

# EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

## URBAN AND RURAL PLANNING ACT, 2000

### Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-072-035
Appellant(s)	Richard Lear, et al
Respondent / Authority	Town of Conception Bay South
Date of Hearing	June 7, 2022

#### Board Members

Chair	Cliff Johnston, MCIP
Member	Carol Ann Smith
Member	Paul Boundridge, MCIP

#### Also in Attendance

Appellant(s)	Richard Lear, Cecil Morgan
Representatives for the Appellant(s)	
Representatives for the Authority	Corrie Davis, MCIP Director of Planning & Development Melanie Power, Development Control Officer John Whalen, Planning and Development Manager
Interested Parties	Wanda Lee Morgan, Developer
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Keith Batstone, MCIP
Start/End Time	9:00 am – 10: 40 am.

The authority for appeals comes from section 42 of the *Urban and Rural Planning Act, 2000* (The Act).

#### Board's Role

The role of the Eastern Newfoundland Regional Appeal Board (the "Board") is to determine if the discretionary decision of the Town of Conception Bay South (the Authority) made on September 7<sup>th</sup>, 2021 to issue an Approval in Principle for a Home Occupation - Medical and Professional Services and Personal Service (Medical Footcare and Spa) at Civic #71, Seal Cove Road, Conception Bay South was in accordance with the Urban and Rural Planning Act and the Town's Municipal Plan and Development Regulations.

## **LEGISLATION, MUNICIPAL PLANS AND REGULATIONS CONSIDERED BY THE BOARD**

Urban and Rural Planning Act, 2000

Town of Conception Bay South Municipal Plan

Town of Conception Bay South Development Regulations

### **Background:**

On September 13, 2021, the Authority (Town of Conception Bay South) issued a letter as notice of a Council decision to grant an Approval in Principle for a Home Occupation - Medical and Professional Services and Personal Service (Medical Footcare and Spa) at Civic #71, Seal Cove Road, Conception Bay South. On September 17, 2021, the Appellant (Richard Lear) filed an appeal with the Secretary of the Eastern Newfoundland Regional Appeal Board against the Council decision.

### **Presentations During Hearing**

The following is synopsis/summary of the verbal representations made to the Board during the Appeal Hearing. The Board also received and reviewed written submissions from the Technical Advisor, the Appellant and the Authority; and a verbal presentation (by phone) from the Applicant, Wanda Lee Morgan.

The Board heard from the following:

### **Technical Advisor:**

July 2, 2021 The Authority received the subject Home-Based Business Application for a proposed Home Occupation – Medical and Professional Service & Personal Service (Medical Footcare & Spa) at 71 Seal Cove Road in Conception Bay South, NL.

July 28, 2021 The Authority contends that “Public Notification of the application” occurred.

August 10, 2021 The Authority’s Planning & Development Committee minutes of Meeting #21-12 indicate that:

The Committee reviewed the application, the regulatory standards, and a summary of comments from affected persons received prior to the advertised deadline for public submissions of August 12, 2021.

The Committee “agreed” that any further submissions be forwarded to a future meeting of the Committee of the Whole, and also recommended to Council that:

...in accordance with Sections 5.16 and 10.7 of the Town’s Development Regulations, Application No. Com- 21-071 for a home-based occupation at 71 Seal Cove Road, be refused given that the property does not directly front onto a public street and clients would have to cross adjacent private property to access the property.

