

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-087-004 and 15-006-087-035
Adjudicator: Mary Bishop
Appellant(s): Brian and Rick Rose
Respondent/Authority: Town of Fortune
Date of Hearing: April 16, 2024
Start/End Time : 1:00pm – 3:00pm

In Attendance

Appellant: Brian and Rick Rose
Appellant Representative(s): Devin Drover, Benson Buffett
Respondent/Authority: Town of Fortune
Respondent Representative(s): Michael Williams, Duncan Wallace, O'Dea Earle
Linda Collier, Town Manager, Lacy Symes, Town Clerk
Appeal Officer: Robert Cotter, Departmental Program Coordinator,
Municipal and Provincial Affairs
Technical Advisor: Faith Ford, Planner III, Department of Municipal and
Provincial Affairs

Adjudicator's Role

Part VI of the *Urban and Rural Planning Act, 2000* authorizes adjudicators to hear appeals and establishes the powers of adjudicators.

In the matter of Appeal **No. 15-006-087-004**, the role of the Adjudicator is to determine if the Authority acted in accordance with the *Urban and Rural Planning Act, 2000*, and the Town of Fortune Municipal Plan and Development Regulations 2012-2022 when it issued a Stop Work and Removal Order dated June 15, 2023 pertaining to parking services and parking lot development at Civic No.14-18 Bayview Street, Fortune.

In the matter of Appeal **No. 15-006-087-035**, the role of the Adjudicator is to determine if the Authority acted in accordance with the *Urban and Rural Planning Act, 2000* and the Town of Fortune Municipal Plan and Development Regulations when it attached conditions to an approval dated November 23,2023 for development of a parking lot at Civic No. 14-18 Bayview Street.

Hearing Presentations

Both appeals concern development of a parking lot in the Town of Fortune. At the beginning of the hearing, all parties agreed that as these appeals pertain to the same issue, that they would be heard together.

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 states: The Hearing shall 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 ...

Matters Relating to a Stop Work and Removal Order - Appeal No. 15-006-087-004

At the hearing, the Technical Advisor in presenting her report, indicated the series of events leading to the issuance of the Stop Work and Removal Order dated June 15, 2023. In reviewing applications for the use of the subject property, and in considering the use in relation to the issuing of the Stop Work and Removal Order, the Town interpreted that a parking lot is a discretionary use in the Commercial land use zone set out in the Development Regulations. This interpretation is not at issue in this appeal.

The Technical Report indicates that a parking lot, its associated signage and other structures fall within the definition of development outlined in Section 2(g) of the *Urban and Rural Planning Act, 2000* and such uses require a permit under the Town's Development Regulations.

The report indicates that the Town determined that the appellant was in violation of the Town's Municipal Plan and Development Regulations. This was specific to the operation of the parking lot by offering a fee-based, overnight/long term parking service on the lot.

The Technical report outlined the Town's authority to issue orders including:

1. Section 102 of the *Urban and Rural Planning Act, 2000 (URPA)* for development contrary to a town's Municipal Plan and Development Regulations; and
2. Section 404(1)(c) and 404(1)(h) of the *Municipalities Act, 1999*.

The Technical Advisor noted that the Order issued by the Authority was not made under the *URPA*, but rather, under Section 404(1)(c) and 404(1)(h) of the *Municipalities Act, 1999*. The Order stated that the Appellant was in violation of Section 169(2) and Section 197 of the *Municipalities Act, 1999*, as follows:

Parking lots

169. (2) A person shall not, within a municipality, operate or construct a parking lot except under and in accordance with a written permit from the council.

Signs

197. A person shall not, within a municipality, erect a sign except in accordance with the terms of a written permit issued by the council.

