URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-077-028

Adjudicator: John R. Whelan Q.Arb

Appellant(s): Justin Parsons

Respondent / Authority: Town of Victoria

Decision Dated: December 12, 2023

Re: Appeal of Justin Parsons of a Removal Order issued by the Town of Victoria regarding culverts installed at #42 Gully Path Road, Town of Victoria.

Procedural Background

On or about June 27, 2022 the Appellant installed culverts in the Town's ditch along the frontage of 42 Gully Path Road. The Appellant possessed no Permit authorizing the culvert installation. On September 20, 2022 the Town Council for the Town of Victoria passed a motion to direct the Appellant to remove the culverts and restore the ditch (the Removal Order). On September 21, 2022 the Authority sent a letter to the Appellant informing them of the motion and advising that the culverts needed to be removed and the ditch restored. The Authority failed to provide notice of the right to appeal in its September 21, 2022 letter.

The Appellant filed the appeal herein on September 29, 2022.

The Appeal was heard on October 25, 2023 at 1pm at the Comfort Inn Hotel, 106 Airport Road, St. John's.

Grounds of Appeal

The Appellant is appealing the Removal Order and raised the following arguments during the hearing:

- That the Authority has not previously issued permits for culvert installation;
- That the Appellant was not aware that a Permit was required for culvert installation;
- That the Removal Order was considered during a prior meeting of Council (August 30) and that this prior consideration should invalidate any later decision of Council in relation to the culvert removal;

- That the September 21 letter from the Authority was issued via email and should not be considered a valid Order from the Authority because it was not delivered either in person or by Registered Mail;
- That there are technical errors within the analysis of Council that would invalidate the Removal Order;
- That the Authority is unfairly using its authority by targeting the Appellant for enforcement measures that are not used against other residents in the Town;
- That adjacent properties are in states of disrepair that have gone unaddressed by the Town;
- That the contractor used to install the culvert has been allegedly harassed by the Town;
- That the culvert specifications relied on by the Town have not been properly communicated to residents;
- That the personal career (Municipal Enforcement Officer in an adjacent community) of the Appellant is not a relevant consideration;
- That the Appellant's application for permits for other building projects associated with the property should not be considered as evidence whether he knew he needed a permit for the culvert installation; and,
- That the Appellant has done no further work on the culvert installation since September 21, 2022.

Position of the Authority

That Authority has taken the position that the Appellant installed the culvert without a permit and that its Removal Order is valid. The Authority states that the failure to provide a Notice of the statutory right to appeal does not invalidate the Order. The Authority stated that the failure to advise the Appellant of his right to an appeal was a procedural error and caused no substantive harm to the Appellant.

Onus

It may be helpful to remind the parties that in an Appeal, the onus rests upon the Appellant. In this instance, the Authority is not under an obligation to justify its conduct. Rather, the Appellant must prove their case that the decision of the Authority should be overturned.

Analysis

While the Appellant has advanced multiple arguments for my consideration, it may be more helpful to consider the Appeal under general principles. Specifically,

1. What is the authority of the Town to make a Removal Order?
2. Do I have jurisdiction to review the decision of the Town to make a Removal Order? If so, what is the scope of my authority?

3. If the Town had the right to enact a Removal Order, are there general or specific legal principles that would dislodge the presumption that the discretionary decision of the Town should be upheld?

Authority to Order Removal

The Parties agree that the September 21, 2022 letter from the Town to the Appellant constitutes a Removal Order. The September 21, 2022 letter does not state the provision relied upon by the Town to order the removal of the culvert. However, the September 21, 2022 letter does include excerpts from the *Municipalities Act, 1999*. Specifically, the letter cites sections 196, 404(1)(k), 404(5), and 404(6) of that Act.

Section 196 of the *Municipalities Act, 1999* states:

> *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.*[1]

Section 404(1)(K) 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;*[2]

It is agreed between the Parties that the Appellant did not have a Permit from the Town for the installation of the culvert. Further, it is agreed between the Parties that the Appellant did not have the prior written approval of the Department of Environment and Labour for the installation of the culvert. The Town would have been within its authority to issue a Removal Order pursuant to s.404(10(k) of the *Municipalities Act*, *1999*.

