

**EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD**

**URBAN AND RURAL PLANNING ACT, 2000**

15-006-064-037

**APPEAL**

**BETWEEN** Noel O’Dea **Appellant(s)**

**AND** Town of Witless Bay **Respondent**

**RESPECTING** approval to permit an excavation at the end of Mallowney’s Lane,  
Witless Bay

**BOARD MEMBERS** Cliff Johnston, Chair  
Carol Ann Smith, Member  
Robert Warren, Member

**DATE OF HEARING** February 3, 2020

**IN ATTENDANCE**

Noel O’Dea, Appellant  
Geraldine Caul, Town Clerk-Manager  
Ron Harte, Developer  
Gary Churchill and Ann Marie Churchill, Interested parties

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

## DECISION

### Facts/Background

1. Chronology assembled from the material submitted by the Appellant and the Authority:  
November 6, 2019:

- Ronald Harte applied to the Town of Witless Bay to do maintenance on an historical right-of-way leading to his property, off Mullowney's Lane Extension. In support of his application, Harte provided the Town with:
- a copy of a survey and Crown Lands grant, dated Jan 12, 2017
- November 12, 2019: At a public meeting, Council approved the application (Motion #2019-281).
- November 13, 2019: The applicant, Ronald Harte, was provided with a letter of approval-in-principle for excavation of historical right-of-way to his private property, subject to approval from all applicable Government Agencies.
- a copy of the Commercial Cutting permit that had been granted to him by the Forestry Branch of the Department of Fisheries and Land Resources (permit effective Nov 13, 2019 to Dec 31, 2019)
- November, 2019: The Public Works Committee of Council conducted a property site visit.
- November 15, 2019: Email to Town from Water Resource Management Division of Municipal Affairs and Environment (MAE) indicating no permits are required.
- November 15, 2019: Town Council Permit Granted to Ronald Harte, with specification "Excavation of Historical Right-of-Way" valid Nov 15, 2019 to Nov 15, 2020. (Development Application # 2019-61; Permit #749)
- November 15, 2019: An appeal of Council's decision was filed by appellant, Noel O'Dea.
- November 15, 2019: Email to Town from the Director of Local Governance Land Use Planning to advise that the appeal has been filed; that, pursuant to S. 45 of URPA, all work related to the subject property must immediately cease until the Board has determined the appeal.

The Board accepts the chronology order and notes that it was not contested at the hearing.

#### Land Use Planning

Development within the Town of Witless Bay is directed by the Town's Development Regulations, the zoning of the subject lands owned by Harte and over which the right-of-way leads, is primarily Residential (with exception of Conservation zoning respecting watercourses in the area).

#### **Legislation, Municipal Plans and Regulations considered by the Board**

*Urban and Rural Planning Act, 2000*

Municipal Plan and Development Regulations June 2016

*Municipalities Act, 1999*

#### **Matters presented to and considered by the Board**

Notification of the Appeal.

Mr. O'Dea requested a postponement of the hearing. A notice of hearing was sent to the email provided on the appeal form to Mr. O'Dea and the Town of Witless Bay on January 9, 2020. On January 15, 2020 another email was sent to Mr. O'Dea's assistant.

At the hearing Mr. O'Dea explained that he was out of the country since January 3, 2020 and only became aware of the hearing on February 3, 2020. Mr. O'Dea explained that upon review of the Town's submission that information Mr. O'Dea requested when he submitted the appeal was absent from the Town's submission for the appeal.

