

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-083-012
Adjudicator: Paul Boundridge, MCIP
Appellant(s): Noel Hurley
Respondent / Authority: Town of North River
Date of Hearing: 11 January 2024
Location of Hearing: 1st Floor, Beothuk Building, 20 Crosbie Place, St. John's, NL
Start - End Time: 2:05 p.m. – 3:04 p.m.

In Attendance

Appellant: Noel Hurley
Authority Representative(s): Katie O'Flaherty, Town Clerk (by Zoom)
Joanne Morrissey, Councillor

Appeal Officer: Robert Cotter, Departmental Program Coordinator
Department of Municipal and Provincial Affairs
Technical Advisor: Faith Ford, MCIP, Planner III
Department of Municipal and Provincial Affairs

ADJUDICATOR'S ROLE

Part VI of the *Urban and Rural Planning Act, 2000* 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*, the *Municipalities Act, 1999*, and the Town of North River Municipal Plan and Development Regulations when it issued a Removal Order at 44 North River Road on May 3, 2023.

It is noted that in an Appeal, the onus rests with the Appellant to demonstrate that the decision(s) of the Authority should be overturned.

HEARING PRESENTATIONS

The Adjudicator heard oral presentations from the following parties at the appeal hearing. The Adjudicator also received written presentations from the Planner/Technical Advisor the Appellant and the Authority (copy of Technical Report and Appellant's and Authority's submissions are on file with the Appeal Officer), prior to the appeal hearing date.

Planner's Presentation

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness.

Under the Rules of Procedure:

(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.

The Planner from Municipal and Provincial Affairs shall provide the framework with respect to the appeals process under the Urban and Rural Planning Act, 2000 and provide an overview of how an application was received from a developer and processed by Council as prescribed in their roles and responsibilities.

Background

The Adjudicator heard from the Planner/Technical Advisor that this appeal follows a series of interactions between the Appellant and the Town of North River between February and May 2023 wherein the Appellant, during the process of having a new home and garage constructed: (1) acted contrary to the terms of Council's Approval in Principle for the dwelling and garage; (2) against Council's stated wishes that now new plastic culvert system be installed; and, in defiance of Council's wishes and (3) without a Permit from the Town, proceeded to remove existing metal culverts in an open drainage ditch and replace them by installing a series of plastic culverts.

- In February 2023, the Authority (Town of North River) received an application to construct a dwelling and garage at 44 North River Road (subject property). The application was approved in principle pending approval of well and septic system design from Service NL.
- On April 4, 2023, the Appellant (property owner) submitted a letter [not a development application] to Council requesting the Town clean up the ditch along the subject property and install culverts in the ditch or reimburse the property owner for the installation of new culverts. At a regular Council meeting that same day, Council discussed the letter and voted to deny the Appellant's request. In response to the Council's decision to deny the request, the Appellant submitted a revised proposal to install culverts and indicated their intention to proceed with culvert installation.
- According to the Authority's submission, development of the dwelling commenced in April 2023 without well and septic system approval from Service NL. The Authority issued a Stop Work Order on April 11, 2023 [Order # 1], which was lifted on April 13, 2023, when the Authority received confirmation of approval from Service NL. Permit #493 was then issued for the construction of a dwelling and garage.
- On April 24, 2023, the Authority learned new culverts were installed by the Appellant at 44 North River Road. The Appellant's submission asserts the ditch and culverts are located on their property. According to the submission documents, the existing metal driveway culvert was replaced, and an additional 80 feet of plastic culverts were installed in the ditch. The Authority then issued another Stop Work Order regarding the installation of culverts without a permit [Order # 2].
- At the next regular Council meeting on May 2, 2023, the Appellant made a presentation about the installation of culverts to Council. At that same meeting, the Council voted on Motion 2023-2177 to issue a Removal Order for the removal of culverts [Order # 3]. The Removal Order was issued on May 3, 2023. The issuance of this Removal Order is the subject of this appeal. The appeal was filed on May 12, 2023.

Jurisdiction/Validity

- The Appeal was filed within the prescribed period (14 days of becoming aware of the Council decision).
- The Appeal concerns an application for development, which is defined under *the Urban and Rural Planning Act, 2000* (URPA) as “*the carrying out of building, engineering, mining or other operations in, on over or under land or the making of any material change in the use, or the intensity of use of land, buildings or premises...*”
- This appeal is based on Section 41 of the URPA with respect to development which establishes the types of decisions that may be appealed:

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.*
- Both appeal submissions (the Appellant’s and the Development Authority’s) included all required articles under Section 41 (4) of the Act.

