

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-067-013
Appellant(s)	Stephen Dunne
Respondent / Authority	Town of Witless Bay
Date of Hearing	September 28, 2021

Board Members

Chair	Cliff Johnston
Member	Lisa Slaney
Member	Carol Ann Smith

Also in Attendance

Solicitor for the Appellant(s)	Gerald O'Brien, Appellant's Solicitor
Representatives for the Appellant(s)	Stephen Dunne, Appellant Gerard Dunne Barbara Ann Harrigan, former Assistant Town Clerk
Representatives for the Authority	Gilles Ayres, Town's Solicitor Councillor Vince Swain
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Elaine Mitchell, MCIP
Start Time/Completion Time	9:00 am/10:55 am

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

Board's Role

The role of the Regional Appeal Board is to determine if Town of Witless Bay acted in accordance with the *Municipalities Act, Urban and Rural Planning Act, 2000* and the Town of Witless Bay Municipal Plan and Development Regulations when making its decision to issue an order respecting property at 41 Dunn's Lane.

Presentations During the Hearing

1. Planner's Presentation

The subject of this appeal is an accessory building (barn) located on a corner lot at 41 Dunn's Lane, at the juncture with South Side Track, in Witless Bay. The property owner/ Appellant, Stephen Dunne, submitted an application to the Town on January 30, 2020, to demolish and rebuild or refurbish the structure.

At the May 19, 2020 Public Meeting of Witless Bay Town Council, the "application to demolish and rebuild barn, or refurbish" was tabled. Council resolved a motion for "demolition of the barn as per application, per determination of 50% on the deterioration of the structure and under Regulation 10 for safety concern on one of the main intersections of the Town". The Minutes noted Council's decision to demolish the structure, and no further comment on the aspect of the development application to rebuild or refurbish. Council's May 19, 2020 motion further issued a Removal Order to Stephen Dunne to have the barn demolished within 60 days.

The Order, dated May 22, 2020, was issued to Stephen Dunne, which he indicates that he received on May 26, 2020. On June 4, 2020, Stephen Dunne appealed Council's Order.

The Appellant is appealing the decision to issue the Removal Order, based on the following grounds:

- The Appellant notes that he applied to the Town, wishing to demolish the existing barn and rebuild a new barn or to refurbish the existing barn.
- The barn is an existing non-conforming use. Council deferred the application pending a report from the Town Planner. The planner's report advised that a determination was needed to quantify the % deterioration of the barn, whether it is deteriorated more or less than 50%.
- The Appellant argues that the Town did not conduct a site visit. Further, the Town does not provide building inspections, and the staff and councillors are not qualified personnel to make the determination about the structure.
- The Appellant engaged the services of Richard Bursey of NewLab Engineering Limited, who conducted a site visit of the subject property to determine whether "50% or more of the value of the building has been destroyed" per article 49(3)(c) of the Town Plan.
- The Appellant notes that his request to refurbish the barn was not addressed. He appeals for the Order to be reversed and the application re-tabled.

This appeal is against a decision of Council to issue an order under subsection 404 of the *Municipalities Act, 1999*. Section 408 of the *Municipalities Act, 1999* enables aggrieved parties to challenge a decision with respect to orders made under subsection 404(1) by appealing to the appropriate regional appeal board established under the *Urban and Rural Planning Act, 2000* ("URPA").

Section 42(1)(d) of URPA enables an appeal of a decision permitted under another act, which would include the issuance of a Removal Order under the *Municipalities Act, 1999*:

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...

(d) a decision permitted under this or another Act to be appealed to the board.

Section 42 (4) and (5) of URPA 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 was filed on June 4, 2020, 9 days after Council issued the Order on May 26, 2020. The Appellant's submission included the grounds of appeal, an appeal summary form, and the required fee.

Legislation and Regulations

The applicable legislation with respect to this appeal is:

- *Municipalities Act, 1999*
- *Urban and Rural Planning Act, 2000*
- Town of Witless Bay Municipal Plan and Development Regulations

In accordance with the *Municipalities Act, 1999*:

404. Council orders

(1) A council may make an order that

(f) where a building is in a dilapidated state, or is, in the opinion of the council, unfit for human habitation, or another use for which it is then being used, or is a public nuisance, the owner or occupier is to pull down, remove, fill in or otherwise destroy the building and restore the site to its original state, or make the disposition or alteration of the building that the order directs;

(l) that the owner or occupier of real property remove from that property, solid waste, noxious substances and substances or things which may be a hazard to public health and safety or which adversely affects surrounding properties.

(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.

