URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #:	15-006-083-007
Adjudicator:	Christopher Forbes
Appellant(s):	Scott Davis
Respondent / Authority:	Town of Conception Bay South
Date of Hearing:	December 11, 2023
Start/End Time :	10:30 a.m. – 11:35 a.m.

In Attendance

Appellant:	Scott Davis
Respondent/Authority:	Corrie Davis, Director of Planning & Development, Town of Conception Bay South Sascha Malloy, Municipal Enforcement Officer 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 *Municipalities Act, 1999*, the *Town of Conception Bay South Development Regulations 2011-2021*, the *Town of Conception Bay South Waste Disposal and Property Regulations*, and the *Town of Conception Bay South Fence Regulations* when it issued an Order on March 24, 2023, to remove the trailer, truck cap and wood piles from the front of the property at 837 Conception Bay Highway in Conception Bay South, remove all other miscellaneous debris from the property, and obtain a permit to repair or remove the fence on the property.

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 20, 2023, noting that a complaint was received by the Town of Conception Bay South (the "Authority") on October 31, 2022 of an unsightly property at 837 Conception Bay Highway. The Authority indicated that its staff visited the subject property and advised the Appellant they were in breach of the Town's *Waste Disposal and Property Regulations*. According to the Authority, the Appellant was given two weeks in which to comply and bring the property up to standards. Thereafter, another complaint was received by the Authority on December 13, 2022. Again, according to the Authority, its staff visited the subject property and noted no further improvement. The record shows the Authority delivered a letter to the Appellant on January 17, 2023 that stated the Appellant was in breach of those *Regulations* and directed the Appellant to bring the property up to standards within fourteen days. According to the Town, the Appellant then removed some items and debris from the property.

The Technical Advisor indicated that staff from the Authority visited the subject property again on February 23, 2023, and indicated to the Appellant additional work was needed. The Appellant was apparently given a further 2-3 weeks to do complete this work.

According to the Authority, the Order in issue was sent to the Appellant via registered mail on March 31, 2023 and received by the Appellant on April 11, 2023. The Appeal was then filed in accordance with the requirements set out in the Act.

The Technical Advisor outlined the definition of "development" set out in the Act, noting it includes the making of a material change in the use or intensity of the use of land. Sections 4.1 and 4.2 of the Town's *Development Regulations* require that a permit be obtained before a development can be undertaken and mandate that development be in accordance with the Town's *Development Regulations* and *Municipal Plan*.

The Order in issue references section 5.21 of the Town's *Development Regulations*, which prohibits outdoor storage in front yards unless certain exceptions are met. The Technical Advisor noted that "outdoor storage" is in turn defined in those *Regulations* as meaning the storage of materials, equipment or other items not intended for immediate sale by locating them outside.

The Technical Advisor also made reference to the Town's *Waste Disposal and Property Regulations*. Sections 3.1 and 3.2 of those *Regulations* are cited in the Order in issue and require the owner and occupant of a residential property to maintain the property in a clean and sanitary condition, free from waste material, garbage and other debris.

The Town's *Fence Regulations* were also cited by the Technical Advisor. The Order in issue required the Appellant to obtain a permit either to repair or dismantle the fence located on the subject property. The Technical Advisor noted that section 10 of the *Fence Regulations*, cited in the Order, requires anyone who owns a fence to maintain it in a good state of repair. Further, section 5 of those *Regulations* requires anyone who is erecting or repairing a fence to obtain a permit to do so.

Lastly, the Technical Advisor reviewed the procedure followed by the Authority in issuing the Order, noting in particular the power of the Authority pursuant to section 5.21 of the Town's *Development Regulations* and section 102 of the Act.

The Appellant's Presentation and Grounds

The Appellant argued that the Order issued by the Authority is unrealistic and that the Authority continually required him to do more. He indicated that, with time, he had been cleaning up the items from his front yard, but winter weather had delayed this.

He also argued that the Order required him to remove a utility trailer and truck cap from his front lawn, but that there was no ability to move these items into his backyard because of the small amount of space between his front porch and the upward grade along his property line. There was also limited space in his backyard for storage.

According to the Appellant, the majority of the items still on his property are no longer visible from the highway that runs along the front of his property.

With respect to the requirement to repair or dismantle his fence, the Appellant submitted that the fence running along the front of his property, adjacent the sidewalk and highway, had been damaged by a snow plow and he had removed part of it without knowing a permit was required to do so. Over time, he has also removed other sections (for example, some of his fencing was damaged by drivers using the neighbouring parking lot).

Authority's Presentation

The Authority submitted that the Appeal raises two particular issues: first, whether the Town had the authority to make the Order in issue and second, if so, did the Town properly use that authority in a reasonable manner such that the Order is valid?

