

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-072-018
Appellant(s)	Michael O'Dea
Respondent / Authority	City of Mount Pearl
Date of Hearing	April 20, 2022

Board Members

Chair	Cliff Johnston, MCIP
Member	Carol Ann Smith
Member	Paul Boundridge, MCIP

Also in Attendance

Appellant(s)	Michael O'Dea
Representatives for the Appellant(s)	
Representatives for the Authority	Stacey Pratt, Legislative Officer & City Clerk; Blair Tilley, Superintendent of the Municipal Enforcement Division
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Keith Batstone, MCIP
Interested Parties	

The authority for appeals comes from section 42 of the *Urban and Rural Planning Act, 2000* (The Act).

Board's Role

The role of the Eastern Newfoundland Regional Appeal Board (the "Board") is to determine if the decision of the City of Mount Pearl (the Authority) to issue an Order on June 15, 2021 to the Appellant to provide a Condition Assessment on the property at Civic Number 161 Park Avenue, to be completed by June 30, 2021, is in accordance with the Urban and Rural Planning Act, 2000, the Mount Pearl Development Regulations 2010, the Mount Pearl Building Regulations, 2019, and the Occupancy and Development Regulations.

LEGISLATION, MUNICIPAL PLANS AND REGULATIONS CONSIDERED BY THE BOARD

- City of Mount Pearl Act
- Urban and Rural Planning Act, 2000
- City of Mount Pearl Development Regulations, 2010
- City of Mount Pearl Building Regulations, 2019
- Provincial Occupancy and Maintenance Regulations

Background:

The Authority indicated it received complaints regarding the condition of the property, Civic # 161 Park Avenue, with respect to the building being unsecured, debris accumulation, construction activity and condition of the building.

The City conducted an outdoor inspection of the property and sent written correspondence to the Appellant regarding the state of the property. The City did not undertake an interior inspection of the property or request permission to do so.

A Committee of Council determined the property to be “dilapidated, unfit for human habitation, and a public nuisance”. Subsequent to this determination, the Authority determined that the Appellant should undertake a Condition Assessment at his expense. In a letter dated May 28, 2021, the City of Mount Pearl wrote Mr. O’Dea to advise him that on May 18, 2021, Committee of Council discussed the condition of the property at Civic #161 Park Avenue, is dilapidated, unfit for human habitation and is a public nuisance, as outlined in Section 238 of the City of Mount Pearl Act. This same letter requested the Appellant to conduct a Condition Assessment to determine the state of the building. This letter was apparently not received by the Appellant.

The Appellant subsequently received an Order from the Authority, delivered in person, on July 9, 2021, regarding the condition of the existing building at 161 Park Avenue in Mount Pearl NL. The Authority originally issued the Order on June 15, 2021, as notice of Council’s requirement to conduct a ‘Condition Assessment’, per the authority of Section 238 of the City of Mount Pearl Act, 1990. The Appellant filed an appeal with the Secretary of the Eastern Newfoundland Regional Appeal Board on July 16, 2021.

Presentations During Hearing

The following is synopsis/summary of the verbal representations made to the Board during the Appeal Hearing. The Board also received and reviewed written submissions from the Technical Advisor, the Appellant and the Authority.

The Board heard from the following:

Technical Advisor:

The Authority contends that the property and/or building at Civic No. 161 Park Avenue is being maintained or used contrary to the regulatory requirements of the City’s

Building Regulations and the Province of Newfoundland and Labrador Occupancy and Maintenance Regulations CLNR 1021/96.

The Authority's appeal package outlines that the City received complaints about the physical condition of the property at 161 Park Avenue. The City indicates that: staff initiated email correspondence with the registered property owner; that a Council Committee determined the building to be in a dilapidated state; and, that the City requested – in writing – that the property owner provide a Condition Assessment for the building.

The Authority has not evidenced that a correspondence letter dated May 28, 2021 was received by the registered owner. However, the Authority has confirmed that City staff visited the site in May 2021 (no date provided) and determined that general property maintenance by the Appellant's employee was on-going.

The Authority's minutes for the regular Council meeting of June 15, 2021 establish that Council considered the property complaint, the City's written request to provide Condition Assessments for the vacant building, and resolved unanimously to pass motion No. 21-06-322, which Ordered the Appellant to provide "a condition assessment (phase 1 environmental site; hazardous buildings material and structural assessments) of the property (...) to be undertaken by June 30, 2021."

The Authority's appeal package further indicates that City staff met with the Appellant on July 9, 2021 for an in-person meeting and evidenced that a Municipal Enforcement Officer served the Order at that time.

The Authority contends that the property and/or building at Civic # 161 Park Avenue is being maintained or used contrary to the regulatory requirements of the City's Building Regulations and the Province of Newfoundland and Labrador Occupancy and Maintenance Regulations CLNR 1021/96.

