

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-094-031

Adjudicator: Chris Forbes

Appellants: Andrea and Jason Lundrigan

Respondent/Authority: Town of Conception Bay South

Date of Hearing: May 12, 2026

Start/End Time: 1:00 p.m. –

In Attendance

Appellants: Andrea and Jason Lundrigan

Respondent/Authority: Corey Davis, Director of Planning and Development
Town of Conception Bay South

Daniel Barrett, Development Control Coordinator
Town of Conception Bay South

Counsel for the Authority: Alex Templeton

Interested Parties: Jon Pawson, Progressive Engineering & Consulting Ltd.

Jon Cutler, Black Diamond Construction Ltd.

Appeal Officer: Sarah Kimball
Local Governance and Land Use Planning
Municipal and Provincial Affairs

Technical Advisor: Setare Vafaei, Planner III
(appearing by teleconference) 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* and the *Town of Conception Bay South Municipal Plan and Development Regulations 2011-2021* (the "Development Regulations") when it

issued Approval-in-Principle to develop a residential subdivision at 240-258 Anchorage Road, Conception Bay South, on December 17, 2025 (the “Decision”).

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 she authored dated April 8, 2026 (the “Technical Report”). She summarized the general chronology found at p. 6 of the appeal package. From there, she discussed the definition of “development” found in the Act and the designation of the subject property under the Municipal Plan and its zoning in the Regulations.

She specifically referenced Policies 5.2.1 and 5.8 of the Municipal Plan. The Technical Advisor also referenced the Authority’s “Report on Vulnerability to Geological Hazard in Conception Bay South, 2011” (the “Hazard Report”) and the fact that the subject property is within an area identified in that report as having “low geological hazard vulnerability.” She also referenced Policy 4.3.14 of the Municipal Plan which addresses this rating.

The Technical Advisor went on to discuss the requirements in the Municipal Plan regarding the protection of waterways and similar bodies and requirements in the *Development Regulations* regarding an applicable 15-metre buffer.

She then discussed the requirements for storm water management found in Section 5.32 of the *Development Regulations* and summarized the Appellant’s arguments regarding flood risk. The Technical Advisor also summarized section 5.28 regarding soil removal, deposit and site grading.

The discretion afforded to the Authority to require a land use assessment under section 4.15 was also discussed.

Lastly, the Technical Advisor discussed section 7.8 of the *Development Regulations* regarding land for public open space and the ground of appeal concerning the granting of a variance under this section.

Appellant’s Presentation and Grounds

The Appellants raised multiple grounds of appeal in relation to the Decision, specifically the following (as found at p. 10 of the Authority’s written submissions):

- (a) “Failure to identify the high water mark (1:100 year flood elevation) of Cross Brook”;

- (b) “Failure to conduct flood risk mapping (despite Commissioner direction)”;
- (c) “Failure to require a land use impact assessment”;
- (d) “Inadequate environmental and fish habitat assessment requirements”;
- (e) “Misclassification of required open space”;
- (f) “Building line setback variance is unwarranted (9 m vs. 10 m)”;
- (g) “Procedural fairness concerns and lack of consideration of resident evidence.”

The reference above to the Commissioner is to Commissioner Jewczyk, who completed a report in May 2023 respecting a proposed amendment to the Authority’s Municipal Plan in relation to the zoning of the general area in which the subject property is located, specifically Municipal Plan Amendment No. 23 (the “Commissioner’s Report”). That Report included various statements relied upon by the Appellants in their submissions.

During the hearing, the Appellants focused much of their argument on the failure to identify the high-water mark and a land use impact assessment. They argued the Decision was not properly granted because it did not address issues raised in the Commissioner’s report and ignored evidence of significant flooding at and around the subject property.

During her presentation, Ms. Lundrigan testified that she has occupied property in the immediate area for 49 years. She is a geoscientist by profession.

