

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Derek Belbin (**Appellant**)

AND Town of Witless Bay (**Authority**)

RESPECTING Appealing Council Motion 2018-070 which relates to a Crown Land referral (Application E151285) that would require Council's approval on "opening the public right-of-way at the end of Mallowney's Lane extension".
[MAE Appeal File #: 15-006-057-011a]

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

DATE OF HEARING March 8, 2019

LOCATION OF HEARING Mount Pearl Council Chamber

IN ATTENDANCE

Appellant: Not Present

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

Interested Parties: Gary and Ann-Marie Churchill

Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board

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

DECISION

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Witless Bay acted in accordance with the applicable legislation, policy and regulations when, on April 10, 2018, Council voted to support two Crown Land applications from Gary and Ann-Marie Churchill related to an historic right-of-way at Mallowney's Lane.

Facts/Background

On **April 10, 2018** the Town of Witless Bay Council, made a two-part decision (motion 2018-070): a decision to open the public right-of-way at the end of Mallowney's Lane extension subject to a successful application by Gary and Ann-Marie Churchill to obtain Crown land (Crown Land application E151285); a decision to support a Crown land application by Gary and Ann-Marie Churchill related to an historic right-of-way at Mallowney's Lane. The Churchill Crown land application was ultimately denied in June 7, 2018 by the Provincial Department of Fisheries and Land Resources.

On **July 16, 2018**, Derek Belbin completed an appeal summary form supported by a letter articulating his grounds for appeal. Mr. Belbin noted that he is an interested third party, and is appealing two decisions made by Council and referenced in Council minutes (motion 2018-070, and motion 2018130).

Motion 2018-070 relates to a Crown Land referral (Application E151285) that would require Council's approval on "opening the public right-of-way at the end of Mallowney's Lane extension". [MAE Appeal File #: 15-006-057-011a]

Grounds for Appeal

The Appellant has advised that the Council decisions "regarding Mallowneys Lane are directly related and both impact my property to my detriment", and "considering that I am under direct orders from council subject to severe penalties to maintain drainage on my property draining onto a public road, any clearing of the narrow public pathway bordering my property will impact my drainage in place and put me at risk of financial penalty...It should be noted that Council has not communicated with me on any occasion to identify the clearing boundaries that might impact drainage...No inspection of the area has been completed as required."

Legislation, Municipal Plans and Regulations Considered by the Board

The Urban and Rural Planning Act 2000

The Town of Witless Bay Municipal Plan 2013-2023

The Town of Witless Bay Development Regulations 2013-2023

Matters Considered by the Board

This hearing was originally scheduled to be held February 13, 2019. At Mr. Belbin's request the hearings were postponed and rescheduled until March 8, 2019. Mr. Belbin was notified of the rescheduled date for today's hearing on February 13, 2019. Mr. Belbin requested on March 4, 6 and 7 another postponement via two medical notes from his physician dated March 4, 2019 and March 6, 2019.

Q: Why was it decided by the Board to proceed with the hearing in the absence of the Appellant?

A: The Board had already granted the Appellant a postponement in response to a written request citing health reasons/concerns. There was no firm indication in documentation received from the Appellant or his physician if there would be a time in the foreseeable future when the Appellant might be able to attend an appeal hearing. The Appellant had been advised by the Secretary of the Appeal Board prior to the rescheduled appeal hearing date that he could have a representative attend the rescheduled appeal hearing to act on his behalf regarding the postponement request and/or the matter under appeal.

On the date of the rescheduled hearing the Board asked the representative for the Authority and interested parties (Gary and Ann-Marie Churchill) for their comments, if any, on the request by Mr. Belbin for another postponement, given that this is a third party appeal against a decision by the Town to open the public right-of-way at the end of Mallowney's Lane extension subsequent to the successful application by Gary Churchill to obtain Crown land (Crown Land application E151285). The Town Clerk/Manager verbally advised the Board that it was the Town's wish that the hearing not be postponed indefinitely and she requested that the hearing proceed on March 8, 2019 in order that the Town's business is not unnecessarily delayed. The Churchills verbally advised the Board that they favoured the hearing proceeding as scheduled.

