URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #:	15-006-083-024 and 15-006-087-020
Adjudicator:	Chris Forbes
Appellant(s):	Clay Oates
Respondent/Authority:	Town of Carbonear
Date of Hearing:	March 11, 2024
Start/End Time:	11:00 a.m. – 12:10 p.m.

In Attendance

Appellant:	Clay Oates
Respondent/Authority:	Cynthia Davis, Chief Administrative Officer Town of Carbonear
Appeal Officer:	Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs
Technical Advisor:	Faith Ford, Planner, MCIP, Municipal and Provincial Affairs

Adjudicator's Role

Part VI of the *Urban and Rural Planning Act, 2000* (the "Act") authorizes adjudicators to hear appeals and establishes the powers of adjudicators. The role of the Adjudicator is to determine if the Authority acted in accordance with the *Urban and Rural Planning Act, 2000* and the *Town of Carbonear Municipal Plan* and *Development Regulations* when it issued an order to cease all business operation and remove all vehicles, machinery and/or equipment used in such business operation at 4 Kelby Corners in Carbonear on May 24, 2023 and issued a second order to cease all such business operation and remove all vehicles, machinery and/or equipment used in such business operations at 45 Janes Avenue in Carbonear on August 30, 2023.

Technical Advisor

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness as outlined in the Appeal Board (Rules of Procedure) Order, 1993. Section 10 of that Order reads:

> 10. The Hearing will proceed in the following manner:

> (a) There shall be a technical advisor to the Board who shall provide data relative to the Municipal Plan or other Scheme in effect and an interpretation on whether or not the proposal under appeal conforms, is contrary to, or could be discretionarily approved pursuant to the Municipal Plan, Scheme or Regulations in effect, …

At the hearing, the Technical Advisor outlined her report of February 2, 2024, noting that, according to the submission of the Authority, business operations on the property located at 4 Kelby Corners commenced in 2011 and enforcement efforts have been ongoing since that time. According to the Authority, commercial operations associated with a landscaping business have continued on that property and the Appellant is using the garage on the property to complete repairs on commercial vehicles. Further, according to the Authority, at some point those activities expanded onto the abutting property of 45 Janes Avenue.

The Technical Advisor confirmed the first order was issued in respect of 4 Kelby Corners on May 24, 2023 and the second order was issued in respect of 45 Janes Avenue on August 30, 2023.

It was indicated by the Technical Advisor that the Appellant did not submit grounds of appeal in respect of the first order but did submit grounds in respect of the second.

The Technical Advisor reviewed the definition of "development" found in the Act and noted that the storage, repair, and operation of machinery or equipment associated with a commercial operation falls within that definition.

According to the Technical Advisor, both of the subject properties are zoned residential medium density. The storage, repair, and operation of commercial machinery, vehicles or heavy equipment is not a permitted or discretionary use for that zone and is not permitted as a home-based business. Pursuant to section 91 of the *Development Regulations*, such uses are prohibited.

The Technical Advisor also referenced the submission of the Authority that the commercial operations on 4 Kelby Corners are occurring in an accessory building on that property. According to the *Development Regulations*, accessory buildings within that zone are subject to various conditions, including conditions 6 and 7, which prohibit the use of an accessory building for non-residential purposes and the use of such a building for the purpose of performing repairs to vehicles or heavy equipment. While a permit was obtained for the construction of the garage at 4 Kelby Corners, no permit was obtained for the performance of repairs on either that property or 45 Janes Avenue.

The Technical Advisor noted that all development within the subject area must comply with the *Development Regulations* and requires a permit.

It was also noted by the Technical Advisor that both orders were issued pursuant to section 102 of the Act.

The Technical Advisor noted that Council for the Authority resolved on September 13, 2022 to send an order to 4 Kelby Corners "to complete property clean-up" and that the Authority did not provide confirmation of any other resolutions with respect to the first order.

The Technical Advisor also noted that Council for the Authority resolved on August 15, 2023 to issue the second order in respect of 45 Janes Avenue.

Appellant's Presentation and Grounds

The Appellant argued that there is no "commercial activity" going on on his properties. The activities are in the nature of a repair garage. There is no exchange of money in relation to those activities. His understanding of "commercial" is that it means doing something for monetary reasons (money changing hands for services).

According to the Appellant, 90-95% of the time, his equipment is inside the garage. Sometimes vehicles are temporarily on the properties for repairs, even without his knowledge.

