URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #:	15-006-091-011
Adjudicator:	Chris Forbes
Appellant:	Kimberley Parsons
Respondent/Authority:	Town of Harbour Grace
Date of Hearing:	September 19, 2024
Start/End Time:	9:00 a.m. – 10:30 a.m.

In Attendance

Appellant:	Kimberley Parsons
Respondent/Authority:	Don Coombs, Mayor Town of Harbour Grace
	Amy Dwyer, Town Clerk/Manager Town of Harbour Grace
	Reginald Garland, Municipal Planner (via teleconference) Town of Harbour Grace
Appeal Officer:	Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs
Acting 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 *Town of Harbour Grace Municipal Plan 2010* (the "*Municipal Plan*") and the *Town of Harbour Grace Development Regulations 2010* (the "*Development Regulations*") when it issued a permit on May 17, 2024 to replace/repair a deck at 21 Woodville Road, Harbour Grace, to the same size as the original deck.

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 Vafaei dated August 28, 2024. She began by reviewing the chronology of the issuance of the subject permit and the filing of the appeal, and then discussed the definition of "development" found in section 2(g) of the *Act*.

The Technical Advisor confirmed that the subject property is zoned residential and indicated that the construction of a deck is considered a permitted use. She referenced section 28 of the *Development Regulations* and its requirements respecting setback for a single dwelling serviced by municipal water and sewer. She noted that the materials submitted by the Authority do not contain any indication of the existing sideyard/setback measurements for the subject property.

The Technical Advisor referenced a 3m-wide easement over the subject property in favour of the neighbouring property of the Appellant for water and sewer.

During her presentation, the Technical Advisor referenced sections 7 and 8 of the *Development Regulations*, which require that a permit be issued for any development in the Authority's Planning Area and that all such development comply with those *Regulations*.

The Technical Advisor discussed the issuance by the Authority of a stop work order for the repair/replacement of the deck, which was issued after the filing of the appeal, and discussed the regulatory provisions relevant to the issuance of that order.

Appellant's Presentation and Grounds

Ms. Parsons began her presentation by noting that in June 2023 she faced a water leak on her property. She indicated that her municipal water/sewer lines run through her property, across Mr. Earle's property (through an easement) and continue to the Town's main water supply line. At that time, Mr. Earle's pool and deck were sitting atop the easement. For the next few months, Ms. Parsons obtained water via garden hose that was connected to a fire hydrant. On November 16, 2023, she was finally able to access the easement and replace the water line.

The Appellant then referenced the permit issued by the Authority on May 17, 2024 and indicated the issuance of the permit raised issues of regulatory compliance, personal impacts and financial burdens. She confirmed the grounds for her appeal were as follows:

(i) an incomplete permit application in 2017 (when the permit for the original construction of the deck was issued);
(ii) non-compliance with the *Act*, insofar as, in her view, the deck construction does not comply with requirements for construction over easements or distance to boundaries;
(iii) the deck obstructs the easement;
(iv) unauthorized deck construction – that is, in mid-April 2024, Mr. Earle worked on the deck prior to the issuance of the permit at issue in this matter;
(v) failure to adhere to the stop work order issued after the commencement of this appeal, contrary to the requirement that all development stop during the appeal process;
(vi) safety concerns regarding Mr. Earle's pool – the claim that there were safety concerns for an empty pool, which did not justify working during the stop work order;
(vii) water supply issues – use of the garden hose for a water supply was inadequate since it was accessible to contaminants;
(viii) the Town's claim that it was unaware of the easement despite being aware of the source of water crossing Mr. Earle's property;
(ix) repeated requests for notifications did not result in effective action from the Authority;
(x) she has incurred approximately $15,000 in legal fees in addressing these issues; and
(xi) if another issue is faced with the water/sewer lines, she would be unable to access the easement in a timely manner without incurring additional fees.