On the basis of the documents provided for the appeal, it is unknown the specific manner in which the Order was served to Mr. Dunne. The appeal form indicates that he received the Order dated May 22, 2020 on May 26, 2020. Mr. Dunne engaged the appeals process on June 4, 2020, 9 days of the date of issuance of the Order.

The Order issued by the Town on May 22, 2020 referenced Council's May 19, 2020 meeting at which time Council "formally motioned that the structure be removed" (the Order noted it was revised May 27, 2020 to correct the date of the Council meeting). The legislative authority for the issuance of the Order was not noted in the Council Minutes; however, the Removal Order document cited the legislative authority for Council's issuance of the Order; per subsections 404(1)(f)(l) of the *Municipalities Act, 1999*. The Removal Order also cited subsections 404(2) respecting the obligation of the recipient to comply with the Order at their expense; 404(3) respecting the duration of the Order to remain in effect until revoked by the authority; 404(4) respecting the authority's discretion to specify a timeframe for compliance, which was specified at 60 days; and, 404(5) enabling Council, in the event of non-compliance, to take action to carry out the terms of the Order at the expense of the recipient. The Order also noted the right and process to appeal.

Wherein the decision to issue a Removal Order was in response to a development application concerning barn that is a non-conforming use, section 108 of the *Urban and Rural Planning Act, 2000* outlines the provisions, and these are carried through in the Town's Municipal Plan and Development Regulations.

To inform Council's consideration on the matter, the Town engaged its planning consultant to prepare a planning report. In summary, the report indicates that the application concerns an existing non-conforming use. The subject property is located in the Residential Zone, and has an area of 966 m², which does not meet the lot area requirement of 1860 m². In addition to the barn (accessory structure) that is the subject of this appeal, the property has an old dilapidated vacant house which has not housed residents for many years, and two other accessory structures (small sheds); however, the barn structure has had continued storage use for 60 years according to the applicant. The location of the subject barn on the property does not meet the current Development Regulations or standards for setbacks required for the Residential Use Zone Table. The planning report notes that, in considering the requested permit to demolish and rebuild or refurbish the existing building, Council must determine the status of the building in conjunction with the provisions for continuation of the non-conforming use, particularly the determination whether the deterioration of the structure is 50% or more of the value of the structure.

Non-conforming uses, commonly known as "grandfathered" developments, are defined and enabled by legislation and municipal planning framework, and shall be allowed to

continue as a non-conforming use within the provisions and limitations of section 108 of URPA, and Regulation 49 of the Town's Development Regulations.

Non-conforming use provisions in the Witless Bay Development Regulations:

➤ Schedule A, Definitions:

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

➤ Part II, General Development Standards:

49. Non-Conforming Use

(1) Notwithstanding the Municipal Plan, scheme or regulations made under this Urban and Rural Planning Act, 2001, the 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 Act, 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 12 months after that discontinuance.

(3) A building, structure or development that does not conform to a scheme, plan or regulations made under the Act that is allowed to continue under subsection (1)

(a) shall not be internally or externally varied, extended or expanded unless otherwise approved by the Authority;

(b) shall not be structurally modified except as required for the safety of the building, structure or development;

(c) shall not be reconstructed or repaired for use in the same non-conforming manner where 50% or more of the value of that building, structure or development has been destroyed;

(d) may have the existing use for that building, structure or development varied by the Authority to a use that is, in the Authority's opinion, more compatible with the plan and regulations applicable to it;

(e) may have the existing building extended by approval of the Authority where, in the Authority's opinion, the extension is not more than 50% of the existing building;

(f) where the non-conformance is with respect to the standards included in these development regulations, shall not be expanded if the expansion would increase the non-conformity;

(g) where a building, structure or development does not meet the development standards included in development regulations, the building, structure or development shall not be expanded if the expansion would increase the non-conformity and an expansion must comply with the development standards applicable to that building, structure or development.

(h) where the building or structure is primarily zoned and used for residential purposes, may, in accordance with the municipal plan and regulations, be repaired or rebuilt where 50% or more of the value of that building or structure is destroyed.

Where considering a non conforming building, structure or development and before making a decision to vary an existing use of that non-conforming building, structure or development, the Authority, at the applicant's expense, shall publish a notice in a newspaper circulating in the area or by other means give public notice of an application to vary the existing use of a non-conforming building, structure or development and shall consider any representations or submissions received in response to that advertisement.

