

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-064-043
Appellant(s)	Chris Warren
Respondent / Authority	Town of Paradise
Board Members	Chair: Clifford Johnston Member: Robert Warren Member: Paul Bountridge
Date of Hearing	October 27, 2020

Also in Attendance

Solicitor for the Appellant(s)	
Representatives for the Appellant(s)	
Representatives for the Authority	Alton Glenn, Director of Planning and Development
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Kim Blanchard, MCIP
Interested Parties	Rod Snow

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

Land Use Planner's Technical Report

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Appellant(s)	Chris Warren
Respondent / Authority	Town of Paradise

1. Board's Role

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Paradise acted in accordance with the *Urban and Rural Planning Act, 2000*, and the Town of Paradise Municipal Plan and Development Regulations when it issued an order to Marilyn and Eugene Warren and Chris Warren on December 12, 2019 ordering that the accessory building on 63 Round Pond Road be altered to meet the maximum permitted height of 5.8 m on or before January 6, 2020.

2. Background

On March 12, 2019, Chris Warren (the Appellant) and Eugene Warren, applied to build a shed (accessory building) at the subject property at 63 Round Pond Road. In keeping with its development regulations, the Town advertised the application to inform Council's consideration of the application. The Town considered representations and, on June 5, 2019, approved the development with conditions. On June 17, 2019 the Town issued a Building Permit to Chris and Eugene Warren to construct a 147m² accessory building, 5.8 metres in height, at 65 Round Pond Road.

Subsequently, the Town issued an Order of non-compliance, dated December 11, 2019, and served on December 12, 2019, which outlined the following:

- That a building permit had been issued to the Appellant on June 17, 2019 to construct an accessory building, stating that the height of the building must not exceed 5.8 m.
- That building height and established grade are defined by the Town of Paradise Development Regulations;
- That section 3.1 of the Paradise Development Regulations “compliance with regulations” directs that development be carried out in accordance with the Town’s Plan and Regulations and any conditions stated in a development approval and/or building permit;
- That inspections were carried out at the subject property on December 5 and 6, 2019 where it was determined that the building height was greater than the maximum 5.8 m;
- That the structure was deemed in non-compliance with section 3.1 of the Town of Paradise Development Regulations and the Urban and Rural Planning Act;
- That the Town derives authority from section 102(1) of the Urban and Rural Planning Act to issue orders for building or development contrary to development regulations;
- That the Order must be carried out within a specified timeframe;
- That there are consequences of not complying with the Order; and
- That the Order could be appealed and how to file an appeal.

3. Chronology

Chronology assembled from the material submitted by the Applicant, Appellant, and the Authority.

12 March, 2019	Application (B2019-065) submitted to the Town of Paradise by Chris and Eugene Warren to construct an accessory building at 65 Round Pond Road
April 24, 2019	Due to the size of the proposed accessory building, public notice was published in the Shoreline to receive input for Council’s consideration
5 June, 2019	Development Approval granted for application (B2019-065) to construct a 147m ² accessory building, 5.8 metres in height, at 65 Round Pond Rd
17 June, 2019	Building Permit issued to Chris and Eugene Warren to construct a 147m ² accessory building, 5.8 metres in height, at 65 Round Pond Rd
5 & 6 December, 2019	Municipal inspections and measurements at the subject property
11 December, 2019	An Order of non-compliance was issued by the Town to Chris Warren of 63 Round Pond Road, and Marilyn and Eugene Warren of 16 Juniper Place Chris Warren
12 December, 2019	Order was personally served by Town staff to Eugene Warren at 16 Juniper Place
17 December, 2019	Order was ratified by Council by unanimous motion
24 December, 2019	Appeal submitted to the Secretary of the Regional Appeal Boards

4. Grounds of Appeal

This appeal is based on the following section of the Act: Section 42.(1)(d).

42. (1) A person or an association of persons aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to

- (a) an application to undertake a development;***
- (b) a revocation of an approval or a permit to undertake a development;***
- (c) the issuance of a stop work order; and***
- (d) a decision permitted under this or another Act to be appealed to the board.***

The Appellant(s) is/are appealing the decision by the Town to issue an Order of non-compliance, on the basis of the following grounds:

1. In their application for the accessory building, the applicants did not have the engineered truss drawings. The height calculated for the application was 5.8m. This was stipulated as the maximum building height, calculated at 5.8 m to the centre of the truss.
2. Once they had engineered truss plans with accurate calculations, the overall building height was a foot more than what was calculated at the time of the application.
3. There was no intent to deceive the Town of Paradise. It was an error on the part of the applicants, not taking into consideration the heel height of the truss in the overall calculations.
4. The applicants were in communication with the Town in an effort to find solutions to rectify the discrepancy in height with accurate engineered truss dimensions. The applicants suggested lowering the eaves, which they suggested would lower the centre of the truss measurements, and therefore lower the overall building height.
5. The appellant noted that his interpretation of how building height is defined and calculated in the Town's development regulations and in the Provincial development regulations was not accepted by the Town.
6. The appellant notes that the Town's measurement is 6.1m, as calculated from the top of the slab to the top of the wall plus the truss height divided by 2. He indicates that the Town has directed him to alter the gable to reduce the measurement; whereas he argues that he can accomplish the overall building height requirement to meet the definition by lowering the eave (the most cost effective and least invasive option).

