

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-087-031

Adjudicator: John R. Whelan Q.Ar.

Appellant(s): Kim & Peter English

Respondent / Authority: Town of Paradise

Decision Dated: April 30, 2024

Re: Revocation of a Building Permit to renovate and extend an existing single detached dwelling at 288 Three Island Pond Road, Paradise

Appearances:

For the Appellant: Michael Williams

For the Respondent: Marjan Fadaei, Town Planner, Town of Paradise

Third Parties: None

Date of Hearing: April 18, 2024

Procedural Background

[1] On or about February 20, 2023 the Town of Paradise (the Respondent) received an application from the Appellants to renovate and extend an existing single detached dwelling at 288 Three Island Pond Road (the subject property).

[2] The existing structure on the subject property was a non-conforming use for its current zoning. The structure was a residential property that would be generously described as being in a state of disrepair.

[3] On March 27, 2023 the Council for the Respondent reviewed the application and granted development approval subject to conditions. Those conditions included Condition #9 that stated:

The Development Approval is for an extension and renovation to the existing Single-Family Dwelling only. The dwelling shall not be reconstructed or repaired for use where 50% or more of the value of the building has been destroyed.

[4] On May 12, 2023 Building Permit No. D2023-083 was issued with conditions. The scope of work was limited to the extension and renovation of the existing dwelling only.

[5] In September of 2023 the Respondent was notified of a complaint regarding the complete demolition of the residence on the subject property.

[6] On September 19, 2023 the Respondent confirmed that the building had been completely demolished.

[7] On September 21, 2023 the Planning and Protective Services Committee recommended the Building Permit be revoked as the demolition of the existing dwelling did not comply with permit conditions.

[8] On October 24, 2023 the Council for the Respondent passed a motion to revoke the Building Permit.

[9] On October 26, 2023 the Respondent issued a decision letter notifying the Appellant of the permit revocation.

[10] On November 6, 2023 the Appellant filed the herein appeal.

[11] During the November 6, 2023 hearing the Appellant was represented by Counsel who wished to expand upon the arguments initially raised in the Appellant's originating appeal.

Legislative and Regulatory Framework

[12] Section 12 of the *Urban and Rural Planning Act, 2000* states that

12. A plan and development regulations are binding upon

(a) municipalities and councils within the planning area governed by that plan or those regulations; and

(b) a person undertaking a development in the area governed by that plan or those regulations.

[13] Section 41(1)(b) of the *Urban and Rural Planning Act, 2000* states that

41. (1) A person or a group of persons aggrieved by a decision may appeal the decision to an adjudicator where...

(b) the decision is permitted to be appealed under the regulations and the decision relates to one or more of the following:

- (i) an application to undertake a development,*
- (ii) a revocation of an approval or a permit to undertake a development, or*
- (iii) the issuance of a stop work order.*

[Emphasis Added]

[14] The options on disposition, as an adjudicator, are guided by Section 44 of the *Urban and Rural Planning Act, 2000* which states, in part:

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.

[15] Section 108 of the *Urban and Rural Planning Act, 2000* deals with Non-conforming use. It states, in part:

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.

(2) Notwithstanding subsection (1), a right to resume a discontinued non-conforming use of land shall not exceed 6 months after that discontinuance unless otherwise provided by regulation under this Act.

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

(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;

(e) may have the existing building extended by the appropriate council, regional authority or authorized administrator where, in its opinion that extension is not more than 50% of the existing building;

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

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

[16] While no definition of non-confirming use is contained with the *Urban and Rural Planning Act, 2000*, a definition is included within the *Provincial Development Regulations*. The *Development Regulations* define a “non-conforming use” as

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

[17] The *Town of Paradise Development Regulations, 2016* contains some modification of the above definition. The *Town of Paradise Development Regulations, 2016* defines “non-conforming use” as:

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

[18] The *Town of Paradise Development Regulations, 2016* contains the following definitions:

BUILDING means:

a. a structure, erection, excavation, alteration or improvement placed on, over or under Land, or attached, anchored or moored to Land.

b. mobile structures, vehicles and marine vessels adapted or constructed for residential, commercial, industrial and other similar Uses.

