

15-006-009-044

**DECISION OF APPEAL BY THE EASTERN NEWFOUNDLAND REGIONAL APPEAL
BOARD**

July 28, 2014

BETWEEN:

APPELLANT: Blue Sky

AND:

RESPONDENT: Town of Marystown

Re: Refusal

Dear Participants:

I have received the Board's decision for distribution. Please find the attached document concerning the above noted appeal. Any action specified in the order must be taken within the time period prescribed by the 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 Trial Division on a question of law or jurisdiction (of the Board). If this action is contemplated, the appeal must be filed no later than ten (10) days of the date of the Board's decision has been received by the appellant.

Yours truly,



Robert Cotter, Secretary
Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

This appeal arises from the Town of Marystown refusing to issue a permit to Blue Sky family care to operate a group home at 31-33 Butler's Road. The proposed group home would have four (4) beds and house children and/or youth who have been removed from their homes. The Town considered and refused the subject application at the June 3, 2014 Regular Meeting of Council. The appellant was notified of Council's decision in writing on June 4, 2014. The letter outlined Council's reasons for refusal, which stated:

1. *Council deems your proposal to be[a] commercial use, operated by a for-profit business, which is neither a Permitted nor a Discretionary use in a Residential Zone.*
2. *Council deems the proposed use to be "Institutional" which is neither a Permitted nor a Discretionary Use in a Residential Zone.*

The refusal letter also noted the appellant's right and process to appeal Council's decision.

On June 17, 2014, John Whelan, Director of Operations for Blue Sky, filed an appeal with the Eastern Newfoundland Regional Appeal Board against Council's refusal. The grounds of appeal can be summarized as follows:

- the Town's decision is inconsistent with the Town's Development Regulations;
- the Town's decision is inconsistent with Canadian law;
- the Town's decision is inconsistent with the duty of procedural fairness;
- the Town has acted *ultra vires*; and,
- the Town acted in bad faith towards the appellant.

In accordance with the *Urban and Rural Planning Act, 2000* a public notice of the appeal was published in *The Southern Gazette* on June 24, 2014 and a notice of the time, date, and place of the Hearing was provided to the appellant and authority by registered mail sent on July 27, 2014.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

Town of Marystown Municipal Plan and Development Regulations, 2002

Matters presented to and considered by the Board

What is permitted in the Residential zone?

The proposed group home is located at 31-33 Butler's Road and is zoned Residential. The Board reviewed Schedule "C" of the Town of Marystown Development Regulations and found that the uses permitted and discretionary in the Residential Use are outlined in the Residential Use Zone Table and are as follows:

PERMITTED USE CLASSES – (see Regulation 96)

Conservation, Double Dwelling, Family and Group Care Centre, General Service (Home Occupation), Light Industry (Home Occupation), Medical and Professional (Home Occupation), Office (Home Occupation), Personal Service (Home Occupation), Public Utility, Recreational Open Space, Single Dwelling, Subsidiary Apartment and Antenna.

DISCRETIONARY USE CLASSES – (see Regulations 23 and 97)

Apartment Building, Bed and Breakfast, Boarding House, Child Care, Educational, Marina, Mobile Home, Place of Worship, Row Dwelling, Convenience Store.

The Board accepts that institutional uses are not listed as a permitted or a discretionary use and Family and Group Care Centres are listed as a permitted use.

Did Council use its discretion appropriately when it classified the proposed group home as an institutional use?

Institution is defined in Schedule "A" of the Town's Development Regulations as follows:

Institution means a building or part thereof occupied or used by persons who:

- (a) are involuntarily detained, or detained for penal or correctional purposes, or whose liberty is restricted, or;*
- (b) require special care or treatment because of age, mental or physical limitations or medical conditions.*

The Board heard arguments from the appellant that the proposed group home would not fall under the definition of Institution because the proposed group home will be located in an existing dwelling and therefore be classified as a Family and Group Care Centre. Schedule "A" of the Town's Development Regulations defines Family and Group Care Centre as follows:

Family And Group Care Centre means a dwelling accommodating up to but no more than six (6) persons exclusive of staff in a home-like setting. Subject to the size limitation, this definition includes, but is not limited to, the facilities called "Group Homes", "Halfway House", and "Foster Home".