The Board considered all information available to it with regards to the Appellant's request for another "indefinite postponement" and subsequently made the decision to proceed with the appeal hearing.

Q: What is the matter under appeal?

A: The matter under appeal is a two-part decision by the Town: a decision to open the public right-of-way at the end of Mallowney's Lane extension subsequent to the successful application by Gary and Ann-Marie Churchill to obtain Crown land (Crown Land application E151285); a decision to support a Crown land application by Gary and Ann-Marie Churchill related to an historic right-of-way at Mallowney's Lane

The Technical Advisor to the Board has advised that the matter being appealed is the Council decision to approve the opening of the public right-of-way as an extension to an existing public road.

It is also noted by the Board that Gary and Ann-Marie Churchill applied for Crown land in order to develop a private access from their property to the current termination point of Mallowney's Road, following which, it is the Board's understanding that the Churchills and the Town intended that the private access would be taken over by the Town and developed and maintained as a public road. Although the Town did support the Churchills' Crown land application, this application was ultimately turned down by the Crown Lands Office due to several requirements not being satisfied by the Churchills. The Board notes that the Churchills' Crown lands application was ultimately denied by the Crown Lands Office, thereby making the decision of Council to support development of the right-of-way as a public roadway moot.

Q: Is the decision by the Town to (1) support a private Crown land application to enable the (2) opening and development of the public right-of-way as a public street appealable?

A1: The *URPA* is silent on the matter of appealing decisions relating to Crown land applications and the official appeal form states that Crown land applications are not subject to appeal; thereby matters relating to municipal council recommendations regarding the acquisition of Crown land are not appealable to the Regional Appeal Boards.

A2: The Board notes that that the Urban and Rural Planning Act 2000 defines development as:

(g) "development" 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 ...

(i) making of an access onto a highway, road or way,
and excludes the...

(vi) 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,"

[emphasis added]

Furthermore, *URPA 2000* identifies the scope of decisions by a Council that can be appealed:

"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."

It appears, based on the above definition, that what is being appealed is outside of the jurisdiction of the Board to consider.

Q: Was the application for appeal filed within the prescribed time limits (14 days of the date of the decision being appealed)?

A: The Appellant's appeal form is dated July 16, 2018 and was received (date-stamped) by the Department of Municipal Affairs and Environment on July 19, 2018.

The decision/Council Motion being appealed occurred at a Witless Bay Council Meeting held on April 10, 2018. It appears to the Board that the application for appeal was made well outside of the *URPA* prescribed time limits, and that it therefore may not be valid or within the Board's jurisdiction to hear.

Conclusion

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Witless Bay acted in accordance with the applicable legislation, policy and regulations when, on April 10, 2018, Council approved support of a Crown Land application related to an historic right-of-way at Mallowney's Lane.

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.

The Board does not have jurisdiction to hear the appeal for the following reasons:

- Matters relating to municipal council recommendations regarding the acquisition of Crown land are not appealable to the Regional Appeal Boards.
- The Council decision/motion to support 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 is not considered development by URPA and is thereby not appealable.
- It appears that the appeal was filed outside the URPA prescribed time limitation.
- Furthermore, it does not meet the requirements for consideration under Section 42 of *URPA*.

ORDER

Based on the information presented, the Board found that it is outside its jurisdiction to hear an appeal beyond the legislated requirement stated in Section 42 of the *Urban and Rural Planning Act 2000*: it does not have jurisdiction to hear the appeal by Mr. Derek Belbin against the Town of Witless Bay decision of April 10, 2018 to support the private Crown land application and to open the public right-of-way at the end of Mullooney's Lane extension (Crown Land application E151285). Therefore, the Board is unable to confirm, reverse or vary the Council decision that is the subject of this appeal.

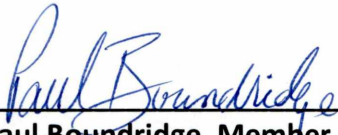
The Respondent and the Appellant(s) are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

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 13th day of March, 2019.



