URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #:	15-006-077-047
Adjudicator:	Chris Forbes
Appellant(s):	Arthur Saunders
Respondent/Authority:	Town of Marystown
Date of Hearing:	March 11, 2024
Start/End Time:	9:10 a.m. – 10:10 a.m.

In Attendance

Appellant*:	Arthur Saunders
Appellant's Representative*:	Jenny McCarthy
Respondent/Authority*:	Kelsey Kilfoy, Director of Planning & Economic Development Town of Marystown
Appeal Officer:	Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs
Technical Advisor:	Faith Ford, Planner, MCIP, Municipal and Provincial Affairs

***** Participating by teleconference.

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*, the *Town of Marystown Development Regulations 2017-2027* (the "*Development Regulations*") and the *Town of Marystown Itegrated Community Sustainability Municipal Plan 2017-2027* (the "*Municipal Plan*") when it refused to issue the Appellant a Development Permit for a commercial garage at 374 Creston Boulevard, Marystown, on February 21, 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 a report of the Department by Setare Vafaei dated March 1, 2024, noting that, on February 14, 2023, the Authority received an application from the Appellant to operate Tag Team Mechanical, a commercial garage, at the subject property at 374 Creston Boulevard in Marystown. As the Technical Advisor noted, the Appellant's submission indicates he purchased the subject property in 2018 after receiving confirmation of the property's commercial status from the Authority. The Authority denied the Appellant's application on February 21, 2023, and according to the Appellant, he received notice of this on February 24, 2023. The appeal was filed on March 8, 2023.

The Technical Advisor reviewed the definition of "development" found in the Act. She noted that the subject property was zoned "Residential Traditional Community" under the *Municipal Plan* and that operating a commercial garage falls within "general industrial use" under the *Development Regulations.* This is not a permitted or discretionary use for the Residential Traditional Community Zone and is not permitted within that zone.

The Technical Advisor referenced the submission of the Appellant that the use proposed by the Appellant was a "non-conforming use" and that the conditions for a discontinuance of that use have not been met. She referenced the submission of the Appellant that his position is supported by the historical use of the property as a commercial garage, the payment of commercial tax and lack of evidence suggesting the building was vacated.

The Technical Advisor reviewed the definition of "non-conforming use" in the *Development Regulations* and referenced the applicable sections of the Act and 2.4.3 of the *Development Regulations.* She also indicated that the *Development Regulations* stipulate that a party has up to one year following discontinuance of a non-conforming use in which to resume that use. Section 2.4.3 also sets out the conditions under which a use will be deemed discontinued.

It was noted by the Technical Advisor that the Authority refused the Appellant's application on the basis that the proposed use was not permitted under the Residential Traditional Community Zoning of the subject property.

In response to questioning by counsel for the Appellant, the Technical Advisor confirmed that the Authority did not appear to process the Appellant's application through consideration of the non-conforming use issue.

Appellant's Presentation and Grounds

Appellant's counsel began by referencing the case of *Gibbs v. Bonavista (Town)*, 1989 CanLII 4991 (S.C.).

Counsel indicated that the Appellant took issue both with the approach to non-conforming use taken by the Authority and the position advanced by the Authority that the Appellant's application for a permit to operate the commercial garage was a "development" pursuant to the Act.

Counsel questioned whether the Authority even had the option of rejecting the Appellant's application give that he proposed to use the subject property as a commercial garage as it had been previously used for a long time.

I indicated to counsel that I accepted the statement attached to the Appellant's Appeal Form as his evidence. Counsel advised she wished to supplement that statement was some additional questions of Mr. Saunders.

The Appellant purchased the subject property in 2018 to operate it as a commercial garage business. It had been operated as a garage for many years. He approached the Town about it and was advised it was still zoned commercial.

He began paying commercial tax on the subject property once he purchased it. He also indicated that, had he been told the property was not zoned commercial by the Town, he would not have purchased it.

The Appellant confirmed the property has not been destroyed, altered, changed or used as a residence at all. It is currently sitting idle.

He indicated he has lived in the Marystown area for 55 years. The property has been used as a garage for as far back as he can remember.

After having his application rejected by the Town, no one from the Town reached out to him with questions or to discuss non-conforming use.

In response to the Appellant's evidence, Ms. Kilfoy indicated that the taxes being paid by the Appellant in respect of the property are commercial property taxes and not business taxes. The last business taxes to be paid in respect of the property were paid in 2011.