- August 17, 2021 The Authority's submission package contends that "Council deferred consideration of the application at its regular public meeting". However, the minutes of the Authority's Regular Meeting #13 of Council indicate that:  
Resolution #21-292  
Councilor Hillier/Councilor Bent Be it so resolved that the decisions and recommendations made at the Planning and Development Committee meeting on August 10, 2021, be accepted as presented.  
- carried unanimously
- August 31, 2021 The Authority's Planning & Development Committee minutes of Meeting #21-13 indicate that:  
The Committee discussed "...concerns that were raised, the applicant's responses, and the issue of a business operating from a private lane."  
The Committee "concurred" with the Director of Planning and Development that Section 5.16 (Lot Frontage) of the Development Regulations "...relates specifically to construction of residential and commercial buildings and does not explicitly prohibit business from operating from existing buildings that do not front onto a public road".  
The Committee discussed a recommendation to approve the application for "...a limited period of one year, after which the Committee would review the file and consider any concerns raised (...) before considering whether to grant a permanent approval."  
The Committee recommended to Council that:  
...in accordance with sections 4.11(3) and 10.7 of the Town's Development Regulations, Application No. Com-21-071 for a home-based occupation at 71 Seal Cove Road, be approved on a temporary basis for one year and that the application be re-considered after the expiration of the temporary permit.
- September 7, 2021 The Authority resolved at Regular Meeting #14 of Council, to approve application #COM-21-071.
- September 7, 2021 The Appellant became aware of the Authority's decision to approve, with conditions, the proposed Home Occupation—Medical and Professional Service & Personal Service (Medical Footcare & Spa) on a temporary 1-year basis.
- September 13, 2021 The Authority's submission package materials contend that the "Applicant [was] advised in writing of Council's decision".
- September 17, 2021 The Appellant submitted an Appeal Application Form to the Secretary of the Eastern Newfoundland Regional Appeal Board (with supporting information).



## Grounds of Appeal

This appeal is based on the following provision of the Urban and Rural Planning Act, 2000: Section 42(1)(a) (an application to undertake a development). The Act establishes the types of decisions that may be appealed to the Board:

42. (1) A person or an association of persons aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to
- (a) an application to undertake a development;
  - (b) a revocation of an approval or a permit to undertake a development;
  - (c) the issuance of a stop work order; and
  - (d) a decision permitted under this or another Act to be appealed to the board.

The Appellant is appealing the decision of Council to approve application #COM-21- 071 for a proposed Home Occupation – Medical and Professional Service & Personal Service on a temporary 1-year basis at 71 Seal Cove Road in Conception Bay South, NL on the following grounds:

- We believe that Council did not take into consideration the fact this home based business is being proposed on a private, single width driveway that services a total of four familys [sic], where small children are present and there is no public maintenance...
- Also, Council did not take into consideration the concerns of the other residents and neighbouring properties after sending out the notice that an application had been submitted...

## Land Use Planning Considerations

The Town of Conception Bay South Municipal Plan outlines a general policy that contemplates the regulation of ancillary home-based commercial uses in the 'Residential' land designation:

### Section 5.2.3.11

Home based businesses in the form of professional, medical service, personal service, educations and craft uses can or may be permitted in all residential designations in accordance with standards set out in the Development Regulations.

The Residential Low Density (R-1) Use Zone development standards provide for a range of land uses – examples include:

- Permitted – Home Office, Single Dwelling, Family Child Care
- Discretionary – Bed and Breakfast, Child Care, Home Occupations (various)

The Town of Conception Bay South Development Regulations establish land use definitions and general standards for home based businesses that appear intended to restrict future developments to residential lots that would satisfy the Town's established property access and site design criteria, while demonstrating compatibility and consistency with the amenity of other residential uses in the area:

**Home Occupation** means an accessory use of a dwelling and/or accessory building for gainful employment involving the provision or sale of goods and/or services.

**Home Office** means a secondary use of a dwelling unit by at least one of the residents of such dwelling unit to conduct a gainful occupation of business activity.

### **5.16 Lot Frontage**

Except where specifically provided for in the Use Zones set out in Section 10 of these Regulations, no residential or commercial building shall be erected unless the lot on which it is situated fronts directly onto a street constructed to standards established by the Authority.

