

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal # : **15-006-077-015**

Adjudicator: Garreth McGrath

Appellant(s): James Kelloway and 3 in 1 Contracting Inc

Respondent / Authority: Town of Portugal Cove St. Philip's

Date of Hearing: 20 September 2023

Start/End Time : 11:00 – 11:30

In Attendance

Appellant: N/A

Appellant Representative(s): N/A

Respondent/Authority: Town of Portugal Cove St. Philip's

Respondent Representative(s): Les Spurell, Ashley Leyhan, Brian Peach

Proponent/Developer: N/A

Developer Representative: N/A

Interested Party: N/A

Appeal Officer: Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs

Technical Advisor: Faith Ford

Board's Role

The role of the Adjudicator is to determine if the Authority acted in accordance with the Urban and Rural Planning Act, 2000 and Town of Portugal Cove St. Philip's Municipal Plan and Development Regulations when it issued a removal order at 27 Legion Road, Portugal Cove-St. Philip's on July 12, 2022.

Hearing Presentations

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.

The Adjudicator heard from the planner that this appeal relates to a removal order issued by the Town of Portugal Cove St. Philip's. The removal order more specifically stated that construction materials, supplies, equipment, tools, commercial vehicles and commercial vehicle parts, and heavy equipment and heavy equipment parts related to the operation of a construction yard were to be removed; remove freight containers used as accessory buildings; and remove vehicles, trailers and objects in wrecked, discarded or abandoned condition and the accumulation of litter, garbage and debris from the property at 27 Legion Road.

The planner outlined the Appellant's grounds for appeal at pages 8 and 9 of the appeals package as:

- Section 45 of the *Occupancy and Maintenance Regulations* under *The Urban and Rural Planning Act, 2000* states the time allotted for appeal is 30 days from the date of the decision and that the Authority shall provide to the aggrieved a written statement of the exact procedures to be followed. The Appellants state they were informed of a 14 day appeal period and did not receive a statement of procedures;
- Section 102(5) of the *Urban and Rural Planning Act, 2000* is applicable only when a person has undertaken a "building or development", and the Town's allegations do not relate to building, development, or construction;
- Section 404(5) of the *Municipalities Act, 1999* is only applied when the object of the order is in relation to Section 404(1) of the *Municipalities Act, 1999*. The Appellants were not informed by the Town which power it is operating under Section 404(1); and
- The use on the subject property is a historical use and should be "grandfathered in" or permitted to continue.

The Appellant's Presentation and Grounds

Neither of the Appellants, nor their counsel Daniel Bennett appeared at the hearing. Emails were exchanged between the Appeal Officer Robert Cotter and Mr. Bennett regarding the timing of the hearing. Mr. Bennett objected to the timing of the hearing, stating that he would require more time to prepare an argument than the time that he was given. The Adjudicator noted at the time of the hearing that the legislative notice period for a hearing under the Development Regulations under the Urban and Rural Planning Act, 2000 s.9(1) states:

9. (1) A board shall notify the appellant, applicant, authority and other persons affected by the subject of an appeal of the date, time and place for the appeal not fewer than 7 days before the date scheduled for the hearing of the appeal.

Mr. Bennett was notified of this hearing by the Appeal Officer on 7 September 2023, 13 days before the hearing date, well within the statutory requirements under the Regulations. As the Authority was there prepared to move forward with the matter, the Adjudicator was prepared to hear from the Authority and to rely on the written submissions of the Appellant in making this determination.

Authority's Presentation

The Authority's presentation started by outlining that the Authority and Appellant originally had correspondence in 2021 regarding the condition of 27 Legion Road, with a deadline of 9 July 2021 to complete work to remedy the property. Mr. Kelloway asked for an extension which was granted till 31 August 2021. April 20 2021 to July 2022 the town had 8 separate site visits to the property to review the contents of the site as they continued to work to remedy the issues they saw on the property.

The Authority objected to the claims that Regulation 103 and Schedule "C" as being unclear, pointing to the Removal Order which at Section 4 points specifically to where the use of a freight container as an accessory building is not allowed by the regulations.

When the order was posted, the town took photos of the conditions of the property at the time of the removal order. At the time of the photos being taken, the Authority also saw a number of boxes and containers inside one of the freight container on the property. The Authority presented photos to show the freight container are being used as accessory storage buildings on the property, which they claim is in contravention to the regulations.

The Authority's position vis a vis the requirements for notice on the removal order is that of the technical planner, that the 14 day notice period is the correct notice period for the removal order appeal period.

The Authority's position regarding whether the Appellant was given a proper statement of procedure is that the Appellant was given a proper statement of the procedure, as it was contained on the Removal Order. Specifically they rely on the statement that includes the location and address to be filed on appeal, the person to submit to, and the cost to the appeal.

The Authority states that regarding section 102(5) the terms “building and development” in the Urban and Rural Planning Act include the freight containers as buildings and put it within the definition of a building for the purpose of issuing a removal order.

The Authority states that they were specifically acting under the authority of section 404(1)(L) of the Municipalities Act as was outlined on the order.’