Planning Considerations

Urban and Rural Planning Act, 2000

1. The Act defines development under Section 2(g), as follows:

(g) "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, [emphasis added] or the making of a material change in the use, or the intensity of use of land, buildings or premises and the

- (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,*

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;

When carried out by a private individual, the construction or alteration of culverts, ditches or drains would fall within the definition of development (emphasis added) in that it is the “carrying out of building, engineering, mining or other operations in, on, over, or under land”. The Authority’s submission indicates the Appellant did not have a permit to remove the old metal culverts and install the new plastic culverts and was not authorized by Council to carry out the work. (emphasis added)

2. Where a person has carried out development without a permit, the Authority has the power to issue an Order under Section 102(1) of the *Urban and Rural Planning Act, 2000*:

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.*

The Removal Order that is the subject of this appeal was not issued pursuant to Section 102, though the submission documents indicate the Authority previously issued a Stop Work Order under this Section on April 24, 2023.

The Municipalities Act

1. Section 196 of the *Municipalities Act, 1999* establishes the requirement to obtain a permit from Council prior to constructing or altering culverts, drains, or ditches within the Municipality:

196. Storm drainage

- (1) *A person shall not within a municipality*
 - (a) dig or construct ditches, drains or culverts;*
 - (b) make greater use of existing ditches, drains or culverts; or*
 - (c) connect to an existing storm drainage system, whether publicly or privately owned,**except in accordance with a written permit from the council.*
- (2) *A council shall not approve a permit under subsection (1) without the prior written approval of the Department of Environment and Labour.*

The requirement to obtain a permit from Council prior to constructing or altering drainage infrastructure applies to all lands within the municipal boundary, including both privately-owned lands and Town-owned lands. Approvals from other agencies, including the Department of Environment and Climate Change, do not exempt an individual from the requirement to obtain a permit from Council.

The Town did not issue a Permit for the installation of culverts at the subject property nor has the Department of Environment given prior written approval for the installation.

2. The Removal Order was issued under Section 404(1)(k) of the Municipalities Act, 1999, which grants Council the authority to issue an order where a person has constructed, filled in, or removed a drain, ditch, or culvert without a permit:

404. Council Orders

- (1) *A council may make an order that
(k) the construction, filling in or removal of a ditch, drain or culvert or connection to a storm drainage system constructed or made without a permit or not in accordance with the terms of a permit or regulations of the council be stopped;
and*
- (2) *A person ordered to carry out an action or to stop an action under subsection (1) shall be served with that order and shall comply with that order at that person's own expense.*
- (3) *An order made under this section continues in force until revoked by the council which made that order.*
- (4) *A council may, in an order made under subsection (1), specify a time within which there shall be compliance with the order.*
- (5) *Where a person to whom an order is directed does not comply with the order or a part of an order made under subsection (1), the council may take the action that it considers necessary to carry out the terms of the order and any costs, expenses or charges incurred by the council in carrying out the terms of the order are recoverable from the person against whom the order was made as a debt owed to the council.*
- (6) *A council may delegate to an official or employee of the council the power to issue orders under this section.*

The Removal Order dated May 3, 2023, states the culverts must be removed and the site restored to its original condition by May 18, 2023. Council may specify a deadline to comply with an order under Section 404(4).

3. The Removal Order was issued by the Town Clerk. Under Section 404(6), Council can delegate the power to issue an order to an employee of the Council. The submission materials indicate the Order was served directly to the Appellant by Town Staff.

Section 406(1) of the *Municipalities Act, 1999* states:

Service

- 406. (1)** *A notice, order or other document required to be given or served under this Act or the e regulations is sufficiently given or served where delivered personally or sent by registered mail addressed to the person to whom delivery or service is to be made at the latest address appearing on the records of the applicable council.*

Town of North River Municipal Plan and Development Regulations

The Town of North River Municipal Plan and Development Regulations came into legal effect on December 27, 1996. According to the Land Use Zoning Map under the Town's Development Regulations, the subject property at 44 North River Road Main Street is zoned Mixed Development (MD).