She referenced the Hazard Report completed in 2011 and noted it identifies the subject area as “Low Risk.” She also noted, however, that this classification is conditional in the report on human activities not modifying the landscape. The Appellants state that the proposed development will do exactly that through vegetation removal, grading and the introduction of impervious surfaces.

The Appellants also noted that the Hazard Report was completed in 2011. They submit that, since that time, there have been significant alterations to the surrounding, immediately adjacent properties, such as significant vegetation removal due to a mine operating immediately south of the property. Further, since the time the report was completed, there have been significant changes to the technology used to make such assessments, such as aerial photograph mapping.

The Appellants further testified that very recently, flooding extended almost to the edge of Anchorage Road. They referenced the extensive photographic evidence of flooding in the area, both this year and during previous years, found in the Appeal Package.

In reference to the Commissioner’s Report, the Appellants acknowledged that it was created for the purpose of considering a re-zoning of the subject area and an amendment to the Municipal Plan, and is not directly concerned with the Decision; however, they referenced that report as evidence of significant flooding in the area and general concerns related to development.

The Appellants also referenced page 8 of the Hazard Report, which includes the following disclaimer statement:

“... This vulnerability assessment does not consider any hydrographical or climatological analysis of a stream or its watershed, and as such, should not be considered as a replacement for formal flood-risk mapping. ...”

The Appellants argued that the Authority's decision-making process is based significantly on the hazard characterization for the area contained in the Hazard Report. They argue that the characterization of the area as "low risk" is illogical when considered against current evidence. The contention of the Appellants is that the Hazard Report is both outdated and based on insufficient data as confirmed by the disclaimers contained in the report. It is not a localized study, which is what is needed.

Further, they submit that human activities in the area and climate change have made flooding much worse than it was in 2011. Specifically, they noted that three of the properties included in the proposed development were underwater in the month preceding the hearing. As described by the Appellants, their property and adjacent properties are in a valley or at the "bottom of a bowl", and the sides of the bowl upgrade have gradually been stripped of vegetation over time, exacerbating flooding.

Ms. Lundrigan noted there has been a pyrophyllite mine in the area on and off for approximately 80 years. The mine is open-pit and is quite high, upgrade of the subject property. It is currently very active and mining occurs there on a daily basis, resulting in fine, granular material flowing down to the subject property and making floodwater appear milky. As she explained it, this material is washing down and "clogging the base of the bowl."

The Appellants also noted that, when they built their home, they had to build the basement six feet above grade because of the flooding that has occurred in the area.

It was argued that, while the Authority would ultimately have to approve drainage and net zero run-off management per the Decision, the Decision itself did not require the developer to undertake flood risk mapping or a land use impact assessment. Because the Authority classified the subject property/area as "low risk" (per the Hazard Report), as opposed to "moderate risk" (which the Appellants submit is more appropriate), they are concerned that the approval of the Authority on the issues may be based on factors that might be inappropriate as compared with factors that would be taken into account with flood risk mapping.

The Appellants also raised concerns with the vagueness of the Decision and in particular how the developer and Authority were to assess infrastructure and downstream waterways.

On cross-examination, the Authority emphasized that the concerns raised by the Appellants regarding flood risk could be addressed in the course of the development process given the Authority's continuing discretion (keeping in mind this is only an approval-in-principle and not a development approval), and that a future decision taken by the Authority in relation to the development could be subject to further appeals if the Appellants disagreed with them.

I find that the Appellants presented as very credible during the hearing.

Authority's Presentation

The Authority provided an extensive written submission in relation to this matter that I have reviewed.

During the hearing, the Authority confirmed that its position is that the developer's diligence will inform whether the issues raised by the Appellants need to be addressed and how they should be addressed. It emphasized that much of the discussion raised by the Appellants was speculative. The Authority argued that it may be that the developer, in doing its diligence, discovers that there is something that precludes

it from proceeding with the development. It also noted that hydrological assessment of the area was required, per the Decision.