The Authority raises the possibility that there was at one time a vehicle repair garage on the property at 27 Legion Road that would have pre-dated the amalgamation of Portugal Cove-St. Philip’s. The Authority’s position, however, is that there has been a complete change in the use of the property. The Authority’s position is that the intensity of the use of the property, combined with the distinct change in the character of the property from a small vehicle repair business to the level of a “construction yard” as they stated in the Removal Order was not grandfathered in and is far beyond the scope of what should be allowed as a non-conforming use. The town believed that at one point the property may have been known as “Neary’s Garage” a small vehicle repair garage but that since the property was purchased by Mr. Kelloway and 3 in 1 Contracting Inc it has not been used for small vehicle repairs.

Adjudicator’s Analysis

The Adjudicator reviewed The Urban and Rural Planning Act, 2000 as well as the Town of Portugal Cove – St. Philip’s Municipal Plan and Development Regulations and determined the following:

Question/Answer .

Q: What was the correct period for the appeal for the Removal Order?

Upon review of the submissions, technical report, and applicable legislation, it is clear to the Adjudicator that the correct appeals period for the order that was issued by the Authority is 14 days. The Conflict provisions under s.43 of the *Occupancy and Maintenance Regulations* of the *Urban and Rural Planning Act, 2000* is clear that where there is a conflict with another provision, that the higher standard shall prevail. The Adjudicator sees no reason in an argument for natural justice why the more stringent standard should not prevail here. As such, it is the position of the Adjudicator that the Authority met their obligations to provide the Appellant with the correct 14 day period to appeal the Removal Order.

Q: Does Section 102(5) of the Urban and Rural Planning Act only apply when a person undertaken a “building or development?”

On reviewing the position of the Appellant in this matter, the Adjudicator finds it difficult to take the position that the Appellant is raising. Essentially, the Appellant has stated that they have not undertaken a building or development, that rather the building and development of the property

are complete and therefore the Town cannot issue this removal order. The main problem that the Adjudicator has with this position is that it leaves open a logical absurdity when it comes to the regulations. It means that should someone start and complete a non-conforming and non-compliant construction within the development zone and complete it before the Town is made aware of the action, that Section 102(5) no longer applies because the party is no longer undertaking that development. Given that the powers of the Authority under Section 102 include being able to demand that a party demolish a building should the building not conform, it is necessary that the Authority has the power to stop a building or development that is complete but unapproved.

Further when we examine the Urban and Rural Planning Act, we see that the scope of the definition of building and development are very broad and include definitions for buildings as “mobile structures, vehicles and marine vessels adapted or constructed for residential, commercial, industrial and other similar uses” and development as “or the making of a material change in the use, or the intensity of use of land, buildings or premises” it is clear to the Adjudicator that the Authority was acting in accordance with the authority granted under the Urban and Rural Planning Act.

Q: Did the Authority inform the Applicant of which power it was using under Section 404(1) of the Urban and Rural Planning Act?

It is clear to the Adjudicator that the Authority explicitly referenced Section 404(1)(l) on their removal order which was received by the Applicant.

Q: Was the use “grandfathered” in as a non-conforming use of the property?

As shown in photos provided by the Authority, the subject property at 27 Legion Road has drastically changed in its use since 2013. Where once a few vehicles and a small amount of debris was visible, the images supplied in 2019 show a drastic change in the use of the property. Whereas in 2013 an argument could be made that the property had only vehicles that may or may not be there to be repaired under the non-conforming use as a garage, the images in 2019 show a complete change. There are now several accessory building freight containers, vehicles in various states of disrepair, piles of debris, what appears to be a small pleasure craft, and several more unidentifiable objects.

It is clear from these photos that whatever grandfathered rights the property may have once had, the property is no longer being used. As well, in the interest of clarity, the Adjudicator has not accepted or declined the possibility that there may have been a “grandfathered” right to operate a repair garage on the property. Instead, this is to say that even if there was this right that was “grandfathered” in to allow non-conforming use, the changing intensity of use of the property, or development, is such that there is no longer any argument in the Adjudicator’s mind that the current use of the property has never been allowed.

Adjudicator’s Conclusion

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 Authority acted within the scope of their authority by issuing the Removal Order for the property at 27 Legion Road, Portugal Cove-St. Philip's. For the above stated reasons, the Adjudicator has found that the Authority complied with their obligations under the *Urban and Rural Planning Act, Municipalities Act, Occupancy and Maintenance Regulations Town of Portugal Cove-St. Philip's Municipal Plan, Town of Portugal Cove-St. Philip's Development Regulations* and *Town of Portugal Cove-St. Philip's Litter, Garbage and Refuse Regulations*.

That is to say, that the order stands and that the Appellant must comply with the order immediately.

Order

The Adjudicator orders that the decision of the Town of Portugal Cove St. Philip's to be confirmed. The removal order must be complied with immediately.

The Authority and the Appellant(s) are bound by this decision.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this 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 8 October 2023.

Garreth McGrath

Adjudicator

Urban and Rural Planning Act, 2000