

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-077-030

Adjudicator: Lorilee A. Sharpe

Appellant(s): Deno Colbourne (c/o Bumblebee Bight Inn & Brewery)

Respondent / Authority: Town of Pilley's Island

Date of Hearing: June 13th, 2024

Start Time: 9:00 a.m.

In Attendance

Appellant: Deno Colbourne & Natalie Colbourne

Respondent/Authority: Town of Pilley's Island

Respondent Representative(s): Valerie Whelan, previous Mayor

Interested Parties: Wanda Seitl, current Mayor of the Town of Pilley's Island

Jeffery Vincent, Town Clerk

Robert Seitl, Deputy Mayor, Town of Pilley's Island

Nora Tizzard, adjacent property owner

Kerry Tizzard, adjacent property occupant

Appeal Officer: Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs

Technical Advisor: Faith Ford, Planner III, Municipal and Provincial Affairs

Adjudicators Role

Part VI of the *Urban and Rural Planning Act, 2000* 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*, and *Development Regulations* enacted thereunder, the *Town of Pilley's Island Municipal Plan*, and the *Town of Pilley's Island Development Regulations* when the Town of Pilley's Island issued an order requiring the property owner to comply with the minimum sideway setback prescribed by the *Town of Pilley's Island Development Regulations*.

Hearing Presentations

Planner's Presentation

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness.

Rule 10 (a) of the Rules of Procedure provides that there shall be a technical advisor 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.

The Planner from Municipal and Provincial Affairs provides the framework with respect to the appeals process under the *Urban and Rural Planning Act, 2000* and an overview of how the order was processed by Council as prescribed in their roles and responsibilities.

The Adjudicator heard from the planner that this appeal relates to issuance of an order by the Town of Pilley's Island to the owner of 188 Main Street to bring the property into compliance with the 1.5m sideway setback requirement set out in the Town's development regulations. The property is located in a Mixed Development zone within the Town of Pilley's Island Planning boundary and as such is subject to the Town of Pilley's Island municipal plan and development regulations. Schedule C of the Town of Pilley's Island Development Regulations sets out the use zones. The Mixed Development zone prescribes a minimum 1.5 meter side yard setback for main buildings and 1 meter setback for accessory buildings. Section 12 of the *Development Regulations* under the *Urban and Rural Planning Act* provides that the Town may allow a variance of 10% which could reduce the sideway setback for main buildings in a mixed development zone to 1.35 meters.

The Appellant's Presentation and Grounds

The Appellants' grounds for appeal are set out in the written appeal and were summarized in the technical advisors' report as follows:

- Town staff visited the subject property, measured the setbacks from the new deck to the property boundaries, and determined the 1 meter setbacks complied with the Development Regulations setback requirements for accessory buildings

- The Town issued a permit to construct the new deck after confirming the 1 meter setbacks
- The Town did not follow proper procedure and were not familiar with their Development Regulations;
- There is no deck By-Law; and
- The fire escape deck was built in 2020 with approval from the Town and approval from DGSNL. No concerns about the deck or egress stairs were raised by Council at that time.

In support of his grounds of appeal, the Appellant and his wife Natalie Colbourne appeared at the hearing, provided testimony and made oral submissions. The Appellant takes the position that the Town was fully aware and had approved the location of both the fire escape and the deck. The Appellant provided evidence that the fire escape and its location and dimensions were included as part of the engineered drawings that were submitted to and approved by the Town. The Appellant testified that the fire escape was designed by a professional engineer to comply with the regulations requiring two means of egress for the five bedrooms. The Appellant testified that an employee of the Town (maintenance man Wayne Weir) attended the site both prior to and following construction of the deck and confirmed that it was in compliance with the Town's setback requirements. The employee had understood and represented to the Appellant that the requirement was a 1 meter setback. The Appellant described the Town employee as having measured it with string and then signing the drawing indicating the Town's approval. The Appellant testified that another employee (Paulette Callahan) issued him a written permit to construct the deck based on the same information.

Authority's Presentation

The Town of Pilley's Island took the position that the onus is on property owners to comply with the Town's Development Regulations and that there is a standard provision stating same in the permits. The Town also advised that Council's Policy was to have a site visit and inform the property owner that there was a set of development regulations to be followed. The Town did not present any minute of council delegating authority to staff to issue permits or orders but advised that the Town's practice in relation to permit approvals was for staff to approve permits if there was a non-structural change or deck that was being replaced. However, where there was to be a new footprint, such a development would be brought to Town Council for approval. The Town also advised that it had no record of a permit for deck construction for this property. The Town did confirm that Wayne Weir was employed as a temporary maintenance person due to retirement of their full time person that past January. Valerie Whelan, the previous mayor presented on behalf of the Town and she testified that she recalled Mr. Weir being made aware of the deck being under construction without a permit and that she advised Mr. Weir to ensure the property owner was aware of the 1.5 meter setback requirement. She recalled that Mr. Weir questioned her on that because he had understood the setback requirement to be 1 meter and that she then explained to him that the 1 meter applied to accessory buildings. Mr. Robert Seidl also testified on behalf of the Town and advised that he

had attended the property and measured the distance between the new deck and the property boundary and found that it was not in compliance with the required sideyard setback and that it was even closer than 1 meter if you factored in the overhang. The Town confirmed that there had been no motion of Council to issue the Order in dispute prior to its issuance and confirmed that there has been no motion of Council subsequently to ratify the Order.

