

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

RECORD OF APPEAL DECISION

BETWEEN Jerome Terry **Appellant**

AND City of Mount Pearl **Respondent**

RESPECTING Development Permit
to construct a fence-secured parking compound
at 835 Topsail Rd.

BOARD MEMBERS Michelle Downey – Chair
Mary Thorne-Gosse
Colleen Hanrahan

DATE OF HEARING June 15, 2017

IN ATTENDANCE

Jerome Terry – Appellant
Mike Walsh – Representative for appellant
Julia Schwarz – Authority, City of Mount Pearl
Christopher Hardy – Authority, City of Mount Pearl
Robert Cotter – Secretary to the Eastern Newfoundland Regional Appeal Board
Kim Blanchard – Technical Advisor to the Eastern Newfoundland Regional Appeal Board

SUMMARY

This appeal arose from a situation in which development had taken place without prior approval by the City of Mount Pearl (the City). Mr. Jerome Terry brought the matter to the attention of the City on October 2, 2016. A municipal inspector acted on the complaint on October 3, 2016 by communicating the development permit requirements with the individual who had undertaken the development, Mr. Chris Wilkes. An application was filed by Mr. Wilkes of East Coast Upfitters on October 3, 2016. On October 13, 2016, the City approved the development of a fenced parking compound at the rear of the commercial building located at 835 Topsail Road, subject to a list of conditions to be met by the applicant, East Coast Upfitters. On October 27, 2016, Mr. Terry filed an appeal with the Eastern Newfoundland Regional Appeal Board against Council's decision to issue the conditional development permit.

The appeal was heard by the Board on June 15, 2017. Based on its consideration of the evidence and analysis, and for the reasons stated below, the Board Orders that decision by the City of Mount Pearl to issue conditional development approval for a fenced parking compound at the rear of the commercial building located at 835 Topsail Road, be **confirmed**.

BACKGROUND

On October 2, 2016, Mr. Jerome Terry, who operates a business at 835 Topsail Road, informed the City of Mount Pearl that a fenced parking compound was constructed by another tenant of the building at that location. The parking compound had been built by Mr. Chris Wilkes of East Coast Upfitters to meet the requirements of a public tender for decommissioning of RCMP vehicles. On October 3, 2016, the City Inspector informed Mr. Wilkes that a development application was required for the fenced parking compound located at 835 Topsail Road. That same day, East Coast Upfitters applied to the City for a Development Permit. The City issued a conditional development permit to the applicant on October 13, 2016.

The subject property located at 835 Topsail Road is zoned both Commercial – Mixed (CM) and Conservation (CON). The secure parking compound is located in the rear lot, which is zoned Conservation.

Upon issuance of the conditional development approval, Mr. Jerome Terry filed an appeal with the Eastern Newfoundland Regional Appeal Board on October 27, 2016.

EVIDENCE

At the hearing, the Technical Advisor to the Board presented a report outlining the legislative, regulatory, and zoning authorities that govern the Council as related to circumstances presented in this case. The Board also heard arguments made on behalf of the appellant, and responses to the arguments on behalf of the City. Key issues raised in the grounds for appeal are:

1. the City did not practice due diligence in processing the application. Specifically, the appellant argued that the other tenants of the building were not consulted about the development, and the impacts on them would be negative, and
2. though the appellant brought to the City's attention that this was illegal development, the City did not issue any Orders against the developer.

A question was also raised as to whether the fenced parking compound would truly constitute "parking" or, rather, would be "storage".

Matters considered by the Board

Did the City have a requirement to consult with the building tenants or public?

The Appellant stated that the tenants of the property could be negatively impacted by the fenced parking compound as it interfered with the space around the building, such as impact on parking spaces, traffic circulation for tenants' requirements, and a snow-clearing. The tenants were not given notice of the application and provided with an opportunity to make their views known to the City of Mount Pearl. The representative of the Authority stated that, according to the City of Mount Pearl Development Regulations, section 4.17, Public Notification, it had no obligation for consultation regarding a permitted use application.

What is the usual course of action taken by the City when it is brought to light that development precedes the development application?

The Appellant argued that the fenced parking compound was constructed without a permit and the City should address the unpermitted development. The Board asked the City's representative about its practice in such situations. The City's representative informed the Board that it typically employs a two-stage process in which a violation notice is sent to the developer indicating that a development application is needed. If this notice does not result in compliance with the Development Regulations, then the City Council will consider exercising its authority to issue an Order. In this case, the application was immediately filed to begin the development application process, so there was no basis for Council to consider the issuance of Orders.