The Town of North River Development Regulations

1. Within the Residential zone, single dwelling and recreational open space are Permitted Use Classes. Discretionary Use Classes for the Residential zone include double dwelling, row dwelling, apartment, mini home and modular home, place of worship, educational, convenience store, restaurant, childcare, home occupation, special care institutional uses, utilities, antenna and traditional agriculture. Where a use is not listed within the permitted or discretionary use classes for a zone, the use is not permitted within that zone per Section 91 of the Development Regulations.
2. Section 6 and 7 of the Town's Development Regulations state:

6. Compliance with Regulations

No development shall be carried out within the Planning Area except in accordance with these Regulations.

7. Permit Required

No person shall carry out any development within the Planning Area except where otherwise provided in these Regulations unless a permit for the development has been issued by the Authority.

Procedural Compliance

The issuance and service by the Town of the Removal Order dated May 3, 2023 were in compliance with the Municipalities Act.

Appellant's Presentation

The Appellant is appealing the issuance of the Removal Order based on the following grounds:

- Condition 7 of the Residential Building Permit issued for the construction of a dwelling states "It is the contractor/applicant's responsibility to ensure appropriate ditching is in place and obtain all permits from other government departments." The Town has relinquished responsibility for culvert approvals to the Department of Environment and Climate Change, and this provincial department did not require a permit for the installation of the culverts;
- The Town installed approximately 120 feet of galvanized culverts on the northern end of the ditch but denied the Appellant's request to install similar plastic culverts;
- The Order falsely states the Town owns the drainage ditch. The ditch and culverts are located on the Appellant's property, the Town does not own the culverts, and there is no easement on the land granting the Town access to the ditch;
- The existing culverts were substandard and rusting and needed to be replaced as it was a safety hazard and obstructed water flow; and

- The Town “Council exceeded its jurisdictional powers granted under Section 404(1)(k). of the Municipalities Act by stating “further to 404(1)(k) of the Municipalities Act, the culverts be destroyed, and the site reverted to its original state by no later than May 18, 2023”.

The Appellant did not provide any information at the hearing to support his contention that Sections 196 and 404 of the *Municipalities Act*, Sections 10 and 102 of the *Urban and Rural Planning Act, 2000*, and Sections 6, 7, 10 and 16 of the Town of North River Development Regulations are not applicable to the matter under appeal – the installation of plastic stormwater culverts on his land without a municipal approval or a municipal development permit.

Despite being asked several times by the Adjudicator, the Appellant did not speak to or provide any information at the hearing to support his contention that the Town “Council exceeded its jurisdictional powers granted under Section 404(1)(k). of the Municipalities Act by stating “further to 404(1)(k) of the Municipalities Act, the culverts be destroyed, and the site reverted to its original state by no later than May 18, 2023”.

Authority’s Presentation

The Towns position is summarized in its May 31, 2023 letter to the Appeals Coordinator [subject heading: “Re: Noel and Elizabeth Hurley – 44 North River Road Development”] in which the Town Clerk states:

The order being appealed was the removal order issued on May 3, 2023 for the installation of culverts without a permit. The council consulted with Stewart McKelvey Law Office for clarification of the Act and councils’ authority. It was confirmed that the Municipalities Act prohibits constructing culverts and other drainage infrastructure without a permit from Council.

The removal order was then issued to Noel and Elizabeth Hurley based on the advice received from Stewart McKelvey Law Office and referenced the following sections of the Municipalities Act 1999.

Section 196 of the *Municipalities Act, 1999*, SNL1999 c. M-24 (the “Act”) provides that a person shall not dig or construct ditches, drains, or culverts within the municipality except in accordance with a written permit from the Council. As well, Section 404(1)(k) of the Act provides that a culvert installed without a permit may be ordered to be removed by the Council, and states:

- 404.** (1) A council may make an order that
- (k) the construction, filling in or removal of a ditch, drain or culvert or connection to a storm drainage system constructed or made without a permit or not in accordance with the terms of a permit or regulations of the council be stopped;

Since the order was issued, Mr. Hurley has claimed the ditch as his personal property, as seen in a deed provided in his documents. To date the town has not received any information on the sale of property. This drainage ditch has been in place for the last 50+ years, and while Mr. Hurley may now claim to own the property, the sections referenced in the order are still valid. Section 196, which states as follows:

- 196.** (1) A person shall not within a municipality
- (a) **dig or construct ditches, drains or culverts;**
 - (b) make greater use of existing ditches, drains or culverts; or
 - (c) connect to an existing storm drainage system, **whether publicly or privately owned,**
- except in accordance with a written permit from the council.
- (2) A council shall not approve a permit under subsection (1) without the prior written approval of the Department of Environment and Labour.