## **6.7 Home Occupations**

### **6.7.1 General**

The following conditions shall apply to the use of a dwelling for a home occupation:

- a) Where the proposed use is a barber, hairdresser, beauty or tanning salons, esthetician salon/spa or similar use, the use may be permitted under the following conditions:
  - i) Notwithstanding section 6.7.1(d) of these regulations, the business is limited to one service provider who must be a resident of the dwelling where the business is located,
  - ii) No more than two overlapping client appointments are permitted at any one time, and
  - iii) Notwithstanding section 6.7.1(f) of these regulations, a minimum of two parking stalls are required for the dwelling. Parking associated with the business must be arranged so that each space is individually accessible from the public street; (2017-12-29)
- b) The residence is occupied by the operator of the Home Occupation;
- c) The use is clearly subsidiary to the residential use, does not alter the residential character of the property, and does not detract from the residential character of the neighbourhood. The external appearance of the dwelling shall not be changed by the home occupation;
- d) There are no more than 2 assistant employees employed on site in addition to a resident of the dwelling;
- e) Not more than 25 percent of the total floor area of the dwelling is devoted to the home occupation and there is no increase in the Gross Floor area of the dwelling unit;
- f) One off-street parking space, other than that required for the dwelling, is provided for every 18.5 m<sup>2</sup> of floor space occupied by the home occupation;
- g) No wholesale, outdoor storage of goods or equipment is carried out, any retail sales are incidental and subsidiary to the approved use;
- h) On-site advertisements shall be non-illuminated with a maximum sign face area of 0.2 square metres and shall meet the requirements of the Authority in terms of shape and material construction;
- i) No change shall be made in the type, class, or extent of the occupation without a permit;



- j) The use shall not generate traffic, parking, sewage or water use in excess of what is normal in the residential area;
- k) No regular parking of commercial vehicles except for one vehicle with a gross weight of no greater than one tonne will be permitted on the lot or on the road reservation adjacent to the lot; and
- l) The residential lot has sufficient area to accommodate the parking requirements of the dwelling unit and the home occupation.

The decision of the Authority and the grounds of appeal of the Appellant appear to involve contrasting interpretations and conclusions as to the relevance of the following provisions of the Development Regulations:

- Section 5.16 (Lot Frontage) – re: street to Council standards
- Section 6.7.1(a)(iii) (Home Occupations) – re: parking stalls access
- Section 6.7.1(j) (Home Occupations) – re: normal traffic patterns

### **The Appellant's Appeal**

The Appellant contends that it is pertinent to the Board's consideration of the appeal matter that:

- The property is accessed from a private single width driveway
- Council did not consider resident concerns submitted after the advertisement of a Discretionary Use application

Section 4.2 of the Town's Development Regulations states that the Development shall be carried out and maintained within the Planning Area in accordance with the Municipal Plan, these Regulations, conditions stated in a Development Approval, and any other by-law or regulation enacted by the Authority.

Section 4.3 of the Town's Development Regulations states that decisions made by the Authority with respect to a Development Approval required by these Regulations, shall be made in writing and state the reasons for a refusal of, or conditions contained within the Development Approval. The Authority shall also advise the person to whom the decision applies of their right to appeal, in accordance with Section 42 of the Act and the requirements of Section 3, Regulation 5 of these Regulations.

Section 4.3 also states that Council must issue approval where a proposed development conforms to the Municipal Plan, Development Regulations, the Building Code, and any other regulation in force in the Planning Area.

Section 4.4 of the Development Regulations states that Subject to Regulations 4.5 and 4.6, a Development Approval shall be issued for development within the Planning Area that conforms to:

- a) The policies expressed in the Municipal Plan and any further scheme, plan, or regulation pursuant thereto;

- b) The general development standards set out in Section 5 of these Regulations, the requirements of Section 10 of these Regulations including the use classes, standards, requirements, and conditions prescribed for the use zone in which the proposed development is located;
- c) The standards set out in the Building Code and/or other ancillary codes, and any Building Regulations, Waste Disposal and Property Regulations, and/or any other municipal regulation in force in the Planning Area regulating or controlling development, conservation and use of land and buildings;

By contrast, where a proposal does not clearly conform to the regulatory framework, it is required that the Council consider specific criteria in the evaluation of an application and determine whether the proposal is premature and shall be refused, or in applying its discretion, whether the established policies and evaluation criteria – including the amenity of the area and public safety – are material, prior to rendering a decision.