5. Validity

Section 42 (4) and (5) of the Act state:

42. (4) An appeal made under this section shall be filed with the appropriate board not more than 14 days after the person who made the original application appealed from has received the decision being appealed.

42. (5) An appeal shall be made in writing and shall include

- (a) a summary of the decision appealed from;***
- (b) the grounds for the appeal; and***
- (c) the required fee.***

According to the documents provided, the appeal summary form dated December 23, 2019 was filed via email to the Secretary to the Appeal Board on December 24, 2019, along with the grounds of appeal. Records indicate that the receipt date for the appeal fee was January 8, 2020.

6. Legislation and Regulations

The applicable legislation with respect to this appeal is:

- *Urban and Rural Planning Act, 2000*
- *Town of Paradise Municipal Plan and Development Regulations, 2016*
- *Minister's Development Regulations (Provincial)*

Section 102 of the *Urban and Rural Planning Act, 2000* authorizes Council to issue enforcement orders where building or development is contrary to the development regulations:

102. Order

- (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 he or she 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.*
- (2) *A person ordered to carry out an action under subsection (1) shall be served with that order and shall comply with the order at the person's own expense.*
- (3) *An order made under this section continues in force until revoked by the council, regional authority, authorized administrator, or minister that made the order.*
- (4) *A council, regional authority, authorized administrator or the minister may, in an order made under this section, specify a time within which there shall be compliance with the order.*
- (5) *Where a person to whom an order is directed under this section does not comply with the order or a part of it, the council, regional authority, authorized administrator or minister may take the action that it considers necessary to carry out the order and any costs, expenses or charges incurred by the council, regional authority, authorized administrator or minister in carrying out the order are recoverable against the person against whom the order was made as a debt owed to the council, regional authority, authorized administrator or the Crown.*

The *Paradise Development Regulations, 2016* defines "Building Height" and "Established Grade" consistent with the provincial regulations, the Minister's Development Regulations. To supplement the definitions, the *Paradise Development Regulations* provides illustrations to assist with the interpretation.

- 4.1.(d) *"Building Height" means the vertical distance, measured in metres from the established grade to the*
- (i) *highest point of the roof surface of a flat roof,*
 - (ii) *deck line of a mansard roof, and*
 - (iii) *mean height level between the eave and the ridge of a gable, hip or gambrel roof,*

and in any case, a building height shall not include mechanical structure, smokestacks, steeples and purely ornamental structures above a roof;

4.1.(g) "Established Grade" means,

(i) where used in reference to a building, the average elevation of the finished surface of the ground where it meets the exterior or the front of that building exclusive of any artificial embankment or entrenchment, or

(ii) where used in reference to a structure that is not a building, the average elevation of the finished grade of the ground immediately surrounding the structure, exclusive of any artificial embankment or entrenchment;

General Regulation 3.1 of the *Paradise Development Regulations, 2016* requires that development be compliant with the regulations:

3.1 Compliance with Regulations

Development shall be carried out and maintained within the Planning Area in accordance with the Municipal Plan, these Regulations, the conditions stated in a Development Approval and/or Building Permit, and any other by-law or regulation enacted by Council.

7. Land Use Planning

The subject land is zoned Rural Residential (RR) under the *Town of Paradise Development Regulations*. An accessory building is a permitted use, subject to the requirements of the Town's development regulations.

Section 4.2.2 (g) of the *Paradise Development Regulations* requires that, for a lot size greater than 4050m², an accessory building with size greater than 90m² and size greater than 4.5m is subject to public notice prior to Council's discretionary review and approval.

The appeal submission indicates that Council published a Notice, that the Town considered the representations, and there were communications between staff and the applicant related to public concerns. Four written objections were received by the Town in response to the notice.

Staff recommendations were considered by Council and ultimately the development approval was granted on June 5, 2019 for the accessory building with conditions, and a building permit was issued on June 17, 2019.

Upon inspection of the site, the Town deemed the subject accessory building to have been constructed contrary to the development approval and building permit, in that it exceeded the maximum height of 5.8 m.

Council exercised its authority under section 102(1) of the *Urban and Rural Planning Act, 2000* in issuing an order of non-compliance and ordered that the accessory building be brought into compliance with the development regulations. The timeframe for compliance, the consequences of non-compliance, and the right and process to appeal the decision were noted in the written Order.

The Act directs Councils on the matters of how an enforcement Order is to be served, and gives provision to delegate authority to staff to issue an Order:

Section 107 (1) of the Act requires that an order be delivered personally or sent by registered mail.

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.

Section 109 (3) of the Urban and Rural Planning Act states that an employee of Council may issue an order. Subsection (4) requires this order to be confirmed by the majority vote of the members of council present at the next meeting and the order is considered cancelled if it is not confirmed.