The matter is complicated by the Town's inclusion of provisions from the *Town of Victoria Development Regulations 2010* in the September 21, 2022 letter. Specifically, the Town included Part I General Regulations 7, 8, 9, and 10. The inclusion of the provisions from the Development Regulations confuse the specific statutory authority relied upon by the Town.

[1] *Municipalities Act, 1999*, SNL 1999 c. M-24, at s.196.
[2] *Ibid.,* at s.404(1)(k)

The matter is not clarified by reference to the specific motion adopted by the Town Council. Motion 2022-217 states:

> *Be it resolved, that due to the property owner of #42 Gully Path Road, Victoria knowingly having carried out the identified work in a town owned and maintained ditch without obtaining &/or submitting a development application for Council's consideration in compliance with the town's adopted Municipal Plan & Development Regulation, in conjunction with Section 196 of the Municipalities Act, 1999, including the Urban and Rural Planning Act, Council hereby directs the owned of #42 Gully Path Road, that except for the pre-existing driveway culvert, all other culverts installed in the town's ditch along the identified property on June 27, 2022, shall be removed immediately and the ditch restored as an open ditch, prior to this work being done.*

It would appear that Council relied on both the *Municipalities Act, 1999* and the *Urban and Rural Planning Act, 2000* to ground its Removal Order. Ultimately, the use of either statute leads to the same conclusion. The Town had the Authority to order the removal of the installed culvert because it was non-compliant with s.196 of the *Municipalities Act, 1999* and/or because the Appellant had failed to comply with the Town's Development Regulations.

Authority to Review and Scope of Authority

Section 408(1) of the *Municipalities Act, 1999* states:

> *408. (1) A person aggrieved by an order made under subsection 404(1) may, within 14 days of the service or posting of the order, appeal to an adjudicator appointed under the Urban and Rural Planning Act, 2000 and the adjudicator may make an order with respect to the matter that appears just.*[3]

Section 44 of *Urban and Rural Planning Act, 2000*[4] states:

> *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] *Ibid*, at s.408(1)
[4] SNL2000, c. U-8

(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.

While s.408(1) of the *Municipalities Act, 1999* states that I have the authority to make an order "that appears just" I find that s.44 of the *Urban and Rural Planning Act*, *2000* restricts my authority to make an order when it involves a discretionary decision of Council.

Section 404(1) states that "…Council may make an order that…" Use of the term "may" in section 404(1) creates a presumption that the exercise of the authority is discretionary in nature. I find in this instance, that the issuance of a Removal Order was a discretionary decision of the Town Council.

Having decided that the Council exercised its discretion, I may not overrule the decision of the Town Council because my authority is restricted by s.44(2) of the *Urban and Rural Planning Act, 2000*. However, while I cannot overturn the decision, I may send the decision back to the Town where there is some fatal error in how the Council exercised its discretion. Such errors could include, but are not limited to, non-compliance with the statutory authority or breaches of procedural fairness.[5] Errors of this type have been described as "[not] a needle in a haystack, but of a beam in the eye."[6]

Is there a Palpable and Overriding Error?

The Appellant has submitted several arguments that he alleges constitute sufficient grounds to overturn the decision of the Town. As noted above, I have no authority to overturn the decision of the Town, I am limited to either affirming the decision of the Town or returning this matter to the Town for reconsideration. Of the arguments raised by the Appellant, the following warrant consideration as they may rise to the level of palpable and overriding error:

1. Failure to provide proper notice of the right of appeal;
2. Failure to properly serve the Removal Order;
3. Failure to accord Procedural Fairness to the Appellant;

[5] For clarity, application of the Town's discretionary authority in this instance constitutes a question of mixed fact and law. The appropriate review standard of review for this appeal is palpable and overriding error. I utilized a plain language simplification of the test to assist lay readers.

[6] G. (J.) c. Nadeau, 2016 QCCA 167 (C.A. Que) at para 77, cited with approval in *Benhaim v. St-Germain,* 2016 SCC 48, at para 39.