- c. a part of and fixtures on buildings referred to in (a) and (b), and*
- d. an excavation of Land whether or not that excavation is associated with the intended or actual construction of a building or thing referred to in subparagraphs (a) to (c).*

DEVELOPMENT means the carrying out of building, engineering, mining or other operations in, on, over, or under Land, or the making of a material change in the Use, or the intensity of use of Land, Buildings, or premises and the:

- a. making of an Access onto a highway, road or way.*
- b. erection of an advertisement or Sign.*
- c. construction of a Building.*
- d. the parking of a trailer, or vehicle used for the sale of refreshments or merchandise, or as an Office, or for living accommodation;*

and excludes

- e. the carrying out of works for the maintenance, improvement or other alteration of a Building, being works which affect only the interior of the Building or which do not materially affect the external appearance or Use of the Building.*
- f. the carrying out by a highway authority of works required for the maintenance or improvement of a road, being works carried out on Land within the boundaries of the road reservation.*
- g. the carrying out by a local authority or statutory undertaker of works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of Streets or other Land for that purpose.*
- h. the Use of a Building or Land within the courtyard of a dwelling house for a purpose incidental to the enjoyment of a dwelling house as a dwelling.*

[19] Section 3.7 of the *Town of Paradise Development Regulations, 2016* deals with Development Approval. It states:

- 1. A plan or drawing which has been approved by Council and which bears a mark and/or signature indicating such approval together with a Development Approval shall be deemed to be permission to develop Land in accordance with these Regulations but such permission shall not relieve the Applicant from:*

a. full responsibility for obtaining a Building Permit, permits or approvals under any other regulation or statute prior to commencing the Development.

b. having the work carried out in accordance with these Regulations or any other regulations or statutes; and

c. compliance with all conditions imposed there under.

Council may attach to a Development Approval and/or Building Permit such conditions as it deems fit, in order to ensure that the proposed Development will be in compliance with the Municipal Plan and these Regulations.

2. A Development Approval and/or Building Permit is valid for one (1) year. If the Development has commenced, the Development Approval and/or Building Permit shall be renewed annually until the Development is complete.

3. No person shall erase, alter or modify any drawing or specifications upon which a Development Approval and/or Building Permit has been issued.

4. Any changes or modifications to plans or drawings shall be approved by Council. 5. A copy of the Building Permit, and the plans and specifications, shall be kept on the site until completion of the Development.

[Emphasis Added]

[20] Section 3.18 of the *Town of Paradise Development Regulations, 2016* deals with the revocation of permits for non-compliance. The section states:

Council may revoke a Development Approval and/or Building Permit for failure by the Applicant or developer to comply with these Regulations or any condition attached to the Development Approval and/or Building Permit or where it was issued in error or was issued contrary to the applicable regulations, or was issued on the basis of incorrect information.

[21] Section 3.6 of the *Town of Paradise Development Regulations, 2016* outlines the discretionary powers of Council. It states, in part, that:

1. Council may conditionally approve an application to carry out Development which, notwithstanding the conformity of the application with the requirements of these Regulations, is, in the opinion of Council:

a. Consistent with the policies expressed in the Municipal Plan and any further scheme, plan or regulations applicable to the subject property;

b. Would not create any hazard to public safety; and

c. Enhances the general appearance of the area.

[22] Section 4.11 of the *Town of Paradise Development Regulations, 2016* deals with non-conforming uses. The Section states:

1. Notwithstanding the Municipal Plan, scheme or regulations made under the Urban and Rural Planning Act, 2000, Council shall, in accordance with regulations made under the 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, of the plan, scheme or regulations made with respect to that kind of Development or Use.

2. Notwithstanding Section 4.11 (1), a right to resume a discontinued Non-Conforming Use of Land shall not exceed twelve (12) months after that discontinuance. (202306-02)

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 Section 4.11 (1):

a. shall not be internally or externally varied, extended or expanded unless otherwise approved by Council.

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 Council to a Use that is, in Council's opinion, more compatible with the plan and regulations applicable to it.

e. may have the Existing Building extended by approval of Council where, in Council'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; and

g. where the Building or structure is primarily Zoned and used for residential purposes, may, in accordance with the appropriate plan and regulations, be repaired or rebuilt where 50% or more of the value of that Building or structure is destroyed.

Jurisdiction

[23] No issues of jurisdiction were raised at the hearing. The Parties accepted my jurisdiction to hear this matter.

The Zoning Issue

[24] Interestingly, the subject property is bifurcated by two planning zones. The front of the subject property, nearest the roadway, is zoned Rural Residential (RR). The rearward portion of the subject property is zoned Conservation (CON). The existing non-conforming structure is located mostly within the Conservation zone, with a small portion inside the Rural Residential zone. The development proposed by the Appellant maintains the original footprint of the building within the Conservation zone and expands the residence in the Rural Residential zone.

