

**URBAN AND RURAL PLANNING ACT, 2000**

**Section 40-46**

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

Appeal #: 15-006-083-006  
 Adjudicator: Christopher Forbes  
 Appellant(s): Jim Bouzane  
 Respondent / Authority: Town of Conception Bay South  
 Date of Hearing: December 11, 2023  
 Start/End Time : 9:00 a.m. – 10:00 a.m.

**In Attendance**

Appellant: Jim Bouzane  
 Respondent/Authority: Corrie Davis, Director of Planning & Development,  
 Town of Conception Bay South  
 Ed Jarvis, Municipal Enforcement Manager  
 Town of Conception Bay South  
 Appeal Officer: Robert Cotter, Departmental Program Coordinator,  
 Municipal and Provincial Affairs  
 Technical Advisor: Faith Ford, Planner, MCIP,  
 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*, and the *Town of Conception Bay South Development Regulations 2011-2021* when it deferred consideration of an application to expand an accessory building at 193 Seal Cove Road, Conception Bay South, until flood plain mapping is completed in relation to Billy Brook and the surrounding area

### **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 her report dated November 2, 2023 noting that, according to the Town of Conception Bay South (the “Authority”), the Appellant’s Application for the extension of an existing accessory building on the subject property was received by the Authority on January 17, 2023. The location of the accessory building was proposed to be near the waterway buffer for Billy Brook. The proposed lot coverage required discretionary approval and public consultation.

The Authority submitted that, during the consultation period, it received three submissions indicating concerns about flooding in the area and the negative impacts of development near Billy Brook. The Authority contended it notified the Appellant of flooding concerns and the Appellant responded to them, indicating the proposed garage would not impact flooding or Billy Brook, after which the Application went to the Authority’s Planning and Development Committee for discussion. According to the Technical Advisor, on March 7, 2023, the Town Council for the Authority resolved to defer the Application until flood plain mapping was completed for Billy Brook.

The Authority submits it sent a letter to the Appellant on March 10, 2023, notifying him of Council’s decision to defer the Application. In response to this, the Appellant submitted a revised plan with a new proposed location for the accessory building.

The Authority further submits that on March 13, 2023, the Application returned to the Authority’s Planning and Development Committee; however, it was recommended that the deferral of the Application remain in place. Council subsequently resolved to accept this recommendation at its regular meeting on March 21, 2023. Thereafter, the Appellant was formally notified of Council’s decision by letter issued on April 11, 2023.

The Technical Advisor referenced section 12 of the Act which stipulates that municipalities, councils and persons undertaking a development within a planning area are governed by applicable plan and development regulations, and further noted that the definition of “development” in the Act includes the construction of the proposed accessory building.

Sections 3 and 4 of the Act enable the creation of provincial land use policies and the Technical Advisor referenced the Provincial Land Use Policy for Flood Risk Areas, which provides a

framework for development in flood risk areas. It was noted that, under this Policy, development vulnerable to flood damage is discouraged in areas that are known to be subject to localized flooding but have not yet been mapped. The Technical Advisor confirmed that the Authority was responsible for controlling development in flood risk areas within its planning area, and implementing regulations and policies that are consistent with the provincial land use policy.

Reference was made by the Technical Advisor to section 5.34(1) of the Authority's Development Regulations, which prohibits development within the 15 m waterway buffer and provides that the Authority may require larger buffer areas around watercourses.

The Technical Advisor referenced the submission of the Authority that there is a history of flooding in the Billy Brook area and the fact that Council had engaged a consultant to complete a storm water study in 2022. At time of the Appellant's application, flood risk mapping for the area had been undertaken but a final report had not yet been submitted.

Lastly, the Technical Advisor referenced the discretion of the Authority to defer consideration of an application for development under sections 4.9(2) and (4) of the Town's Development Regulations.

### **The Appellant's Presentation and Grounds**

The primary ground of appeal argued by the Appellant was that the Authority's exercise of its discretion under section 4.9 of the Town's Development Regulations was unreasonable.

The Appellant noted that a permit for construction of an accessory building had been issued by the Town to the previous owner of the subject property in January, 2021. The current Development Regulations are the same as those that were in effect at the time this permit was issued so it is unclear why the Appellant's Application needs to be deferred.

The Appellant submitted that he is trying to build a garage on the subject property. In the past year and a half, he has experienced a lot of rain, and Billy Brook at most has risen approximately one to two feet. The owner of the neighbouring property to the west has lived on his property for approximately 40 years and claims never to have had water on his lawn, and that property is approximately five to seven feet lower than the subject property.

While the owners of neighbouring properties to the west have experienced flooding, the Appellant submitted that this may be due to significant infilling on and around the Garden Road area, which is to the west of the subject property, rather than flooding from Billy Brook.