The Appellant indicated she spoke with Mayor Coombs on May 16, 2024 at which time he indicated that a "general repairs" permit was going to be issued for Mr. Earle so he could repair his deck and that the decking would be "hinged" so it would be easily removed.

During her presentation, Ms. Parsons confirmed she first learned of the subject permit on May 17, 2024 when she saw it in Mr. Earle's window. She also confirmed that she believed the letter she dropped off with the Town on May 27, 2024 constituted an "appeal" letter. She subsequently learned from Ms. Dwyer what was required to appeal the issuance of the permit, whereupon she contacted Mr. Cotter and filed the appeal.

Authority's Presentation

Mayor Coombs began by noting that, when the permit was issued on May 17, 2024, the repairs to the deck were not considered a "development." He indicated requests for such permits (concerning general repairs) are not tabled at a public meeting. The construction of structures such as sheds would go to Council. He indicated this is the same in all municipalities in the Province (except the cities which are governed by their own legislation). Repair permit applications are handled through in-house staffing.

He indicated he was unaware of the existence of the easement until he spoke with Ms. Parsons. It is a private easement. The Town was advised by Municipal Affairs not to get involved in affairs between two parties.

Mayor Coombs indicated that the sole issue to be determined in this matter is whether the Town has the right to issue a general repairs permit or not.

He confirmed there is no public list of general repairs permits that are issued by the Authority. He believed that, if you wanted to discover whether a particular individual had been issued a general repairs permit, you could likely call the Town and request that information.

During the Authority's presentation, in response to questions from the adjudicator, Mr. Earle confirmed that, in the fall of 2023, he removed approximately 65% of the deck around his pool and the pool itself. The pool is 15'x30'. The entire length of the pool had been situated atop the easement as had decking.

Mayor Coombs indicated that the notation on the permit that it was for a "replacement/repair" was actually incorrect, as the permit was not for a replacement but rather a repair only. He indicated this was included after a conversation with Mr. Garland and in an effort to alert future buyers of the property, who may wish to have the deck removed.

Mr. Garland indicated that, "somewhere down the line," the Council for the Town had "downloaded" the authority to issue general repairs permits to staff, as is common with many municipalities; however, no minutes or other documents were provided at the hearing or in the materials submitted to Municipal and Provincial Affairs confirming this was the case.

Analysis

Was the Appeal Filed Within the Timeframe Required under the *Act*?

Yes.

Section 41(3) of the *Act* requires that an appeal made under that section be filed with an appeal officer within fourteen days "after the person who made the original application receives the decision."

The permit was issued to Mr. Earle in relation to the deck at 21 Woodville Road, Harbour Grace, on May 17, 2024. The permit was placed in the window of his home on that date.

The Appellant is not the person who "made the original application" but rather a member of the general public (albeit a neighbor of Mr. Earle). She indicated she only became aware of the existence of the subject permit when she saw it in Mr. Earle's window although she was "formally informed" of its existence by her lawyer on May 24, 2024.

The Appellant further indicated that she believed her letter of May 22, 2024 to the Authority constituted a valid appeal. It was not until late May or early June, after reaching out to the Town, that she was advised she had to go through the specified appeal process.

The Authority confirmed during the hearing that there is no "general repairs permit list" that is accessible to the public for viewing. Instead, all such permits that are issued are required to be posted in the window of the property that is the subject of the permit.

I note that, if the 14-day filing period commenced as of May 17, 2024, then the appeal was to be filed on or before May 31, 2024. The appeal was not filed until June 4, 2024.

The issue of when the appeal period begins to run for the purpose of an appeal by a member of the general public was considered by the Supreme Court of Newfoundland and Labrador Trial Division (General) in *Gillespie v. Newfoundland and Labrador (Eastern Newfoundland Regional Appeal Board)*, 2012 NLTD(G) 59. In that case, Justice Paquette stated that the appeal period for a member of the

general public runs from the day of "notification to the public of the decision appealed from." She further stated, "The event which comprises 'notification to the public' is to be determined by an examination of the facts of a particular case and does not impose an obligation to provide notice to particular third party appellants." She indicated that, in that case, the Board was required to consider on the basis of evidence "when appropriate 'notification to the public' was provided" with respect to the decision under appeal.