The Technical Report indicates that the Order was served in accordance with Section 406 of the *Municipalities Act*. It was noted that the Stop Work and Removal order included in the submission documents does not include notice of the right to appeal. This was included in a letter addressed to the Appellant dated June 12, 2023, outlining the Authority's ability to issue an Order and notifying the Appellant of the right to appeal that Order. Where the Authority makes a decision that can be appealed under *URPA*, they must include notice of the right to appeal per Section 23 of the Development Regulations:

23. *Notice of Right to Appeal (Refer to Minister's Development Regulations, Section 5, January 2, 2001)*

Where the Authority makes a decision that may be appealed under section 42 of the Act, the Authority shall, in writing, at the time of making that decision, notify the person to whom the decision applies of the

- (a) person's right to appeal the decision to the board;*
- (b) time by which an appeal is to be made;*
- (c) right of other interested persons to appeal the decision; and*
- (d) manner of making an appeal and the address for the filing of the appeal.*

Appellant's Presentation

The Appellants outlined their grounds for appeal as follows:

1. The Order is overbroad;
2. The Order, by forbidding any parking on the lot, impairs the ability of Stagehead Tours to carry out its business activities other than overnight parking, and
3. The Stop Work Order does not advise the Appellants of their right of appeal to the Adjudicator, as required by the Town's Development Regulations.

As part of their presentation, the Appellants indicated that a valid permit was in place for the operation of Stagehead Tours and the Visitors Centre. While these businesses operate out of a building on a parcel of land adjacent to the subject property, both entities have been approved to make use of the subject property for parking and were not in violation of their permit. They argued that the Order was essentially preventing these businesses from operating by forbidding any parking on the subject property.

The Appellant also asserted that the Order does not advise them of the right to appeal. They argued that while the letter from solicitors for the Town dated June 12, 2023 did specify a right to appeal, this was not in accordance with Section 5 of the Town's Development Regulations. They provided case law (*Janes vs Town of Embree, 2022, NLCA36*) in which the courts determined that notice of a right to appeal an Order, must be included in the notice. Under questioning by the Adjudicator, it was noted that in the case of *Janes vs Town of Embree*, notice of the right to appeal was only given by the Town in separate correspondence well after the appeal period had expired.

In this case, the Appellants acknowledged that the cover letter dated June 12, from the Town's solicitors was included in the same envelope as the Order served on the Appellant June 19, 2023. The letter outlined, among other things the right to appeal. The appellants argued that the right to appeal, based on the decision in *Janes vs Town of Embree*, should have been included in the Order itself, and furthermore, that the accompanying letter from the Town's solicitors was

not from the Authority, and on a “without prejudice” basis, and as such, should not have been provided to the Adjudicator for consideration. Case law dealing with the issue of correspondence without prejudice was provided for consideration by the Adjudicator.

Authority’s Presentation

The Authority, in making their presentation, responded to the Appellant’s grounds for the appeal. The Authority indicated that the matter of parking on the subject property has been an ongoing issue for the Town since 2014. The submission presented correspondence with the Appellant, Council decisions, permits and orders, as well as copies of development applications submitted by the Appellant.

The Authority asserts that the appellant violated the conditions of a permit to operate the parking lot by intensifying the use of the site and charging a fee for parking on the lot. Contrary to the permit, the appellant also continued to allow overnight parking on the lot, contrary to the conditions of a permit issued on July 19, 2022 that stipulated that no overnight parking of vehicles was permitted.

The Authority indicated that it considered the matter of having advised the Appellants of their right to appeal as being included in the letter accompanying the Order. They also provided case law evidence on correspondence made without prejudice, and stating that the correspondence provided with the Order was not intended as a confidential negotiation, but rather as an attempt to fully explain the reasoning behind Council’s decision to issue the Order.

Adjudicator’s Analysis

The following questions arise from this appeal:

- 1. Did the Town have the authority to issue the Stop Work and Removal Order?**
Yes, Section 102 of *URPA* and Section 404 of the *Municipalities Act* provide the Town with the authority to issue orders for development that is not in accordance with the Town’s Municipal Plan and Development Regulations. Sections 169 and 197 of the *Municipalities Act*, specifically provide for orders pertaining to parking areas and signage.
- 2. Was the Order specific to the operation of the parking lot as a fee-based service, separate from the operation of Stagehead Tours/Café and Visitors Centre?**

The Order states:

Whereas a violation of Section 169(2) and Section 197 of the Municipalities Act has been found, it is hereby ordered in accordance with the above legislation this order to: Stop Work and Removal - immediately pertaining to parking services and parking lot development including removal of cement barriers and signage under the business operating on the premises known as 14-18 Bayview Street, Fortune NL, known as Stagehead Tours and Parking.