Development & Permit Conditions

[25] As noted above, the March 27, 2023 Development Approval issued by the Respondent to the Appellant contained a number of conditions. Of note to this appeal, Condition #9 stated:

9. The Development Approval is for an extension and renovation to the existing Single-Family Dwelling only. The dwelling shall not be reconstructed or repaired for use where 50% or more of the value of the building has been destroyed.

[26] The Building Permit, issued on May 12, 2023 included the following:

The Development Approval is for an extension and renovation to the existing Single Family Dwelling only. The dwelling shall not be reconstructed or repaired for use where 50% or more of the value of the building has been destroyed.

Grounds of Appeal

[27] The Appellants have stated the following grounds of appeal:

[1] That during the controlled demolition of the building on the subject property the structure collapsed to the point where it was unsafe to work on the remaining building. The building had become a safety hazard and there was no choice but to remove the structure

[2] That the Appellant wishes to build the new structure in accordance with the plans that had been previously approved by the Respondent.

[28] The original notice of appeal included additional issues that were later determined to be immaterial to the core issue at the hearing. For instance, the issuance of a Stop Work Order on the property is no longer a live issue to be considered by the Adjudicator.

[29] During the hearing, counsel for the Appellant raised an additional argument. Specifically, that the Town's condition restricting demolition to 50% of the building value was too narrow. Counsel argued that the *Urban and Rural Planning Act, 2000* requires the inclusion of land value when assessing the 50% threshold. Counsel argued that *Torbay (Town) v. Planchat*, [2009] N.J. NO. 72, 2009 NLTD 43 was a guiding case for value assessments on non-conforming uses.

Position of the Respondent

[30] The Respondent takes the position that the Appellant breached the conditions of their building permit and revocation of the permit was an appropriate consequence to that action. The Respondent submits that because the pre-existing structure is no longer present on the property, the Appellant is required to submit a new application that must comply with the Development Regulations. The Respondent submits that construction of a new structure on the same footprint is not allowed because the prior structure was a non-conforming use.

Analysis

[31] There is little factual dispute in this matter. The Parties agree that the Appellant fully demolished the existing structure on the subject property. The question is whether the destruction of the existing structure constituted a breach of the conditions of the Permit issued by the Respondent.

[32] However, before assessing the actions of the Appellant in this matter, it is necessary to consider the proper interpretation and application of Condition 9 and the Building Permit condition. The Conditions both state that "*dwelling shall not be reconstructed or repaired for use where 50% or more of the value of the building has been destroyed.*" However, the s. 4.11(3)(c) of the *Town of Paradise Development Regulations, 2016* states that a non-conforming use "*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.*" Section 4.11(3)(c) is consistent with s.108(2)(c) of the *Urban and Rural Planning Act, 2000*.

[33] The Respondent does have the authority to attach conditions to issued permits as per s.3.7 of the *Town of Paradise Development Regulations, 2016* but those conditions must be "in order to ensure that the proposed Development will be in compliance with the Municipal Plan."

[34] There is an incongruity between Condition #9 and s.4.11(3)(c) of the *Town of Paradise Development Regulations, 2016*. The former restricts the assessment of demolition value to 50%

of the building while the latter states that demolition value is calculated using “that Building, structure, or Development.”

[35] Both Condition #9 and s.4.11(3)(c) establish a 50% threshold for the assessment of demolition value. However, Condition #9 is limited to the “Building” while s.4.11(3)(c) includes the “Building, structure, or Development.”

[36] As noted above, the Town’s definition of Building includes “a structure, erection, excavation, alteration or improvement placed on, over or under Land.” This definition clearly applies to existing structures and does not apply to the positive actions that would be necessary to create such structures. I find that a Building would only refer to the existing non-conforming use and would not be inclusive of the additional work that had been approved by the Respondent.

[37] The definition of Building can be contrasted with the Town’s definition of Development. Development, as per the Town, “means the carrying out of building... and the... (c) construction of a Building.” Development necessary includes the near-term actions of the Appellant in this instance. Consequently, it would include the construction of the building alterations, and the inclusion of the demolition and presumably removal of old material from site.

[38] Taking both definitions into account, it is clear that Condition #9 would create a far lower financial value threshold for calculation of the 50% limit. It would be limited to 50% of the value of the structure as it existed at the time the Permit was issued.

[39] It is possible that the narrowed scope of Condition #9 was intended as an exercise of discretionary authority by the Council under s 3.7 of the *Town of Paradise Development Regulations, 2016* however I have no evidence before me to support the conclusion that there was such an overt intention. Further, I would suggest that if the Council intended to restrict the demolition value from what the Appellant could reasonably expect, the duty of procedural fairness may well require that the Respondent provide reasons to the Appellant for such a restriction. The evidence indicates that no reasons explaining a restriction were provided to the Appellant.