The Authority confirmed that it relied on the Hazard Report in classifying the subject area as “Low Risk.” However, it also noted that the Commissioner’s Report is not directly relevant to the subject of this appeal, since it was commissioned in a re-zoning context.

The Authority emphasized the discretion afforded to it under section 4.10 of the *Development Regulations*, dealing specifically with Approvals-in-Principle. It said that the approval-in-principle is a unique type of decision and that its requirements must be met prior to issuance of the relevant development approval. The Authority noted that the Decision outlines a comprehensive list of requirements that must be met by the developer and calls for a significant level of diligence to be undertaken to ensure conformity of the development with the *Development Regulations*.

According to the Authority, the critical question of this appeal is whether the Development Control Coordinator (“DCC”) decided the issue before him in accordance with his authority. The burden of proof here is on the appellants, who must show that the Authority exceeded its authority.

In relation to the specific issue of the failure of the Authority to identify the relevant high-water mark prior to issuing the Decision, the Authority submitted that, in reference to section 5.34(1) of the *Development Regulations*, the Appellants were selective in what they were arguing. The full requirement set out in that section is that no development shall be permitted within 15 metres of the high water mark “without approval from the Department of Environment and Conservation” and possibly also Fisheries and Oceans, Canada. The Authority noted this because, it argues, the section does not contain a blanket prohibition against development within that distance. It submitted that item 6 of the Decision letter properly addresses this.

The Authority acknowledged that, in the course of the process, it was possible the high water mark might not be determined, since the developer could concede that the proposed development was going to be within the specified 15 metres and thus seek the appropriate governmental approvals.

With respect to flood risk mapping, the Authority submitted that the Commissioner was careful in his report to note that his suggestions respecting that mapping were comments outside his mandate. The Authority’s position is that undertaking flood risk mapping was not a necessary precursor to the Decision. It referenced section 16 of the Decision letter, which requires the developer to “assess any infrastructure and downstream waterways to determine if drainage from the proposed development can be accommodated, and if it cannot be accommodated, achieve net zero increase in runoff with respect to the drainage, as determined to be required by the Town.” In other words, the Authority argues any concerns related to runoff, flooding, etc. will be fully addressed in the course of the process, and the Authority retains full discretion over requirements to be imposed in relation thereto.

When asked about the concern raised by the Appellants as to the initial classification of the subject area in the Hazard Report as “Low Risk” as compared with “Moderate Risk,” the Authority submitted that, regardless of the initial classification, the diligence required of the developer post-Approval-in-Principle would properly address any concerns that would relate to that subject matter.

Analysis

I begin by noting that my jurisdiction here is relatively limited. In that regard I refer to the decision in *Mount Pearl v. Mount Pearl Local Board of Appeal*, 1995 CarswellNfld 154, in which the Newfoundland and Labrador Court of Appeal commented at para. 16 that “it is not a matter of the Board agreeing or disagreeing with the Council’s decision. That is not the test. Neither is the Board permitted to substitute the exercise of its own discretion for that of Council. ...” I also note the comment of the Court at para 18 that “before a court, or a review board, may overturn the actions of a municipal authority acting in the exercise of its discretionary power, it must be demonstrated that without question the municipal authority has acted in excess of those powers.”

In *Stroud v. Newfoundland and Labrador (Central Regional Appeal Board)*, 2010 CarswellNfld 42, the Court explained as follows at para. 12:

“... Any decision made by a town council or other regional authority that involves an exercise of discretion must be made on the basis of a proper understanding of the request. ... If the authority makes its decision based upon an erroneous view of material circumstances, the discretion exercised is not immune from being overruled. ...”

Likewise, in *Yates v. Central Newfoundland (Regional Appeal Board)*, 2013 NLTD(G), the Court noted that a review board may overturn actions of a municipal council where the council acts “upon an erroneous view of the facts.”