Section 4.5 of the Development Regulations (Approval Not to be Issued in Certain Cases) directs that no approvals shall be issued for development within the Planning Area when, in the opinion of the Authority, it is premature by reason of the site lacking adequate road access, power, drainage, sanitary facilities, or domestic water supply, or being beyond the natural development of the area at the time of application unless the applicant contracts to pay the full cost of construction of the services deemed necessary by the Authority and such cost shall attach to and upon the property in respect of which it is imposed.

Section 4.6 of the Development Regulations (Discretionary Powers) directs that in considering an application to carry out development, the Authority shall take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto, and shall assess the general appearance of the development of the area, the amenity of the surroundings, availability of utilities, public safety and convenience, and any other considerations which are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, the Authority may, in its discretion, and as a result of its consideration of the matters set out in this Regulation, conditionally approve or refuse the application.

The proposed home based business involves a use of building and lands in the Residential Low Density (R-1) Use Zone which is listed as a Discretionary Use, and the Authority received public comments from residents, so it would appear to be relevant that the Regulations establish the following public notification standards.

#### **4.14 Public Notice**

1. The Authority shall provide public notice for a period of not less than:
  - (...)
  - b) 14 days including publication of a notice in a locally circulated newspaper on at least two occasions - when considering a change in a non-conforming use in



accordance with Section 3.15 or development which is listed as a Discretionary use in Section 10 of these Regulations; and

(...)

2. The Authority may require public notice of any development application where, in the opinion of the Authority, such notice is required for information and public consultation purposes.
3. The Authority shall require the cost of the public notice, or portion thereof, be paid by the applicant and that such notice shall be by public advertisement in a newspaper circulating in the area or by any other means deemed necessary or appropriate by the Authority. (2017-12-15)

The Urban and Rural Planning Act, 2000 establishes the required considerations for the continuation and/or expansion of a development that does not conform to a plan, regulation, or scheme made under the Act:

#### **108. Non-conforming use**

- (1) Notwithstanding a plan, scheme or regulations made under this Act, the minister, a council or regional authority shall, in accordance with regulations made under this Act, allow a development or use of land to continue in a manner that does not conform with a regulation, scheme, or plan that applies to that land provided that the non-conforming use legally existed before the registration under section 24 of the plan, scheme or regulations made with respect to that kind of development or use.

(...)

- (3) A building, structure or development that does not conform to a scheme, plan or regulations made under this Act that is allowed to continue under subsection (1)
  - (a) shall not be internally or externally varied, extended or expanded unless otherwise approved by the minister or appropriate council, regional authority or authorized administrator;

(...)

- (f) where the non-conformance is with respect to the standards included in development regulations, shall not be expanded if the expansion would increase the non-conformity; and

(...).

The Development Regulations, 2011-2021 reiterates and exceeds the provisions of the Act for non-conforming uses and new development, as related to Town standards:

#### **3.16 Non-conformance with standards**

Where a building, structure or development does not meet the development standards included in development regulations, the building, structure or development shall not be expanded if the expansion would increase the non-conformity and an expansion must comply with the development standards applicable to that building, structure or development.



### 5.19 Non-conforming Uses

In addition to the provisions of Section 108 of the Urban and Rural Planning Act and Section 3.14 – 3.17 of the Provincial Development Regulations in Section 3 of these Regulations, non-conforming uses shall meet the following requirements: (...)

