

**URBAN AND RURAL PLANNING ACT, 2000**

**Section 40-46**

<https://www.assembly.nl.ca/legislation/sr/statutes/u08.htm#40>

Appeal #: 15-006-083-017

Adjudicator: John R. Whelan Q.Arbitrator

Appellant(s): Terry Kennedy – Regina Best

Respondent / Authority: Town of Portugal Cove – St. Phillip’s

Decision Dated: January 16, 2024

Re: Fence Development at 417 Dogberry Hill Road

Appearances:

On Behalf of the Appellant: John Baird

On Behalf of the Respondent: Les Spurrell – Planning & Development Coordinator, Town of Portugal Cove – St. Phillip’s

**Procedural Background**

On January 30, 2023 the Town of Portugal Cove – St. Phillips (“the Town”) received a complaint regarding a fence development on the subject property. On February 6, 2023, the Appellants contacted the Town requesting the implementation of fencing regulations. The Town explored the possibility of regulations at a committee meeting on March 7, 2023. On March 20, 2023 the Appellants contacted the Town requesting a stop work and removal order be issued for the fence. On April 18, 2023 the Town gave Notice of Motion for the adoption of fencing regulations. On May 16, 2023 the Town Council passed motion 2023-111 stating that the Town would not get involved with the civil matter between the neighbors on Dogberry Hill Road, and Motion 2023-112 which adopted the Fence Regulations.

On May 17, 2023 the Town contacted the Appellants notifying them that they considered the fence to be a civil dispute and the Town would not get involved.

The Appellants filed an appeal on May 29, 2023.

The parties appeared before me on January 10, 2024. The Appellants were advised that the undersigned is a rostered investigator for the Town and asked whether they had any concerns regarding apprehension of bias. Mr. Baird, on behalf of the Appellants advised that there were no concerns around apprehension of bias.

## **Preliminary Objection – Jurisdiction**

Mr. Spurrell, on behalf of the Town, raised a preliminary objection in relation to jurisdiction. Mr. Spurrell stated that it was the Town's position that the decision to not involve itself in the fence issue is not an appealable decision by an Adjudicator under the *Urban and Rural Planning Act, 2000*.

Section 43(4) of the *Urban and Rural Planning Act, 2000* ("the *Act*") states:

43. (4) *Where an adjudicator determines that the subject matter of an appeal is not within the jurisdiction of the adjudicator under section 41, the adjudicator may dismiss the appeal without holding a hearing.*

The relevant provisions of Section 41 of the *Act* state:

41. (1) *A person or a group of persons aggrieved by a decision may appeal the decision to an adjudicator where*

(a) *the decision is permitted to be appealed to an adjudicator under this Act or another Act; or*

(b) *the decision is permitted to be appealed under the regulations and the decision relates to one or more of the following:*

(i) *an application to undertake a development,*

(ii) *a revocation of an approval or a permit to undertake a development, or*

(iii) *the issuance of a stop work order.*

(2) *A decision of a council, regional authority or authorized administrator to adopt, approve or proceed with a plan, a scheme, development regulations and amendments and revisions of them is final and not subject to an appeal.*

## **Do I have jurisdiction to hear the appeal?**

The Appellants argued that the decision of the Town to ignore the erection of the fence at 417 Dogberry Hill Road is *de facto* development approval and therefore the decision may be appealed under s.41(1)(b)(i) of the *Act*. Respectfully, I cannot accept this argument.

The Appellant is attempting to argue that the decision of a Town to not take enforcement action is an appealable decision under this *Act*. A cursory review of the types of actions that can be appealed under s.41(1)(b) clearly demonstrate that they all involve some positive action by the Town. Either its consideration of an application, its revocation of a prior decision, or the issuance of a stop work order. The application of s.41(1)(b) to matters where there has been no positive action by the Town would create an unreasonable burden upon municipalities in the province.

While the Appellant may well have a *bona fide* issue in relation to the Town's decision in relation to the fence at 417 Dogberry Hill Road, the s.41 adjudication process is not the proper forum for

those issues. Section 41 Adjudicators do not have the authority to hear matters related to the non-exercise of municipal authority.

Consequently, I find that the Respondent is correct in its position that I do not have jurisdiction to hear this matter. Simply stated, there is no action by the Town that would grant jurisdiction to hear an appeal under s.41 of the *Act*.

### **Alternatively – the Decision is Discretionary**

In the alternative, if I do have jurisdiction to hear this matter, I find that the Town's refusal to issue an Order under s.102(1) is a discretionary decision of the Town and may not be overturned per s.44(2) of the *Act* unless there is some clearly articulated legal error.

The Appellant's submission involved opinion evidence from their representative along with assertions regarding the construction quality of the fence. Their evidence relied upon two key arguments. First, that the Town *should have* required a permit for the development of the fence. Second, that the fence was not of sound construction. The Appellant submitted that the failure to intervene on the fence may create future legal liability for the Town.

While I appreciate the arguments raised by the Appellants, the fence is not the primary issue of this appeal. The primary issue is whether the Town properly exercised its authority when it decided to not involve itself with the fence at 417 Dogberry Hill Road. While the Town may have made decisions in this case that may attract future liability, I find that the decision to not involve itself in the 417 Dogberry Hill Road fence was made within the proper discretionary rights of the Town Council.

Further, the Town is within its rights to not act in relation to the 417 Dogberry Hill Road fence. Section 102(1) of the *Act* incorporates discretionary authority by stating that the town "may order" the removal of development undertaken without a permit. Section 102(1) does not mandate that the Town issue an Order and the Council has broad authority to determine whether it will intervene on certain developments undertaken without permits. Accordingly, if I do have jurisdiction to review this issue, I find that the decision not to act was made within the Town's discretionary authority.

### **Is the Appellant Entitled to Reimbursement of its Fee?**

Section 45(2) of the *Act* states that:

*(2) Where an appeal under section 41 is successful, the council, regional authority or authorized administrator that made the decision that was appealed shall pay the person or group of persons who brought the appeal an amount of money equal to the fee paid under subsection 41(4).*

The *Act* does not define the term "successful." However, based on a plain language interpretation of the word, the Appellant cannot be considered as successful in this instance. Accordingly, I do not believe that the Appellant is entitled to fee reimbursement under s.45(2).

**Order – Dismissal of Appeal / Confirmation of Decision**

Having found that there is no statutory authority to hear the issues raised by the Appellant, I dismiss the appeal for lack of jurisdiction as per s.43(4) of the *Act*.

Alternatively, in the event that I do have jurisdiction to hear this matter, I confirm the decision of the Town per s.44(1)(a).

DATED at St. John's, Newfoundland and Labrador, this 16<sup>th</sup> day of January, 2024.

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John R. Whelan Q.Arb

Adjudicator