I agree with the Authority that the Decision was a discretionary decision of the DCC, made pursuant to section 4.10 of the *Development Regulations*. Under that section, the Authority could issue an Approval in Principle “if it determine[d] the application conforms to the Municipal Plan and [the *Development*] Regulations.”

I acknowledge item 16 of the Decision. That item reads:

“The developer shall assess any infrastructure and downstream waterways to determine if drainage from the proposed development can be accommodated, and if it cannot be accommodated, achieve zero net increase in runoff with respect to drainage, as determined to be required by the Town. Assessment information, calculations, reports, etc. are to be provided to the Town for review. Storm drainage may also require approval of other authorities, including but not limited to the Department of Transportation and Infrastructure (if applicable). The Town reserves the right to make a final determination of the drainage solution to be designed and developed after a review of assessments or proposals.”

I also acknowledge that, as the Authority points out, many issues related to potential runoff and flooding will become apparent during the assessment and diligence process triggered by the above requirement, and the Authority retains discretion to impose various requirements on the developer to address such issues.

The concern raised by the Appellants, however, was that the Discretion letter should have gone further than including the above statement and actually included a requirement for a land use impact assessment. To that end, section 5.10 of the *Development Regulations* is key. It reads:

“5.10 Development in Hazard Areas

1. In addition to development complying with the development standards and conditions outlined in the Use Zones set out in Section 10, the following conditions will also apply to development located within areas identified as high and moderate Hazard Vulnerability identified on Map 2 Environmental Overlay Map of the Municipal Plan. ...

...

- b) Where proposed residential development is located in any area identified as Moderate Hazard, the Authority shall require a site specific study in the form of a Land Use Impact Assessment, prepared by suitably qualified person(s) to evaluate the level of hazard risk, taking into consideration the susceptibility of the proposed development to storm surges, erosion or flooding. Such studies will consider elevation, topography and geomorphology.”

The Authority conceded during the hearing that, in issuing the Decision, it relied upon the classification of the subject area in the Hazard Report as “Low Risk.” I take from this that, had the subject area been classified in that report as “Moderate Risk,” the Authority would have included in the Decision letter the requirement that a Land Use Impact Assessment be undertaken (as required by section 5.10(1)(b) of the *Development Regulations*).

While it is possible that the diligence and assessment process ongoing subsequent to the Decision could raise issues that might be raised by a full Land Use Impact Assessment of the area, it is speculative to conclude that this would necessarily be the case. In any event, section 5.10(1)(b) is clear that such an assessment is mandatory where the area is not “Low Risk.”

The question is therefore whether the subject area is properly characterized as “Low Risk” for the purpose of section 5.10(1)(b).

I note that the Commissioner’s Report describes the area as follows (found at p. 112 of that report):

“There was a number of comments from the public during the public consultation session and the public hearing with respect to the area around the subject property and the property flooding periodically especially during intense storm events. A site inspection of the site indicates flooding of the lower lying land on the site across Cross Brook. The subject property has several culverts from upstream flows that converge at this location.

The Commissioner is satisfied that the requirement for 'zero net increase in storm water runoff' at the development stage will not contribute any further water to the flooding situation as noted by area residents.

However, considering the public commentary about flooding received at the public hearing, the Commissioner notes that Cross Brook currently is not referenced in the Town's flood risk mapping. Council has a number of water courses mapped for flood risk purposes[s] and have undertaken flood risk mapping of other watercourse[s] in recent times. To date this has not been done for the water course system of which Cross Brook is a part. While not a part of this amendment process[,] Council should give consideration to undertake flood risk mapping for this watercourse.

Furthermore, the Hazard Vulnerability Study 2011 has identified the subject property as Low Risk. According to the study, where a property is within a low vulnerability hazard area, no action is required as the area is unlikely to be affected by hazardous geological processes (including flooding), unless human activities modify the landscape to increase hazard potential – page 17. [Underlined by the Commissioner].