Counsel for the Appellant objected to this information on the grounds it was not contained in any information provided by the Town nor had it been mentioned in the response to Mr. Saunders.

Under questioning from the adjudicator, Mr. Saunders indicated that when he purchased in 2018, he purchased both the garage/the business and the property. At the time it was called Legges Auto. It was operated by an individual who had passed away. When purchased, the garage still contained tools, welding machines, toolboxes and other garage items. He indicated he intended to do the same kind of work as Mr. Legge did while he operated out of the garage.

He does not recall any valid business permit being in place for the garage at the time he purchased it. He did not request this information.

The Canning Bridge in Marystown had been closed, which prompted Mr. Saunders to want to operate the garage. He has not operated the garage at all since he purchased it in 2018. He was working in Alberta at the time. The bridge was closed in February, 2023. Mr. Saunders returned from Alberta in

2021. He has a business in Marystown other than this, and once the Canning Bridge closed he decided it might be a good time to open the garage. At the time he purchased, he did not have a specific timeline in mind for opening the garage.

In her concluding remarks, counsel for the Appellant referenced the fact that the garage had been operated as a non-conforming use by Mr. Legge. Pursuant to section 108 of the Act, Council is mandated to allow a non-conforming use to continue. Accordingly, the Town was not permitted to make the decision that it did.

She also made reference to the *Development Regulations* that speaks to the discontinuance of a non-conforming use and submitted that none of the events listed in that section apply to the Appellant.

Authority's Presentation

Ms. Kilfoy indicated that the garage in question had first begun operating in the 1950's. By the time Mr. Saunders purchased the garage in 2018, years had passed during which it had not operated as a business. While he might have paid commercial property tax on the property, there was no established business in the garage.

In response to questioning from the Appellant's counsel, Ms. Kilfoy indicated she was not sure when the business ceased to operate. To her knowledge, the property had never been used as anything other than a garage. Another commercial garage is located in the area known as Fizzard's Garage and she believes it was grandfathered in. To her knowledge, that particular garage has always been operating. That particular garage, however, is zoned commercial. Within the general residential area, there are pockets zoned commercial.

When asked, Ms. Kilfoy could not confirm or deny whether the Appellant was advised by the Town at the time of his purchase that the property was zoned commercial.

She confirmed that commercial property taxes are not solely payable in respect of properties that are zoned commercial. For example, there was a convenience store in the residential-zoned area that was a discretionary use so it was permitted in the zone but it was charged commercial property tax. When a business is operating out of the property, commercial property tax will be payable regardless of zoning.

Ms. Kilfoy confirmed that, even if Mr. Legge had paid commercial property tax, that tax would have remained payable even after he ceased to operate a business out of the garage.

She indicated that commercial property taxes and business taxes are not the same thing. She further stated business taxes are normally reflected in the "tenant's portion" part of the tax roll for a business. As of 2011, there was tax payable on the property itself but no amount was indicated in the "tenant's portion," thus leading to the inference that the business operating on the property had ceased to carry on at that time. The tax roll is prepared by the Municipal Assessment Agency. Ms. Kilfoy was told this is how the roll works, though she is not entirely sure herself. The Town has no other records showing business taxes being paid in relation to the property.

Analysis

Did the Town have the authority to refuse the Application of the Appellant to Operate a Commercial Garage?

No.

Resolving this question requires consideration of whether the proposed use of the subject property by the Appellant would constitute a "non conforming use" such that section 108 of the Act applies. That section reads:

> "108. (1) Notwithstanding a plan, scheme or regulations made under this Act, the minister, a council or regional authority shall, in accordance with regulations made under this Act, allow a development or use of land to continue in a manner that does not conform with a regulation, scheme, or plan that applies to that land provided that the non-conforming use legally existed before the registration under section 24 of the plan, scheme or regulations made with respect to that kind of development or use.
>
> (2) Notwithstanding subsection (1), a right to resume a discontinued non-conforming use of land shall not exceed 6 months after that discontinuance unless otherwise provided by regulation under this Act. …"

It is clear that the subject property is designated "Residential" under the *Municipal Plan*, which took effect on June 14, 2019. Further, it is zoned as "Residential Traditional Community" under the *Development Regulations*. A commercial garage is not a permitted or designated use class within that zone and is therefore prohibited by virtue of section 2.3.2.4 of the *Development Regulations.*

Section 108 of the Act finds its parallel in section 2.4.3 of the *Development Regulations*, which provides that "any legal use of land or development at the date of registration of [the *Regulations*] may be continued."

