

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-083-013

Adjudicator: Christopher Forbes

Appellant: Frank Brown

Respondent/Authority: Town of Summerford

Date of Hearing: November 29, 2024

Start/End Time: 9:00 – 11:00 a.m.

In Attendance

Appellant: Frank Brown

Respondent/Authority: Stuart Wallace
Counsel for the Town of Summerford

Appeal Officer: Synthia Tithy
Municipal and Provincial Affairs

Technical Advisor: Setare Vafaei, Planner II
Municipal and Provincial Affairs

Adjudicator's Role

Part VI of the *Urban and Rural Planning Act, 2000* (the “Act”) 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*, the *Municipalities Act, 1999*, the *Town of Summerford Municipal Plan* (the “Municipal Plan”) and the *Town of Summerford Development Regulations* (the “Development Regulations”) when it issued an order to stop keeping livestock on, and to remove barns at, 38 Village Cove Road West on May 5, 2023.

The adjudicator, counsel for the Respondent and the Technical Advisor appeared at the hearing via the Teams platform, while the appellant and Appeal Officer called into the hearing via that platform from the same location in Clarendville.

Technical Advisor

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness as outlined in the Appeal Board (Rules of Procedure) Order, 1993. Section 10 of that Order reads:

10. The Hearing will proceed in the following manner:

- (a) There shall be a technical advisor to the Board 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 in effect, ...

At the hearing, the Technical Advisor outlined a report of the Department by Setare Vafae dated November 21, 2024 (the “Technical Report”). She reviewed the chronology of events leading up to the filing of the appeal and noted that the requirements for the filing of the appeal had been met.

The Technical Advisor reviewed the definition of “development” found in section 2(g) of the *Act* and indicated that the construction of “livestock structures or barns” fell within this definition.

According to the Technical Advisor, the subject property is within the residential designation per the Authority’s *Municipal Plan* and is zoned residential under its *Development Regulations*. Agriculture uses are neither a permitted use nor a discretionary use for that zone. The definition of “agriculture” in the *Development Regulations* includes the “breeding or rearing of livestock.”

The Technical Advisor also referenced section 40 of the *Development Regulations*, which sets out the requirements for structures that contain “more than five animal units” (an “animal unit” being defined in the *Development Regulations*). The Technical Advisor noted that, based on information provided, the barn(s) that were on the subject property did not meet the requirements of section 40.

The Technical Advisor also referenced the requirements of section 108 of the *Act* respecting non-conforming uses and the issuance of the relevant removal orders pursuant to section 102 of the *Act* and 404(1)(e) of the *Municipalities Act, 1999*.

Appellant’s Presentation and Grounds

This matter concerns structures located on, and the use of, land located at the subject property (38 Village Cove Road West in Summerford) as well as neighbouring property at 40B Village Cove Road West. Evidence was given by both Mr. Brown and Ms. Seane Rowsell.

In his “Appeal Application Form,” Mr. Brown referenced the fact that livestock have occupied the subject property “for 100 years.” He indicated that sheep were currently housed on the subject

property for the purpose of lambing but were only on the property from January to May of each year. He stated that the sheep have been traveling to and from the property “for approx. 10 years.”

Mr. Brown also indicated in the form that the small barn occupying the land is not on the subject property and was built approximately seven years ago. During his presentation, it became apparent that the small barn was instead located on the property at 40B Village Cove Road.

Much of Mr. Brown’s presentation related to prior occupation and ownership of the two properties. Affidavit evidence submitted by Mr. Brown and sworn by third parties confirmed that he had “occupied” the land at 40B Village Cove Road West since 1994, even though he had not held legal title to the land at the time. As I understand it, that particular property had been legally owned at the time by a man named Larry Pelley. Mr. Brown apparently obtained legal title to the property in 1998 from his brother-in-law, Mr. Craig Moore.

