**URBAN AND RURAL PLANNING ACT, 2000**

**Section 40-46**

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

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| Appeal #: | 15-006-087-045 |
| Adjudicator: | Chris Forbes |
| Appellants: | Joy Batten-Lethbridge & Adrian Lethbridge |
| Respondent/Authority: | Town of Conception Bay South |
| Date of Hearing: | June 26, 2024 |
| Start/End Time: | 9:00 a.m. – 10:00 a.m. |

**In Attendance**

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| Appellants: | Joy Batten-Lethbridge<br>Adrian Lethbridge |
| Respondent/Authority: | Daniel Barrett, Development Coordinator,<br>Town of Conception Bay South<br>John Whelan, Manager of Planning and Development,<br>Town of Conception Bay South |
| Appeal Officer: | Robert Cotter, Departmental Program Coordinator,<br>Municipal and Provincial Affairs |
| Technical Advisor: | Setare Vafaei, Planner II<br>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 Conception Bay South Municipal Plan 2011-2021* (the "*Municipal Plan*") and the *Town of Conception Bay South Development Regulations 2011-2021* (the "*Development Regulations*") when it refused to issue the Appellants a permit to develop a basement apartment (third unit) in an existing dwelling at 13 Nettab Drive, Conception Bay South, on February 26, 2024.

**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 June 18, 2024, noting that, on January 8, 2024, the Authority received an application from the Appellants to develop a subsidiary apartment (third unit) at 13 Nettab Drive, Conception Bay South. The Authority denied the application on February 6, 2024, and notice of this decision was sent to the Appellants by letter on February 7, 2024. This appeal was filed on February 21, 2024.

The Technical Advisor reviewed the definition of "development" found in the Act and noted that constructing a subsidiary apartment falls within the definition. She indicated that a subsidiary apartment is a permitted use within the zoning for the subject property. The Technical Advisor also noted the requirements of section 5.33 of the Development Regulations, which apply to subsidiary apartments.

It was indicated that the Authority regards the existing property at 13 Nettab Drive as a single dwelling with a subsidiary apartment and the Authority's position is that adding a third unit would classify the building as an apartment dwelling, as defined in the Development Regulations.

The Technical Advisor referenced section 10.11.3 of the Development Regulations, which provides for minimum setback and side yard requirements for various types of dwellings, including apartment dwellings. While the Authority is permitted under the Development Regulations (see section 3.12) to vary development standards, they are only permitted to do so to a maximum of 10%.

Pursuant to the Development Regulations, the minimum side yard requirement for apartment dwellings is 5 metres, which means that, if varied to the maximum of 10%, the Authority could only reduce the side yard requirement to 4.5 metres. The Authority's position is that the existing side yard for the dwelling on the property is 3.97 metres and on this basis it refused the Appellants' application.

**Appellants' Presentation and Grounds**

Ms. Lethbridge indicated that the measurements shown in the Real Property Report prepared by Craig Nightingale Surveys Limited dated 2014 were not accurate. She indicated she had measured the side yard in question (between the house on the property and the property boundary pin) and it was fourteen feet. She said this report was submitted previously so that Council could approve the house that was to be built there.

Part of the subject property is vacant and bears civic number 11. According to Ms. Lethbridge there is room for up to 10 cars to park on this part of the property. The house bears civic number 13. She also indicated that, to the right of the house (looking at the Real Property Report), there is room for up to eight cars to park, plus a boat, since the shed shown on the survey no longer exists. Ms. Lethbridge provided photos as confirmation.

The existing subsidiary apartment, shown on the Real Property Report as an extension on the left side of the main house, is approximately 450-500 square feet. There is approximately 1000 square feet in the basement that the Appellants wish to convert.

Ms. Lethbridge indicated that it is not reasonable to refuse to allow the development of a basement apartment over "twelve inches" when so many people are seeking housing in the area.