It is the Commissioner's position that given the consideration by Council to these matters including the response by the Water Resources Management Division of the Provincial Department of Environment and Climate Change as part of the amendment process, that this amendment should proceed. However, given the concerns by area respondents, a site specific study (Land Use Impact Assessment Report) be undertaken and made available publicly at the development application stage prior to Council's consideration with whether or not to approve the development application. ...

I agree that the Commissioner's Report does not directly relate to the appeal; however, the conclusions it draws in relation to the general views of residents in the area as to flooding, and the likely benefit in that area of a site specific study, is important evidence that relates to the proper characterization of the area for the purpose of section 5.10(1)(b).

I also note the extensive evidence found in the Appeal Package as to flooding in and around the subject property, which is in addition to the credible testimony of the Appellants. In light of this evidence, the comments of the Commissioner, and the age of the Hazard Report, I find it was not reasonable for the Authority to rely on the classification of the subject area set out in the Hazard Report for the purpose of determining whether section 5(1)(b) applied. The simple fact is that the area experiences extensive flooding on a regular or semi-regular basis.

By classifying the subject area as "Low Risk", the Authority evidenced "an erroneous view of material circumstances" (to use the language of the *Stroud* case) that justifies varying the Authority's Decision. I appreciate the Authority was simply relying on the conclusion drawn in the Hazard Report; however, the Authority should have also had regard for the significant evidence put forward by residents in the

neighbourhood and the Commission's Report, as well as the age of, and limitations expressed in, the Hazard Report, when drawing that conclusion.

The Decision should be varied to include the requirement set out in section 5.10(1)(b) that a land use impact assessment be conducted that is site-specific to the area in question.

However, I find no merit in the remaining grounds of appeal. To that end, I note as follows:

- (a) With regard to the Authority's failure to require determination of the high-water mark, I agree with the Authority that the Decision adequately addresses section 6.34 of the *Development Regulations*, insofar as that section does not necessarily require determination of the high-water mark but instead evidence that the appropriate governmental approval is obtained where development will occur within 15 metres of that mark;
- (b) With regard to the Authority's failure to conduct flood risk mapping, no such requirement is explicitly imposed on the Authority in the *Development Regulations*, and while the Commissioner's Report suggests it would be beneficial, that does not translate to a legal requirement that must be reflected in the Decision;
- (c) With regard to the Authority's failure to impose adequate "environmental and fish habitat assessment requirements," I find that item 6 of the Decision is sufficiently broad to address these issues in a manner consistent with section 5.34 of the *Development Regulations*;
- (d) With regard to "misclassification of required open space," section 7.8(5) of the *Development Regulations* provides the Authority with discretion to require a riparian area to be conveyed in satisfaction of the open space area requirement;
- (e) With regard to the building line setback variance being unwarranted (9m as compared with 10 m), I agree with the Authority that section 7.7 of the *Development Regulations* does not impose any criteria for the establishment of building lines but is instead permissive in authorizing the Authority to establish such lines at its discretion; and
- (f) With regard to "procedural fairness concerns and lack of consideration of resident evidence," I find no evidence of procedural unfairness sufficient to ground an appeal, with the exception discussed above related to the hazard classification.

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 issue an Approval-in-Principle to develop a residential subdivision at 240-258 Anchorage Road, Conception Bay South, on December 17, 2025 be varied to require that the applicant thereof complete a site specific Land Use Impact Assessment, in accordance with section 5.10(1)(b) of the *Development Regulations*. The Decision shall remain in full force and effect in all other respects.

Further, the Adjudicator orders the Town of Conception Bay South to pay the Appellants an amount of money equal to the appeal fee in accordance with Section 45(2) of the *Urban and Rural Planning Act, 2000*.

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 12th day of June, 2026.



Christopher Forbes
 Adjudicator
Urban and Rural Planning Act, 2000