At the hearing, the Authority acknowledged that the development had taken place without the benefit of any municipal permits. However, the City explained that, immediately after the City inspector contacted Mr. Wilkes, a development application was filed. The City argued that it followed its normal procedures for considering the development.

Is the subject fence in compliance with the City's Fence and Retaining Wall Regulations?

A question was raised in the report of the Technical Advisor as to whether the fence met the regulations. The Board was advised by the City that it issued a Development Permit, with conditions, for the fenced parking compound in question. The Authority explained that, due to the requirement that the development process halt upon filing of an appeal, the next stage of the process to address specific conditions for a Development Permit did not proceed. Therefore, the City has yet to determine if the fenced parking compound is developed according to the conditions placed on the approval, or meets the requirements of the Municipal Plan, Development Regulations, and the Fence and Retaining Wall Regulations. Compliance with the conditions of the development approval is determined prior to the issuance of a Building Permit.

Is a fenced parking compound permitted at the subject property?

The Board queried the nature of the use of the compound – when does parking become storage? The City outlined for the Board that the conditions on the development permit placed limitations on the use of the fenced parking compound.

Analysis

Legislative provisions

The appeal met the statutory requirements to extend jurisdiction to the Board to hear it. Section 42 of the *Urban and Rural Planning Act* provides for the right of appeal.

The appeal was filed within the required timeframe as per section 42(4) of the *Urban and Rural Planning Act* and included the necessary information as outlined in section 42(5) of the *Act*.

Upon issuance of the conditional development approval, Mr. Terry exercised his right to file a third party appeal. The filing of the appeal resulted in the process coming to a halt, pending the decision of the Appeal Board. Section 45 of the *Urban and Rural Planning Act*, states:

45. (1) *Where an appeal is made under section 42, the development with respect to the appeal, work related to that development or an order that is under appeal shall not proceed or be carried out, pending a decision of the board.*

In this circumstance, the fenced parking compound had been erected and the effect of filing the notice of appeal was to suspend the Authority's consideration of whether the developer satisfied the City's Development Regulations and conditions stipulated in the development permit.

Procedure of the Authority when a violation is identified

The City acted on the information provided by the appellant when the violation was reported. The developer responded by filing an application immediately. Based on the evidence of the City's usual practice in situations where development has proceeded without a permit, there was no indication that the actions of the City in this circumstance were outside its usual practice.

Zoning

The zoning of the land on which the fenced compound was erected is Conservation. The Board considered if "parking" was listed as a permitted use in the Conservation zone.

A *parking lot* is listed as a permitted use in the Conservation Use Zone Table in section 11.27.1 of the City of Mount Pearl Development Regulations.

11.27 CONSERVATION (CON) ZONE

11.27.1 Permitted Uses Other:

- (a) Access (2013-08-16)*
- (b) Civic Use*
- (c) Community Garden (Subject to Regulation 7.9) (2016-06-17)*
- (d) Conservation*
- (e) Park*
- (f) Parking Lot (2013-08-16)*

Section 2 of the City's Development Regulations defines *parking lot* as "a lot used solely for the parking of motor vehicles."

Based on the evidence before the Board, a parking lot is a permitted use within the Conservation Zone. The City had the authority to issue a conditional development permit for a fenced parking compound.

Requirement for public consultation

As for the appellant's assertion that the City had not exercised due diligence by consulting with the tenants of the property, the City of Mount Pearl Development Regulations, section 4.17, "Public Notice", provide for circumstances when public notification of development applications public notice is required.

Under the City of Mount Pearl's Development Regulations, where a use is listed as a permitted use within the Conservation zone, there is no requirement to confer with the public.

The proposed parking use in this particular application is listed as permitted in the Conservation zone. There was under no obligation or legal requirement for the City to consult with the public. The Board accepted that the City considered the application an associated use to the existing permitted use as a garage, thus the application did not trigger public notice requirements.

Parking vs. Storage

Parking is defined in the City of Mount Pearl Development Regulations, Section 2, and limits parking to motor vehicles.

Further, the City of Mount Pearl Development Regulations, Section 4.13.2 allows the Authority to attach conditions to its development permits.

4.13.2 Council may attach to a permit such conditions as it deems fit in order to ensure that the proposed development will be in accordance with the purposes and intent of these Regulations.