The Appellant has argued that the Order is overly broad and as such prevents Stagehead Tours/Café and the Visitors Centre from operating. The Adjudicator does not see that the wording of the Order applies to these business entities. Both operate out of property adjacent to the subject property. Parking associated with these uses is accessory to their business and does not – as far as can be determined from the materials provided and

presentations made at the hearing - involve long term, overnight parking. The Town indicated at the Hearing that nine (9) parking spaces had been approved for these uses on the subject property and that the Order did not prevent the continued use of those spaces for their intended purpose. This is also referred to in correspondence to the Appellant included in the materials provided.

Under questioning at the Hearing, the Authority stated that the concern was directly related to the use of the subject property for long term, overnight parking. It is the Authority's position that such use of the property was contributing to traffic congestion in the Town. The Adjudicator does not have jurisdiction to determine whether this is actually the case or not.

The Adjudicator finds that the reference to parking services contained in the Order refers to the long term, overnight parking of vehicles on the lot, for a fee, to Stagehead Tours and Parking to whom the Order is issued. Furthermore, that the reference to signage and cement barriers would pertain to signage associated with the fee for parking use and area. This is a separate use of the property from that associated with the nine spaces considered as accessory parking for Stagehead Tours/Café and Visitor Centre.

3. In issuing the Stop Work and Removal Order, did the Town provide written notice to the Appellant of the right to appeal?

Section 23 of the Town's Development Regulations requires the Authority to provide written notice of the right to appeal. The Appellant argued that such notice was not included on the actual Order and as such the Order should be dismissed. While it is best practice for municipalities to include the right of appeal directly on an Order, the legislation states that written notice is required. I find that the Order, accompanied by a cover letter from solicitors acting on behalf of the Town, did include notice of the right to appeal. In the case of Jones vs the Town of Embree, the Town did not include notice of the right to appeal on the Order or any other correspondence attached to the Order, and only did so well after the appeal period had ended. It is not possible to conclude whether the court in that case would still have considered the Order invalid had the Town included a cover letter with the Order advising of the right to appeal. In any event, I consider that written notice of the right to appeal was provided with the Order and I reject the Appellant's arguments that this letter should not have been made available to the me for consideration.

Matters Relating to Conditions of Development Approval
Appeal No. 15-006-087-035

Technical Advisor Presentation

The Technical Advisor provided a chronology of events related to the appellant's application for a parking lot and the Authority's decision, and outlined the relevant sections of the Town's Development Regulations that apply. The application was processed as a Discretionary Use. This interpretation is not at issue in this appeal.

The Planner's presentation indicated that standards for off-site parking areas contained in Section 51(5) of the Development Regulations apply. In considering the application, the

Authority also applied its Snow Clearing Policy. The Planner presented information that demonstrated the Town had the authority to enact snow clearing policies.

In her report, the Planner noted that while the Snow Clearing Policy applies to public streets, there appeared to be a question as to the status of two rights of way shown on the survey document. At the Hearing, the Authority asserted that these rights of way are publicly owned and maintained, and that the Town had in fact recently paved both.

The Planner presented information on the requirements for the Authority in making decisions, attaching conditions to approvals and providing reasons for conditions. It was noted that in attaching conditions to its approval of the Appellant's application, no reasons were given. Reasons were only provided upon a written request made by the Appellant.

Presentations by both the Authority and the Appellants focused on the specific conditions of the approval and the reasons for the conditions that were provided to the Appellants following the issuance of the letter of Approval.

Appellant's Presentation

The Appellants argued that requiring a 3m sideyard for development in the Commercial land use zone should not apply to parking lot development as no building is proposed. Furthermore, that a condition to not permit parking within 10 feet of the two rights of ways adjacent to the property were overly restrictive to their development. They also questioned the validity of the Snow Clearing Policy, noting that there is no evidence that it has ever been properly brought into effect. Upon questioning by the Adjudicator, the Authority could not provide any evidence as to how or when the policy was enacted.