Cliff Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Paul Boundridge, Member
Eastern Newfoundland Regional Appeal Board



Damian Ryan, Member
Eastern Newfoundland Regional Appeal Board

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Derek Belbin (**Appellant**)

AND Town of Witless Bay (**Authority**)

RESPECTING Appeal of the June 12, 2018 Regular Council Meeting Motion 2018-130 to defer consideration of an application to “fill in trench and return site to its original condition on 9-23 Mallowney’s Lane”.
[MAE Appeal File #: 15-006-057-011b]

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

DATE OF HEARING March 8, 2019

LOCATION OF HEARING Mount Pearl Council Chamber

IN ATTENDANCE

Appellant: Not Present

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

Interested Parties: Gary and Ann-Marie Churchill

Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board

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

DECISION

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Witless Bay acted in accordance with the applicable legislation, policy and regulations when, on July 10, 2018, Council voted to defer processing an application from Ryan Brunkard to fill in a trench at 9-23 Mallowney's Lane pending the outcome of the Town's Crown Lands application.

Facts/Background

Ryan Brunkard submitted a development application to Council to "fill in unauthorized trench and return the area to its original condition" at 9-23 Mallowney's Lane. Council's initial consideration of the application on **June 12, 2018** was to defer pending additional information from the applicant (an updated survey and a detailed description of the work to take place). The application appeared in the Council minutes again on **July 10, 2018** and, again, Council decided when it passed Motion 2018-130 to defer, this time pending the outcome of an application by the Town to Crown Lands. Details of the Town's application to Crown Lands were not included in the appeal submission. [At the appeal hearing, the Town Clerk/Manager advised that the Town's application for a Crown Grant was approved by the Crown Lands Office on September 7, 2018.]

On **July 16, 2018**, Derek Belbin completed an appeal summary form supported by a letter articulating his grounds for appeal. Mr. Belbin noted that he is an interested third party, and is appealing two decisions made by Council and referenced in Council minutes (motion 2018-070, and motion 2018-130).

Grounds for Appeal

The Appellant has advised that the Council decisions "regarding Mallowney's Lane are directly related and both impact my property to my detriment", and "considering that I am under direct orders from council subject to severe penalties to maintain drainage on my property draining onto a public road, any clearing of the narrow public pathway bordering my property will impact my drainage in place and put me at risk of financial penalty...It should be noted that Council has not communicated with me on any occasion to identify the clearing boundaries that might impact drainage...No inspection of the area has been completed as required."

Legislation, Municipal Plans and Regulations Considered by the Board

The Urban and Rural Planning Act 2000

The Town of Witless Bay Municipal Plan 2013-2023

The Town of Witless Bay Development Regulations 2013-2023

Matters Considered by the Board

This hearing was originally scheduled to be held February 13, 2019. At Mr. Belbin's request the hearing was postponed and rescheduled until March 8, 2019. Mr. Belbin was notified of the rescheduled date for today's hearing on February 13, 2019. Mr. Belbin requested on March 4, 6 and 7, 2019 another postponement via two medical notes from his physician dated March 4, 2019 and March 6, 2019.

Q: Why was it decided by the Board to proceed with the hearing in the absence of the Appellant?

A: The Board had already granted the Appellant a postponement in response to a written request citing health reasons/concerns. There was no firm indication in documentation received from the Appellant or his physician if there would be a time in the foreseeable future when the Appellant might be able to attend an appeal hearing. The Appellant had been advised by the Secretary of the Appeal Board prior to the rescheduled appeal hearing date that he could have a representative attend the rescheduled appeal hearing to act on his behalf regarding the postponement request and/or the matter under appeal.

On the date of the rescheduled hearing the Board asked the representative for the Authority and interested parties (Gary and Ann-Marie Churchill) for their comments, if any, on the request by Mr. Belbin for another postponement, given that this is a third party appeal against a decision by the Town to open the public right-of-way at the end of Mullowney's Lane extension subsequent to the successful application by Gary Churchill to obtain Crown land (Crown Land application E151285). The Town Clerk/Manager verbally advised the Board that it was the Town's wish that the hearing not be postponed indefinitely and she requested that the hearing proceed on March 8, 2019 in order that the Town's business is not unnecessarily delayed. The Churchills verbally advised the Board that they favoured the hearing proceeding as scheduled.

