

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Jack Foley-Noel O’Dea **Appellant**

AND Town of Witless Bay **Authority**

RESPECTING the Town of Witless Bay Council’s approval to permit to grub a driveway at 241A Gallows Cove Road, Witless Bay

BOARD MEMBERS Chair – Cliff Johnston
Member – Paul Boundridge
Member – Damian Ryan

DATE OF HEARING February 13, 2019

IN ATTENDANCE

Respondent: Town of Witless Bay – Geraldine Caul, Town Clerk/Manager

Appellants: Jack Foley-Noel O’Dea

Interested/affected parties that presented at the hearing: Dr. Earle Wright

Secretary to the Eastern Newfoundland Regional Appeal Board: Robert Cotter

Technical Advisor to the Eastern Newfoundland Regional Appeal Board: Kim Blanchard

DECISION

Facts/Background

On June 4, 2018 Frances Wright submitted to the Town of Witless Bay a development application to “grub driveway (right of way)” at 241A Gallows Cove Road. A letter from Frances Wright to the Town dated May 27, 2018 states that “our intention is to build a family dwelling on the land in the near future... the above-mentioned work is necessary before we submit a building permit request to Council.”

On July 10, 2018 The Town of Witless Bay Council decided to approve the development application to grub a right-of-way (develop a driveway) to 241A Gallows Cove Road.

On July 11, 2018 Jack Foley and Noel O’Dea, both neighboring residents of the subject property that is subject to appeal, completed an appeal summary form supported by a letter articulating their grounds for appeal. The appellants are interested third parties. The appellants have challenged the approval on the grounds that the decision made by Council is not compliant with the Town’s Municipal Plan and Development Regulations.

On July 12, 2018 the Appellants filed an Appeal package with the Secretary of the Appeal Board. The grounds of appeal can be summarized as follows:

The basis for this Appeal is that “Council did not comply with the Town’s Municipal Plan and Development Regulations and related legislation.” The appellants advised further that more detailed written submissions will be provided to the Board prior to and at the Appeal hearing. At the hearing the appellants presented 11 grounds of appeal.

1. Primary Basis for Appeal – Council’s actions, procedures, and approval are not in compliance with and are in violation of the intent, provisions, and requirements of the Town’s Municipal Plan and Development Regulations, Town Policies and Procedures, the Municipalities Act, the Urban and Rural Planning Act, and other legislation, as well as the general intent of the Town’s planning framework and the public interest.
2. “Grub” is not a defined activity under the Town’s Municipal Plan and Development Regulations.
3. “Grub” can be an “excessive and aggressively destructive activity”.
4. “Grub” will cause serious adverse effects on – and irreversible damage to – the adjoining properties and property owners.
5. Council did not require or impose any specifications or conditions for the “Grub”/excavation of

this narrow, grassy, 3.1 metres wide right of way.

6. “Grub” is completely unnecessary since easy access along the grassy right-of-way is not impeded.

7. Council’s actions were in violation of the Town’s Plan and Regulations.

8. The application is a full application for development.

9. The application for development does not meet the Town’s Development Regulations and other requirements.

10. Requirements for development are not met.

10.1 There is no clear title ownership of the access.

10.2 The required minimum width of the access is not met.

11. Council erred and failed its duty and responsibility, and acted in violation of the rules and regulations.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

Town of Witless Bay Municipal Plan and Development Regulations

A notice of the time, date and place of the hearing was provided to the appellant and the authority and interested parties as required by the Urban and Rural Planning Act, 2000.

Matters presented to and considered by the Board

Q. What is the subject matter under appeal?

A. All parties confirmed that the approval to grub is under appeal. Information provided by the applicant shows that a single dwelling is intended to be developed in the future.

Q: What is Development and does grubbing fall under the definition.

A: DEVELOPMENT, as defined by the *Urban and Rural Planning Act 2000*, “means the carrying out of building, engineering, mining or other operations in, on, over, or under land, or the making of a material

change in the use, or the intensity of use of land, buildings, or premises and the:

(a) making of an access onto a highway, road or way,

(b) erection of an advertisement or sign,

(c) construction of a building,

(d) the parking of a trailer, or vehicle used for the sale of refreshments or merchandise, or as an office, or for living accommodation, **and excludes,**

(e) the carrying out of works for the maintenance, improvement or other alteration of a building, being works which affect only the interior of the building or which do not materially affect the external appearance or use of the building,

(f) the carrying out by a highway authority of works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road reservation,

(g) the carrying out by a local authority or statutory undertaker of works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of streets or other land for that purpose,

(h) the use of a building or land within the courtyard of a dwelling house for a purpose incidental to the enjoyment of a dwelling house as a dwelling.”

“ACCESS means a way used or intended to be used by vehicles, pedestrians or animals in order to go from a street to adjacent or nearby land or to go from that land to the street.”

The creation of an access by Grubbing falls within the definition of Development.