2. A use shall be considered to be discontinued where:
  - a) the use of the land or building ceases;
  - (...)
  - d) the scale or intensity of the activity results in change in the type of use;
  - e) the addition of new activities or the modification of old activities is considered remote from previous activities; or if
  - f) the new or modified activities can be shown to create undue additional or aggravated problems for the municipality, the local authorities, or the neighbours, as compared with what went before.

(...)

4. Where a building, structure, or development does not meet the development standards included in the Development Regulations, the building, structure, or development shall not be expanded if the expansion would increase the non-conformity.

The Authority contends that the application was reviewed in consideration of the broad purpose and intent of the current Municipal Plan and consistent with the provisions of the Development Regulations, prior to rendering a decision to issue an Approval-in-Principle.

The Authority's appeal submission package indicates that consideration of the permit application involved the following:

- The public notification of a Discretionary Use application
- A preliminary evaluation of the application by the Planning and Development Committee, discussion about referring further public submissions to a future Committee of the Whole meeting, and recommendation to refuse with reasons
- The Planning and Development Committee's re-evaluation of the proposal, consideration of new information from the Applicant, a determination that the proposed home based business is consistent with the intent of the General Development Standards (eg. Section 5.16 – Lot Frontage) and Specific Use Regulations (eg. Section 6.7 – Home Occupations), and a recommendation for Council to approve the proposal on a temporary 1-year basis
- Issuance of a letter as confirmation of Council's decision to issue an approval.
- Notice of the right of appeal and the associated appeal application process to the Eastern Newfoundland Regional Appeal Board

The Appellant contends that the Authority did not satisfy the requirements of the Urban and Rural Planning Act and the Town Development Regulations because:

- Council did not consider that the driveway access serves 4 lots
- Council did not consider resident concerns submitted after the advertisement of a Discretionary Use application.

The Board must contemplate whether Council, in carrying out the decision to approve application #COM-21-071 for a proposed home based business at an existing private lot – located in the Residential Low Density (R-1) Use Zone – did so in accordance with the provisions of the legislative, policy, and regulatory framework.

#### **The Appellant:**

- The property which is the subject of the appeal, Civic # 71 Seal Cove Rd., is accessed by a private lane/driveway, which is currently shared with three (3) other dwellings. The subject property does not have direct frontage on a public road; therefore the application should have been rejected by Council under Section 4.5 of the Town's Development Regulations (Approval not to be issued in Certain Cases).
- The Applicant entered into an Easement Agreement with the surrounding home owners and users of a shared gravel driveway access to establish easement rights to use the gravel driveway.
- The Town does not maintain the private, shared gravel driveway.
- Children who live in the homes along the shared driveway play in the driveway and may be at risk of harm from the traffic associated with the proposed business.
- The amount of vehicle traffic that could potentially be generated by the Home Occupation is greater than would normally one expected in a residential neighbourhood. Some vehicles could be large commercial vehicles.
- Council's approval of the application was premature by virtue of the application site lacking frontage on a public street.
- Council did not take into consideration the written concerns of the residents living on the private, shared driveway.
- The Town made an error in how the area was planned.
- Cecil Morgan, one of the Appellants, said that the proposed Home Occupation is contrary to the Easement Agreement; the Applicant has always indicated that she would not operate a business from her property.

#### **The Authority:**

- The Applicant currently holds a permit to operate a Home Office at Civic # 71 Seal Cove Road. The approved Home Office does not have clients visiting the dwelling, and business operations are carried out offsite.
- The proposed personal service and medical use as a Home Occupation is considered a Discretionary Use under the R1 Landuse Zone of the Town's Development Regulations. The application was advertised for public consultation for a two week period.
- Council considered all written public submissions received prior to making a decision to approve the application.