The photos submitted by the Town show lumber and related materials that were on the property to be used in building a shed at 34 Earles Lane (for which he had a permit).

He contended that he was permitted to store equipment in the accessory building and that, in order to get the equipment into the building, he had to bring it onto the site. He also indicated that, as he understood the Town's regulations, he was permitted to bring one commercial vehicle onto each "site" (property). In referring to the photographs included in the appeal package, the Appellant noted that the vehicles shown were therefore permitted according to those regulations.

The Appellant also indicated that the Town is incorrect in stating that he is not permitted to do repairs in his own building.

He indicated that moving the equipment elsewhere for repairs would be cost prohibitive.

The Appellant confirmed that the equipment shown in the photographs is used in the Appellant's landscaping business and the business owns that equipment. The name of his business is "Clay Oates Landscaping and Construction Ltd." There is one person who works in the garage on the property doing repairs and he is an employee of that company.

He also confirmed that bags of fertilizer shown in the photographs are used in a sod farm he owns and operates. The sod farm is owned by him personally and it is not used in his landscaping business, although the sods are used in his landscaping business. The photos also show plows that are used for snow clearing. The Appellant owns nearby apartment buildings and the plows would be used for snow clearing at those buildings. 34 Earles Lane is an apartment building and there is equipment on the subject properties (shown in the photographs) that was intended to be used to build a shed next to that apartment building. The Appellant indicated that income from the apartment buildings is claimed by him on his personal income tax return and that he claims expenses associated with them as business expenses.

Lastly, the Appellant indicated that on a previous occasion, he had asked the Town's enforcement officer to speak to him if he noticed anything on the subject properties that looked untidy. He never heard anything further from that enforcement officer and so presumed everything was fine. He also indicated that, when Council is considering matters involving him, he believes he should be informed of those considerations so that he can either defend himself or rectify the problem.

The Appellant stated there was no activity on the Kelby Corners property as that is his home. All of the photographs shown in the appeal package are of the Janes Avenue property. He indicated that he had a permit to build the garage and it was built in connection with the home on the Kelby Corners property.

The Appellant confirmed that, with respect to the first appeal, he paid the fee and submitted a copy of the Order issued by the Town but did not file an appeal form. He did file a form and pay the fee with respect to the second appeal. He clarified during the hearing that the appeal form related to both appeals and he had been under the assumption that the Town had the address wrong on the first order it issued.

He also indicated, with respect to the photographs in the appeal package, that this was a snapshot in time and did not necessarily accurately represent the general state of the property.

According to the Appellant, the registered office of the Appellant's landscaping business is his home. He has been in business for 25 years. The equipment shown in the photographs only represents about 10% of the equipment used in his business, with the remainder stored at a commercially-zoned property on Powell Drive.

The Appellant confirmed that vehicles and equipment are constantly being repaired in his garage.

The Authority's Presentation

The Authority took the position that the Appellant could not have reasonably thought the appeal form submitted in respect of the second appeal could have included the first appeal given the amount of time that passed between the two orders. It noted that the first appeal did not contain grounds of appeal.

Ms. Davis indicated that the garage in question is actually located on the 4 Kelby Corners property, as shown by the survey in the appeal package. She confirmed that the garage was constructed under a permit issued for an accessory building that was related to the residence on that property.

The Authority further indicated that the Appellant had confirmed during his presentation that he operated his business out of the Kelby Corners property.

She noted that the Town has tried to work with the Appellant in the past. He leased property on Powell Drive to accommodate his equipment for his landscaping business.

The Authority indicated that, while the Appellant states most of his repairs are done inside the garage, the Town's regulations state that an accessory building shall not be used for vehicle repairs without permission of Council. The permit issued in respect of the garage was an approval for him to construct and use as his own personal garage and not to operate a business.

According to the Authority, the garage was built in 2011, at the same time the house on Kelby Corners was constructed. While the business was small initially it has grown since then and the Appellant has moved into using larger equipment.

Ms. Davis noted that a lot of neighbours of the Appellant do not agree with the business operation being conducted on the subject property or the use there of equipment, etc.

Ms. Davis also spoke to the issue of a single commercial vehicle being permitted on each property. She confirmed this is the case but the vehicle is intended to be a vehicle used in relation to a business such

as a courier or chip truck. This does not mean the vehicle can be used for a business operated on the property. It is intended to cover off, for example, those who need a vehicle for a business that operates without a fixed address.