The *Development Regulations* do not specifically require an issued permit to be placed in the window of the subject property. Section 21(8) of the *Development Regulations* states that "a copy of the permit" shall be "kept available on the premises where any work, matter or thing in [*sic*] being done for which a permit has been issued."

Section 18 of the *Development Regulations* requires the Authority to keep a public register "of all applications for development," in which all such applications are to be entered together with the Authority's decision in relation thereto. No evidence was put forward at the hearing indicating that this was done in relation to the permit at issue. Further, it was confirmed during the hearing that no public list is available of "general repair permits" that are issued by the Authority. I note some municipalities in the Province maintain such a list and that it is publicly available online (see, for example, the Town of Conception Bay South, which lists development decisions relating to general repairs online).

I find that no "notification to the public" was made in relation to the permit at issue in this matter, so far as that phrase is used in the decision in *Gillespie*. The placement of the permit in Mr. Earle's window does not constitute such notification. Indeed, section 21(8) of the *Development Regulations* required Mr. Earle to keep the permit on his property in any event. It would not be reasonable to require a member of the general public to inform themselves as to whether the Authority had made a decision on a particular permit application by simply having the applicant post a permit in their window.

Further, there was no evidence that the issuance of the permit was indicated in the Authority's public register, as required by section 18 of the *Development Regulations*. While I understand the Authority's position to be that the permit in issue did not fall within the definition of "development" found in the *Development Regulations*, that position is untenable (as discussed below), and as such the Authority's decision to issue the permit should have been recorded in the public registry.

Since no "notification to the public" was given in this matter, the 14-day appeal permit did not begin to run prior to the filing of the appeal by Ms. Parsons. I therefore find the appeal was filed in time.

In any event, the Authority confirmed during the hearing that it was waiving any issue in relation to the 14-day filing period and wished to proceed with the hearing on its merits.

Was the Repair/Replacement of the Deck a "Development" Within the Meaning of the *Act* and *Development Regulations?*

Yes.

In determining the discretion of the Authority in relation to the permit in issue, consideration must first be given to the definition of "development" found in the *Act*.

As defined in section 2(g) of the *Act*, "development" includes "the carrying out of building … or other operations in, on, over or under land" and also includes "the making of a material change in the use, or the intensity of use of land, buildings or premises."

The Authority and Mr. Earle both confirmed that approximately 65% of the deck had to be reconstructed under the subject permit. By any stretch, that is a material amount. This is not analogous to a situation where someone is seeking a permit to undertake work to an existing structure that does not change the extent or magnitude of the structure in a material way, such as the replacement of a broken window.

I also note section 108 of the *Act* which provides for the continuation of non-conforming uses. Section 108(3)(c) provides that a "building, structure or development" that is non-conforming but is allowed to continue under that section "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." While this section does not directly apply to the matter before me, it is helpful in understanding where to draw the line on the issuance of a general permit to repair. The legislature clearly intended a non-conforming use to be deemed to be discontinued where a repair/reconstruction would involve 50% or more of the value of that particular use. Here, the repair/reconstruction would involve approximately 65% of the deck structure, which by any measure is likewise material.

In any event, and regardless of whether the work to the deck is to be characterized as a "repair" or a "replacement," it was of sufficient magnitude to constitute "the carrying out of operations on land" and/or "a material change in the use, or the intensity of use of land, buildings or premises." As such, it constitutes a "development" per the definition in section 2(g) of the *Act* and in the *Development Regulations*.

Since the reconstruction of the deck constituted a "development," then the *Development Regulations* required that a permit for such work be obtained from the Authority (per section 8).

Was the Permit Validly Issued?

No.