There is some discrepancy in the evidence about when and from whom Mr. Brown bought the house at 40B Village Cove Road West. Ms. Rowsell indicated he bought it from Tom Pelley in 1994; however, the Affidavit of Long Possession sworn by Mr. Brown in April 2024 in relation to that property states that he bought that house and land “from Christine Brown and Craig Moore” in 1998.

Regardless, I am satisfied that Mr. Brown used and occupied the property at 40B Village Cove Road West as early as 1994. I base this finding of fact on the affidavits of Wallace Hawkins and Larry Pelley that were submitted by Mr. Brown during the hearing.

I understand that the subject property at 38 Village Cove Road West was legally acquired by Mr. Brown in 1999 but that, like the property at 40B Village Cove Road West, he had occupied and used that land prior to this time. Mr. Brown acquired the property at 38 Village Cove Road West from his brother-in-law, Mr. Moore.

These facts are relevant insofar as, despite legal ownership of the properties, it is apparent Mr. Brown occupied and used the lands prior to 1998 when the *Municipal Plan* and *Development Regulations* first took effect.

With respect to the various structures located on the two properties, Ms. Rowsell indicated that the barn located on the property at 40B Village Cove Road West was built in 1994 with an extension being added to it sometime after 1998. The structures located on the property at 38 Village Cove Road West pre-dated 1998. There is also a school bus stored on that property.

Mr. Brown and Ms. Rowsell also indicated during the hearing that livestock have been reared on the two properties in varying numbers since 1994. These animals have included sheep, goats, chickens and a rescue donkey, some of which have been family pets. They indicated that they operate a certified farm on the properties. By way of explanation for the comment in the Appeal Form that sheep have been on the properties for approximately ten years, they indicated that the ten-year period was in reference to the fact that they began bringing sheep to and from the property approximately ten years ago, whereas prior to that time sheep had simply remained on the property from time to time. Recently, during the spring, summer and fall months, the sheep have been located at a farm elsewhere.

Authority's Presentation

Evidence was submitted by the Authority via affidavits sworn by Holly Anstey, Clerk of the Town of Summerford, and Kevin Barnes, the Mayor of the Town of Summerford.

According to Mr. Barnes, in May 2023 he saw at least 50-100 sheep on the subject property at 38 Village Cove Road West as well as “dozens” of chickens and a donkey.

In her affidavit, Ms. Anstey attached aerial photos of the subject property as well as the property at 40B Village Cove Road West and other neighbouring properties. These photos show the properties at various times – specifically, 1998, 2012 and 2024 (see exhibits A, B and C to her affidavit). I note as follows from a review of these photos:

- (i) a large structure currently located on the subject property (38 Village Cove Road West) was also located on that property in 1998. I note that Ms. Rowsell indicated this structure was built by Ivan Brown in the early 1980's and that she herself referred to it as a shed;
- (ii) aside from this shed, a small structure and school bus are currently located on the subject property (38 Village Cove Road West), and neither of these were located on the property in 1998, though it appears they were located on the property as of 2012;
- (iii) as of 1998, certain structures were located on the property at 40B Village Cove Road West; however, by 2012, these structures appear to have been removed or demolished; and
- (iv) sometime between 2012 and 2023, a larger structure had been built or placed on the property at 40B Village Cove Road West. A review of the photographs attached to Ms. Anstey's affidavit as Exhibit D shows this structure to be a barn with an extension attached to it.

Various animals, including ducks and sheep, are included in the photos attached to Ms. Anstey's affidavit as Exhibit D.

There is at least one inconsistency in the Affidavit of Ms. Anstey. Specifically, Ms. Anstey states that “none of the structures subject to the removal order were on the Property in 1998” (para. 5). However, “Property” is defined in her affidavit as 38 Village Cove Road West. It is obvious from the photos attached to her affidavit that some structures located on that property *were* located on the property as of 1998 (see my discussion above). Perhaps this comment is intended to be in reference to the barn structure located on 40B Village Cove Road West. I will comment on that further below.