An application to “demolish and rebuild or refurbish” an existing non-conforming barn must be considered in accordance with the non-conforming use provisions of URPA section 108 and Regulation 49. The intent of those provisions is to bring development into conformity over time without causing undue hardship. Buildings, structures or developments that do not conform to current standards are allowed to continue and, in certain circumstances, change or expand. Notwithstanding that the barn pre-dated the coming into effect of zoning or standards, a structure that is not in compliance with the current regulatory or policy framework in effect must be considered in relation to current Municipal Plan and Development Regulations, as well as the legislative and regulatory framework for considering a non-conformity and “grandfathering principle”.

Respecting non-conforming use provisions to demolish and reconstruct a 7.3 x 7.3 m barn on a developed lot in the Residential Zone, where an existing 6.1 x 6.7m barn exists contrary to the current regulations and requirements for setbacks, side yards, corner lots, and building lines: Regulation 49(3)(b) prohibits structural modifications unless they are for safety; Regulation 49(3)(c) prohibits reconstruction or repair in the same non-conforming manner where 50% or more of the value of the building has been destroyed; Regulation 49(3)(f) prohibits an expansion of a building where the non-conformity with development standards would increase.

Council's motion noted its decision was being made in accordance with Regulation 10 “for safety concern” on a main intersection. Regulation 10 is a general regulation pertaining to Council's discretionary powers, which states:

10. Discretionary Powers of Authority

(1) In considering an application for a permit or for approval in principle to carry out development, the Authority shall take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto, and shall assess the general appearance of the development of the area, the amenity of the surroundings, availability of utilities, public safety and convenience, and any other considerations which are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, the Authority may, in its discretion, and as a result of its consideration of the matters set out in this Regulation, conditionally approve or refuse the application.

(2) An authority may, in its discretion, determine the uses that may or may not be developed in a use zone and those uses shall be listed in the authority's regulations as discretionary, permitted or prohibited uses for that area

The applicant applied to “demolish and rebuild or refurbish” the barn at the subject property. Council considered the matter at the public meeting of May 19, 2020. The Council Minutes indicate “moved for demolition of the barn as per application”. Council’s motion does not speak to the aspect of the application to “rebuild or refurbish”.

In its consideration of development applications, when refusing to issue a permit, Council is directed by Regulation 22 to state its reasons.

22. Reasons for Refusing Permit

The Authority shall, when refusing to issue a permit or attaching conditions to a permit, state the reasons for so doing.

The Minutes reference Council’s “determination of 50% on the deterioration of the structure”. While no specific mention of Regulation 49(3)(c) is made in the Minutes, this subsection of the regulation prohibits the reconstruction or repair where 50% of the value of the building has been destroyed:

*(3) A building, structure or development that does not conform to a scheme, plan or regulations made under the Act that is allowed to continue under subsection (1)
(c) shall not be reconstructed or repaired for use in the same non-conforming manner where 50% or more of the value of that building, structure or development has been destroyed”*

On the basis of the information provided for the appeal, it is unknown how Council determined the level of deterioration of the subject barn exceeded 50%. Included in the Appellant’s submission is a structural report by Richard Bursey of Newlab Engineering Limited. That report is dated May 25, 2020, the day prior to the date indicated in the appeal form that the Appellant received the Order (May 26, 2020). The structural report indicates that field work was conducted May 22, 2020 and states “in our opinion it has not suffered a 50% dilapidation”. Based on the materials presented for the appeal, it is unknown if this or any other structural assessment was considered in Council’s determination.

2. Appellant’s Presentation

- Appellant uses the subject barn for recreational equipment storage and wishes to continue this use.
- In Appellant’s opinion, the barn is in reasonable condition and wishes to make repairs to improve the structure’s overall condition.
- Appellant hired NewLab Engineering Limited to determine whether 50% or more of the value of the building had been destroyed. This evaluation was done in May 2020, and was determined by the consultant that the barn has not suffered a 50% dilapidation.
- Mr. O’Brien noted that his client had been denied natural justice by the Town in regards to the processing of his application. The Town did not provide him with

an opportunity to speak to Council and/or staff on his application before making its decision to issue the Removal Order.

- Mr. O'Brien noted that the Town did not engage any type of structural analysis of the barn before making their decision to issue the Removal Order. The Town only asked the Appellant if they could visit the barn 6 months after the order was issued.
- In response to questioning from the lawyer for the town, the Appellant indicated that even though his application referenced "demolish and rebuild or refurbish" the barn, it was always his intention to repair/refurbish the barn, not to demolish it.

3. Authority's Presentation

Mr. Giles Ayres advised the Board that the Removal Order was issued in accordance with Section 404 of The Municipalities Act. The Town of Witless Bay has the authority to issue such orders under this Act without first having made a decision on the application from the Appellant to demolish/refurbish the barn. Council has no duty under the provisions of the Act to give reasons when issuing Orders.

