

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Weir's Construction **Appellant(s)**

AND Town of South River **Respondent**

RESPECTING refusal of an application to operate a gravel pit or quarry on the property located at 148-152 Hodgewater Line, South River.
File # 15-006-057-042

BOARD MEMBERS Clifford Johnston, Chair
Robert Warren, member
Damian Ryan, member

DATE OF HEARING December 13, 2019

IN ATTENDANCE

John Burgess, solicitor for Weir's Construction

Jim Weir Jr. Appellant

Ian Hutton, in support of appellant

Giles Ayres, solicitor for the Town of South River

Marjorie Dawson, Town Clerk/Manager Town of South River

Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board

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

DECISION

Facts/Background

The Board reviewed the technical planning report and as the facts and chronological order of events were not contested by either party the Board accepts that:

On March 23, 2018, Weir's Construction Ltd. applied to the Town of South River for a permit to develop a mineral workings operation (gravel pit/ quarry) at 148-152 Hodgwater Line. To inform its December decision, council requested additional information, conducted two public meetings in the community with area residents and company representatives, and considered the provincial environmental assessment. On December 10, 2018, at a public meeting of council, the Town of South River (the authority) refused the application by Weir's Construction Ltd. (the appellants) to develop a gravel pit/ quarry at 148-152 Hodgwater Line. The Town followed up with its written letter of refusal on December 14, 2018. The appellants received the December decision on the same date. On December 23, 2018, solicitor Wayne White filed an appeal on behalf of Weir's to challenge the Town's December decision to reject the quarry. It should be noted that the Eastern Newfoundland Regional Appeal Board (ENRAB) has heard a previous appeal (16-006-057-042) related to an enforcement order at this subject property.

Chronology assembled from the material submitted by the appellant and the authority:

- December 23, 2018 appeal of the December 14, 2018 refusal to permit a gravel pit/ quarry at 148-152 Hodgwater Line
- December 14, 2018 council issued written refusal to operate the gravel pit/ quarry
- December 10, 2018 December decision made at public meeting of council to reject weir's gravel pit/ quarry application
- Fall 2018 consideration of Environmental Assessment for the proposed 3.0 ha quarry.
- project released from EA with conditions on November 20, 2018 June 18, 2018
- second public meeting regarding weir's gravel pit/ quarry application
- June 12, 2018 public meeting to provide information to and obtain input from residents regarding weir's gravel pit/ quarry application
- June 6, 2018 representative of Weir's construction attended public meeting of council to provide information on the proposed gravel pit/ quarry operation

- April 4, 2018 consideration of Weir's gravel pit/ quarry application at public meeting of council. additional information requested respecting EA and quarry permit
- March 23, 2018 application by Weir's Construction for a permit to develop a mineral workings operation (gravel pit/ quarry) at 148-152 Hodgewater Line

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000 – URPA, 2000

Town of South River February 16, 2018 Municipal Plan and Development Regulations

Matters presented to and considered by the Board

All material submitted by the parties was considered by the appeal board.

The Board in this appeal will address the following grounds of appeals as submitted the appellant:

- The property is properly zoned for a quarry
- There are quarries near the property and once such quarry has been in operation for nearly 50 years
- A quarry is a permitted use for the property
- If the quarry is not a permitted use but is a discretionary use for the property, the Town did not exercise its discretion reasonably or judiciously in rejecting the Application
- The reasons given by the Town for rejecting the Application are unreasonable in that the intended use of the Property is not dangerous and will not promote fires or other hazards and will not emit noxious, offensive or dangerous fumes, smoke, gases, radiation, smells, ash, dust or grit, excessive noise or vibration, or create a nuisance.

How is the property zoned under the current Town Plan and Regulations?

The Board reviewed the subject property at 148-152 Hodgewater Line in relation to the Town of South River Municipal Plan and Development Regulations. The subject property is located in the Mineral Workings (MW) zone. The Board understand from the appellant that the proposed development would involve excavation and screening of sand and gravel within the existing Mineral Working (MW) zone only.

The MW zone accommodates “mineral exploration” as a permitted use, and may permit “mineral working” as a discretionary use, subject to the development meeting the conditions stipulated in the Mineral Working Use zone table in Schedule C of the Town’s Development Regulations.

As a discretionary use application what reasons did the Town use to refuse this application?

The Board reviewed the letter dated December 14, 2018 from the Town to Weir’s Construction, its refusal letter that stated:

“Council has refused the application citing Section 51 of the Town of South River Development Regulations:

“51. Offensive and Dangerous Uses No building or land shall be used for any purpose which may be dangerous by causing or promoting fires or other hazards or which may emit noxious, offensive or dangerous fumes, smoke, gases, radiation, smells; ash, dust or grit, excessive noise or vibration, or create any nuisance that has an unpleasant effect on the senses unless its use is authorized by Council and any other authority having jurisdiction.

