen George from dealing in the land. As with the letter, Earl George would have to do something more to enforce his claimed rights and that too would have entailed a proceeding in a court.
>
> (paras. 43-44)

[39] The Town also referred the court to paragraph 10 of **Sign-O-Lite Plastics Ltd. v. Kennedy** (1983), 48 B.C.L.R. 130, 29 R.P.R. 155 (S.C.), wherein a "self help remedy" is discussed:

> 10 What is a "self help remedy"? Jowitt's Dictionary of English Law (2d Ed.) defines it as:
>
> "action by an injured party to obtain redress without recourse to a court".
>
> Black's Law Dictionary (5th Ed.) defines it to be:
>
> "Taking an action in person or by a representative with legal consequences, whether the action is legal or not; for example, a 'self-help eviction' may be a landlord's removing the tenant's property from an apartment and locking the door against the tenant
>
> The Oxford Companion to Law says this:
>
> "self-help - the term for those kinds of legal remedies which a person may use at his own hand, with*out need to seek any order of court*. These include self-defence, distress damage feasant, abatement of nuisance, arrest of a criminal and a few others." (The italics are mine.)

[40] I find that the Town's removal order was not an action within the contemplation of subsection 6(f) of the *Limitations Act.*

Acquiescence and Estoppel

[41] The stated rationale for the Board's decision to forthwith vacate the removal order was concern with the significant delay preceding the Town's decision to issue the removal order.

[42] Throughout the hearings, Ms. Aisthorpe maintained her position that the Town had actual knowledge of the fence's location and height through the process of approving her renovation and access change using illustrated site plans and through their subsequent interactions with her. She states in her written submission: "The fence was erected more than eight years ago and Council knew or ought to have known of the existence of the fence and made issue with the fence in that intervening time." She maintains that she has been prejudiced by the Town's actions and that the sale of her house is in jeopardy due to its lack of privacy without the fence. She submits that equitable relief in the nature of

estoppel or laches is applicable because the Town "slept on its rights" to enforce its regulations.

[43] The Newfoundland and Labrador Court of Appeal in **3163083 Canada Ltd. v. St. John's (City)**, 2004 NLCA 42 had occasion to consider the doctrine of estoppel in the context of municipal action. In that case, the appellant claimed that the City of St. John's was precluded from insisting upon a mandatory pre-condition to the filing of an appeal from a tax assessment because an official of the City had provided assurance that it was not necessary. Welsh, J.A., writing for the majority, explained the nature of estoppel against a municipal corporation:

> 33. When the issue of estoppel arises in the municipal context, an additional factor must be considered. The general principle is stated in Rogers, The Law of Canadian Municipal Corporations, 2nd edition, looseleaf (Toronto: Carswell, 1999), at page 388.1:
>
> > As a general rule municipal rights and powers are of such a public nature that they cannot be lost or vitiated by mere acquiescence, laches or estoppel.... It has also been said that the doctrine can never interfere with the proper carrying out by local authorities of the provisions of a statute and that there can be no estoppel or waiver of their public rights and duties. The doctrine of estoppel has no application to the law governing assessment and taxation of a property for municipal purposes.
>
> 34. However, the text goes on to qualify these broad statements, at page 389:
>
> > These are statements of the general rule and there is authority to the contrary that a municipal corporation may be bound by acquiescence the same as an individual may but that the rule should not be enforced against them as strictly and to the same extent as against other corporations and individuals.
>
> Judicial authority for this last proposition, cited in the Rogers' text, is Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd., [1994] 1 S.C.R. 80. The issue in that case related to the power of the municipality to collect arrears which resulted from a mistake in billing made by the Town. Vacationland Dairy had been undercharged for several years for electric power because an improper multiplier had been used to calculate the amount due. In concluding that estoppel applied to prevent Kenora Hydro from collecting the arrears, Major J., speaking for the majority, explained, at pages 111 to 112:

> ... In this context, the most defensible interpretation of the Ontario legislation is that it is designed to prevent deliberate, unauthorized discrimination among power customers. The penalty provision is not directed against simple negligent mistakes.
>
> A statute can only affect the operations of the common law principles of restitution and bar the defence of estoppel or change of position where there exists a clear positive duty on the public utility which is incompatible with the operation of those principles.... The defence of estoppel is thus an expression of what the common law has considered to be sufficient justification to release a defendant from liability in the pursuit of fairness, and, applying those principles to this case, the Co-op would no longer be liable to Kenora Hydro.
>
> The Power Corporation Act does not express a policy of rate non-discrimination that excludes estoppel or change of position.