The Appellant also submits that the construction of an accessory building on his property, regardless of the location, will not in any way affect the surrounding area. He has proposed a grade on slab, so no basement or excavation will be dug. There will also be no change in elevation. In his experience, Billy Brook has never risen onto the property, so construction of the accessory building will not create any concerns.

### **Authority's Presentation**

The Authority submitted that the Appeal raises two specific issues, namely whether it has the discretion to defer the Application and, if so, whether it exercised that discretion reasonably.

With respect to the first issue, the Authority submitted that section 4.9 of the Town's Development Authority makes it clear that the Authority has the discretion to defer.

With respect to the second issue, the Authority submitted that Council had determined, prior to receipt of the Application, that delineation of the flood risk areas in and around Billy Brook was necessary. Specifically, in 2021, Council engaged a consultant to undertake a stormwater management study for the area. This was completed in 2022, whereupon Council commissioned additional work to delineate flood plain mapping. The Authority confirmed this mapping will identify flood risk areas (based on a 1:100 year probability). The work related to this mapping was completed in summer of 2023, with a final report expected to be submitted in late 2023 or early 2024, potentially before Christmas, 2023.

The Authority referenced the provincial Land Use Policy for Flood Risk Areas and, in particular, the requirement it places on municipalities to have policies and regulations consistent with that policy for areas subject to localized flooding. It also referenced the Town's Municipal Plan, which requires the Town to undertake studies to define flood plains along rivers and streams where flooding is known to occur.

Further, the Town's Development Regulations prohibit development within buffer areas around watercourses. While the Regulations specifically prohibit development within 15 m of such buffer areas, the Authority has the discretion to require larger buffer areas.

The Authority submitted that Billy Brook follows the southeast boundary of the subject property. There is a 3m drop in grade from the north to the south of the subject property. Further, most of the subject property is within 1m elevation of Billy Brook where it borders the property. As such, it is prudent to await the final report delineating flood risk area limits in order to assess the Application.

### **Analysis**

The following questions arise from this Appeal:

#### **1. Did the Town have the authority to defer the Appellant's Application?**

Yes. Subsection 4.9(2) of the Town's Development Regulations expressly states that the Authority may defer consideration of an application "where additional information or consideration is required." Further, subsection 4.9(4) of the Regulations states that the Authority may defer decisions on an application "where the Authority has directed that a planning study or other similar study pertaining to the future use and development" of the specific area be undertaken.

The Authority states it commissioned a stormwater management study for the Billy Brook watershed in 2021. This study was completed in 2022. Thereafter, in October of 2022, according to the Authority, Council commissioned further work to delineate flood plain mapping in that area. As such, the Authority had the discretion under subsection 4.9 to defer a decision on the Appellant's Application while it awaits the outcome of that work.

**2. If yes, was Council's decision to defer the Application in accordance with, and a reasonable use of, the Town's authority?**

Yes. Based on the information provided by the Technical Advisor and the Authority, I find that the Town is directed by provincial policy to undertake flood risk assessment in areas where there has previously been localized flooding. In particular, given the history of the area, it is reasonable for the Town to defer the Application pending receipt of information confirming the flood risk boundaries in the area.

While the Appellant contends that construction of an accessory building would not in any way affect the surrounding areas so far as flood risk is concerned, the flood plain mapping being undertaken by the Town will, according to the Authority, show flood risk boundaries based on a 1:25 and 1:100 year probability risk. As such, the Appellant's experience, and even potentially the experience of his neighbour to the east, may be inconsistent with what the flood risk mapping eventually shows.

Further, while the flooding experienced by neighbours of the Appellant to the west may be due to reasons other than flooding from Billy Brook (such as the infilling in and around Garden Road), it is not clear that Billy Brook does not contribute to or play a part in that flooding. Again, flood risk mapping will be of assistance in clarifying this.

No evidence was provided at the hearing that shows the Authority acted in error or beyond its authority in its decision to defer consideration of the Application, or that procedural requirements were not followed in the course of the Application process. Further, no evidence was provided indicating the Authority acted in a biased manner or otherwise contrary to principles of natural justice. I also find there was no dispute between the parties as to the basic facts in issue and, as such, Council's decision was not based on any material factual error.

**Decision of 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.

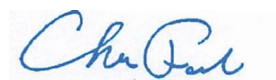
### **Order**

The Adjudicator dismisses the Appeal and orders that the decision of the Council of the Town of Conception Bay South made March 7, 2023 (as Resolution #23-074) to defer consideration of the application for construction of an accessory building at 193 Seal Cove Road pending completion of flood plain mapping for Billy Brook, be confirmed.

The Authority and the Appellant(s) are bound by this decision.

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Adjudicator may be appealed to the Supreme Court of Newfoundland and Labrador on a question of law or jurisdiction. If this action is contemplated, the appeal must be filed no later than ten (10) days after the Adjudicator's decision has been received by the Appellant(s).

DATED at St. John's, Newfoundland and Labrador, this 2<sup>nd</sup> day of January 2024.



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