

**URBAN AND RURAL PLANNING ACT, 2000**

**Section 40-46**

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

Appeal # : **15-006-087-009**

Adjudicator: Garreth McGrath

Appellant(s): Donald Fitzpatrick

Respondent / Authority: Town of Conception Bay South

Date of Hearing: 27 March 2024

Start/End Time : 14:00-15:00

**In Attendance**

Appellant: Donald Fitzpatrick

Appellant Representative(s): Geoffrey Boyd

Respondent/Authority: Town of Conception Bay South

Respondent Representative(s): Cory Davis, Daniel Barrett

Proponent/Developer: N/A

Developer Representative: N/A

Interested Party: N/A

Appeal Officer: Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs

Technical Advisor: Faith Ford

**Adjudicator's Role**

The role of the Adjudicator is to determine if the Authority acted in accordance with the Urban and Rural Planning Act, 2000 and Town of Conception Bay South Municipal Plan and Development Regulations when it issued a permit that required the Appellant to remove a gate at 45 Atkins Road (Burnt Island), CBS, NL.

## **Hearing Presentations**

### **Planner's Presentation**

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness.

Under the Rules of Procedure:

(a) there shall be a technical advisor to the Adjudicator who shall provide data relative to the Municipal Plan or other Scheme in effect and an interpretation on whether the proposal under appeal conforms, is contrary to, or could be discretionarily approved pursuant to the Municipal Plan, Scheme or Regulations.

The Planner from Municipal and Provincial Affairs shall provide the framework with respect to the appeals process under the Urban and Rural Planning Act, 2000 and provide an overview of how an application was received from a developer and processed by Council as prescribed in their roles and responsibilities.

The Adjudicator heard from the planner that this appeal relates to a permit that required the Appellant to remove a gate at 45 Atkins Road (Burnt Island), CBS, Newfoundland and Labrador as a condition of repairing/replacing the stone armor seawall on said property. The planner outlined the Appellant's grounds for appeal in the appeals package as:

- 1) The town does not have the authority to require the gate be removed or relocated as a condition of approval for the repair of an armor stone seawall and rock border.

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

The presentation of the Appellant focused on specifically what the intention of the application was for to the Authority. Specifically, this was an application related to the stone armor seawall on the property and that the application has nothing to do with the gate on the property which had previously been approved by the Authority in 2010.

### **Authority's Presentation**

The Authority's presentation focused on the fact that the permitting process is discretionary. The Authority in their power have the discretion to attach any conditions that they should see fit to a permit to ensure that the permit meets all requirements of the Town Plan, Bylaws, and Regulations.

### **Adjudicator's Analysis**

The Adjudicator reviewed The Urban and Rural Planning Act, 2000 as well as the Town of CBS Municipal Plan and Development Regulations and determined the following:

## Question/Answer

Q: Does the Town have authority to issue a conditional “Development Approval”?

Because both parties addressed this issue, I find it necessary to note that I agree with both of the parties submissions. There is no question in my mind whether there is the authority for a Town to issue a conditional development approval or permit. This is well accepted law before this body and both parties understand this. As such, the answer is clearly yes that a conditional “Development Approval” may be issued by an Authority.

Q: Is the condition to remove the gate a reasonable and permissible condition to attach to a “Development Approval?”

As stated, whether the Authority may issue a permit is not a question that needs to be answered, but instead an interesting question arises from these submissions. Is it reasonable or permissible to require that a gate be removed when was not included by the Appellant in the original application to council and is unrelated to the work being done?

When looking at reasonableness of an order, it is fair to consider the purpose of the application and what the outcomes will be if the permit is performed or not performed. The gate that the Authority is requesting be removed was a gate that was already extant. The permit allowing the gate was originally approved by the Authority pursuant to Permit No. 10-F-130 in August 2010. This permit allowed the Appellant to install the gate originally.

If the Appellant were to agree to the conditions of the permit, the Appellant would then have to remove a gate which had been in place without any removal orders issued since August 2010. However, where the permit crosses the threshold into being unreasonable, is that if the Appellant does not perform the requirements of the permit, their actions would go against the Town Plan that the Authority cites as the basis for their ability to issue this order. The Authority in their submissions state that the intention of the order is to act in line with Policy 4.3.10 of the Town’s Municipal Plan to remove the fence. Specifically:

- 1. In considering proposals for development adjacent to the coastline or shoreline of ponds, Council will require that existing access points to shoreline areas are retained.* (Emphasis in original)

If the intention of the Authority was to ensure that existing access points to the shoreline were retained, they would be looking to have the gate removed regardless of the repairs to the stone armor seawall. If the Appellant was to decide not to go forward with their repair of the stone armor wall, the Gate would still be allowed to remain there. There is no pending removal order for the gate. The Authority has, in essence, defeated their own goals by if they were to not allow the Appellant to perform the repairs to the property. In attempting to “require existing access points to the shoreline are retained” the Authority has in essence crafted an order that if not followed would, from their submissions, leave reduced the access points to the shoreline.