35. However, due to the importance of the public interest component, the application of estoppel in the municipal context depends significantly on the particular facts in issue. For example, in Hensrud v. City of Regina (1994), 115 D.L.R. (4th) 69 (SKQB) (affirmed without reasons, (1994), 121 D.L.R. (4th) 188 (SKCA)), the issue was whether the purchaser of a condominium could rely on a tax certificate provided by the City when the certificate did not contain a warning that the property may be subject to a supplementary assessment which the purchaser would be liable to pay. In refusing to apply the doctrine of estoppel, Barclay J. concluded that the payment of the tax at issue was governed by the legislation, which "represents a complete statutory code governing the assessment and taxation of property, including the effect of appeals of assessment and the imposition and payment of taxes resulting from unsuccessful appeals" (page 78).

36. Other judicial authority demonstrates the potential for a harsh result when the general principle is applied to preclude reliance on the doctrine of estoppel. This was the case in Township of Langley v. Wood (1999), 173 D.L.R. (4th) 695 (BCCA). Wood placed a dwelling on property zoned for single family dwellings. Although the building permit included this stipulation, before the house was located on the property, Wood met with Township officials, including the building inspector and "plan checker", and obtained their approval to use the dwelling to house seasonal farm workers and then as accommodation for two families. The Court noted, at paragraph 4:

> The learned judge below found that "the preponderance of evidence establishes that the owner at least had the Township's informal blessing when the building permit was issued".

37. Nonetheless, the Township submitted that it was entitled to rely on the zoning bylaw, regardless of any alleged condonation or acquiescence relied on by Wood. Citing judicial authority from 1859 and 1903, the Court concluded, at paragraph 12:

> As a general rule, municipal rights, duties and powers, including the duty to carry out the provisions of a statute, are of such public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel.

In the result, Wood was precluded from relying on the doctrine of estoppel.

38. A similar harsh result is found in Northern Alberta Agribusiness Ltd. v. Town of Falher (1980), 14 Alta. L.R. (2d) 97 (ABQB). In that case, the Town passed a resolution granting a tax abatement to Agribusiness. The abatement induced Agribusiness to build an alfalfa plant within the Town's boundary. Unfortunately, the resolution was inconsistent with the Municipal Government Act which precluded the Town from granting a tax abatement. Refusing to apply the doctrine of estoppel, Crossley J. concluded, at paragraph 11:

> In that regard any such resolution by the defendant is clearly invalidated by s. 108 of The Municipal Government Act. As well, any agreement entered into by the parties is invalid, for it is ultra vires the powers of the defendant. Due to the public nature of a corporation such as the defendant, it cannot be estopped from showing that it had no power to enter into the agreement. [authority cited] These [decisions] establish that a person dealing with a public corporation does so at his peril and must take notice of the statutory limits within which the public corporation may operate.
> (emphasis added)

39. The same principle is also stated in Re James and Town of Richmond Hill (1986), 54 O.R. (2d) 555 (Ont. H.C.), at page 558:

> It is common ground that a municipality being a Corporation created by statute has only such authority as is granted by statute and when a municipality acts in excess of its powers, no other party can thereby acquire any legal right capable of being enforced against the municipality.

> 40. However, in that case, the harsh result, that would have obtained had the principle precluding operation of the doctrine of estoppel been applied, was avoided by a legislative interpretation which circumvented the need to rely on estoppel.
>
> 41. It follows from these decisions that, when the doctrine of estoppel is raised in the municipal context, a two stage analysis is engaged. The first step is to determine whether estoppel is established on the facts of the particular case. The second step is to analyse the circumstances, with particular attention to the legislation, to determine whether operation of the doctrine of estoppel is prohibited or permitted.

[44] In her analysis at paragraphs 64-68, Welsh, J.A. concludes that estoppel by convention was established against the City:

> 64. The question, then, is whether, in this context, the operation of the doctrine of estoppel is prohibited or permitted. The decisions cited above (paragraphs 35 to 40), where the property owner was precluded from relying on estoppel, dealt with issues such as the abatement of tax, compliance with zoning regulations and the imposition of supplementary taxes. These are substantive issues relating to the payment of taxes and compliance with City bylaws and regulations. As such, they would directly affect the public interest. In these circumstances, reliance on estoppel would defeat a positive statutory obligation or effect results contravening public policy.
>
> 65. In the appeal before this Court, the rationale that would preclude reliance on estoppel is not engaged. Section 35 of the Act simply provides an enforcement mechanism which is available to the City. The City is not required to prosecute although a person who fails, neglects or refuses to provide information "is guilty of an offence". When the City indicates by its conduct that it does not intend to rely on section 35, there is no compelling reason to apply the principle that, generally, estoppel does not operate in the municipal context. In fact, quite the contrary.
>
> 66. Subsection 35(2) does not impose a positive statutory obligation on the City. Nor would the City's failure to rely on the provision effect results which contravene public policy. The effect of permitting estoppel to operate in respect of subsection 35(2), would simply be to allow the taxpayer to proceed with the appeal of a property assessment.
>
> 67. The right to appeal the decision of a City official who has calculated the value of property for purposes of the assessment roll should not be

> restricted in the absence of compelling rationale. The right to appeal is a fundamental constituent of fairness and justice. Estoppel is an equitable doctrine which should not be set aside without good reason.
>
> 68. In this case, the elements of estoppel by convention have been established. Given the nature of the right at issue under section 35, a limitation on the operation of estoppel in the municipal context, to the extent such limitations exist, is not engaged. Accordingly, the City is precluded from relying on section 35 of the Act to bar the appeal of Labatt's assessment. Labatt has the right to proceed with its appeal of the City's assessment for the 2001 tax year. For that purpose, the matter is remitted to the Assessment Review Court.