Q. What was proposed and what was approved?

A. The applicant applied for development approval to “grub a right-of-way (develop a driveway)” to 241A Gallows Cove Road, a block of land approximately 60 metres back from Gallows Cove Road. The Town Council approved the driveway with the knowledge that the applicant advised of the “intention... to build a family dwelling on the land in the near future.” Construction of a home would require future approval from the Town for a residential building lot and building permit for a dwelling. The Board notes that the Town Representative has stated that the Town has not approved an application for approval of the subject property as a building lot in conjunction with the approval of the driveway nor does it currently have such an application on file.

Q: What is the subject property zoned and does the zoning accommodate Backlot Development?

A: The subject property is zoned Residential (RES). In this zone, Backlot Development may be allowed on a discretionary basis subject to a series of conditions being satisfied. Under the Town's Development Regulations, Backlot is defined as "...a lot characterized by the location of the residential lot generally at the rear of another residential lot, or otherwise separated from the public street which provides access, and by a narrower area extending from the rear residential lot to the public street."

Residential Zone Conditions for this use include "(e) where there is no potential for future development, the access to the public street shall be a minimum of 6 m in width and shall be treated as a private driveway; which the owner must have clear title. It is noted that the information provided to the Board indicates that the subject property has frontage along Gallows Cove Road of 3.1 metres.

Q: Did Council have the authority to approve a driveway as proposed by the applicant – in advance of applying for approval to develop the subject property as a residential (Backlot) building lot?

A: A driveway is defined in the Town of Witless Bay Development Regulations as "...a private road for vehicles that connects a house, garage, or other building with a public road."

The proposed driveway is for the purpose of eventual development of a residential building lot for a single family dwelling. The Town's representative has stated that at present there is no application before the Town for approval of a building lot or for a permit to build a house. It is the view of the Appeal Board that a driveway is not a use which could be allowed alone except as to provide access to a Permitted or Discretionary land use to the land which it is intended to provide access to. Therefore, the Board is of the opinion that issuance of a permit for a driveway in the absence of an application for a residential building lot/permit for a home is outside of the authority of the Council under the provisions of the Town of Witless Bay Development Regulations. Further, the Appeal Board notes that the provisions of the Town's Development Regulations regarding Backlot development in the Residential Zone would require a private driveway to have minimum frontage along a public street of 6 metres. Information provided to Council and the Board indicates that the subject property has frontage along Gallows Cove Road of 3.1 metres.

Q: Does Council have the authority under the Town of Witless Bay Development Regulations to grant a reduction of the 6 metres minimum lot frontage requirement for development of a Backlot

in the Residential Zone?

A: Regulation 11 (Variances) of the Town of Witless Bay Development Regulations allows Council the authority to grant a maximum 10% reduction of the frontage requirement “if, in the authority's opinion, compliance with the development standards would prejudice the proper development of the land, building or structure in question or would be contrary to public interest.” Regulation 12 (Notice of Variance) requires that “Where the Authority is to consider a proposed variance, the Authority shall give written notice of the proposed variance from development standards to all persons whose land is in the immediate vicinity of the land that is the subject of the variance, and allow a minimum period of 7 days for response.”

Had Council wanted to exercise its discretionary authority to grant a reduction of the lot frontage requirement, it would have been beyond the 10% scope of its authority and contrary to the Town’s Development Regulations. There is no indication that the Council has contemplated making text amendments to the Town’s Development Regulations regarding the scope of variances that can be allowed.

Q: Has the authority received a full application to build a single dwelling at 241A Gallows Cove Road, Witless Bay?

A: The Town Representative has stated that the Town has not approved an application for approval of the subject property as a building lot or for a permit to build a dwelling nor does it currently have such an application on file.

Q. Did council receive and consider letters of objections?

A. Letters of objection/concern were submitted by the Appellants to the Town. The Board has no direct knowledge if Council considered this prior to making its decision.

Conclusion

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

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

Based on its findings, the Board determined that the Town of Witless Bay Council's approval of a permit on July 10, 2018 to grub a driveway at 241A Gallows Cove Road, Witless Bay did not fall within its authority under the Town's Development Regulations. Therefore, the Board reverses Council's decision: any permit issued as result of the Council decision of July 10, 2018 is void. The Town Council should consider any potential future applications for the subject property in accordance with the requirements of the Town's Municipal Plan and Development Regulations and in accordance with the comments and observations of the Board regarding this appeal.

Order

Based on the information presented, the Board orders that the decision of the Town of Witless Bay Council of July 10, 2018 to approve a permit to grub a driveway at 241A Gallows Cove Road, Witless Bay be reversed, and any permits issued by the Town are to be rescinded.

The Board further orders that the Town of Witless Bay pay to the appellants an amount equal to the appeal hearing fee of \$230.00 paid by the appellants.

The Respondent and the Appellant(s) are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

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

DATED at St. John's, Newfoundland and Labrador, this 14th day of February, 2019.



Cliff Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Paul Boudridge, Member
Eastern Newfoundland Regional Appeal Board



Damian Ryan, Member
Eastern Newfoundland Regional Appeal Board