Mr. Lethbridge stated that the federal government is actively promoting the development of empty space so Council in this case is not acting consistently with that plan. He indicated that they pay significant property taxes on the subject property because of its frontage, even though nothing can be done with the part of the land to the left of the house (as shown on the Real Property Report).

Ms. Lethbridge referenced an apartment building containing 4 units that was built recently in the general area on Minerals Road.

With respect to the existing dwelling, the Appellants confirmed that the current apartment is not separately metered, that there is no interior door between it and the rest of the house, that it has a separate panel box on the same main, and that it has its own entrance. It is three rooms, including kitchen, bathroom and laundry. The current tenant does not need access to the main house for anything.

With respect to the Nightingale Real Property Report referenced by the Authority, Ms. Lethbridge suggested the house that had actually been built had possibly not been built in the location indicated on the Real Property Road, given that she had measured fourteen feet between the corner of the house and the boundary line.

The Appellants indicated that one of the real issues they have is the amount of property taxes payable in respect of the property. They also indicated that the apartment would be accessible on the side of the house opposite the side with the inadequate side yard.

**Authority's Presentation**

The Authority began by indicating it considered the existing dwelling on the property to be a single dwelling with subsidiary apartment. In 2014 an extension was put onto the dwelling. Since the completion of that extension, the Town has charged a water and sewer fee for that new unit as an apartment. No consideration had been given by the Town, either in terms of development or taxation, to treat it as a double dwelling.

When the application was reviewed, it was determined that the creation of a third unit would create an apartment dwelling, as that term is defined in the Development Regulations.

The Authority indicated that, in making its determination, it relied on the Real Property Report prepared by Craig Nightingale Surveys Limited, which was submitted as part of the previous application seeking approval for the development of the initial subsidiary apartment.

Mr. Barrett confirmed that side yard must be measured from the closest point of the dwelling to the boundary line. Because the Real Property Report showed a side yard of 3.97 metres, but the Development Regulations required at least 5 metres for a side yard of an apartment dwelling, staff at the Town concluded that the proposed application could not meet that requirement.

The Authority indicated that the Appellants' submissions do not indicate that the Authority acted in contravention of the Development Regulations but simply that they disagree with the Authority's measurements and its decision.

Mr. Barrett referenced the definition of "side yard" found in the Development Regulations and the fact it is measured between the side lot line "and the nearest side wall of a building on the lot." He also referenced section 10.11.3 of those Regulations, which lists the required lot standards. He indicated no exterior modification had been proposed as part of the application. The current use meets applicable development standards; however, once a third unit is developed there, it becomes a different use and would create a non-conformity if approved.

The Authority considered a 10% variance; however, this only permitted a 4.5 metre side yard, which would be insufficient.

Mr. Barrett indicated that the existing dwelling is non-conforming but permissible; however, to permit the application to proceed would create a secondary non-conformity, which would be contrary to section 108 of the Act.

When asked how the Authority distinguishes between apartment dwellings (which by definition are dwellings consisting of 3 or more units) and duplexes with a subsidiary apartment, Mr. Barrett referenced the same Minerals Road property. He said that even if a dwelling can be classified as a duplex with a subsidiary apartment, the standards applied by the Authority are those of an apartment dwelling. He stated that the Minerals Road property was proposed as a duplex with subsidiary apartments but actually meets the side yard and frontage requirements of an apartment dwelling.

Mr. Barrett confirmed that civic numbers are applied based on frontage and not on the basis of distinct lots. That exercise is undertaken by the Municipal Assessment Agency rather than the Authority.

**Analysis**

**Did the Authority have the discretion to refuse the Application of the Appellants for a permit to develop a basement apartment (third unit) in an existing dwelling?**

Yes.

The proposed development of the Appellants constitutes a "development" pursuant to the definition set out in section 2(g) of the Act. As such, it is required by section 12 of the Act to conform to the Municipal Plan and the Development Regulations.

Section 4.1 of the Development Regulations prohibits the carrying out of "development" within the Authority's Planning Area unless Development Approval is first obtained. Development is to be carried out and maintained in accordance with the Municipal Plan and Development Regulations (per section 4.2 of the Development Regulations).