With respect to the first issue, the Authority submitted that sections 102(1) of the Act and 404(1)(l) of the *Municipalities Act, 1999* clearly give this power to the Authority.

With respect to the second issue, the Authority submitted that multiple attempts were made with the Appellant to resolve the issues with the subject property before issuing an Order. The initial complaint about the subject property was received from a resident through the Mayor in October,

2022. Ms. Malloy attended the property that day and took photographs. She also left her business card and was contacted the next day by the Appellant. There were discussions about the condition of the subject property and the need for items to be removed; however, as of January, 2023, no improvement had been made. At that time, a written warning was given to the Appellant explaining what had to be done to bring the property into compliance with the Town's *Waste Disposal and Property Regulations.* Certain improvements occurred following this and Ms. Malloy made suggestions to the Appellant on how to reorganize his backyard to permit more storage; however, thereafter the improvements stopped, necessitating the issuance of the Order by the Town.

The Authority submitted that the storage of materials on a property falls within the definition of "development", since it involves a material change in the use of land. It also argued that the cumulative effect of the various provisions cited in the Order and otherwise contained in the Act, the *Municipalities Act, 1999,* and the regulations referred to above is that the unsightly storage of materials in a front yard is not permitted.

Lastly, the Authority noted that no evidence had been put forward to suggest that, in issuing the Order, Council had acted contrary to or in excess of its authority, or with an erroneous view of the facts or a bias towards the Appellant.

Analysis

The following questions arise from this Appeal:

1. **Did the Town have the authority to issue the Order of March 24, 2023?**

Yes. The Authority had the discretion to issue the Order pursuant to section 102(1) of the Act and/or section 404(1)(l) of the *Municipalities Act, 1999.*

With respect to section 102(1) of the Act, the Authority argues that the storage on the subject property of "the trailer, truck cap and wood piles … and other miscellaneous debris," as referenced in the Order, constituted "the making of a material change in the use of land … or premises" pursuant to the definition of "development" in section 2(g) of the Act such that the Town's *Development Regulations* applied. Pursuant to section 4.1 of those *Regulations*, the Appellant was required to obtain approval from the Town prior to undertaking such a material change in the use of his property. According to the Authority, no such approval was obtained by the Appellant.

Further, section 4.2 of the Town's *Development Regulations* requires all "development" to be carried out and maintained in accordance with those *Regulations*. Section 5.21 of those *Regulations* prohibits outdoor storage in front yards unless certain exceptions are met (which are inapplicable in this Appeal). The definition of "outdoor storage" found in section 75 of those *Regulations* includes "materials," "equipment," and "other items which are not intended for immediate sale, by locating them outside." This would include the "trailer, truck cap and wood piles … and other miscellaneous debris", as referenced in the Order.

Accordingly, the storage on the subject property of "the trailer, truck cap and wood piles … and other miscellaneous debris" constituted a "development" that breached the provisions of the Town's *Development Regulations* requiring the approval of the Town and requiring that the "development" be carried out in accordance with those *Regulations*.

Pursuant to section 102(1) of the Act, the Authority has the discretion to order a person undertaking a development contrary to development regulations to "remove" the development "and restore the area to its original state." Accordingly, I agree with the Authority that it had the authority to issue the Order pursuant to that provision of the Act.

The Authority also cites section 5.13 of the Town's *Development Regulations*, which purports to give to the Authority the discretion to order a property "cleaned up" under the Town's *Waste Disposal and Property Regulations* "where any development or use of land, in the opinion of the Authority, is unsightly."

Section 3.1 of the Town's *Waste Disposal and Property Regulations* requires the owner and occupant of a residential property to "maintain the property in a clean and sanitary condition." Likewise, section 3.2 of those *Regulations* requires that all parts of a property "be kept clean and free from (a) waste material, garbage and other debris." "Waste material" is defined in section 2(h) of those *Regulations* as including "refuse, garbage …, rubbish, scrap, and discarded material."

As noted above, section 102(1) of the Act gives to the Town the authority to require the removal of a development undertaken contrary to the Town's *Development Regulations.* Since the subject property was "unsightly", in the opinion of council, and not in a "clean and sanitary condition" (per section 3.1 of the *Waste Disposal and Property Regulations*) and was not "clean and free from waste material, garbage and other debris" (per section 3.2 of those *Regulations*), the development was in violation of section 5.13 of the Town's *Development Regulations.* The Town therefore had the authority to issue an order pursuant to section 102(1) of the Act requiring the removal of that development.