The intention of the Town Plan as cited by the Authority in Policy 4.3.10 of the Town Plan looks to ensure that existing access points to the shoreline are retained. The language used here is specifically that the goal is to ensure “existing access points to the shoreline are retained.” The fence was approved in August of 2010 and the application to repair the stone armor seawall was made in January of 2023 and the approval was granted in July 2023. The existing shoreline access by this point has clearly become the shoreline access that was existing after the Authority approved the gate to be built in 2010, not the shoreline access as it had been at times prior to 2010. If this was a goal of the Authority, then they had the opportunity to make conditions or deny construction of the gate in 2010, not attach the conditions to a permit to repair a stone armor wall 13 years later.

This is unreasonable as it essentially means that should the Appellant not go through with the work permitted, the Authority has acted contrary to their own Town Plan. Logically, this is not an order that is reasonable as the underlying logic for the application defeats the purposes of the Town Plan.

The Appellant in their submission cite *Yates v Central Newfoundland (Regional Appeal Board)*, 2013 NLTD(G) 173 at para 25:

“Any decision made by a town council or other regional authority that involves and exercise of discretion must be made on the basis of a proper understanding of the request.”

The Authority in issuing their decision must properly understand the request being made. The request of the Appellant had nothing to do with the gate on their property. The gate had already been approved in a prior application to the Authority. Instead the Authority lumped in this nearby gate to the application as they saw an opportunity to deal with the gate without having to issue a removal order or exercise some other power to have the gate removed. As such, it is clear that there was not a proper understanding of the request being made of the Authority, and instead they substituted their own scope for the request being made to remove a gate which might otherwise be more difficult to remove with their other powers.

Q: Is there any breach of natural justice?

Since the issuance of this permit there has been no evidence that the Authority has ever used any of their powers to issue a removal order for the gate. Instead, for a period of nearly 13 years, the gate remained on the property and never became an issue for the Authority until the time that an application was made for the repair of the stone armor wall. Then, instead of relying on any other powers available to the Authority, the Authority attaches a condition to remove the gate to the application to repair a stone armor wall. It is the position of the Adjudicator that this is a breach of natural justice.

The Appellant has been permitted to have a gate on the property for a period of 13 years, an extraordinary time. Since the Authority never issued any removal order in the 13 years after approving the gate, the Appellant has come to rely on the position that the gate is acceptable. There has been one minor disagreement over a sign that was posted to the gate, which the Appellant removed. To now request that the Appellant remove the gate as a condition of a permit

for an unrelated part of the property cannot be a reasonable condition of the permit and as such is a breach of the natural justice of the Appellant.

### Adjudicator's Conclusion

#### **Urban and Rural Planning Act, 2000** Decisions of adjudicator

**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.

After reviewing the information presented, the Adjudicator concludes that the Authority acted unreasonably by attaching conditions to remove a gate at 45 Atkins Road (Burnt Island), CBS, Newfoundland and Labrador to the application to repair the stone armor seawall. Requiring work unrelated to the application is unreasonable and the condition cannot stand. As well the Adjudicator finds that the Authority breached the natural justice owed to the Appellant in attaching this condition to remove a fence that had been approved by the Authority some 13 years prior. As such, that Adjudicator is exercising their authority and discretion to vary the permit of the Authority.

The Adjudicator finds that Condition 4 and any other requirement to remove the gate at 45 Atkins Road of Application 2343, reproduced and found at page 62 of the appeal package, be struck and the permit be varied but still subject to the other conditions found reproduced on pages 62-64 of the appeal package as this condition is both unreasonable and a breach of the Appellant's natural justice.

That is to say that while this decision has been varied but that the other conditions of the permit are still valid. The Adjudicator has not had the question of any other condition brought to their attention (other than Condition 5 for a private property sign which the Appellant had already

removed rendering the issue moot) and as such the other conditions to the permit must be seen as valid. If the Authority wishes to remove the fence and gate from the property, the Authority has other powers available to them and the Adjudicator would invite them to properly exercise that authority.

### Order

The Adjudicator orders that the decision of the Town of Conception Bay South is to be varied.

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

In accordance with section 45(2) of the Urban and Rural Planning Act, 2000, the Adjudicator further orders the Authority pay an amount of money equal to the appeal filing fee of \$230.00 to the Appellant.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this 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 16 April 2024.

Garreth McGrath

Adjudicator

Urban and Rural Planning Act, 2000