The Appellants also argued that the standards set out in Section 51 of the Development Regulations more properly apply to development of their parking lot and should be reflected in the Town's decision and conditions included in the approval, particularly as it relates to setbacks.

Authority's Presentation

The Authority argued that it had wide discretion in considering the Appellant's application. While it conceded that a 3m sideyard requirement for development in the Commercial Use Zone did not in fact apply, the requirements of the Town's Snow Clearing policy respecting parking within 10 feet of the two rights of way do apply.

The Authority argued that after close examination of the application and the site, conditions attached to the approval were meant to ensure a reasonable level of parking on the lot, achieve appropriate separation of the parking area from adjoining residential uses, and reduce the impact on traffic in the area. The Authority argued that they have the discretion to attach conditions to development approvals and as such, the appeal should be dismissed.

Adjudicator's Analysis

- 1. What was the Authority approving when it issued its letter of approval dated November 23, 2023?**

The application submitted September 15, 2023 by Stagehead Tours Agency and Parking and signed by owners of the property was for a parking lot. The Town determined that the use was a Discretionary use in the Commercial land use zone and processed it as such in accordance with the Development Regulations. Supplementary information from the Town demonstrated the Town followed proper procedure for processing a discretionary use application.

Information in the application specified that parking will be for short and long term parking, including overnight parking, and for Stagehead Tours/Café, and the Visitor Centre. The application indicates that there will be as many as 30 parking spaces on the lot and that a sign is to be erected. The applicant, also requested details from the Town on design and location requirements for the sign. The site plan drawing attached to the application shows parking for 25 vehicles. There is no indication of the location of any proposed signage on the lot or how/where the nine spaces required for the Visitor Information Centre and Stagehead Café are to be accommodated. As such, it is not clear how many parking spaces were proposed to be included in the fee for parking service on the property. The site plan drawing is not drawn to scale and does not contain any dimensions or detailed layout (including dimensions) of parking spaces, where the access to the lot is, width of drive lanes, any proposed setbacks or separations from streets or rights of ways. A survey of the property is included which shows the overall dimensions of the property, streets and rights of way affecting the subject property. All this is to say that without detailed information it is difficult to determine whether the proposed development meets the requirements of the Town's Regulations or how the Town could have adequately evaluated it.

2. Was the Town's approval of the parking lot use made in accordance with the Municipal Plan and Development Regulations?

Yes, the Town processed the proposed parking lot as a Discretionary Use in accordance with the Development Regulations.

3. Did the Town have the authority to attach conditions to its approval?

Yes, Section 21(2) of the Town's Development Regulations allow the Authority to attach conditions to permits and approvals:

(2) The Authority may attach to a permit or to approval in principle such conditions as it deems fit in order to ensure that the proposed development will be in accordance with the purposes and intent of these Regulations.

Furthermore, Section 10 of the Town's Development Regulations provide broad discretionary authority over decisions, including the issuing of approvals with conditions.

When attaching conditions to a permit, the Authority is required to state the reasons for doing so as per Section 22 of the Development Regulations:

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 so.

In its letter of approval to the Appellants, the Authority stated that the application was approved subject to conditions. However, contrary to Section 22 of the Development Regulations, no reasons were stated. Whatever reasons the Authority had with regards to the conditions were only made available to the Appellants in a subsequent email in which the Authority indicated that the “*10 metre set back was identified in the Municipal Plan Regulations (3 meters - 9.84 feet) and our Snow Clearing Policy*”.

The Appellants, in their submission, indicated that Section 51 of the Development Regulations should apply and that a requirement for a 3m sideway specified in the standards for development in the Commercial use zone should not, as there are no buildings proposed as part of the development. The Town conceded that the 3m sideway requirement does not apply to the proposed development.

4. Were the conditions attached to the approval in accordance with the Town’s Municipal Plan and Development Regulations?