In reaching this decision, council considered the zoning regulations, the results of the environmental assessment, and concerns raised by area residents including safety, noise pollution, environmental concerns, health concerns, affect on property value, etc. The proposed activities would be a nuisance to surrounding residents.”

The Board accepts that the Council adequately considered the above issues through its Municipal Plan review and through the public consultants that the Town undertook on the quarry application.

Did the Town have the authority to refuse Weir’s Construction application?

The Board determined that Council had did have the authority to refuse the application. The Board reviewed Section 30(1)(c) and 30(4) of the Regulations which requires that, for matters that Council may consider as a discretionary use, a notice be circulated and given to those likely to be directly affected. Section 96 provides the specifications for Council’s consideration of discretionary use applications, if it is satisfied that the development would not be contrary to the general intent and purpose of the plan or regulations or public interest.

The consideration of an application that is listed as a discretionary use in the use zone table of the Development Regulations is discretionary decision of Council. Section 11, Discretionary Powers of Council, gives authority to the elected officials on Council to use their discretion to refuse a proposed development when there are substantive considerations, in Council's opinion, "notwithstanding the conformity of the application with the requirements of these Regulations". Council determined that there may be impacts from the proposed quarry that could cause detrimental effects on adjoining land uses.

Was there a bias by the Town of South River?

Mr. Burgess presented at the hearing an argument that there was a level of bias and bad faith on part of the Town. In reaching their decision to refuse Weir's application given that there other existing quarries in the vicinity with a more intense level activity and adverse affects than the Weir's quarry would generate. The Board heard from Mr. Burgess that:

- The Town is not following their current municipal plan
- The current Municipal Plan allows for quarry operations on the subject property
- The Town has the ability to attach conditions to a permit
- Any conditions violated the operation can be order to be shut down
- The Town acted in bad faith and were bias

The Town's solicitor responded that the Town acted in a professional manner to participate in the all of the review process of the application of the quarry. In addition the Town provided ample opportunity to participate not only in the application process but as well in the Municipal Plan and Development Regulations review process undertaken by the Town prior to the submission of the quarry application.

The Board learned that the applicants had a meeting with the council on the proposed quarry and the council subsequently held two public meetings on the application, in which the Weir's attended one of the meetings. Further, the Town waited on the results of the Provincial environmental registration process to release the project from further environmental review prior to council making its decision to reject the application. The Board found notwithstanding the Provincial EA release, the Town still has discretion to approve or deny the application.

Did the Town adequately notify the Appellant of Council's decision?

The Town provide a letter dated December 14, 2018 to the appellants advising of the council's decision to reject the application. This letter provided reasons for the rejection. The Board reviewed *URPA, 2000*:

35. (1) A council or regional authority shall, to ensure that land is controlled and used only in accordance with the appropriate plan or scheme, make development regulations:

(g) requiring that a decision of a council or regional authority with respect to a permit be in writing and state reasons for a refusal of or conditions placed upon a permit;

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.

The Board has determined that the Weir's quarry application falls within the Mineral Working zone and that the Town and has full discretionary powers listed in the Development Regulations to approve or deny an application for a quarry. The Board determined that the Town acted in accordance with the Town's Development Regulations in making its refusal decision.

Therefore, the Board *confirms* the Respondent's decision of refusal of an application to operate a quarry at 148-152 Hodgwater Line, South River.

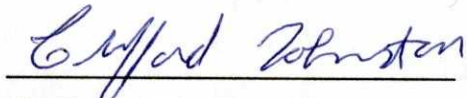
Order

Based on the information presented, the Board orders that the December 10, 2018 decision of refusal of an application to operate a quarry at 148-152 Hodgewater Line, by the Town of South River on December 14, 2018, be confirmed.

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

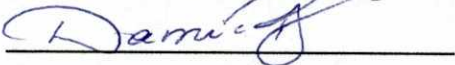
According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Eastern Newfoundland Regional Appeal Board may be appealed to the Supreme Court of Newfoundland and Labrador on a question of law or jurisdiction. If this action is contemplated, the appeal must be filed no later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

DATED at Portugal Cove-St. Philips Newfoundland and Labrador, this 13 day of December 2019.



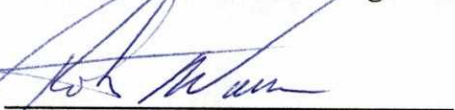
Clifford Johnston, Chair

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