The Board reviewed the *Urban and Rural Planning Act, 2000*

#### **NEWFOUNDLAND AND LABRADOR REGULATION 3/01**

*Development Regulations*

under the

*Urban and Rural Planning Act, 2000*

#### **Appeal registration**

7. (3) *Where an authority has been notified of an appeal that authority shall forward to the appropriate board a copy of the application being appealed, all correspondence, Council minutes, plans and other relevant information relating to the appeal including the names and addresses of the applicant and other interested persons of whom the authority has knowledge.*

## **Hearing notice and meetings**

*9. (1) A board shall notify the appellant, applicant, authority and other persons affected by the subject of an appeal of the date, time and place for the appeal not fewer than 7 days before the date scheduled for the hearing of the appeal.*

Following a brief recess of the hearing, the Board decided to proceed with the hearing for the following reasons:

- Based upon the above legislation the Board concluded that the Town's requirement was met and the notice was issued in accordance to the Minister's Development Regulations
- Mr. O'Dea's while under protest, was willing to proceed

The Board's notes that if either party requires additional information that one should avail of the access to information process (if available).

## **Appellant's Grounds of Appeal:**

The Appellant explained that at a Public Meeting of the Town Council of Witless Bay held on 12 November 2019, Council approved a Development Application from Mr. Ron Harte to permit an excavator to excavate for a distance of ~150 metres on a right-of-way / fisherman's foot path at the end of Mullowney's Lane in a southeastern direction towards Ragged Beach and the Witless Bay Ecological Reserve.

The primary basis for this Appeal is that the Council did not comply with the Town's Municipal Plan and Development Regulations, and related legislation. Further, the Council approval of such a permit does not fall within its authority under the Town's Development Regulations. The appellant provided additional details at the hearing on the grounds of appeal submitted in November 2019. The appellant provided the detailed copy for the Board to consider.

## **Analysis**

### **What approvals did Mr. Harte apply to the Town of Witless Bay for?**

The Board learned that Mr. Harte applied to the Town to do maintenance on a historical right-a-way leading to his property off Mullowney's Lane Extension. The Board heard evidence that Mr. Harte wanted to improve the existing access to his land. During the appeal hearing, the

Board learned from the Town' representative that the application was approved by Council as submitted by the applicant. The Board also learned that the Council did not seek additional information regarding the proposed application nor did the Town require standard information such as the applicant's intended future use of his property. At the hearing, Mr. Harte, told the Board that he would like to use his property for himself and family members for passive activities such as picnicking and camping. His intention is not to construct a residence or any other developments/structures on the property. Mr. Harte, told they Board that he would like to use the property for himself and family members. His intention was not to construct a residence or any other developments/structures on the property.

**What did Council approve?**

At its public meeting held on November 12, 2019 Council approved the application as submitted. On November 13, 2019 Mr. Harte was provided by the Town with a letter of Approval in Principle which stated:

“to do maintenance with an excavator on a historical right-a-way to that leads from the Town turn around off Mallowney's Lane to the extreme of your property approximately 152 meters for safe access” and “subject to approval from all applicable Government agencies”. The Town issued a permit for the work on November 15, 2019.

**What is the role of Crown Lands Branch in the application to the Town of Witless Bay?**

The Land Branch states that the maintenance of the path up to a maximum of 3 meters wide would not require approval from the Lands Branch, this however does not waive of other Branches of the Department of Municipal Affairs and Environment other federal, provincial department and agencies; and/or the Town of Witless Bay prior to commencement.

**Did Council have the authority to issue a permit for Mr. Harte to do maintenance on a historical right-a-way leading to his property off Mallowney's Lane Extension?**

The basic planning principle in the Town's Municipal Plan and Development Regulations is to provide for orderly development to ensure public health and safety. An access is the juncture at which a development site connects to the public infrastructure. In the context of development, “access” has a specific meaning and intent, and a “street” in the public domain is differentiated from a “private road”, as previously referenced in legislation, and as defined in Schedule A of

the Town's Development Regulations:

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.

STREET means a street, road, highway or other way designed for the passage of vehicles and pedestrians, and which is accessible by fire department and other emergency vehicles.

PRIVATE ROAD (SHARED DRIVEWAY) means a roadway within private property that are privately owned, maintained and used for vehicular travel by the owner and those having express or implied permission from the owner, but not other persons. Their main function is to provide access to the private land. Most private roads are not designed to the same standards as public streets.