Board's Analysis

Q. What is the zoning of the property under Appeal?

A. The subject property is located in the Residential Zone and has an area of 966 m², which does not meet the lot area requirement of 1860 m². The barn structure has had continued storage use for 60 years according to the applicant. The location of the subject barn on the property does not meet the current development regulations or standards for setbacks required for the residential use zone table. The existing barn is regarded as a non-confirming use in the Residential Zone.

Q. Does the Town's Development Regulation allow the repairs/refurbishment of a non-confirming use?

A. Respecting non-confirming use provisions: Regulation 49(3)(b) prohibits structural modifications unless they are for safety; Regulation 49(3)(c) prohibits reconstruction or repair in the same non-confirming manner where 50% or more of the value of the building has been destroyed; Regulation 49(3)(f) prohibits an expansion of a building where the non-conformity with development standards would increase. Therefore, the Town's Development Regulations authorize Council at its discretion, to allow the repair or reconstruction of the barn, which is a non-confirming use on the subject property, provided that 50% or more of the value of the barn has not been destroyed.

Q. Did the Town process the Appellant's application appropriately?

A. The Board notes that the Town did not make a decision on the application to demolish and rebuild or refurbish the barn prior to making its decision of May 19, 2020 to issue the Removal Order. There is no information provided to the Board to indicate that the Town asked the Appellant if he was agreeable to a deferral of the processing/Council decision on his application.

Q. Does the Town have the authority to issue Removal Orders?

A. Yes, the Town has such authority.

In accordance with the *Municipalities Act, 1999*:

404. Council orders

(1) A council may make an order that
(f) where a building is in a dilapidated state, or is, in the opinion of the council, unfit for human habitation, or another use for which it is then being used, or is a public nuisance, the owner or occupier is to pull down, remove, fill in or otherwise destroy the building and restore the site to its original state, or make the disposition or alteration of the building that the order directs;

(l) that the owner or occupier of real property remove from that property, solid waste, noxious substances and substances or things which may be a hazard to public health and safety or which adversely affects surrounding properties.

(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.

Q. Did the Town have sufficient information on the structural condition of the barn before making its decision to issue the Removal Order?

A. The Town's Removal Order dated May 22, 2020 references the barn being in a dilapidated state. At the appeal hearing, Councilor Swain advised the Board that Council itself determined that the level of deterioration of the barn exceeded 50% and that Council did not engage a professional/structural evaluation of the barn.

There was no evidence provided to the Board to indicate the Town received/reviewed the report from NewLab Engineering Ltd. prepared for the Appellant which showed that the barn had not suffered a 50% dilapidation before issuing the Removal Order.

Board's Conclusion

After reviewing the information presented to this Board, the Board concludes that the Authority did not process the application from the Appellant appropriately and without adequate consultation with the Appellant. The Appellant was denied natural justice in that no decision was made by the Town with respect to his application to demolish and rebuild or refurbish the subject barn prior to Council making its decision of May 19, 2020 to issue the Removal Order for the barn.

Further, the Board has determined that Council issued the Removal Order for the barn without first having in its possession, adequate professional information on the structural condition of the barn.

Board's Order

The Board orders that the May 19, 2020 decision of the Town Council of Witless Bay to issue a Removal Order for the existing barn at 41 Dunne's Lane, be reversed. The Board further orders that the application dated January 30, 2020 from the Appellant to demolish and rebuild or refurbish the barn at the subject property be referred back to the Town for proper processing in its entirety and referral to Council for a formal decision. Should Council ultimately make a decision to reject the application, Council shall in accordance with Section 22 of the Town's Development Regulations state the reasons for doing so, and shall advise the Appellant of their right of appeal the decision to the Eastern Newfoundland Regional Appeal Board.

Council must make a decision on the Appellant's application and advise the Appellant of this decision, before Council makes any further decisions respecting the barn.

The Board further orders that the Town of Witless Bay pay an amount of money equal of the appeal fee (\$200.00 plus HST = \$230.00) to the Appellant.

The Authority and Appellant are bound by the decision of this Regional Appeal Board.

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

DATED at St. John's, Newfoundland and Labrador, this September 28, 2021.



Clifford Johnston, Chair
Eastern Newfoundland Regional Appeal
Board



Lisa Slaney, Member
Eastern Newfoundland Regional Appeal
Board



Carol Ann Smith, Member
Eastern Newfoundland Regional Appeal
Board