Section 4.6 of the Development Regulations establishes the discretionary power of the Authority in considering an application to carry out development. Under the section, the Authority must take into account the policies of the Municipal Plan and take into consideration the various criteria set out in that section.

Reference must also be made to section 4.4(b) of the Development Regulations, which provides that, subject to section 4.6, Development Approval shall be issued for development that conforms to the general development standards set out in section 5 of the Development Regulations, "including the use classes, standards, requirements, and conditions prescribed for the use zone in which the proposed development is located."

In light of the above, the Authority had the discretion to refuse the Appellant's application.

**If yes, was the Authority's decision to refuse the application of the Appellants in accordance with, and a reasonable use of, its authority?**

Yes.

The sole basis upon which the Authority refused the application of the Appellants was that the distance between the single dwelling located on the subject property and the side lot line did not meet side yard requirements set out in the Development Regulations for apartment dwellings.

It is clear the Authority has historically considered the dwelling currently located on the subject property to be a single dwelling with subsidiary apartment. I agree that the definitions of those terms found in the Development Regulations are applicable here (see sections 2.38, 2.102 and 2.32).

The development of the proposed basement apartment would create a third unit in the existing dwelling. "Apartment dwelling" is defined in section 2.32 as "a building containing three or more

dwelling units, but does not include a row dwelling." As such, if the application was approved, the existing building would constitute an "apartment dwelling."

Because of this, the development standards applicable to apartment dwellings must be considered in determining whether the refusal of the Appellants' application was reasonable. I find that this would be the case even if the existing dwelling was characterized as a duplex rather than a single dwelling with subsidiary apartment. This is because the definition of "apartment dwelling" is broad enough to capture either characterization, based as it is on the total number of dwelling units. The existing dwelling contains two dwelling units (see the definition of "dwelling unit" in section 2.38 of the Development Regulations), and the proposed basement apartment would constitute an additional dwelling unit.

The question becomes whether it was reasonable for the Authority to deny the Appellants' application on the basis the proposed development would not meet side yard requirements applicable to apartment dwellings.

Section 10.11.3 of the Development Regulations stipulates that the minimum side yard standard for an apartment dwelling is 5 metres. "Side yard" is defined as meaning "the distance between the side lot line and the nearest side wall of a building on the lot."

Generally, the Authority has the discretion to vary an applicable development standard up to a maximum of 10% (see section 3.12 of the Development Regulations). This means the Authority could allow for a side yard distance of no less than 4.5 metres.

Regardless, I find that the distance between the side lot line and the nearest side wall of the existing building located on the subject property to be 3.97 metres.

There was conflicting evidence on the exact distance between the side of the existing dwelling and the property's side lot line. Ms. Lethbridge indicated that she had measured the distance and found it to be fourteen feet (or approximately 4.28 metres). However, the Real Property Report for the property submitted by the Authority indicates that the same distance is actually 3.97 metres. Ms. Lethbridge could not account for this discrepancy, although she suggested that perhaps the completed house had not been as large as indicated on the real property report. However, without a current real property report to review or other survey evidence, I must give credence to the best evidence I was provided with, which is the Real Property Report prepared by Craig Nightingale Surveys Limited from 2014.

I find that the side yard in question is 3.97 metres and as such does not meet the minimal side yard requirements set out in section 10.11.3 applicable to apartment dwellings. I find the decision of the Authority to refuse the Appellants' application was therefore reasonable.

In light of this, I need not consider the issue of non-conformity raised by the Authority.

I also note that the Appellants raised the issue of excessive property taxes during the hearing; however, I have no legal authority to consider that issue and therefore make no findings in relation thereto.

**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 of the Authority to refuse the application of the Appellants to develop a basement apartment at 13 Nettab Drive be confirmed.

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 July, 2024.

Christopher Forbes
Adjudicator
*Urban and Rural Planning Act, 2000*