The construction of any drainage infrastructure anywhere is a potential concern for both the Council and the Department of Environment. So, regardless of who owns the ditch, a permit from Council is required.

Councils' decision was clearly communicated with the resident, yet they still went ahead and installed 5 lengths (100ft) of culvert, of which, 4 lengths (80ft) were denied. The council would have granted Mr. Hurley with a permit to change out the culvert for his driveway.

On April 24, 2023, the council issued a stop work order referencing section 102 (i) of the Urban and Rural Planning Act and section 7 of the Town of North River Development Regulations.

The council for the Town of North River believes that they operated within their authority to issue all noted orders to the property. The council made many attempts to work with and clarify the town's regulations and procedures to no avail. Thus, council issued the above orders.

ADJUDICATOR'S ANALYSIS

These following questions arise from this appeal:

- Q:** Is the construction or alteration of culverts, ditches or drains Development?
- R:** A review of the definitions for Development contained in the *Urban and Rural Planning Act, 2000* and the North River Development Regulations confirms that when the construction or alteration of culverts, ditches or drains is undertaken by a municipality or statutory authority it is not development. However, when the construction or alteration of culverts, ditches or drains is not undertaken by a municipality or statutory authority but a third party (such as a private property owner), it is Development.
- Q:** Is the construction or alteration of culverts, ditches or drains not undertaken by a municipality or statutory authority within the Town of North River municipal planning area subject to compliance with the Town's Development Regulations, and if so, must it conform with the Town's Development Regulations and require the issuance of a Permit by the Town Council before it can proceed?
- R:** Yes. Section 6 and 7 of the Town's Development Regulations state:

6. Compliance with Regulations

No development shall be carried out within the Planning Area except in accordance with these Regulations.

7. Permit Required

No person shall carry out any development within the Planning Area except where otherwise provided in these Regulations unless a permit for the development has been issued by the Authority.

- Q:** How is development or alteration of storm drainage systems (culverts, ditches and drain) different from the construction of a house or garage?
- R:** Section 196 of the *Municipalities Act, 1999* establishes the requirement to obtain a permit from Council prior to constructing or altering culverts, drains, or ditches within the Municipality:

196. Storm drainage

- (1) *A person shall not within a municipality*
- (a) dig or construct ditches, drains or culverts;*
 - (b) make greater use of existing ditches, drains or culverts; or*
 - (c) connect to an existing storm drainage system, whether publicly or privately owned,*
- except in accordance with a written permit from the council.*
- (2) *A council shall not approve a permit under subsection (1) without the prior written approval of the Department of Environment and Labour.*

The requirement to obtain a permit from Council prior to constructing or altering drainage infrastructure applies to all lands within the municipal boundary, including both privately-owned lands and Town-owned lands. Approvals from other agencies, including the Department of Environment and Climate Change, do not exempt an individual from the requirement to obtain a permit from Council.

Q: How does a person obtain a Development Permit (municipal approval) to undertake development (installation of culverts) in the Town of North River?

R: Section 16 of the North River Development Regulations informs us that a property owner or person acting under the authority of the property owner shall submit an application to the Town for a development permit.

16. Form of Application

(1) *An application for a development permit or for outline planning permission shall be made only by the owner or by a person authorized by the owner to the Authority on such form as may be prescribed by the Authority; and, every application shall include such plans, specifications and drawings as the Authority may require, and be accompanied by the permit fee required by the Authority.*

(2) *The Authority shall, on request, supply to every applicant a copy of the application forms referred to in Regulation 16(1) and a description of the plans, specifications and drawings required to be provided with the application.*

Q: Did the Appellant apply to the Town of North River for a Development Permit to install culverts?

R: No, the Appellant did not apply to the Town for a Development Permit to install culverts. The Appellant made several requests to the Town to allow him to install culverts at the Town's expense or his. These requests were considered by the Council and refused.

Q: Does the Appellant's Residential Development Permit (Permit # 493) to construct a house and a garage allow the Appellant to undertake the construction or alteration of culverts, ditches or drains on his property?