- Council is aware of the easement agreement.
- Council evaluated the potential traffic that might be generated by the proposed Home Occupation.
- Council approved the application on the basis of a temporary one-year permit in order to evaluate the impacts of the business, following which it is to be reconsidered for approval on a permanent basis.
- The Town submits that Council's decision to approve the application was made in accordance with the Town's Municipal Plan and Development Regulations and that Council appropriately used its discretionary authority.

**The Applicant/ Wanda Lee Morgan:**

- Clients visiting the Home Occupation would be using spa services; they would not be medical clients.
- Supplies for the Home Occupation would only be delivered once every two or three months.
- The Applicant advised the Board that she anticipates that traffic associated with the Home Occupation would be very limited.

**BOARD ANALYSIS**

- Q. How is the subject property zoned?
- A. The property is zoned Residential Low Density (R1) under the Town's Regulation. A Home Occupation may be allowed as a discretionary use by the Town Council in this zone, subject to a public notification procedure, and the requirements of the Development Regulations.
- Q. Was the Application properly advertised for public review and comments, in accordance with the Town's Development Regulations?
- A. Yes, the Town has demonstrated to the Board's satisfaction, that the Application was properly advertised for public review and comment. Further, the Town has demonstrated to the Board's satisfaction that the Town's Planning and Development Committee and Council gave due consideration to the written public submissions received in response to the Town's advertising process.
- Q. Does the fact that the application site does not have direct frontage a public road impact Town Council's authority to approve the application?
- A. It has been demonstrated by the Town to the Board's satisfaction, that the Town Council considered the restrictions imposed upon, and rights granted to the Applicant through the Easement Agreement and that those rights include the ability to have clients, guests, and other invitees travel across the shared driveway/lane to access the application site at Civic # 71 Seal Cove Road.

The Board further notes that Section 108.1 of the Urban and Rural Planning Act directs that the Town shall recognize and allow the continuance of the pre-existing non-conformity of the subject lot without direct frontage along a public road.

- (1) *Notwithstanding a plan, scheme or regulations made under this Act, the minister, a council or regional authority shall, in accordance with regulations made under this Act, allow a development or use of land to continue in a manner that does not conform with a regulation, scheme, or plan that applies to that land provided that the non-conforming use legally existed before the registration under section 24 of the plan, scheme or regulations made with respect to that kind of development or use.*

#### **BOARD'S CONCLUSION AND DETERMINATIONS**

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties along with the technical information and planning advice.

The Board is bound by section 42 of the Urban and Rural Planning Act, 2000 and therefore must make a decision that complies with the applicable legislation, policy and regulations.

Based on its findings, the Board determined that the Town Council of Conception Bay South was fully within its discretionary authority to approve on September 7, 2021 the application submitted by Wanda Lee Morgan to operate a Home Occupation for a Personal Service and Medical Use (Spa, Medical Foot Care) at Civic Number 71 Seal Cove Road, Conception Bay South.



## **BOARD'S ORDER**

The Board orders that the decision made by the Town of Conception Bay South Council on September 7, 2021 to approve an application submitted by Wanda Lee Morgan to operate a Home Occupation for a Personal Service and Medical Use (Spa, Medical Foot Care) at Civic Number 71 Seal Cove Road, Conception Bay South, be confirmed.

The Authority and the Appellant(s) are bound by the decision of this Regional Appeal Board.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this Regional Appeal Board 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 Appellant have received the Board's decision.

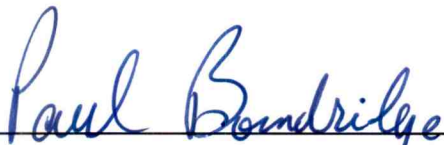
DATED at St. John's, Newfoundland and Labrador, this 8<sup>th</sup> of July, 2022.



Clifford Johnston, MCIP, Chair  
Eastern Newfoundland Regional Appeal Board



Carol Ann Smith, Member  
Eastern Newfoundland Regional Appeal Board



Paul Boudridge, MCIP, Member  
Eastern Newfoundland Regional Appeal Board