Analysis

1. **Was the First Appeal (#15-006-083-02) (Re. 4 Kelby Corners) Filed in Accordance with the Act?**

No.

Section 41(1) of the Act sets out the requirements that must be met in order for a party to appeal a decision. It reads:

> 41. (4) An appeal shall be made in writing and shall include
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> (a) a summary of the decision being appealed;
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> (b) the grounds for the appeal; and
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> (c) the required fee.

I note the following excerpt from the Technical Report (p. 10):

> "According to the documents provided, the first appeal was filed on June 15, 2023. The order was dated May 24, 2023, but it is unknown when the Appellant received the order. The Appellant's submission included a copy of the order and required fee but did not include an application form or grounds for the appeal as required under Section 41 (4) of the Act."

No affidavit of service was produced by the Authority in the course of the hearing, nor was any other evidence produced confirming service of the Order on the Appellant; however, it is clear the Appellant personally received the Order at some point, since he filed a copy of it along with the appeal fee on June 15, 2023. I have therefore concluded that, at a minimum, the Appellant was personally served with the Order on that date, and had 14 days thereafter in which to meet the requirements set out in section 41(4) of the Act.

While the Appellant paid the appeal fee, he did not submit an appeal form or any grounds of appeal at that time. The Appellant indicated during the hearing that he believed the form he filed in relation to the second appeal also related to the first appeal, but that form was not filed until September 19, 2023, which is well beyond the deadline for filing an appeal in relation to the first order issued by the Authority. Further, I am not persuaded that the Appellant actually believed this, since he was clearly aware of the need to file his appeal in relation to the first order when he did so in June 2023. I also note that the appeal form filed in respect of the second appeal referenced only the property at 45 Janes Avenue and did not include any reference to the property at 4 Kelby Corners (p. 24 of appeal package).

Section 6(5) of the Development Regulations under the Act reads:

> "6. (5) Where an appeal of a decision and the required fee is not received by a board in accordance with this section and Part VI of the Act, the right to appeal that decision shall be considered to have been forfeited."

In *Clarke's Trucking and Excavating Ltd. v. Paradise (Town)*, 2015 CanLII 20033, the Newfoundland and Labrador Supreme Court considered the effect of non-compliance with this section of the Act on the jurisdiction of an Appeal Board to hear an appeal. The Court stated as follows

> "[20] Section 42(5)(b) of the URPA ("… shall include the grounds for the appeal") is a provision that exists so that the opposing party knows the case to meet and has adequate time to respond. In this case, it is a provision that exists for the sole benefit of the Town, and it is a provision that can be waived by the Town. When such waiver occurs, the failure to include the grounds for the appeal with the Appeal Summary Form does not result in a loss of jurisdiction to the Board. The waiver meant that the filing of the Appeal Summary Form and required fee within the 14-day appeal period effected a valid appeal, in accordance with Part VI of the URPA. Section 6(5) of the Development Regulations is not engaged. The non-compliance with section 42(5)(b) does not impact the Board's authority to hear the appeal. The Board's jurisdiction is derived from section 42(1) of the URPA and limits on the Board's jurisdiction are identified in section 42(2) and (3)."

I note that the references to section 42 in the above quotation are to the equivalent section 41 that I have discussed above.

During the hearing of this matter, the Authority did not waive the Appellant's non-compliance with section 41. As such, I find that the right of the Appellant to appeal the first order issued by the Authority was forfeited in the circumstances and that appeal is to be dismissed.

2. Did the Town have the authority to issue the order in respect of 45 Janes Avenue?

Yes.

The definition of "development" in section 2(g) of the Act reads:

> 2. (g) "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change in the use, or the intensity of use of land, buildings or premises and the
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> (i) making of an access onto a highway, road or way,
> (ii) erection of an advertisement or sign,
> (iii) construction of a building,
> (iv) parking of a trailer, or vehicle used for the sale of refreshments or merchandise, or as an office, or for living accommodation,
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> and excludes the

(v) carrying out of works for the maintenance, improvement or other alteration of a building, being works which affect only the interior of the building or which do not materially affect the external appearance or use of the building,
(vi) carrying out by a highway authority of works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road reservation,
(vii) carrying out by a local authority or statutory undertakers of works for the purpose of inspecting, repairing or renewing sewers, mains, pipes, cables or other apparatus, including the breaking open of street or other land for that purpose, and
(viii) use of a building or land within the courtyard of a dwelling house for a purpose incidental to the enjoyment of the dwelling house as a dwelling;

It is clear from the evidence that the garage used by the Appellant is located on the property located at 4 Kelby Corners but that various pieces of equipment and other items are stored and used on both that property and on the property that is the subject of the second appeal/second order (re. 45 Janes Avenue). I understand that the property at 45 Janes Avenue is vacant land. The storage and operation of equipment on that land therefore meets the definition of "development" set out above.