Failure to Provide Proper Notice

Section 5 of the *Development Regulations,* enacted under the *Urban and Rural Planning Act, 2000* states:

> *5. Where an authority makes a decision that may be appealed under section 42 of the Act, that authority shall, in writing, at the time of making that decision, notify the person to whom the decision applies of the*
>
> *(a) persons right to appeal the decision to the board;*
>
> *(b) time by which an appeal is to be made;*
>
> *(c) right of other interested persons to appeal the decision; and*
>
> *(d) manner of making an appeal and the address for the filing of the appeal.*

The Parties agree that the Town failed to provide the required notice to the Appellant. The Parties differ on how I should consider that failure.

The Appellant argues that the failure to provide the regulatory notice constitutes a sufficient breach to negate the discretionary decision of the Town. The Town submits that while s.5 of the *Development Regulations* includes the word "shall" I should consider the practical effects of the Town's failure. The Town has submitted case law to support its argument.

In *Janes v. Embree (Town)*,[7] the Newfoundland and Labrador Court of Appeal considered, *inter alia*, the impact of a failure by a municipality to provide notice as required under s.5 of the *Development Regulations*. B.G. Welsh J.A. stated:

> *[32] It was not argued on appeal that "shall" was not intended to be mandatory in this context. Being mandatory, the effect of non-compliance is to render the order a nullity or invalid. See: R. Sullivan, Sullivan on the Construction of Statutes, fifth edition, (Markham, ON: LexisNexis Canada Inc., 2008), at pages 69 and 74 to 79. In the result, where information regarding the right to appeal the order to the Board is not included in the notice, the order is invalid and may not be relied upon by the town council.*[8]

Following the Court of Appeal, absent arguments regarding the interpretation of "shall", a failure to provide notice under s.5 of the *Development Regulations* will render the underlying Order from a Town invalid. However, in this instance, the Town has asked that I consider whether use of the word "shall" in s.5 of the *Development Regulations* should be interpreted as directory rather than mandatory.

The distinction between the two interpretations is neatly summarized by Roberts J.A. of the Newfoundland and Labrador Court of Appeal:

[7] 2022 NLCA 36
[8] *Ibid*., at para 32.

> *[3] As Rowe J.A. has indicated, where "shall" is determined to be mandatory as opposed to directory, failure to comply with the relevant provision renders the procedure invalid and void and goes to jurisdiction. The rule is expressed by Francis Bennion in his text Statutory Interpretation, 3rd ed. (London: Butterworths, 1997), at p. 34:*
>
> > *... If the step is mandatory, the failure vitiates the exercise of the statutory power. If the step is merely directory, the failure will not be fatal.*[9]

In support of its position, the Town has submitted excerpts from the above referenced *Sullivan on the Construction of Statutes* and multiple cases that support the proposition that the proper interpretation of the word "shall" in statutes requires that I engage in a contextual assessment of convenience or justice to the parties.

I note in particular the decision of Gonthier J. of the Supreme Court of Canada writing for the majority in *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*.[10] Specifically, the analysis regarding mandatory versus directory language. Gonthier J. noted

> *42 This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on Montreal Street Railway Co. v. Normandin, 1917 CanLII 464 (UK JCPC), [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175):*
>
> > When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only . . . .
>
> *Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: British Columbia (Attorney General) v. Canada (Attorney General), 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41.*
>
> *43 The true object of ss. 51(3) and 51(4) of the Indian Act was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter's list, in the possession of the DIA amply established valid assent. Moreover, to read the*

[9] *Oates v. Royal Newfoundland Constabulary Public Complaints Commissioner, 2003*, 2003 NLCA 40 at para 3
[10] 1995 CarswellNat 1278, [1995] 4 S.C.R. 344

> *provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with s. 51 of the Indian Act therefore does not defeat the surrender.*

Interpretation of statutory use of the term "shall" in this province relies upon three rules.[11] First, determining the intention of the legislature when using the term. Second, determining whether the term has been used in conjunction with the granting of a public power. Third, determining possible prejudice to the parties.