The Board considered all information available to it with regards to the Appellant's request for another "indefinite postponement" and subsequently made the decision to proceed with the appeal hearing.

Q: What is the matter under appeal?

A: The matter under appeal is a July 10, 2018 Council decision (Motion 2018-130) to defer considering an application from Ryan Brunkard to "fill in trench and return the area to its original condition on 9-23 Mullowney's Lane." pending the outcome of an application by the Town to Crown Lands.

Q: Is the Town authorized to make the decision it did with regard to the application to fill in a trench?

A: Development is defined by URPA s. 2(g). The legislative definition of development encompasses aspects of earth works for private applicants, and excludes from the definition of development certain undertakings by authorities that are not captured as development and therefore not triggering requirement for the issuance of development permits. The Brunkard Application would, in the Board's opinion, constitute a development as defined under URPA. The Town is legally authorized to process and decide on development applications

The Town of Witless Bay Development Regulations provide for the deferment of an application by Council.

“19. **Deferment of Application**

(1) The Authority may, with the written agreement of the applicant, defer consideration of an application.

(2) Applications properly submitted in accordance with these Regulations which have not been determined by the Authority and on which a decision has not been communicated to the applicant within eight weeks of the receipt thereof by the Authority, and on which consideration has not been deferred in accordance with Regulation 18(1), shall be deemed to be refused.”

It is the Board’s opinion that the decision by Council to defer consideration of the development application is a normal exercise of its power as the Development Authority for the Town of Witless Bay. It is the Board’s understanding that the Town Council will make a decision regarding the Brunkard development application in due course now that the Town’s application for a Crown land grant has been approved by the Crown Lands Office.

Q: Is the Council decision to defer processing of the application (making a decision) appealable?

A: *URPA 2000* identifies the scope of decisions by a Council that can be appealed:

“42. (1) A person or an association of persons aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to

- (a) an application to undertake a development;
- (b) a revocation of an approval or a permit to undertake a development;
- (c) the issuance of a stop work order; and
- (d) a decision permitted under this or another Act to be appealed to the board.”

The Witless Bay Council has yet to make a decision on the Brunkard development application. It is the view of the Board that the decision to defer making a decision on the development application is outside the scope of what is contemplated for in Section 42.(1) of *URPA*. Therefore, the Board has determined that the Board does not have jurisdiction to hear the appeal.

Conclusion

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Witless Bay acted in accordance with the applicable legislation, policy and regulations when Council, on July 10, 2018, made the decision to defer consideration of the Brunkard application to fill in a trench on 9-23 Mallowney’s Lane pending the outcome of the Town’s application that was submitted to Crown Lands.

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.

The Board has determined that it does not have jurisdiction to hear the appeal. It is the Board’s determination that the appeal is premature as the Council has yet to make a decision on the development application which is the end subject. Deferral of a decision by Council is outside of the scope of matters that are appealable as defined by Section 42 of *URPA*. Therefore, the appeal does not meet the requirements for consideration under Section 42 of *URPA*.

ORDER

Based on the information presented, the Board found that it is outside its jurisdiction to hear an appeal beyond the legislated requirement stated in Section 42 of the *Urban and Rural Planning Act 2000*: it does not have jurisdiction to hear the appeal by Mr. Derek Belbin against the Town of Witless Bay decision on July 10, 2018 to defer consideration of the Brunkard application to fill in a trench on 9-23 Mallowney's Lane pending the outcome of the Town's application that was submitted to Crown Lands. Therefore, the Board is unable to confirm, reverse or vary the Council decision that is the subject of this appeal.

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).

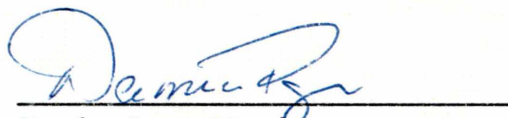
DATED at St. John's, Newfoundland and Labrador, this 13th day of March, 2019.



Cliff Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Paul Bountridge, Member
Eastern Newfoundland Regional Appeal Board



Damian Ryan, Member
Eastern Newfoundland Regional Appeal Board