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The Appellant’s Appeal

The Appellant contends that it is pertinent to the Board’s consideration of the appeal matter that:

- the City is asserting that the building is dilapidated
- the building is occupied, but the building is not rented
- the building is structurally sound and work is proceeding on broken windows
- cosmetic siding material is being removed from one section of the building
- an application for a change of use was approved and then rescinded
- the Order requires engineering reports for a perfectly fine building

The City of Mount Pearl Act, 1990 provides the authority for Council to require permits, regulate and control buildings, and issue Orders where determined to be in a dilapidated state, unfit for human habitation, or a public nuisance:

Building

235. (1) A person shall not within the city

(...)

(b) extend, repair, relocate or demolish an existing building

(...)

(d) occupy a building that has been vacant for a period of 6 months or more or a newly constructed building;

except under and in accordance with a written permit from council.

Building Regulation

236. (1) The council shall make regulations controlling the design, construction, alteration, reconstruction, occupancy, demolition, removal, relocation, and maintenance of buildings and a class of buildings and shall send a copy to the Minister.

Removal of building

238. (1) Where

- (a) a building has been erected, or started to be erected;
- (b) an existing building is repaired or an extension added to it;
- (c) the use of an existing building is changed other than under and in accordance with the terms of a permit issued by the council and the building regulations adopted by council,

(...)

(2) Where a building is in a dilapidated state, or is, in the opinion of the council, unfit for human habitation, or the other use for which it is then being used, or is a public nuisance, the council may order the owner or occupier to pull down, remove, fill in or otherwise destroy the building and return the site to its original state, or make the disposition or alteration of the building that the order directs, within the time specified in the order.

(3) An order made under this section shall be signed by the city clerk and shall be served upon the owner or builder of the building either personally or by registered mail, or by posting the notice on the building, where the owner or builder is not known.

The Provincial Occupancy and Maintenance Regulations CLNR 1021/96 appear to also provide for the City to further control and uphold community standards for a wide range of specific matters pertaining to real property. The following may be relevant to this appeal:

Maintenance

5. All properties in the areas listed in the Schedule including land, buildings, structures, dwellings, fences, sheds, garages, parking lots, driveways, landscaping and all appurtenances shall be maintained in a state of good condition and repair in accordance with the standards set out in these regulations and as otherwise ordered by the enforcement authority.

Structural soundness

6. Structural components of all buildings and dwellings shall be

- (a) free from deterioration, loose jointing, sagging, bulging and excessive deflection; and
- (b) capable of sustaining safely the weight of the structure or dwelling and a load to which it may be normally subjected.

Exterior walls

12. (1) Exterior walls and their components shall be adequate to support loads upon them and shall be maintained to prevent their deterioration from any cause.

(2) Exterior cladding or covering must be reasonably durable and be maintained in accordance with the standards set out in these regulations and as otherwise determined by the enforcement authority.

Exterior doors

14. (1) Existing doors and frames shall be in sound condition, well fitted and operate satisfactorily.

(2) At least one entrance door in every unit shall be capable of being locked from both inside and outside.

(3) All exterior doors shall be weather-stripped or have an appropriate combination of storm and screen door suitable for all year use.

Roofs

16. (1) All roof construction components shall provide adequate support for all probable loads and form a suitable base for the roof covering.

(2) A roof including the fascia board, soffit, cornice and flashing shall be maintained in a watertight condition so as to prevent leakage of water into the dwelling.

Debris prohibited

35. Land shall be free from debris including a vehicle, trailer or object which is in a wrecked, discarded or abandoned condition.

Powers of enforcement authority

41. (1) The enforcement authority may direct the owner of a dwelling unit or building which does not conform to the standard

(a) to undertake work to make the dwelling unit or building conform to the standard;

(b) to demolish all or part of a building or dwelling or structure or erection forming a part of the building or dwelling; or

(c) to clean and paint as required to provide a satisfactory condition of appearance and cleanliness, within the time that the enforcement authority may specify.

(2) Every owner shall carry out the directions of the enforcement authority referred to in subsection (1).

The City of Mount Pearl Development Regulations, 2010 establish further detailed procedures derived from the authority of the Urban and Rural Planning Act which relate to Council's authority to issue Orders and may, therefore, be relevant to the Board's consideration of this appeal matter:

1.6 Delegation of Authority

Where the term Council is referenced in these Regulations, Council may delegate its authority to administer these Regulations or part thereof to an employee of Council or an agent in the employment of Council by a resolution of Council.

10.10 Order

10.10.1 Where, contrary to a plan or Development Regulations, a person has undertaken or commenced a building or other development, Council 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.

10.10.2 A person ordered to carry out an action under Regulation 10.10.1 shall be served with that order and shall comply with the order at the person's own expense.