[45] The Town referred the court to a decision of the Supreme Court of British Columbia in **Fraser Valley (Regional District) v. Petrie**, 2005 BCSC 1385. There, the town sought an injunction to remove a small residence built in an area where residential buildings were prohibited. The individuals conceded that they breached the by-law in constructing the residence and did not apply for a building permit because they knew they would not be entitled to build in that location. They nonetheless maintained that the municipality was estopped from ordering the removal of the residence "because of the conduct in condoning numerous other violations over many years" (at para. 6).

[46] On review of the facts and the law, the Court concluded that this was not a situation in which "the very narrow discretion" available to the Court would be used to prevent the municipality from enforcing its by-laws (at para. 30).

[47] The Ontario Superior Court of Justice in **Aubrey v. Prince (Township)**, [2001] O.J. No. 123, 52 O.R. (3d) 274 (Sup. Ct.) also referred to potential exceptions to the general rule that estoppel will not preclude the enforcement of municipal by-laws. In that case, residents maintained that the town was estopped from enforcing a zoning by-law because it had acquiesced in their use of their summer cottages as year-round residences.

[48] Stortini, J. did not decide the matter in this summary application, but did comment on the legal considerations arising:

> 9. The jurisprudence indicates that as a general rule laches do not apply to a municipal corporation. A mandatory injunction is an equitable remedy. A Trial Court would be hard pressed to grant an injunction to the plaintiffs compelling the defendant to carry out duties which are not mandated by by-law or statute. Such injunction, if granted, would be in favour of persons who are clearly in breach of the Zoning By-law. Both parties have available alternative remedies. The plaintiffs could formally apply to council for a zoning amendment with the right to appeal to the Ontario Municipal Board, if necessary. By exercise of democracy, the plaintiffs could also seek to elect councilors who are favourably disposed to their plight. On the other hand, the defendant has recourse to prosecutorial measures if there is a breach of its By-law.
>
> …
>
> 12. In summary, therefore, the plaintiffs are asking the Court to grant an equitable remedy to force the defendant to carry out non-statutory duties in the face of the plaintiffs occupation of permanent residences contrary to the Zoning By-law. In my view this is not a genuine issue for trial. In the result, therefore, the defendant's motion for summary judgment is granted. The plaintiffs' action is dismissed.
>
> 13. With regard to the counterclaim, the defendant is also seeking an equitable remedy by way of a mandatory injunction to remove the plaintiffs from their permanent residences. In this situation the doctrine of laches and estoppel may well bar the defendant from the remedy sought. The jurisprudence referred to above does not absolutely rule out the application of such defences. In the City of Toronto v. San Joaquim Investments Ltd. et al. (1978), 18 O.R. 730, Steele J., at p. 742, stated:
>
> > 'The doctrine of estoppel normally does not apply to a municipal corporation but where lands have been used and acknowledged as having been used over a period of almost 50 years and a municipality applies for an equitable remedy such as an injunction consideration should be given to this usage and recognition."
>
> 14. The cases refer to a "general" rule and not an absolute one that such doctrines are not to be resorted to in actions involving municipalities. At trial the estoppel may be found to be operative in the circumstances without disrespecting or invalidating the Zoning By-law in question. In my

> view, there is a genuine issue for trial here. The motion for summary judgment granting the counterclaim is dismissed.

(**Aubrey** at paras. 9, 12-14)

CONCLUSION

[49] Based on the foregoing, I am satisfied that the Board erred in law and jurisdiction:

i) in vacating the removal order prior to making a decision on the merits of the appeal; and
ii) in delegating its decision-making authority to the Town.

[50] I further find that the Board erred in law in its consideration of the ambit of the *Limitations Act*. The *Limitations Act* does not bar the Town from its authority to enact removal orders.

[51] Pursuant to subsection 46(4) of the *URPA*, the matter is referred back to the Board for re-hearing and reconsideration as to:

i) whether Ms. Aisthorpe's fence contravened the Town's Fence Regulations;
ii) whether issuance of the removal order was a valid exercise of the Town's discretionary authority; and
iii) whether, by virtue of the particular circumstances of this case, the doctrine of estoppel precludes enforcement of the removal order.