I also note the definition of "non-conforming use" contained in the *Development Regulations*, specifically:

> "NON-CONFORMING USE
> means a legally existing use that is not listed as a permitted or discretionary use for the use zone in which it is located or which does not meet the development standards for that use zone."

Section 2.4.3 of the *Development Regulations* also states:

> "If a non-conforming development or land use is discontinued after these Regulations came into legal effect, a right to resume a discontinued nonconforming use of land shall not exceed one year after the discontinuance occurred. For the purpose of this Regulation, discontinuance of a nonconforming use begins when any one of the following conditions is met:
>
> • The building or use of land is clearly vacated, or the building is demolished,

- The owner or tenant has ceased paying business taxes for that use, and
- The owner or tenant has stated in writing that the use has ceased."

The onus of proving a non-conforming use rests with the Appellant (see for example Prince George (City) v. Geisser, 2015 BCSC 697). In order to establish a lawful non-conforming use, the Appellant must prove that (a) the use of the land, building or structure was lawful at the time of the enactment of the relevant zoning restriction, and (b) the previously lawful use has continued thereafter (per *Feather v. Bradford (Town)*, 2010 ONCA 440).

The evidence clearly shows that the Appellant purchased the subject property with the intention to carry out a commercial garage business from it in the same manner it was carried out by the previous owner. The building still contained tools and other equipment that had been used in the prior business. To the Appellant's knowledge, no changes had been made to the building since it had functioned as a commercial garage, and the building had never been used for any other purpose. The garage had in fact operated on the subject property as Legges Auto for more than sixty years, a fact confirmed by the Authority.

It is unclear from the evidence when Legges Auto became inactive. According to the Appellant, the owner of the business died prior to his purchasing it in 2018; however, neither the Appellant nor the Authority could confirm the approximate date of his death. In or about 2011, business taxes no longer appear to have been paid in respect of Legges Auto, although commercial property taxes continue to be paid by the Appellant in relation to the subject property.

As noted, the onus rests on the Appellant to prove not just a non-conforming use in existence at the time the *Development Regulations* were registered but also that such use was lawful. Business taxes appear to have been paid in respect of Legges Auto prior to 2011, and from this I draw the inference that the business was permitted by the Authority to operate on the subject property. Indeed, the business appears to have operated for decades as a commercial garage.

The question then becomes whether the use of the building as a commercial garage was abandoned prior to the registration of the *Development Regulations*, as referenced in section 108 of the Act. In this regard, several principles from the case law should be noted.

First, a liberal approach should be given to the interpretation of section 108. In *Okanagan-Similkameen (Regional District) v. Leach*, 2012 BCSC 63, the British Columbia Supreme Court commented, in relying on previous case law, that "any doubt as to prior use ought to be resolved in favour of the owner" (see para. 117). Likewise, the Court in that case commented as follows at para. 118:

> "[118] The liberal interpretation in favour of users … also applies with respect to whether a use has been discontinued. The courts have taken a broad approach to "use" in order to avoid the expiration of a lawful non-conforming use through discontinuance."

Second, the purpose of the legal non-conforming use doctrine is to protect the status quo (per *Forbes v. Caledon (Town of)*, 2021 ONSC 1442).

Third, what matters are "the actual facts on the day of the passing of the by-law rather than a consideration of what use could or might have been made" (per *Forbes*). All that matters is that the use "was minimally established" prior to the passage of the by-law or regulation (per *Forbes*).

Fourth, the determination of whether or not a particular use has continued is established "if there is an intention to continue the use and the use continues so far as possible in all the circumstances of the case" (per *Forbes*).

Fifth, the "benefit of a legal non-conforming use runs with the land which is to say that successors in title can lawfully continue to use the property in accordance with the legal non-conforming use doctrine" (per *Forbes*).

Sixth, abandonment or discontinuance requires an intention to abandon (per *Gallant v. Island Regulatory and Appeals Commission*, 1997 CanLII 4572 (PE SCAD)). Mere inactivity is insufficient to constitute abandonment or discontinuance.