109. (3) An employee of a council or regional authority may issue an order under section 102.

(4) An order made by an employee referred to in subsection (3) shall be confirmed by a majority vote of the members of the council or regional authority present at the next meeting of that council or regional authority after the order is made and if the order is not confirmed in this manner, it shall be considered to be cancelled.

Minutes of Council were included in the submission materials as evidence that the Order was ratified by Council on December 17, 2019.

8. Procedural Compliance

In considering Council's interpretation and enforcement of the Development Regulations (both the provincially mandated Ministerial Development Regulations and the Town of Paradise Development Regulations), the Board should consider the following in the Town's calculations of the height of the subject accessory building with a gable roof:

BUILDING HEIGHT means the vertical distance, measured in metres, from Established Grade to the... mean height level between the eave and ridge of a gable, hip or gambrel roof...

ESTABLISHED GRADE means... where used in reference to a Building, the average elevation of the finished surface of the ground where it meets the exterior of the front of that Building exclusive of any artificial embankment or entrenchment...

Presentations during the Hearing

1. Planner's Presentation

During the hearing, the Board heard technical details about the subject property and the provisions from the Town of Paradise Municipal Plan and Development Regulations from the Planner.

2. Appellant's Presentation

The Appellant relied upon the wording of the definition of Building Height as it is written in the Town's Development Regulations, which is to say without reference to the height of the walls on which the roof trusses rested as part of the calculation of Height. The Town didn't agree with the Appellant's interpretation of Building Height.

3. Authority's Presentation

It is the Town's long-established practice to use the height of building walls as a starting point in the determination/calculation of Building Height. Accepting the Appellant's proposal for extension of the roof trusses would be inconsistent with the Town's application of the definition for Building Height.

4. Interested Parties

Rod Snow, an area resident, indicated that he and several of his neighbours had originally objected to the size of the proposed accessory building and its height when the application was originally advertised by the Town. Mr. Snow feels that if development of the accessory building proceeds, it should be in compliance with the conditions established by the Town as set out in the Building Permit.

Q: Has the Town established that its interpretation of Building Height is aligned with that which is contained in the Town's Development Regulations and the Urban and Rural Planning Act?

R: The Board has been advised by the Authority that it has consistently taken into account the height of the walls under the roof trusses when determining building height for a gable roof. Reference to wall height is not included in the definition.

Q: Has the Town established that the present height of the Accessory Building is greater than what has been approved (5.8 metres), and is this consistent with the definition of Building Height?

R: Yes, based on the existing dimensions of the roof.

Q: Is the Appellant's interpretation of Building Height and his proposed response to the Town's Order consistent with the definition of Building Height?

R: Yes, strictly speaking, with the present wording of the definition of Building Height as contained in the Town's Development Regulations.

Q: Has the Town established that the Appellant's suggestion for a modified (extended) eave would result in a height of the Accessory Building greater than what has been approved, and is inconsistent with its application of the definition of Building Height?

R: Yes

Q: Would the Appellant's proposal to extend the eaves result in a Building Height that is greater than 5.8 metres?

R: Yes

Q: Did the Town have the authority to issue the Order to alter the height of the Accessory Building to a maximum height of 5.8 metres?

R: Yes, under Section 102 of the Urban and Rural Planning Act, the Authority is authorized to issue enforcement orders where it has been determined that building or development is contrary to the Development Regulations.

Q: Has the Town applied its authority in a reasonable manner?

R: Yes, given the Authority's representative's statement that the Town has been applying its interpretation of the definition of Building Height in a consistent manner.

Board's Decision

In arriving at its decision, the Board reviewed the submissions and comments given by parties present at the hearing along with the technical information. The Board is bound by Section 42 of the *Urban and Rural Planning Act, 2000* and therefore must make a decision that complies with the applicable legislation, policy and regulations.

Based on the information presented, the Board has determined that the Town Council of Paradise did have the authority to issue the Order on December 11, 2019 to require the Accessory Building at 63 Round Pond Road to be altered to meet the maximum permitted height of 5.8 metres, and did exercise its authority appropriately.

Board's Order

Based on the information presented, the Board orders that the decision by the Town Paradise on December 11, 2019 to issue an Order of Non-Compliance for the Accessory Building at 63 Round Pond Road, be confirmed.

The Respondent and the Appellant(s) are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Eastern Newfoundland Regional Appeal Board may be appealed to the Supreme Court of Newfoundland and Labrador on a question of law or jurisdiction. If this action is contemplated, the appeal must be filed no later than ten (10) days after the Board's decision has been received by the Appellant(s).

DATED a St. John's Newfoundland and Labrador, this 27 of October, 2020.



Clifford Johnston, Chair

Eastern Newfoundland Regional Appeal Board



Robert Warren, Member

Eastern Newfoundland Regional Appeal Board



Paul Boudridge, Member

Eastern Newfoundland Regional Appeal Board