

**EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD
URBAN AND RURAL PLANNING ACT, 2000
APPEAL**

BETWEEN Gerald Gover and Sigrid Kuehnemund, **Appellant**
David Senciall and Darlene Fiander **Appellant**

AND Town of Torbay **Authority**

RESPECTING A Council Order to Gerald Gover and Sigrid Kuehnnemund dated 14 October 2014 requiring a portion of fencing that extends from property located at or about Paul's Lane onto the public right-of-way be removed [File #: 15-006-009-92]; and,

A Council Order dated 16 October 2014 to David Senciall and Darlene Fiander requiring the obstruction to the public right-of-way along the southwestern boundary line of 284-286 Marine Drive be removed [File #: 15-006-009-93].

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

DATE OF HEARING August 28, 2019

IN ATTENDANCE

James Smyth, Appellant's solicitor
Giles Ayres, Solicitor for the Town of Torbay
Brian Winter, Director of Planning and Development - Town of Torbay
Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board
Kim Blanchard, Technical Advisor to the Eastern Newfoundland Regional Appeal Board
Sigrid Kuehnemund, Appellant
David Senciall, Appellant

DECISION

Facts/Background

At the September 23, 2014 Regular Meeting of the Town of Torbay Municipal Council a decision was made to issue an Order respecting a fence located at or about 3 Paul's Place. On October 14, 2014 the Town of Torbay Municipal Council issued an Order to Gerald Gover and Sigrid Kuehnemund regarding a public right-of-way obstructed by a fence located at or about 3 Paul's Place, Torbay. The Order required Mr. Gover and Ms. Kuehnemund to remove the portion of fencing that extends onto the public right-of-way within thirty (30) days of receipt of the Order. The Town issued the Order under Section 404(1)(i) of the Municipalities act 1999 which provides Council with the authority to issue an Order "when a fence, building, steps, erection or other object which projects into or over land reserved for a public highway or sidewalk be removed".

At the September 23, 2014 Regular Meeting of the Town of Torbay Municipal Council a decision was made to issue an Order respecting an obstruction to a public right-of-way located at 284-286 Marine Drive. On October 16, 2014 the Town of Torbay Municipal Council issued an Order to David Senciall and Darlene Fiander to have the obstruction to the public right-of-way along the southwestern boundary line of 284-286 Marine Drive removed. The Order required Mr. Senciall and Ms. Fiander to remove the obstruction within thirty (30) days of receipt of the Order. The Town issued the Order under Section 404(1)(i) of the Municipalities act 1999 which provides Council with the authority to issue an Order "when a fence, building, steps, erection or other object which projects into or over land reserved for a public highway or sidewalk be removed".

On October 30, 2014 Melanie DelRizzo, a lawyer acting on behalf of the Appellants, filed an appeal of the decision to issue a development permit with the Secretary of the Appeal Board. The grounds for appeal are contained in a detailed submission dated October 16, 2014 and attached to the Application for Appeal to the Eastern Regional Appeal Board. Essentially, the

Grounds are that there is no Public Right-of Way in existence.

The Town's submission to the Appeal Board essentially stated that there was a history of general access across land that is part of the subject properties; and that this is the basis for the existence of the purported public right-of-way and the removal Orders to the respective parties.

Legislation, Municipal Plans and Regulations considered by the Board

The Municipalities Act, 1999

The Urban and Rural Planning Act, 2000

The Town of Torbay Municipal Plan and Development Regulations 2007

Matters Considered by the Board

On May 14, 2015 the Eastern Newfoundland Appeal Board convened to hear both appeals. At that time the Board, the Appellants and the Respondent agreed that the appeals revolved around a land ownership issue. The Appeal Board and all parties involved further agreed that property ownership was an issue beyond the authority of the Appeal Board and that the Board would suspend further consideration of the matters before it to allow the Appellants and the Respondent to bring the land ownership question to the Supreme Court of Newfoundland and Labrador, Trial Division for a ruling. Essentially, the matter of land ownership was to have been resolved before the Appeal Board could consider and decide upon the two appeals.

On September 20, 2017 the lawyer for the Town advised the Secretary to the Eastern Newfoundland Regional Appeal Board that the Town was in the midst of preparing to bring the matter before the Supreme Court of Newfoundland and Labrador, Trial Division, in relation to the ownership of the "trail land". The lawyer advised that until the Court has heard the Town's application, the appeals should remain dormant as they cannot proceed until the property ownership issues are dealt with by the Court.

In March 2019 the lawyer for the Town requested that the hearing for the appeals be

rescheduled. The hearing for the appeals was scheduled for April 2019 but was postponed until August 28, 2019.

Upon hearing the submissions of the parties at the August 28, 2019 Appeal Board Hearing, the Board determined that property ownership remains the central issue as a ruling of the Supreme Court has not yet been sought by either the Town or the Appellants. In light of the outstanding questions regarding property ownerships of the subject properties, it is the Board's decision that it lacks the jurisdiction under the *Urban and Rural Planning Act* to confirm, reverse or vary the decisions of the Town to issue the Orders.

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.

Upon hearing the submissions of the parties at the August 28, 2019 Appeal Board Hearing, the Board determined that property ownership remains the central issue as a ruling of the Supreme Court has not yet been sought by either the Town or the Appellants. In light of the outstanding questions regarding property ownerships of the subject properties, it is the Board's decision that it lacks the jurisdiction under the *Urban and Rural Planning Act* to confirm, reverse or vary the decisions of the Town to issue the Orders.

Order

The Board has ordered that that it lacks the jurisdiction under the *Urban and Rural Planning Act* to confirm, reverse or vary the decisions of the Town to issue the Orders.

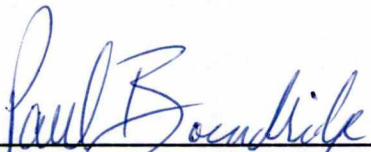
The Respondent and the Appellants are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

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).

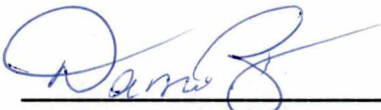
DATED at Mount Pearl, Newfoundland and Labrador, this 28th day of August, 2019.



Cliff Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Paul Boudridge, Member
Eastern Newfoundland Regional Appeal Board



Damian Ryan, Member
Eastern Newfoundland Regional Appeal Board