[52] In deciding these matters, the Board shall take into consideration the legal and statutory authorities referred to in these reasons as they apply to the facts in this appeal.

[53] The Board shall provide an opportunity to the parties to adduce additional evidence and make further submissions to the Board.

[54] There shall be no order as to costs.

_____

DEBORAH J. PAQUETTE
Justice

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN	Marie Aisthorpe	**Appellant**
AND	Town of Carbonear	**Respondent**
RESPECTING	Issuance of an Order	
BOARD MEMBERS	Victoria Connolly - Chair Michelle Downey Harold Porter	
DATE OF HEARING	May 1, 2012	

IN ATTENDANCE

Marie Aisthorpe, Appellant
Lisa Rogers, Interested Party
Cynthia Davis, Town of Carbonear
Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board
Geralyn Lynch, Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts / Background

This appeal arises from a decision of the Town Council of the Town of Carbonear on June 21, 2011 to issue an order to Marie Aisthorpe at 1 Russell Street within in the Town of Carbonear that a fence erected on the property be removed.

Marie Aisthorpe appealed the decision of the Town of Carbonear to this Board on June 24, 2011 on the basis that the fence has been in place since 2003 or 2004.

In accordance with the *Urban and Rural Planning Act, 2000* a public notice of the appeal was published in *The Compass* on November 8, 2011 and a notice of the time date and place of the Hearing was provided to the appellant and respondent by registered mail sent on April 19, 2012.

Legislation, Municipal Plans and Regulations Considered by the Board

The Urban and Rural Planning Act, 2000: Sections 2, 42 and 102.
The Limitations Act, Section 6
The Carbonear Municipal Plan
The Carbonear Development Regulations
The Carbonear Fence Regulations

Matters presented to and considered by the Board

Was there a permit issued by the Town for the current fence?

The Board learned from evidence submitted at the Hearing that Ms. Aisthorpe did not apply for, nor was granted, a permit for the fence that was constructed at the subject property. Both the Carbonear Development Regulations and Fence Regulations require that a written permit is required to be issued prior to the construction of a fence.

Did Council implicitly approve the fence at the time that it was originally constructed?

The Board determined that Ms. Aisthorpe applied for a permit to extend the dwelling and install a new access some time ago; those applications were approved by Council and written permits were issued with no reference to either a new or replacement fence. Although a fence was illustrated on the site plans submitted with the extension and new access applications, there was no evidence to suggest that the illustrated sought approval of a new or replacement fence.

The Board also recognizes that the fence was built as many as eight years ago and Council must have been aware of the fence and made no issue with the fence in that intervening time.

Does the Council have authority to issue an order?

The Board determined that Council has a discretionary authority to enforce an action arising from Section 102 of the Urban and Rural Planning Act, 2000 when development occurs in the absence of a written permit. It is clear that no explicit permit had been sought or granted for the fence when it was built in 2003 or 2004.

Was the Order issued appropriately?

Council referenced its legislative and regulatory authority when it issued the Order and made its decision in an open Council meeting. The Board found that Council's Order does not appear to contradict any aspect of the Urban and Rural Planning Act, 2000.

Does the Limitations Act apply?

At the Hearing, the Board attempted to determine if there was a time limit under which Council could retroactively consider something that has been built in the absence of a permit. The Board reviewed Section 6(f) of the Limitations Act that prevents enforcement of an obligation arising from a statute after six years have elapsed.

The Board is unaware if Section 6 of the Limitations Act applies to Council's consideration to issue an Order. It is clear that Council was aware that the fence existed in excess of six years prior to that consideration. Given the wording of the Limitations Act, the Board finds that there is a reasonable doubt as to the validity of Council's decision to issue the Order. Therefore, the Board will vacate Council's Order so that Council can undertake the necessary inquiries to determine if they have authority to issue such an Order.

Conclusion

Based on its findings, the Board determined that the Council may not have authority to issue the Order due to the time lapse between the construction of the fence and the decision to issue the Order.

ORDER

Based on the information presented, the Board orders that the June 21, 2011 decision of the Town of Carbonear to issue an order for the removal of a fence from 1 Russell Street, Carbonear be vacated.

The Board further orders that the Town of Carbonear pay an amount of money equal to the appeal filing fee of $113.00 paid by the appellant to the appellant.

The Town of Carbonear is bound by this decision of the Eastern Newfoundland Regional Appeal Board which is binding on all parties.

DATED at St. John's, Newfoundland and Labrador, this 1st day of May, 2012.

Victoria Connolly

Victoria Connolly, Chair
Eastern Newfoundland Regional Appeal Board

Michelle Downey

Michelle Downey
Eastern Newfoundland Regional Appeal Board

Harold Porter

Harold Porter
Eastern Newfoundland Regional Appeal Board