[40] There is no evidence before me that either the Respondent or the Appellant established the financial value of the pre-existing Building prior to the demolition. There is no evidence before me that the Respondent or Appellant established the financial value of the property following the total demolition of the Building. Rather, it would appear that the Respondent took the position that if the entirety of the Building was destroyed, presumably that would have exceeded the value of 50%.

[41] Counsel for the Appellant did rely on the decision of Justice Faour in *Torbay (Town) v. Planchat*¹ in support of the proposition that the Respondent had assessed compliance with the Permit in an overly restrictive manner by failing to include value of the land in its assessment.

[42] In *Planchat*, Faour J. was conducting a judicial review of a Regional Appeal Board decision in which the Eastern Regional Appeal Board found that the Town of Torbay had failed to consider the value of the entire development when finding that the total destruction of a cabin nullified a pre-existing non-conforming use.

[43] Justice Faour found, at paragraph 27, that the Board was within its authority to determine that less than 50% of the value of the development had been destroyed.

[44] As mentioned, there is no evidence before me regarding the estimated value of the pre-existing structure on the building lot. Counsel for the Appellant provided some materials concerning the purchase price of the property and the estimated construction costs for the new development. However, it is not my role to conduct financial analysis of this matter. This evidence, while interesting, is not mine to assess. The information would be more properly assessed by the Respondent.

[45] There is no evidence to suggest that the Respondent conducted any objective value assessment. The evidence before me suggests that the Respondent concluded that total demolition of the building necessarily involved a destruction of more than 50% of the building's value. The Respondent's position is predicated on the presumption that the existing building had some value. Based on the photographic evidence provided by the Appellant, I am uncertain that such an assumption holds.

[46] Further, the Respondent's position requires the assumption that the total removal of the building reduced the value of the building by more than 50%. Because both Condition #9 and s.4.11(3)(c) state "*50% or more of the value...has been destroyed*" both require that the Appellant's conduct caused a reduction in value. I find that Condition #9 and s.4.11(3)(c) require a reduction in value because use of the term "destroyed" implies some form of loss. Had Condition #9 or s.4.11(3)(c) included any direction of financial change, I find that wording would have reflect such an intent.

[47] The demolition of a derelict building, partially or completely, does not necessarily mean that value has been destroyed, value may have well been created.

[48] Based on the above, I find that the application of Condition #9 to only include Building value was not consistent with the Respondent's Development Regulations or s.108 of the *Urban*

¹ [2009] N.J. No. 72, 2009 NLTD 43 (hereinafter "*Planchat*")

and Rural Planning Act, 2000. If the restriction was intentional, it was not consistent with s 3.7 of the Respondent's own development regulations. If the restriction was unintentional, failure to properly assess the value of the "Building, structure, and Development" is an overriding error.

[49] Further, I find that there was no objective analysis undertaken regarding the 50% value threshold. It would appear that the Respondent assumed that removal of the building necessarily involved a greater than 50% destruction of value, but such an assumption may not be reasonable when dealing with derelict structures.

[50] I find that the Respondent did not properly apply the *Town of Paradise Development Regulations, 2016* when it concluded the Appellant had breached the approval conditions. First, by failing to properly include both the structure and Development when assessing for value of the demolition. Second, by failing to objectively consider the valuation impact of the actual demolition.

[51] Consequently, I will return this matter to the Respondent for further consideration.

Appeal Fee

[52] Section 45(2) of the *Urban and Rural Planning Act, 2000* states:

(2) Where an appeal under section 41 is successful, the council, regional authority or authorized administrator that made the decision that was appealed shall pay the person or group of persons who brought the appeal an amount of money equal to the fee paid under subsection 41(4).

[53] I find that the Appellants have been successful in their Appeal. Accordingly, I will award the Appellant its appeal fee.

Disposition

[54] I hereby allow the appeal. I reverse the decision of the Respondent to revoke the building Permit and direct the Respondent to assess whether the removal of the building from the subject property decreased the total value of the property by greater than 50%. The Respondent shall make this determination in accordance with the *Town of Paradise Development Regulations, 2016* specifically s.4.11(3)(c).

[55] Further, I direct the Respondent to pay the Appellant an amount equal to the Appellant's s.41(4) fees for this appeal.

[56] The Respondent and the Appellant(s) are bound by this decision.

[57] According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this Adjudicator 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 St. John's, this 30 day of April, 2024.

A handwritten signature in black ink, appearing to read 'J. Whelan', is positioned above a horizontal line.

John R. Whelan Q.Arb
Adjudicator