Ms. Anstey seems to assume that, because the property at 40B Village Cove Road West was not “cleared” until after 1998, no animals were housed there prior to that. The photos attached to her affidavit confirm that the land was not “cleared” until sometime between 2012 and 2023; however, I cannot agree that this necessarily means animals were not housed on either that property or the subject property (38 Village Cove Road West) prior to the time the land was cleared. In fact, the evidence of Ms. Rowsell contradicts this.

I also note that, notwithstanding what is apparent from the aerial photos attached as Exhibits A, B and C to Ms. Anstey's affidavit, Ms. Rowsell indicated that the barn structure currently located on 40B Village Cove Road West was built in 1994, with its extension being built after 1998. While I acknowledge the existence of certain structures on the property at 40B Village Cove Road West as of 1998, this particular

structure (currently located on the property) was not apparent in the aerial photo taken at that time. I therefore find it was not located on the property as of 1998.

The primary argument advanced by the Authority was that the Removal Order was validly issued. In his brief, counsel for the Authority referenced the broad discretion afforded to the Authority to grant such an order and the relatively limited authority for an adjudicator to review that order. According to the Authority, both building barns and housing livestock constitute “development” under the *Act*. Further, the subject property is zoned residential and as such, the keeping of livestock is not a discretionary use for that property.

The Authority also argued that section 108 of the *Act* does not apply. The *Development Regulations* came into effect in 1998. At para. 52 of his brief, counsel for the Authority states that “Mr. Brown did not purchase the property until 1999” and as such, neither the “Barns” nor the livestock could constitute a “non-conforming use.” Counsel also referenced section 108(2) of the *Act* which states that a “right to resume a discontinued non-conforming use of land” expires six months after that discontinuance.

Findings of Fact

I make the following findings of fact:

1. Mr. Brown used the properties at 38 Village Cove Road West and 40B Village Cove Road West for keeping and rearing some livestock prior to 1998, notwithstanding legal ownership of those properties.
2. Neither the barn structure currently located on 40B Village Cove Road West nor its extension existed prior to 1998.
3. The school bus currently located on 38 Village Cove Road West was not located on that property prior to 1998.
4. The largest structure currently located on 38 Village Cove Road West (and which Ms. Rowsell referenced as being a “shed” built by Ivan Brown) existed on that property prior to 1998.

Analysis

Did the Authority Have the Discretion to Issue the Removal Order?

Yes in part.

By its terms, the Removal Order issued on behalf of the Authority expressly ordered the removal of livestock and the livestock structure/barn located on or near the subject property (38 Village Cove Road West).

The discretion of the Authority to issue such an order is found in section 102(1) of the *Act*, which provides that an order to “pull down” or “remove” a “development” may be made where a person has undertaken or commenced that development contrary to a plan or development regulations.

In this case, two “developments” in particular are in issue. The first is the barn structure(s) referenced in the decision of Council. The second is the keeping of livestock. Both fall within the definition of “development” found in section 2(g) of the *Act*.

Likewise, per section 404(1)(e) of the *Municipalities Act, 1999*, the Authority has the discretion to order that a person “pull down” or “remove” a building that has been erected without a permit.

As such, so long as the “development” in issue was undertaken contrary to the legislation or the *Development Regulations*, the Authority had the discretion to order its removal.

Since I have found that the barn structure and its extension located on the property known as 40B Village Cove Road West were constructed without a permit and contrary to the requirements of section 40 of the *Development Regulations*, and are therefore in violation of the *Act* and the *Municipalities Act, 1999*, I find the Authority had the discretion to order their removal.

With respect to livestock, however, I find that section 108 of the *Act* precludes the Authority from making such an order.

Section 108(1) provides that a council shall allow a use of land to continue in a manner that does not conform with a regulation or plan where that use “legally existed” prior to the registration of the regulation or plan. This is the non-conforming use provision of the *Act* and is echoed in section 45 of the *Development Regulations*.

Several principles from the case law should be noted.