10.10.3 An order made under this section continues in force until revoked by Council.

10.10.4 Council may, in an order made under this section, specify a time within which there shall be compliance with the order.

10.10.5 Where a person to whom an order is directed under this section does not comply with the order or a part of it, Council may take the action that it considers necessary to carry out the order and any costs, expenses, or charges incurred by Council in carrying out the order are recoverable against the person against whom the order was made as a debt owed to the City.

10.10.6 A person who does not comply with an order made under Regulation 10.10.1 is guilty of an offence under the provision of the Act and is subject to such penalties as outlined in the Act.

10.11 Delegation of Authority to Issue Order

Where Council has delegated to an employee of Council its authority to issue an Order in accordance with Regulation 1.6, the Order shall be confirmed by a majority vote of the members of Council present at the next meeting of Council after the Order is made, and if the Order is not confirmed in this manner, it shall be considered cancelled.

10.12 Stop Work Order and Prosecution

10.12.1 Where a person begins a development contrary, or apparently contrary, to these Regulations, Council may order that person to stop the development or work connected therewith pending final adjudication in any prosecution arising out of the development.

10.12.2 A person who does not comply with an order made under Regulation 10.11.1 is guilty of an offence under the provisions of the Act.

The Authority's appeal submission package indicates that the Order issued to the Appellant cited the authority of the City of Mount Pearl Building Regulations, 2011, which may be a typographical error, since the regulation was repealed in March 2019.

The City of Mount Pearl Building Regulations, 2019 establish the scope of building controls for all Use Zones and the procedures for issuance of permits subject to the provisions of the National Building Code. The regulation reaffirms the requirement of the City of Mount Pearl Act to obtain a permit and provides additional details about the circumstances under which an application is required and a permit may be issued.

Scope and Application

3. No building shall be constructed (...) changed, altered, extended, repaired or demolished unless a permit for such use has been issued by the City...

Permit Required

5. A permit shall be obtained prior to commencement of any activity regulated pursuant to these Regulations

6. A building permit shall be required from the City for:

- (a) all new construction and extensions, placement of buildings, additions, structural changes affecting load bearing members, floor layout changes...;
- (b) all repairs or renovations to existing buildings not covered by (a) above and that are not exempt from permitting;

The Building Regulations appear to contemplate that the Department of Community Development may impose conditions in conjunction with the granting of a permit:

Permit Requirements

19. The Department may, upon granting a permit, impose such conditions as may be necessary to fulfill the requirements of these Regulations. Such conditions or requirements shall be outlined to the applicant in writing prior to, or upon the granting of, the permit.

The Building Regulations are consistent with Section 238(1) of the City of Mount Pearl Act inasmuch that it would appear to limit Council, where upon it determines that a building is "in a dilapidated state, unfit for human habitation, or is a public nuisance" to issuing Orders, in accordance with Section 55, that would require:

- removal of buildings
- restoration of the site
- the making of a disposition
- alteration of buildings

Removal of Building

55. Where a building is in a dilapidated state, or is, in the opinion of the Council, unfit for human habitation, or the other use for which it is then being used, or is a public nuisance, the council may order the owner or occupier to pull down, remove, fill in or otherwise destroy the building and return the site to its original state, or make the disposition or alteration of the building that the Order directs, within the time specified in the Order.

56. An Order made under this section shall be signed by the Chief Administrative Officer and shall be served upon the owner or builder of the building either personally or by registered mail, or by posting the notice on the building, where the owner or builder is not known.

The Authority contends that the building is dilapidated, which may fall to the authority of Section 238(2) of the City of Mount Pearl Act and/or Section 55 of the Building Regulations. The role of the Board is to determine if, or, how the Order issued to the Appellant (ie. Council's request to provide a Condition Assessment of the building) conforms to the limitations conferred within the above-noted statutory and regulatory provisions for Orders.

The appeal submission packages from both parties have not clarified whether an active building permit application is involved or required for the property. It may be arguable that local government authority to require a Condition Assessment for the building is limited to matters pertaining to the National Building Code.

The Authority's appeal submission package indicates that enforcement investigation proceedings initiated as a result of resident complaints, involved:

- City inspection, discussion with Appellant, and Council evaluation
- Council determination of a dilapidated building
- Issuance of a Council Order by hand delivery
- Specification of a 14 day time period within which there shall be compliance
- Notice of the right of appeal and the associated application process for the Eastern Newfoundland Regional Appeal Board

The Board must contemplate whether Council in exercising its authority to regulate and control the condition of buildings and maintenance of real property, adequately considered and carried out the enforcement procedures in accordance with the provisions of the legislative, policy, and regulatory framework.