It is clear that the intention of s.5 of the *Development Regulations* is to ensure that individuals who are impacted by certain decisions of a municipal authority are aware of the right and mechanism to appeal those decisions. The letter of September 21 from the Town to the Appellant constituted a decision where notice should have been provided. No notice was given. The response from the Appellant to the Town on September 22 clearly demonstrates that the notice was not necessary; the Appellant was well aware of his right of appeal.

As noted by Green C.J.N.L. and Rowe J.A. (as he was then) in *Newfoundland and Labrador (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*

> *The purpose of [the statute] will not be subverted if the provision is construed to be directory rather than mandatory, based on considerations of prejudice. In that way, prejudice to the litigants in being forced to re-litigate the matter, involving more cost and time for no apparent reason, can be avoided without rote, technocratic application of the provision.*[12]

In this instance, the prejudicial effect of finding that "shall" should be interpreted as mandatory would not be immaterial. The Appellant would continue to have a culvert in contravention of the municipal development regulations and s.196 of the *Municipalities Act, 1999*. The Appellant's practical situation is not improved by a determination the provision is mandatory, he would simply get a brief respite before the Town likely cured the technical deficiency with its original Order and this matter would restart.

The Town has submitted that the decision of the NLCA in *Janes v. Embree (Town)* is distinguishable because in that case the Town had taken irreversible actions that clearly prejudiced the resident. I agree. The instant case is distinguishable from *Janes v. Embree (Town)* on the facts.

Based on the above, I find that use of the term "shall" in s.5 of the *Development Regulations* is directory and not mandatory. A failure to provide notice as per s.5 of the *Development Regulations* does not nullify the underlying Removal Order of the Town.

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[11] See *Oates*, supra at paras 5-8.
[12] 2011 NLCA 42, at para 51.

Failure to Properly Serve the Removal Order

Section 406 of the *Municipalities Act, 1999* states:

> *406. (1) A notice, order or other document required to be given or served under this Act or the 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.*

Similarly, s.107 of the *Urban and Rural Planning Act, 2000* states:

> *107. (1) Unless otherwise stated in this Act, a notice, order or other document required to be given, delivered or served under this Act is sufficiently given, delivered or served where delivered personally or sent by registered mail addressed to the person at the latest known address of that person.*

The Parties agree that the September 21, 2022 letter was not personally served upon the Appellant and was not sent by Registered Mail. The Appellant has argued that this failure constitutes a sufficient breach to warrant dismissal of the underlying Removal Order. The Town has submitted that while the Order was not personally served or sent by Registered Mail, it was clearly delivered to the Appellant.

It is clear on the facts that the Appellant received the September 21, 2022 letter either on September 21 or at the latest by September 22, 2022. This is evidenced by the fact that the Appellant sent correspondence on September 22 indicating his intent to appeal the decision of the Town. I am unwilling to find that a failure to comply with a technical requirement of either Act is a sufficient basis to nullify the Town's decision absent evidence of clear prejudice to the Appellant. No such evidence has been provided to me.

Consequently, a failure to provide notice via personal service or registered mail is insufficient to displace the discretionary decision of the Town Council.

Failure to Provide Procedural Fairness to the Appellant

While not articulating his argument as one of procedural fairness, the Appellant raised multiple arguments that rightfully fall under the heading of procedural fairness. These include the allegedly unfair application of discretion, the allegedly uneven application of discretionary authority, and the allegedly opaque interpretation of the Town's Development Regulations.

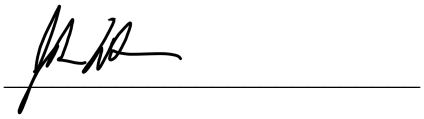
While the Appellant did provide undated and unmarked photographs of various properties allegedly within the municipality, I find that he has not established any evidentiary basis for me to consider whether the Town was non-compliant with its procedural fairness obligations.

Consequently, I dismiss the balance of the Appellant's arguments.

Order

1. The Appeal is dismissed;
2. The Town's Removal Order to confirmed; and,
3. The Appellant is not entitled to a reimbursement of the appeal fee.

DATED at St. John's, Newfoundland and Labrador, this 12th day of December 2023.



John R. Whelan Q.Arb

Adjudicator