The City attached conditions to the Development Permit issued to the developer. Conditions in the Development Permit include;

1. *The fence be erected and maintained in accordance with the Mount Pearl Fence and Retaining Wall Regulations, 2013.*
2. *The fenced area (sic) shall be used for the secured parking of vehicles only.*
3. *There shall be no other equipment, products, or chemicals stored with the secured parking area.*

The Board accepted that the use was in accordance with the definitions as stipulated in the City's Development Regulations, and conditions on the Development Permit restricted the use to parking, not storage.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

Minister's Development Regulations, NLR 3/01

City of Mount Pearl Municipal Plan and Development Regulations

City of Mount Pearl Fence and Retaining Wall Regulations

CONCLUSION

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

The Board is bound by section 42 of the *Urban and Rural Planning Act, 2000* and therefore must make a decision that complies with the applicable legislation, policy and regulations.

Based on its findings, the Board determined that the City of Mount Pearl had the authority to issue a conditional development permit, and did so in accordance with the *Urban and Rural*

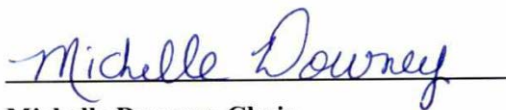
Planning Act, 2000. Therefore, the Board confirms the City's decision to issue a conditional development permit for a fenced parking compound as issued on October 13, 2016.

ORDER

Based on the information presented, the Board orders that the decision made by the City of Mount Pearl to issue a conditional development permit for a fenced parking compound at 835 Topsail Road, as issued on October 13, 2016, be confirmed.

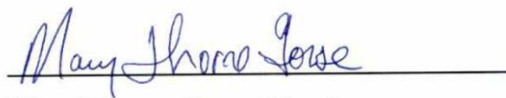
According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Eastern Newfoundland Regional Appeal Board may be appealed to the Supreme Court of Newfoundland and Labrador Trial Division on a question of law or jurisdiction. If this action is contemplated, the appeal must be filed no later than ten (10) days after the Board's decision has been received by the Appellant.

DATED at St. John's, Newfoundland and Labrador, this 15th day of June, 2017.



Michelle Downey, Chair

Eastern Newfoundland Regional Appeal Board



Mary Thorne-Gosse, Member

Eastern Newfoundland Regional Appeal Board



Colleen Hanrahan, Member

Eastern Newfoundland Regional Appeal Board

APPENDIX
APPLICABLE LEGISLATION / POLICIES / REGULATIONS

URBAN AND RURAL PLANNING ACT, 2000

42. Appeal

(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.*

CITY OF MOUNT PEARL DEVELOPMENT REGULATION, 2010

Section 2 - Definitions

“PARKING AREA” means the use of land or a public or private area, under or outside of a building or structure, designed and used for parking motor vehicles including parking lots, garages, private driveways, and legally designated areas of public streets.

“PARKING LOT” means a lot used solely for the parking of motor vehicles.

“PARKING SPACE” means a space for the parking of a motor vehicle within a public or private parking area and also includes “parking stall”.

4.13 Development Permit

4.13.2 Council may attach to a permit such conditions as it deems fit in order to ensure that the proposed development will be in accordance with the purposes and intent of these Regulations.

4.17 Public Notice

4.17.1 Council shall require public notice of the following:

- (a) a change in non-conforming use,*
- (b) a development that is listed as a discretionary use in the appropriate Use Zone Schedule in Section 11, and*
- (c) a residential intensification project as outlined in Regulation 6.33, prior to Council’s consideration of the application. (2015-01-23)*

4.17.2 Council may, when a variance is necessary under Regulation 4.6 or when a Development Application is received on which Council determines that it wishes to receive public input, require the public notice of the variance or application prior to Council’s consideration of the application.

4.17.3 Council shall require that the cost of the public notice or portion thereof shall be paid by the applicant and that such notice shall be by public advertisement in a newspaper circulating in the area or by any other means deemed necessary or appropriate by Council.

4.17.4 Council may require public notice of any development application where, in the opinion of Council, such notice is required for information and public consultation purposes.

CITY OF MOUNT PEARL FENCE AND RETAINING WALL REGULATIONS, 2013

17. Industrial and Commercial Lot – Rear Yard Fence

Unless otherwise approved by the City, the maximum height of a fence erected for industrial and commercial purposes shall be a maximum height of 2.7 meters above grade in the area of the lot between the building line and street line, provided the lot does not abut a residential lot.

In the case where an industrial or commercial lot abuts a residential lot or use zone, the maximum height of a fence erected for industrial and commercial purposes shall be a maximum height of 1.8 meters above grade.

21. Barbed Wire Fence

A fence consisting wholly or partly of barbed wire or other barbed material shall be permitted to be erected only along the top of any fence in excess of 2.1 meters enclosing a lot used for commercial or industrial purposes and provided the industrial or commercial lot does not abut a residential lot or residential use zone. The use of barbed wire shall not be permitted on residential lots.