In the circumstances, I note that upwards of seven years may have passed between the cessation of operation of a commercial garage out of the building on the subject property and its purchase by the Appellant. This may have been due to the death or retirement of Mr. Legge, although the evidence is unclear on this point. Regardless, the evidence does not clearly show an intention on the part of the prior owner of the subject property to abandon the use of the building as a commercial garage. No changes were subsequently made to the building or the subject property that might indicate such an intention. Tools, welding machines, toolboxes and other garage equipment were still in the garage at the time the Appellant purchased it. It may be that several years were required for the prior owner to find a buyer for the property, which would be analogous to the situation in the *Gibbs* case in which the period of vacancy was largely attributable to the power of sale process working itself through. In any event, any doubt as to whether or not the use of the building on the subject property as a commercial garage was abandoned must be resolved in favour of the Appellant who, like the plaintiff in *Gibbs*, purchased the building on the subject property with the clear intention of carrying on the same use in it. The fact that he did not do so immediately likewise does not mean he intended to abandon the non-conforming use of the building. I note the Appellant indicated it was difficult to hire mechanics around the time he purchased the building. Further, he was living in Alberta at the time, which would have made running the garage more difficult.

The Authority repeatedly emphasized section 2.4.3 of the *Development Regulations*, which sets out the bases on which a non-conforming use will be deemed to have been discontinued. Again, those conditions are:

- The building or use of land is clearly vacated, or the building is demolished,
- The owner or tenant has ceased paying business taxes for that use, and
- The owner or tenant has stated in writing that the use has ceased.

A precondition to the application of this section of the *Development Regulations* is that the discontinuance in question must have occurred <u>after</u> the *Regulations* came into legal effect. This requirement is built into the section itself. I have found no such discontinuance occurred before the *Development Regulations* took effect, even though it appears business taxes had not been paid in respect of the subject property since approximately 2011. While the cessation of payment of business taxes (condition 3) <u>subsequent</u> to the *Regulations* taking effect is relevant to determining whether a

discontinuance has occurred after that date, I was provided with no case law or other authority suggesting that such a cessation of payment of taxes is determinative of whether a discontinuance has occurred at common law, which would apply here since business taxes appear to have ceased being paid well before the *Regulations* took effect. I therefore find that the test for a discontinuance set out in section 2.4.3 does not apply in the circumstances and as such, that section is inapplicable in the circumstances.

Further, as counsel for the Appellant pointed out during the hearing, conditions 1 and 3 are inapplicable here in any event. There was no evidence before me that the building itself was vacated. I note the definition of "vacate" set out in *Black's Law Dictionary* and referenced by counsel for the Appellant, namely "to empty" and "to cease from occupancy." The Appellant confirmed it still contained various garage-related items and equipment at the time he purchased it. The Authority did not provide any evidence to suggest the building had been emptied. Likewise, no evidence was adduced showing the Appellant or the prior owner of the subject property had stated in writing that the use had ceased.

Since I have found that there was no discontinuation of the non-conforming use of the building on the subject property as a commercial garage, section 108(2) of the Act does not apply.

Counsel for the Appellant also raised the issue of estoppel and argued that the Authority was estopped from denying that the Appellant's use of the subject property would not constitute a non-conforming use. Counsel made this argument on the basis of the fact the Appellant was told by the Town prior to purchasing the subject property that it was zoned commercial and that the Appellant continued to pay commercial property tax on that property, thus leading him to reasonably believe it was zoned commercial.

I do not agree with the latter position. It was clear from the evidence of the Authority that just because a property is taxed as a commercial property does not mean that it is necessarily zoned as commercial. Indeed, the Authority referenced other properties in the general area that are taxed in that manner but which are zoned residential. There was also no evidence that the Authority made any representation to the Appellant that the payment of commercial property tax somehow meant the property itself was zoned commercial.

However, the evidence did indicate that the Authority had represented to the Appellant that the subject property was *zoned* commercial at or about the time he purchased it. I find the Appellant credible in this regard and have no reason to doubt his evidence.

The doctrine of estoppel has been previously applied by courts where a municipality makes a representation to a party as to the permitted use by that party of a property and the party relies upon it. For an example of the application of the doctrine in the context of non-conforming uses, see *Forbes v. Caledon (Town)*, 2009 CanLII 9465 (ON SC), appeal dismissed at 2009 ONCA 605. The representation can be either implicit or express.