The Technical Report indicates that Regulation 51(5) applies to applications for parking areas within the town with the applicable subsections as follows:

51. Offstreet Parking Requirements

- 5) *Where, in these Regulations, parking facilities for more than four vehicles are required or permitted:*
 - (a) parking space shall mean an area of land, not less than 15 m² in area, capable of being used for the parking of a vehicle without the need to move other vehicles on adjacent areas;*
 - (b) the parking area shall be constructed and maintained to the specifications of the Authority;*
 - (f) no part of any off-street parking area shall be closer than 1.5 m to the front lot line in any zone;*

In its letter approval, and in subsequent correspondence with the Appellants regarding the conditions, the Authority makes no reference to having considered the requirements of Section 51(5) of the Development Regulations pertaining to off-street parking areas.

5. Did the Town have the authority to include conditions in its development approval based on the Town’s Snow Clearing Policy?

The Authority’s submission indicates Council considered the Town of Fortune Snow Clearing Policy when reviewing the application. A copy of the policy was included in the appeal package. It prohibits parking within a street reservation overnight from December to March.

The appellants in their submission challenged the validity of the Snow Clearing Policy. Information provided in the Planner’s report clearly show that the Town has the authority to enact snow clearing policies and regulations. At the Hearing, the appellants indicated that despite a search of the NL and Labrador Gazette, no record of the policy enacted under the *Highway Traffic Act* could be found. The Town was unable to provide any evidence to show how or when the policy had been brought into effect.

Decisions of the Adjudicator

As Adjudicator, I am bound by Section 44 of the URPA, 2000, 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.

Appeal 15-006-087-004 concerning the issuance of a Stop Work Order dated June 15,2023. The Adjudicator finds that the Town of Fortune acted in accordance with the *Urban and Rural Planning Act, 2000*, and the Town of Fortune Municipal Plan and Development Regulations 2012-2022 when it issued a Stop Work and Removal Order dated June 15, 2023 pertaining to development of a fee-based parking lot at Civic No.14-18 Bayview Street, Fortune. As such, the Stop Work Order is confirmed.

Appeal No. 15-006-087-035, respecting conditions attached to an approval dated November 23, 2023 for development of a parking lot at Civic No. 14-18 Bayview Street.

That the Town approved the proposed parking lot use as a Discretionary use is not at issue in this appeal. The Town clearly has discretion to attach conditions to approvals for development. However, in doing so they are required to state the reasons for such conditions. In this case, the Town failed to include its reasons for the conditions of its approval, contrary to the requirements of the *Urban and Rural Planning Act, 2000* and the Town of Fortune Municipal Plan and Development Regulations. Furthermore, reasons given subsequent to the approval appear not to have considered appropriate sections of the Development Regulations concerning off-street parking.

Order

1. Concerning **Appeal No.15-006-087-001** the Adjudicator orders that the Stop Work and Removal Order, issued by the Town of Fortune dated June 15, 2023 to cease operation of a parking lot at Civic No.14-18 Bayview Street, Fortune, be confirmed.
2. Concerning **Appeal No. 15-006-087-035**, the Adjudicator orders that the conditions attached to the approval dated November 23, 2023 for development of a parking lot at Civic No. 14-18 Bayview Street, be reversed, as the Town has failed to provide reasons for its conditions in accordance with Section 22 of the Fortune Development Regulations. The Adjudicator further orders that the matter be referred back to the Town where, after careful consideration of the application, including any additional information that it may require, the approval be re-issued with conditions that are in accordance with the Fortune Municipal Plan and Development Regulations or other municipal policies or bylaws, that Council, in its discretion, determines are applicable to the proposed development.
3. The Adjudicator finds that the appeal under file no. 15-006-087-035, is successful. Therefore, in accordance with section 45(2) of the *Urban and Rural Planning Act, 2000*, it is further ordered that the Authority pay an amount of money equal to the appeal filing fee of \$230.00 to the Appellant.

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 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(s).

DATED at St. John's, Newfoundland and Labrador, this 21th of May, 2024.



Mary Bishop, RPP, MCIP, FCIP
Adjudicator,
Urban and Rural Planning Act, 2000