From the approval issued and from the evidence presented at the hearing, the Board determined that there was no documentation provided by the Town for this development application respecting specifications or parameters on the development approval. Specifically, the Town did not provide direction to the applicant that the excavation of the road/ right-of-way is to be performed to particular municipal standards, arrangements to ensure public use or access to the road/ right-of-way, nor evidence of consent of the parties to ensure that the Town will take over and maintain the road/ right-of-way were not included in the Town's submission.

The Town's issuance of a permit to a private land owner to undertake work on a public right-of-way without a development agreement or specifications of public road development standards is contrary to the intent and directives in the legislative, policy, and regulatory framework that guides the Town's infrastructure development.

The Board learned through the materials submitted and presented at the hearing that the subject of the appeal is an historic crown land right-of-way, which is vested in the Town, and is not privately owned. As such, all members of the public must have the right to use the right-of-way. That the intent by the proponent is to upgrade the historic right-of-way from a cart path to a road on which cars can drive. That the lands to be accessed were used historically for agriculture but

were not previously developed with structures and were not accessed by a publicly maintained roadway.

The Board determined that the Council has authority for undertaking or controlling all road works in its jurisdiction (per the URPA and the Municipalities Act); whether a "street" for the travelling public, or a "private street" (as differentiated in the definitions found in Schedule A of the Town's Development Regulations).

The Board reviewed URPA S. 2(g), road work undertaken by the authority is NOT considered "development", and the Town does not issue permits to itself for road work. Whereas, road work by private individuals/developers IS considered "development" as defined by URPA S. 2(g), and must be authorized by Council. The right-of-way is vested in the Council for its ownership, management and control, and considered to be public, per Section 163 of the Municipalities Act. In exercising its authority for the development of roads (granted by both the *Municipalities Act*, and by the *Urban and Rural Planning Act*), Council's role is to ensure appropriate specifications and standards for safe public use. If a road or right-of-way is to be used by the public, it is the duty of the Town to ensure the road is constructed to an appropriate established municipal standard (certified by the Town's engineer) and to have the road conveyed to the municipality for the Town to maintain as a public road.

## **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 found that, while Council has authority to make decisions respecting all roads within the municipality, in this case, Council did not exercise its authority correctly in accordance with the provisions and requirements of the *Urban and Rural Planning Act, 2000*, and the *Municipalities Act, 1999* and Town of Witless Bay Municipal Plan and Development Regulations as outlined above.

Based on its findings, the Board determined that while the Town has development control over all public and private roads within its municipal boundaries, the Town does not have the authority in this application to issue a permit to a private individual to do work on a public right of way for the benefit of that individual. Council must determine that work on any public roads and right-of-ways is designed and undertaken in full compliance with all applicable Town road engineering standards and parameters.

Therefore, the Board reverses the Authority's decision to issue the permit to Mr. Harte for an excavation at the end of Mallowney's Lane, Witless Bay. The permit is no longer valid.



**Order**

Based on the information presented, the Board orders that the Authority's decision to issue the permit to Mr. Harte for an excavation at the end of Mullowney's Lane, Witless Bay, be reversed. The permit is no longer valid.

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

In accordance with section 44(3) of the *Urban and Rural Planning Act, 2000*, the Board further orders the Respondent pay an amount of money equal to the appeal filing fee of \$230.00 to the Appellant.

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).

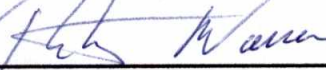
**DATED** at Portugal Cove-St. Philip's, Newfoundland and Labrador, this 3 day of February 2020.



**Clifford Johnston, Chair**  
**Eastern Newfoundland Regional Appeal Board**



**Carol Ann Smith, member**  
**Eastern Newfoundland Regional Appeal Board**



**Robert Warren, member**  
**Eastern Newfoundland Regional Appeal Board**