The following comments of the Ontario Superior Court of Justice in the *Forbes* case are relevant (emphasis mine):

> "[74] It appears to me that the Forbes would reasonably have interpreted the Town's order as a representation that it would acquiesce in the Forbes' non-conforming use of the lands provided they made the changes and that it would be unreasonable for

> the Town now, having caused the Forbes to rely on its implicit representation to their financial detriment, to be permitted to take the opposite position now. Maracle v. Travellers Indemnity Co. of Canada, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50.
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> [75] The Town is correct that the doctrine of estoppel cannot be used to override the law, namely, the zoning that is in place. See Stickel v. Minister of National Revenue, [1972] F.C. 672 (F.C.C.); Ford Credit Canada Ltd. v. Canada (M.N.R.), 1994 CanLII 1782 (BC SC), [1994] B.C.J. No. 3026 (B.C.S.C.). Estoppel can be advanced, however, as a defence to the Town's position that the Forbes' continued non-conforming use, which the Town previously implied that it would countenance provided the Forbes incurred the expense of fencing and paving the storage area, is now unlawful.
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> [76] The Forbes advance the doctrine of estoppel based on the fact that they relied to their detriment on the Town's implied representation that the actions required by the Order to Comply would bring them into compliance. They submit that the Town cannot now take the position that the use of the land is not, in fact, in compliance. The Forbes do not rely on estoppel to avoid a statutory obligation or to invalidate the by law but rather to support their argument that their use of the lands was a legal non-conforming use once they had complied with the Order. Based on my finding that the Order to Comply was an implied representation that the use would be a legal non-conforming use upon compliance and that the Forbes relied on that representation to their detriment, I agree that the Town is now estopped from claiming that the Forbes' use of the lands is not a legal non-conforming use.
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> [77] While estoppel is not generally applied to a municipal corporation, this is not an absolute rule. The doctrine can be applied in circumstances that do not disrespect or invalidate the zoning by-law in question. Aubrey v. Prince (Township) (2001), 2001 CanLII 28250 (ON SC), 52 O.R. (3d) 274; Kenora Hydro v. Vacationland Dairy (1992), 1992 CanLII 7592 (ON CA), 7 O.R. (3d) 385. In my opinion, the circumstances of this case allow for such an application. The Forbes' argument is not analogous to that of the defendant in Toronto (City) v. Polai, 1972 CanLII 22 (SCC), [1973] S.C.R. 38, who argued that the City was estopped from enforcing a by law because many other property owners were also violating it without prosecution. Nor is it analogous to the facts in Toronto (City) v. McIlroy, [1997] O.J. No. 5649 (Ont. Gen. Div.), where the defendant argued that the Court should hold the City to their earlier decision because the defendant had successfully deceived the City officials as to the real use of the land. Here, the Forbes complied with the lawful Order of the Town to their financial detriment in good faith and in reliance on the Town's implied representation that this would constitute compliance with the by law."

I also refer to the more recent decision of the Ontario Superior Court of Justice in *2185863 Ontario Limited v. City of Toronto*, 2020 ONSC 6480. In that case, the Court commented as follows at para. 35 (emphasis mine):

> "… [E]stoppel cannot generally be used to override a municipal by-law. The exception may be when there is a legal non-conforming use, or that a representation has been made to that effect, as in Forbes v. Caledon (Town), [2009] O.J. No. 928, 2009 CanLII 9465 (ONSC) at paras. 74-77, and was relied upon."

In light of the above, I find that the Authority is estopped from taking the position that the use of subject property by the Appellant as a commercial garage is not a non-conforming use.

I find section 108(1) of the Act applies such that the Authority must allow the Appellant to use the building on the subject property as a commercial garage. As such, the Town did not have the authority to refuse the application of the Appellant.

Decision of the Adjudicator

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;
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> (b) a plan and development regulations registered under section 24 that apply to the matter being appealed; and
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> (c) a scheme, where adopted under section 29.
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> (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 the decision of Council respecting Motion MMC 2023 02 21/004R be reversed and that Council re-consider the "Application to Operate a Business" of the Appellant dated February 14, 2023 to operate Tag Team Mechanical on the basis such operation constitutes a non-conforming use that legally existed for the purpose of section 108(1) of the Act.

The Adjudicator further orders that Council pay to the Appellant the amount of $230.00, representing the fee paid by the Appellant to file the appeal herein.

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 16th day of April, 2024.

Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000