Since the activities of the Appellant on the property located at 45 Janes Avenue constituted a "development," the Town's *Development Regulations* applied to those activities (per section 6 of those *Regulations*). Further, before undertaking the "development," the Appellant was required to obtain a permit from Council (per section 7 of those *Regulations*).

Pursuant to the *Municipal Plan*, the subject property at 45 Janes Avenue is zoned Residential Medium Density ("RMD"). The storage, repair, and operation of commercial machinery, vehicles or heavy equipment is not a permitted or discretionary use for the RMD zone. Condition 7 of Schedule C to the *Municipal Plan* expressly prohibits storage of goods and repairs to vehicles and heavy equipment. Section 91 of the *Development Regulations* provides that uses that are neither permitted nor discretionary for a particular zone are not permitted.

The Appellant contends that the equipment stored (either temporarily or otherwise) on the subject property is not "commercial" and as such should be permitted; however, it is clear from both his own evidence and the evidence of the Authority that a great deal, if not all, of the equipment, machinery and vehicles located on the subject property are used in relation to businesses operated either by the Appellant personally (such as his apartment buildings and sod farm) or through his landscaping company. The fact that the equipment, machinery and vehicles are not used in a business that involves cash transactions with the public is irrelevant. Storage of those items on the subject property, even temporarily, requires a permit from Council and, pursuant to the *Development Regulations* and *Municipal Plan*, Council is prohibited from permitting such storage on property that is zoned Residential Medium Density.

Section 102(1) of the Act reads:

> "102. (1) Where, contrary to a plan or development regulations, a person has undertaken or commenced a building or other development, the council, regional authority or authorized administrator responsible for that plan or those regulations or the minister where the minister considers it necessary, may order that the person pull down, remove, stop construction, fill in or destroy that building or development and may order that the person restore the site or area to its original state."

In light of the above, the Authority clearly had the authority to issue the order requiring the Appellant to "cease all such business operation on the said land" and cause "all vehicles, machinery and/or equipment utilized in such business operation [to] be removed from the said land."

3. If yes, was the issuance of the second Order in accordance with, and a reasonable exercise of, the Town's authority?

Yes.

I find that no evidence was provided at the hearing showing that the Authority acted in error or beyond its authority in issuing the second Order for 45 Janes Avenue or that procedural requirements were not appropriately followed. Further, no evidence was provided indicating that the Authority acted in a biased manner or otherwise contrary to principles of natural justice. I also find there was no dispute between the parties as to the basic facts in issue. Accordingly, Council's decision with respect to the issuance of the second Order was not based on any material factual error.

The decision to issue such an order is a discretionary decision of Council. Generally, I am not permitted to interfere with such a decision, except when it is based on an error of law (see section 44(2) of the Act).

<u>Decision of the Adjudicator</u>

As Adjudicator, I am bound by section 44 of the Act, which states:

> 44. (1) In deciding an appeal, an adjudicator may do one or more of the following:
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> (a) confirm, reverse or vary the decision that is the subject of the appeal;
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> (b) impose conditions that the adjudicator considers appropriate in the circumstances; and
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> (c) direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have the adjudicator's decision implemented.
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> (2) Notwithstanding subsection (1), a decision of an adjudicator shall not overrule a discretionary decision of a council, regional authority or authorized administrator.
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> (3) An adjudicator shall not make a decision that does not comply with
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> (a) this Act;

(b) a plan and development regulations registered under section 24 that apply to the matter being appealed; and

(c) a scheme, where adopted under section 29.

(4) An adjudicator shall, in writing, notify the person or group of persons who brought the appeal and the council, regional authority or authorized administrator of the adjudicator's decision.

Order

The Adjudicator orders that both Appeals be dismissed. The Orders of Council issued on May 24, 2023 and August 30, 2023 are hereby upheld and confirmed.

The Authority and the Appellant are bound by this decision.

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Adjudicator 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 Adjudicator's decision has been received by the Appellant.

DATED at St. John's, Newfoundland and Labrador, this 3rd day of April, 2024.

Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000