First, a liberal approach needs to be given to both the interpretation of section 108 of the *Act* and the determination of whether a use has been discontinued (see *Okanagan-Similkameen (Regional District) v. Leach*, 2012 BCSC 63). As the Court noted in that case, a broad approach to “use” is appropriate “in order to avoid the expiration of a lawful non-conforming use through discontinuance” (per para 118).

Second, it is important to keep in mind that the purpose of section 108 and the legal non-conforming use doctrine is to protect the status quo (see *Forbes v. Caledon (Town of)*, 2021 ONSC 1442).

Third, the party claiming a non-conforming use need only show that the use “was minimally established” prior to the passage of the relevant by-law or regulation (see *Forbes*).

Fourth, the question of whether or not a particular use has continued is established “if there is an intention to continue the use and the use continues so far as possible in all the circumstances of the case” (see *Forbes*).

Fifth, the “benefit of a legal non-conforming use runs with the land which is to say that successors in title can lawfully continue to use the property in accordance with the legal non-conforming use doctrine” (see *Forbes*).

Lastly, mere inactivity is insufficient to constitute abandonment or discontinuance of a legal non-conforming use, since an intention to abandon is required (see *Gallant v. Island Regulatory and Appeals Commission*, 1997 CanLII 4572 (PE SCAD)).

I have found Mr. Brown used both the properties at 38 Village Cove Road West and 40B Village Cove Road West for farming and rearing animals prior to 1998 when the *Development Regulations* and

Municipal Plan were registered. Such uses were legal at the time. I also find no evidence of any intention on his part to discontinue or abandon such use. While Mr. Brown may not have been owner of the properties at the time, that is irrelevant for the purpose of section 108 of the *Act*, since “the benefit of a legal non-conforming use runs with the land” (per *Forbes*). I also find section 108(2) of the *Act* does not apply since there was no discontinuance of the non-conforming use.

I note section 108(3)(a) of the *Act*, which prohibits the variation, extension or expansion of a non-conforming use. The question is whether the activities currently undertaken by Mr. Brown on the two properties are not entitled to legal protection because they violate this subsection of the *Act* or are otherwise inconsistent with the common law.

I do not find that the manner in which Mr. Brown currently keeps and rears livestock on his land constitutes a variation, extension or expansion of a non-conforming use. I acknowledge that the land on 40B Village Cove Road West has been cleared since the implementation of the *Development Regulations* and that the barn on that property has been added since that time. These facts suggest an increase in the number of animals kept and reared on the subject properties over time. However, I do not find that an increase in the number of animals alone is sufficient to constitute a variation, extension or expansion of the non-conforming use. By nature, the quantity and type of livestock kept and reared will vary over time. This was acknowledged by Mr. Brown as well, who indicated that the number of sheep kept on the property changes from year to year.

I also think it is helpful to read section 108(3)(a) of the *Act* in conjunction with the decision of the Supreme Court of Canada in *Saint-Romuald (City) v. Olivier*, 2001 SCC 57. In that case, the Court discussed the doctrine of acquired rights and non-conforming uses in the context of municipal zoning by-laws. It set out various principles at paragraph 39, which I will not reiterate here; however, I note in particular the Court’s emphasis that a current use that is “merely an intensification of [a] pre-existing activity” will “rarely be open to objection.” Further, I note “to the extent activities are added, altered or modified *within* the scope of the original purpose (i.e. activities that are ancillary to, or closely related to, the pre-existing activities), the Court has to balance the landowner’s interest against the community interest, taking into account the nature of the pre-existing use (e.g., the degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right) and the new or aggravated neighbourhood effects ...”