The appellant argued that the term "dwelling" as used in the definition of Family and Group Care Centre is critical in determining how to classify the proposed group home. The appellant further noted that the definition of Institution does not include the term dwelling but specifies that an

Institution means a “building”. The appellant stated that Blue Sky purchased a pre-existing single dwelling that will continue to be used as a dwelling designed to house children and/or youth in a residential setting. While the Board accepts the Town’s argument that a dwelling is considered a building, not all buildings are dwellings. A dwelling unit is defined in Schedule “A” as follows:

Dwelling Unit means a self-contained unit consisting of one or more habitable rooms used or designed as the living quarters for one household.

While a building is defined in Schedule “A” as follows:

Building means

- (i) a structure, erection, alteration or improvement placed on, over or under land or attached, anchored or moored to land,*
- (ii) mobile structures, vehicles and marine vessels adapted or constructed for residential, commercial, industrial and other similar uses,*
- (iii) a part of and fixtures on buildings referred to in subparagraphs (i) and (ii), and*
- (iv) an excavation of land whether or not that excavation is associated with the intended or actual construction of a building or thing referred to in subparagraphs (i) to (ii).*

The Board therefore determines that the Town incorrectly classified the proposed group home as an institutional use.

Is the proposed group home a residential use?

The Board reviewed Schedule “B” of the Town’s Development Regulations which provides direction for Council on how to classify uses within the Town. In accordance with Schedule “B” of the Town’s Development Regulations, the Board concludes that the proposed use is classified as a Family and Group Home, which is listed as an example of a residential use.

Did the Town use its discretionary authority appropriately when it classified the proposed group home as an institutional use?

No. While the Board understands that Council has the discretionary power of authority to determine the classification of a use under section 11 of the Town’s Development Regulations, the Board is unsatisfied that the Town of Marystown applied its discretionary authority in accordance with its Development Regulations. Specifically, the Town did not interpret the definition of Institution correctly. Moreover, the Board concludes that the proposed group home is classified as a Residential use and is considered a Family and Group Home Centre, which is

listed as a permitted use in the Residential zone.

Conclusion

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties 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.

Based on its findings, the Board determined that the Town of Marystown did not apply its discretionary authority in accordance with its Development Regulations when it refused Blue Sky's application to operate a group home at 31-33 Butler's Road.

Therefore, the Board reverses Council's June 3, 2014 decision to refuse the subject application. That is to say, Council shall now issue a permit to Blue Sky for the purpose of operating a group home at 31-33 Butler's Road.

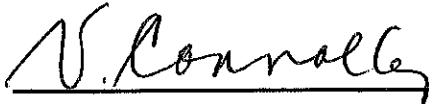
Order

Based on the information presented, the Board orders that the June 3, 2014 decision of the Town of Marystown to refuse Blue Sky's application to operate a group home at 31-33 Butler's Road be reversed.


The Board further orders that the Town of Marystown pay an amount of money equal to the appeal filing fee of \$113.00 paid by the appellant to the appellant.

The Town of Marystown and the appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

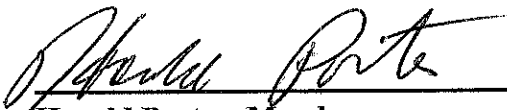
DATED at St. John's, Newfoundland and Labrador, this 23rd day of July, 2014.



Vicki Connolly, Chair
Eastern Newfoundland Regional Appeal Board



Michelle Downey, Member
Eastern Newfoundland Regional Appeal Board



Harold Porter, Member
Eastern Newfoundland Regional Appeal Board