

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Paul Duffy (**Appellant**)

AND Town of Torbay (**Authority**)

RESPECTING Council's refusal to allow reconstruction of a cabin at 177 Middle Three Island Pond Road, Torbay
[MAE File: 15-006-057-003]

BOARD MEMBERS Chair – Cliff Johnston
Member – Paul Boundridge
Member – Robert Warren

DATE OF HEARING March 6, 2019

LOCATION OF HEARING Mount Pearl Council Chamber

IN ATTENDANCE

Appellant: Paul Duffy; Mike Duffy, Solicitor for Paul Duffy

Respondent: Brian Winter, Town of Torbay

Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board
Kim Blanchard, Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

This appeal arises from the Town of Torbay Council's refusal to permit the reconstruction of a cabin on land located at 177 Middle Three Island Pond Road, Torbay. An application to redevelop the subject property was refused by the Town of Torbay (the Authority) on April 25, 2018. Correspondence to that effect was sent to the Appellant on April 26, 2018 outlining that the subject property is within a part of the Town that is zoned 'Rural' and therefore does not accommodate the proposed development (a seasonal residence).

The Appellant appealed the Decision to reject his application on the following grounds:

- Original dwelling was a pre-existing non-conforming use
- The Appellant did not willingly choose to remove the previous seasonal dwelling – it was destroyed by arson.
- The Appellant maintains that he was not informed by the Town of Torbay of his right to apply to rebuild a non-conforming use when he verbally inquired of a Town official about it within a month of the fire.
- The Appellant maintains that he only became aware of the Town's regulations concerning Non-Conforming Uses when the Application for a permit to reconstruct was rejected in 2018. The Appellant further maintains that the right to seek a permit to rebuild within 12 months of the loss should begin from the time the refusal was made.
- Discontinuance of Use [Can the destruction of the former seasonal dwelling by arson and the failure by the property owner to apply for a permit to rebuild within 12 months of the fire be legitimately interpreted as equivalent to a discontinuance of the use by the owner?]
- Principle of natural justice relating to the application of URPA 2000 should apply,
- Previous cabin did not meet National Building Code. A new seasonal dwelling would meet current NBC requirements.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

Town of Torbay Development Regulations 2015-2025

Matters presented to and considered by the Board

The role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Torbay acted in accordance with the *Urban and Rural Planning Act, 2000* and the Town's Development Regulations when it refused a development application on April 25, 2018 concerning the redevelopment of a cabin at 177 Middle Three Island Pond Road in the Town of Torbay.

Q: What was the zoning of the subject property when the original seasonal residence was destroyed and what is the present zoning of the property?

A: Rural Zone. The zoning had not changed in the interim.

Q: Did the Rural zoning allow a seasonal residence and does it allow a seasonal residence now?

A: No, a seasonal residence was not and is not presently allowed in the Rural Zone. The Rural Zone allows single dwellings as a Discretionary Use only as Accessory to agriculture or forestry uses.

Q: How would the original seasonal residence have been classified/defined under the Town's present and previous Development Regulations and under URPA?

A: It would have been considered a Legal Non-Conforming Use, defined in URPA as:

“...means a legally existing use that is not listed as a permitted or discretionary use for the zone in which it is located or which does not meet the development standards for that use zone”

Q: How does the Town of Torbay Development Regulations deal with the repair or reconstruction of a building occupied by a Non-Conforming Use?

A: Section 49 of the Town of Torbay Development Regulations states:

“49. Non-Conforming Use

(1) Notwithstanding the Municipal Plan, scheme or regulations made under this Urban and Rural Planning Act, 2001, the Council 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. [emphasis added]

(2) Notwithstanding subsection (1), a right to resume a discontinued non-conforming use of

land shall not exceed 12 months after that discontinuance [emphasis added]

- (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 Council;
 - (b) shall not be structurally modified except as required for the safety of the building, structure or development;
 - (c) may have the existing use for that building, structure or development varied by the Council to a use that is, in the Council's opinion, more compatible with the plan and regulations applicable to it;
 - (d) may have the existing building extended by approval of the Council where, in the Council's opinion, the extension is not more than 50% of the existing building;
 - (e) 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;
 - (f) 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 nonconformity and an expansion must comply with the development standards applicable to that building, structure or development.
 - (g) where the building or structure is primarily zoned and used for residential purposes, may, in accordance w'1th the municipal plan and regulations, be repaired or rebuilt where 50% or more of the value of that building or structure is destroyed.
- (4) 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 Council, 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."

The Town's Development Regulations regarding non-conforming uses do conform to the requirements of the Urban and Rural Planning Act 2000.

Q: Did Council have the authority under the Town's Development Regulations to approve the 2018 application to replace the seasonal residence (a non-conforming use) that had been destroyed in 2011?

A: No, Section 49(1) and (2) clearly states:

49. Non-Conforming Use

- (1) Notwithstanding the Municipal Plan, scheme or regulations made under this Urban and Rural Planning Act, 2001, the Council 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. [emphasis added]
- (2) Notwithstanding subsection (1), a right to resume a discontinued non-conforming use of land shall not exceed 12 months after that discontinuance [emphasis added]

The Board notes that at the time the Town of Torbay Development Regulations 2015 came into legal effect the Non-Conforming cabin no longer existed as the structure had been destroyed by fire some 4 years previously.

Q: Do the Appellant's arguments regarding interpretation of the term "discontinuance" have any bearing on this appeal or the application of Section 49.(2) of the Town's Development Regulations; did the Town err in its interpretation of "discontinuance"?

A: There is no definition of the term "discontinuance" in the Urban and Rural Planning Act 2000 or the Town's Development Regulations. It is the Board's opinion that the Town correctly interpreted "discontinuance" as being the time the previous seasonal dwelling was destroyed by fire and subsequent to which an application could have been made to the Town for a Permit to rebuild.

Conclusion

In arriving at its decision, the Board reviewed the submissions and comments given by all parties present along with the technical information and planning advice.

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. The Board derives its powers *Under Section 42 of the Urban and Rural Planning Act 2000, which states:*

“ (10) In determining an appeal, a board may confirm, reverse or vary the decision appealed from and may impose those conditions that the board considers appropriate in the circumstances and may direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have its decision implemented.”

It is the opinion of the Board that the Refusal of the 2018 application from the Appellant for a permit to reconstruct a cabin (seasonal residence) that was destroyed by fire in 2011 was found to be warranted and in accordance with the Section 49 (2) of the Town's Development Regulations and the *Urban and Rural Planning Act 2000* based on the evidence presented to the Board. Therefore the Board confirms the Council decision of April 25, 2018 to reject the application for a permit to reconstruct a cabin (seasonal residence) that was submitted by the Appellant.

ORDER

Based on the information presented, the Board orders that the decision dated April 25, 2018 from the Town of Torbay to the Appellant to reject the application to reconstruct a seasonal residence destroyed by fire in 2011 on property located at 177 Middle Three Island Pond Road, Torbay, 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 at Mount Pearl, Newfoundland and Labrador, this 7th day of March, 2019.



Cliff Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Paul Bountridge, Member
Eastern Newfoundland Regional Appeal Board



Robert Warren, Member
Eastern Newfoundland Regional Appeal Board