First, I understand the Authority's position to be that, since the reconstruction of the deck in issue did not constitute a "development," I have no authority to hear Ms. Parsons' appeal, since the powers of an adjudicator under the *Act* only apply to decisions that relate to "an application to undertake a development" or "a revocation of an approval or a permit to undertake a development" (per section 41 of the *Act*). However, since I have found that the reconstruction of the deck constituted a "development," I find that I have jurisdiction in this matter.

Second, since I have found the reconstruction of the deck constituted a "development," it is necessary to determine whether the permit was appropriately issued by the Authority.

In this regard, the following evidence is clear: on May 15, 2024, Ms. Dwyer reached out to Mr. Garland to ask whether Mr. Earle could obtain a permit to "put back his deck in sections over the easement" that is the subject of this hearing. Mr. Garland apparently indicated that was "no problem." Mr. Garland also apparently told Ms. Dwyer to include in the permit the comment that "Council has the authority to ask him to move the deck if the easement has to be accessed."

On May 17, 2024, Ms. Parsons had a conversation with Mayor Coombs during which it appears the Mayor confirmed his agreement with Mr. Garland's approach. Later that day, Ms. Dwyer instructed Ms. Sherrie Best to type up on the permit what Mr. Garland had directed, and then she signed the permit as Town Clerk/Manager.

Accordingly, the matter was never brought before Council, despite constituting a "development."

I understand the Authority's position to be that the reconstruction of the deck in issue did not constitute a "development" but rather a general repair and that, as a matter of process, requests for general repairs permits are not tabled at Council but rather dealt with by staff. I further understand from Mr. Garland that this delegation of authority would have been previously approved by Council. However, no evidence was put before me confirming such delegation, either specifically in relation to this specific permit application or to repair permit applications more generally.

As such, the permit was invalidly issued.

Third, and regardless of the issue of delegation of authority, it is clear that Mr. Earle's application did not meet the requirements of the *Development Regulations* and as such, Council could not have approved it in the form in which it was submitted.

It was undisputed that an easement exists that runs across Mr. Earle's property in favour of Ms. Parsons' property. This easement has existed since 1990-91 and is 3m wide. It was confirmed during the hearing that the deck in issue impinges upon this easement at least to some degree (thus the need for the condition that was included in the permit).

Section 7 of the *Development Regulations* states that "no development shall be carried out … except in accordance with these Regulations." In other words, it is not within the discretion of the Authority to permit development that contravenes any of the provisions of the *Development Regulations.*

Section 17(1) of the *Development Regulations* states that an application for a development permit "shall be made only by the owner." "Owner" in turn is defined in Schedule A as "a person … owning or having the legal right to use the land under consideration." This is logical, since an application to develop land should obviously be made by those with an interest in that land. However, in this case it is clear that Ms. Parsons, as owner of the dominant tenement/neighbouring land, has a "legal right to use" a portion of Mr. Earle's land for a specific purpose (namely, water and sewer). She was not a party to the permit application and as such, by considering an application that at least to some degree involved Ms. Parsons's legal right to use the land, the Authority did not act in accordance with its own *Development Regulations*, since it did not take into account that Mr. Earle was not the sole "owner" of the land in issue (as that word is defined in the *Development Regulations*).

The Authority argued that it did not wish to intervene in what it regarded as a private dispute over land rights between neighbours. While I appreciate that sentiment, the Authority acted here in a manner that disregarded the interests of Ms. Parsons even though the *Development Regulations* requires that Ms. Parsons, as an "owner," be a party to the permit application.

If the deck work contemplated by the permit application did not extend at all into the easement, then the situation would obviously be different.

Since the permit application at issue was not compliant with the *Development Regulations*, it could not have been approved by the Authority. Accordingly, I find that there is no reason to remit the matter to the Authority for reconsideration.

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:
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> (a) confirm, reverse or vary the decision that is the subject of the appeal;
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> (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 approval granted by the Authority by permit dated May 17, 2024 to repair/replace a deck at 21 Woodville Road, Harbour Grace, is hereby 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 9th day of October, 2024.

Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000