Interested parties

The adjudicator heard from Nora Tizzard, owner of the adjacent property and her son Kerry Tizzard who resides in her property. They expressed how the development has negatively impacted use and enjoyment of their own property, the biggest concerns being the lack of privacy in their yard and garbage that blows over onto their property.

Adjudicators Analysis

I have reviewed the documents in the appeal package and submissions of all parties, as well as the applicable provisions of *The Urban and Rural Planning Act, 2000*, the ministerial *Development Regulations*, and the *Town of Pilley's Island Municipal Plan and Development Regulations*.

The drawings and other documents in the appeal package show and describe the fire escape and new deck as being attached to the main building at 188 Main Street in the Town of Pilley's Island and not an accessory building. This was also confirmed in the photos submitted by the Appellant. As such, it is clear that the sideyard setback requirement of 1.5 meters as prescribed in the Mixed Use zone of the Town of Pilley's Island Development Regulations applies to the decking under dispute and not the 1 meter sideyard setback that would apply to an accessory building. The Town does have discretion to allow a 10% variance in accordance with section 12(1) of the ministerial *Development Regulations* should the Town desire to do so which would reduce the sideyard setback requirement to 1.35 meters. The Town does not have discretion to reduce the sideyard setback for the main building to 1 meter.

Section 108 of the *Urban and Rural Planning Act* allows continuance of a structure that does not conform to the Regulations. That provision however is not applicable to the non-conformity in this matter as the non-conformity (ie the failure to have proper sideyard setback for the deck and fire escape) did not legally exist prior to registration of the *Town of Pilley's Island Development Regulations* that have been in effect since May 5, 1995. Section 108(1) states:

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.**

[Emphasis Added]

The Appellant had raised several allegations of officially induced errors by the Town of Pilley's Island both in relation to issuance of the initial permit for the major renovations to the Inn that included approval of drawings submitted for the non-conforming fire escape and subsequent dealings with Town staff in relation to approval of the non-conforming deck. Section 20(5) of the *Town of Pilley's Island Development Regulations* states:

20(5) The approval of any application and plans or drawings or the issue of a permit shall not prevent the Authority from thereafter requiring the correction of errors, or from ordering the cessation, removal of, or remedial work on any development being carried out in the event that the same is in violation of this or any other regulations or statute.

As such, the Town of Pilley's Island pursuant to section 20(5) of its development regulations, has authority to order removal of the structures that are in non-compliance with the sideyard setbacks even if there was an error in a permit issued by the Town or erroneous approval of drawings.

The powers of an adjudicator do not include any assessment of or order for damages in relation to a municipality requiring a property owner to rectify any non-conforming development that may have been erroneously approved by a municipality. The powers of an adjudicator in deciding an appeal are set out in s.44 of the *Urban and Rural Planning Act*:

Decisions of adjudicator

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) 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.

In this instance, the Town of Pilley's Island was correct in stating that the sideyard setback requirement is 1.5 meters. Further, the Town was acting within its authority in requiring the Appellant to remove the non-conforming structures, even if the structures may have been constructed in a non-conforming manner due in part to errors on the part of the Town and its staff. However, the Town did not follow the correct procedures in issuance of the Order.

Section 102(1) of the *Urban and Rural Planning Act* allows a Town Council to make an Order:

102. (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 the minister 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.

The evidence presented indicates the matter was discussed at a council meeting and thereafter the Mayor issued the Order in dispute. There was no motion of council to issue the order and as such council did not make an order pursuant to s.102(1).

Council may delegate the ability to issue permits and orders to its employees in accordance with section 109(2) and 109(3) of the *Urban and Rural Planning Act* provided that the Order is ratified by majority vote at the next meeting of council following issuance of the order pursuant to s.109(4):

Delegation

109.

(2) A council or regional authority may appoint an employee of that council or authority to approve or reject applications, as designated by the council or regional authority, to develop land in accordance with the appropriate plan and regulations and that employee may outline the conditions applicable to that development.

(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.

There was no motion of council delegating authority to the mayor to issue Orders and no motion of council to confirm the Order at any subsequent meeting of Council.

Order

As such, the Order is invalid and cannot be confirmed. Therefore the Adjudicator orders that this matter be referred back to the Town Council of the Town of Pilley's Island for their consideration. Should they desire to issue an Order to the property owner in this matter I direct that they comply with the provisions of s. 102 and 109 of the Urban and Rural Planning Act by either:

- 1) Making a motion for issuance of the order at a meeting of Town Council and decide the matter by majority vote prior to issuance of and order; or
- 2) Delegating authority to an employee of the Town to issue the Order and then making a motion to confirm the Order at the very next meeting of Town Council following issuance of the Order.

The Authority and the Appellant(s) are bound by this decision.

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 Adjudicator's decision has been received by the Appellant(s).

DATED at Corner Brook, Newfoundland and Labrador, this 8th day of July, 2024.



Lorilee A. Sharpe, Adjudicator

Urban and Rural Planning Act, 2000