The Appellant:

- The Appellant gave a brief overview of the history of the use of the property since acquired it in 2017.
- He acknowledged complaints received by the City of Mount Pearl of break-ins and vandalism at the property.
- He indicated there are no hazardous materials at the site.
- He questioned how the City of Mount Pearl determined that his property "is dilapidated".
- He stated that he has not taken out any permits (building or occupancy) from the City since he acquired the property.
- He indicated that in his view, the property/building is in good condition and questions why the City would ask him to undertake expensive engineering assessments of the building.

The Authority:

- There is a documented history going back to 2016/2017 of the property owner / Appellant, carrying out work on the building without permits from the City, and failing to provide the City with specific requested information; a Hazardous Materials Report; an Environmental Site Assessment Phase 1 and 2 Report; Letter of Clearance from the Department of Environment and Conservation.
- Complaints received in 2020-2021 from nearby property owners, which prompted the City to contact the owner of the subject property and request that he secure the siding on the building, dispose of any garbage including building materials, and secure the building to prevent unauthorized entry.
- The Appellant did not provide any of the requested information to the City before the City made its decision to make a formal request and subsequent Order for a Condition Assessment for the property.
- The City stated it had the authority under Section 238 of the City of Mount Pearl Act to issue the Order for the Condition Assessment.

BOARD ANALYSIS

Q. Does the City of Mount Pearl have the authority to issue an Order to a property owner where the City is of the opinion that the building is in a dilapidated condition?

A. Yes. Section 238(2) of the City of Mount Pearl Act provides that where a building is in a dilapidated state, or is, in the opinion of the Council, unfit for human habitation, or the other use for which it is then being used, or is a public nuisance, the Council may order the owner or occupier to pull down, remove, fill-in or otherwise destroy the building and return the site to its original state, or make the disposition or alteration of the building that the order directs, within the time specified in the Order.

Q: Who determines if a property is in a dilapidated state?

A: The authority to determine if a property is in a dilapidated state rests with the Authority, as provided for by the City of Mount Pearl Act, and in consideration of the factors outlined in the Provincial Occupancy and Maintenance Regulations and consideration of the City of Mount Pearl Building Regulations and Development Regulations.

Q: Did the City undertake an interior inspection of the subject property prior to issuing the Order for the Condition Assessment?

A: No. Evidence has been provided by the City that an interior inspection was not undertaken prior to the issuance of the Order.

Q. Does Section 238(2) of the City of Mount Pearl Act authorize the City to order the preparation of a Condition Assessment for property?

A. No. In the Board's determination, Section 238(2) of the City of Mount Pearl Act does not provide this authorization. However, the Board has determined that Section 19 of the City's Building Regulations would authorize the City to require a Condition Assessment. Section 19 of the City's Building Regulations states that the City may, upon granting a permit, impose such conditions as may be necessary to fulfill the requirements of the Regulations. Such conditions or requirements shall be outlined to the Applicant in writing prior to, or upon the granting of, the permit.

- Q. Was there an Application on file with the City from the Appellant or did the City issue any permits to the Appellant prior to the issuance of the Order for the Condition Assessment?**
- A.** No. The Board has been advised that the Appellant failed to apply for permits to occupy or to undertake any work/repairs on the subject building prior to the City's issuance of the Order for the conditional assessment.

BOARD'S CONCLUSION AND DETERMINATIONS

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 City of Mount Pearl did not have the authority to issue an Order for a Condition Assessment as no permit had been issued by the City to the Appellant to undertake development on the subject property. Thereby, the Order is reversed, which means the City did not have the authority to issue the Order dated June 15, 2021, for the preparation of a Condition Assessment.

The Board accepts that the City has the authority under Section 105 of the Urban and Rural Planning Act, 2000 to enter upon a property to make an inspection or survey for the purpose of the Act. However, the Board has determined that the City erred in ordering a Condition Assessment for the subject property under Section 238(2) of the City of Mount Pearl Act in the absence of an application for development/repair from the Appellant. A Condition Assessment can be required under Section 19 of the City's Building Regulations if a permit is issued by the City in conjunction with an application for development/repair and/or occupancy.

BOARD'S ORDER

The Board orders that the decision made by the City of Mount Pearl to issue an Order on June 15, 2021 to the Appellant to provide a Condition Assessment on the property at Civic Number 161 Park Avenue, be reversed.

The Board further that the Authority shall pay an amount of money equal to value of the appeal filing fee to the Appellant (\$230.00).

The Authority and the Appellant are bound by the decision of this Regional Appeal Board.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this 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 Appellant have received the Board's decision.

DATED at St. John's, Newfoundland and Labrador, this April 20, 2022.




Clifford Johnston, MCIP, Chair

Eastern Newfoundland Regional Appeal Board



Carol Ann Smith, Member

Eastern Newfoundland Regional Appeal Board



Paul Boudridge, MCIP, Member

Eastern Newfoundland Regional Appeal Board