Analysing this situation in light of the comments of the Court in *Saint-Romuald*, I find that the activities currently undertaken on the subject properties are within the scope of the original use. I find that, if there has been any intensification in use, it does not go beyond a matter of degree or constitute a difference in kind. To that end, I note the example given by the Court at para. 25 of that case: “... A family farm which has a few pigs on the fringe of a town may continue as a legal non-conforming use, but the result may be otherwise if it is sought to expand its pork operation into ‘factory in the country’ type intensive pig farming. While in one sense the ‘use’ has continued, in another sense its character has been so altered as to become, in terms of its impact on the community, an altogether different use.” It may be that if Mr. Brown’s farming operations expand or change in the future they will become an “altogether different use;” however, I am not persuaded that this is currently the case.

I also note that, in undertaking the sort of analysis demanded by *Saint-Romuald*, it is important to have regard to “neighbourhood effects,” since those form part of the balancing that is to occur. However, I also note the comment of the Court at para. 49 that “neighbourhood effects, unless obvious, should not

be assumed but should be established by evidence if they are to be relied upon.” Almost no evidence was put forward by the Authority here indicating any kind of negative effects on the surrounding neighbourhood. I note the comment of Mr. Barnes that he witnessed slaughtering on the subject property; however, there was no further indication of the extent of this, whether it had any kind of environmental implications, what effect it had if any on neighbours or neighbouring properties, etc. I thus cannot conclude that there are any neighbourhood effects.

For the above reasons, and by virtue of section 108 of the *Act*, I find it was not within the discretion of the Authority to require the removal of livestock from the subject properties.

Was that Discretion Properly Exercised?

No.

As noted above, the Authority did not have the discretion to order the removal of livestock from the subject properties.

With respect to the “Barn” located on 40B Village Cove Road West, I find confusion in the Removal Order as to the structure required to be removed.

In *Janes v. Embree (Town)*, 2022 NLCA 36, the Court of Appeal of Newfoundland and Labrador discussed the importance of clarity in a removal order issued under section 404 of the *Municipalities Act, 1999*. It stated, “Care must be taken to avoid imprecise language when a council takes action under section 404.” According to the Court, the reason for this is that “a lack of precision may lead to confusion and misunderstanding and the consequent destruction or removal of items for which authority is not granted by the legislation” (see para. 19).

As I have noted above, the Authority had the discretion to require the removal of the barn and its extension currently located on 40B Village Cove Road West but not the structures located on 38 Village Cove Road West that existed as of 1998.

Reading the Removal Order, however, it is not clear precisely what the word “Barn” refers to, especially given the lack of any mention in that Order of the property at 40B Village Cove Road West. While I acknowledge the Removal Order does reference the “Barn” as being “on or near [the] property at 38 Village Cove Road West,” the problem with this is that there is also another large barn or shed-like structure on that particular property. This confusion is amplified by the reference on p. 2 of the Removal Order to “Barn(s)” which suggests the possibility of more than one such structure.

The confusion is also apparent from counsel’s brief and the affidavits submitted by the Authority. Counsel references “livestock structures/barns” throughout his brief (see para. 1). Likewise, Ms. Anstey references multiple “structures” as being the subject of the Removal Order (see paras. 5 and 12). Confusion in the Order could have been avoided with a more detailed and accurate description of the barn and extension structure on 40B Village Cove Road West that the Authority wishes to have removed or aerial photographs identifying the specific structure to be removed.

Given that the Removal Order was materially flawed, both in requiring the removal of livestock and in ambiguously requiring the removal of a “Barn,” it cannot stand. This result applies only to this particular

Removal Order and not of course to any such order that council for the Authority might issue in the future.

Decision of the Adjudicator

As Adjudicator, I am bound by section 44 of the Act, which states:

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.

Order

The Adjudicator orders that the decision to issue the Removal Order dated May 5, 2023 be reversed.

The Adjudicator further orders that the Authority pay to the Appellant the amount of \$230.00, representing the fee paid by the Appellant to file the appeal herein.

The Authority and the Appellant are bound by this decision.

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

DATED at St. John's, Newfoundland and Labrador, this 2nd day of January, 2025.



Christopher Forbes

Adjudicator

Urban and Rural Planning Act, 2000