R: No, Residential Development Permit # 493 applies only to the construction of a dwelling and a garage. In addition, House Permit Condition # 9 states that *"The issue of this permit does not relieve the applicant from obtaining any other permits or approvals required by the law."*

Q: What action may Council undertake when development occurs within the municipal planning area without municipal approval (a Development Permit) having been first obtained?

R: Section 25 of the Town of North River Development Regulations gives Council the discretion to *"order that person to stop he development or work connected therewith pending final adjudication in any prosecution arising out of the development."*

25. Stop Work Order and Prosecution

(1) *Where a person begins a development contrary or apparently contrary to these Regulations, the Authority may order that person to stop he development or work connected therewith pending final adjudication in any prosecution arising out of the development.*

(2) *A person who does not comply with an order made under Regulation 25(1) is guilty of an offence under the provisions of the Act.*

Where a person has carried out development without a permit, the Authority also has the power to issue an Order under Section 102(1) of the *Urban and Rural Planning Act, 2000*:

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.

Q: In this case, what was the legal basis for the Removal Order issued by the Town of North River on May 3, 2023?

R: The Removal Order was issued under Section 404(1)(k) of the *Municipalities Act, 1999*, which grants Council the authority to issue an order where a person has constructed, filled in, or removed a drain, ditch, or culvert without a permit:

404. Council Orders

- (1) *A council may make an order that (k) the construction, filling in or removal of a ditch, drain or culvert or connection to a storm drainage system constructed or made without a permit or not in accordance with the terms of a permit or regulations of the council be stopped; and*
- (2) *A person ordered to carry out an action or to stop an action under subsection (1) shall be served with that order and shall comply with that order at that person's own expense.*
- (3) *An order made under this section continues in force until revoked by the council which made that order.*
- (4) *A council may, in an order made under subsection (1), specify a time within which there shall be compliance with the order.*
- (5) *Where a person to whom an order is directed does not comply with the order or a part of an order made under subsection (1), the council may take the action that it considers necessary to carry out the terms of the order and any costs, expenses or charges incurred by the council in carrying out the terms of the order are recoverable from the person against whom the order was made as a debt owed to the council.*
- (6) *A council may delegate to an official or employee of the council the power to issue orders under this section.*

Q: Has any evidence been brought forward that supports the Appellant's claim (and a ground for appeal) that the Town "Council exceeded its jurisdictional powers granted under Section 404(1)(k) of the Municipalities Act by stating "further to 404(1)(k) of the Municipalities Act, the culverts be destroyed, and the site reverted to its original state by no later than May 18, 2023".

R: No

ADJUDICATOR'S CONCLUSION

In arriving at his conclusion, the Adjudicator has reviewed the submissions and evidence presented by all parties, along with technical information and planning advice.

The Adjudicator is bound by Section 44 of the Urban and Rural Planning Act, 2000 and must therefore make a decision that complies with the applicable legislation, policy and regulations.

Urban and Rural Planning Act, 2000

"Decisions of adjudicator

44. (1) In deciding an appeal, an adjudicator may do one or more of the following:

- (a) confirm, reverse or vary the decision that is the subject of the appeal;*
- (b) impose conditions that the adjudicator considers appropriate in the circumstances; and*
- (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.*

(2) Notwithstanding subsection (1), a decision of an adjudicator shall not overrule a discretionary decision of a council, regional authority or authorized administrator.

(3) An adjudicator shall not make a decision that does not comply with

- (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."

After reviewing the information presented, the Adjudicator concludes that the Town of North River was within its authority under the Town of North River Municipal Plan and Development Regulations, the *Urban and Rural Planning Act, 2000*, and the *Municipalities Act, 1999* to make its decision on May 3, 2023 to issue a Removal Order to the Appellants under Section 404(1)(k) of the *Municipalities Act, 1999*.

ADJUDICATOR'S ORDER

Concerning Appeal # 15-006-083-012 - the Adjudicator orders that the Council Decision of May 3, 2023 to issue a Removal Order at 44 North River Road on May 3, 2023 be 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(s).

DATED at St. John's, Newfoundland and Labrador, this 21st day of January, 2024.

A handwritten signature in blue ink that reads "Paul Boundridge". The signature is written in a cursive style with a horizontal line underneath it.

Paul Boundridge, MCIP

Adjudicator

Urban and Rural Planning Act, 2000