The Town also submits that section 404(1)(l) of the *Municipalities Act, 1999*, applies and permitted Council to make the Order in issue. That section applies where "things" are on a property "which may be a hazard to public health and safety or which adversely affect surrounding properties." The "trailer, truck cap and wood piles … and other miscellaneous debris" that are the subject of the Order are "things" that "adversely affect surrounding properties." There can be no question, in looking at the photographs contained within the Appeal Package and hearing the evidence of Ms. Malloy, that these items "adversely affect surrounding properties." Accordingly, the Town was authorized under section 404(1)(l) to order the removal of the items listed in the Order.

With respect to the issue of fencing, section 10 of the Town's *Fence Regulations*, passed pursuant to 414(2) of the *Municipalities Act, 1999*, requires every person owning a fence to maintain it "in a good state of repair," which includes ensuring the fence "does not present an unsightly appearance deleterious to abutting land or to the neighbourhood." Pursuant to section 404(1)(l) of the *Municipalities Act, 1999*, the Town was permitted to issue an order requiring the

removal of the fencing on the subject property due to the fact its condition would "adversely affect surrounding properties." The authority under the express wording of section 404(1)(l) does not extend, however, to ordering a person to obtain a permit to repair the fencing.

Having said this, constructing or repairing a fence falls within the definition of "development" in the Act (per sections 2(c) and 2(g)). Section 4.1 of the Town's *Development Regulations* requires that a permit be obtained prior to undertaking such a "development." Further, section 5.9 of those *Regulations* stipulates that no fence shall be repaired unless a permit for construction has been issued by the Town. The Authority also has the power under section 102(1) of the Act to order that anyone undertaking a development in contravention of applicable development regulations stop doing so. The end result of these provisions is that the Town has the express authority under the Act to order a person to stop undertaking repairs to a fence where they do not have a permit to do so.

Does this mean the Authority has the power to require a person to undertake those repairs (and as a corollary, to obtain a permit to do so)? In my view, it does. The definition of "development" in the Act is a broad one and includes, for example, the making of a "material change in the use of land" and a "material change in the use of buildings." "Building" is defined as including "a structure … placed on … land." This would include a fence. Accordingly, permitting a fence to become dilapidated or to fall down, so long as this is material, constitutes a "development". A municipality is therefore authorized under section 102(1) of the Act to order a person to remove or fill in the material change in the structure and to "restore the site … to its original state." While the wording is somewhat awkward, this interpretation is in keeping with the "broad and purposive approach to statutory interpretation" directed by applicable case law.

2. **If yes, was the issuance of the Order in issue in accordance with, and a reasonable exercise of, the Town's authority?**

Yes.

My discussion here is divided into three separate issues: (1) whether the fact the Order did not fully set out the legislative provisions relied upon by the Authority has any bearing on the validity of the Order; (2) whether the reference to "miscellaneous debris" in the Order has any bearing on the validity of the Order; and (3) whether the Order was in accordance with and a reasonable exercise of the Town's authority.

(1) Did the fact that the Order did not fully set out the legislative provisions relied upon by the Authority have any bearing on the validity of the Order?

As noted above, the Town had the authority to issue the Order to remove the various items pursuant to both section 102(1) of the Act and section 404(1)(l) of the *Municipalities Act, 1999*.

The Order in issue is not perfectly drafted. It makes reference to various legislative provisions, specifically section 404(1) of the *Municipalities Act, 1999*, section 5.21 of the Town's *Development Regulations,* sections 3.1 and 3.2 of the Town's *Waste Disposal and Property Regulations*, section 10 of the Town's *Fence Regulations*, section 404(5) of the *Municipalities Act, 1999* and section 106 of the Act. The *Waste Disposal and Property Regulations* and *Fence*

Regulations were all passed pursuant to the *Municipalities Act, 1999*. Section 5.21 of the *Development Regulations*, however, was passed pursuant to the Act, and the Order makes no explicit reference to section 102(1) of the Act, which gives the Town power to issue an order in respect of "development" that is undertaken in breach of its *Development Regulations*. The Order does make reference to section 106 of the Act, which makes it an offence to contravene the Act or a regulation made under it.

For these reasons, one might argue that the Order insufficiently set out the basis on which it was issued and/or is confusing and as such should be deemed invalid. However, the law does not require a standard of perfection in such matters. Nothing in the governing legislation expressly requires that an Order issued in these circumstances contain a reference to each specific legislative provision relied upon or that potentially applies to the directive contained in the Order. Accordingly, the question is whether the Order is drafted in such a way as to be procedurally fair to the person to whom it is issued and whether its terms could create a real possibility of prejudice to that person.

In *Tuteckyj v. Winnipeg (City)*, 2012 MBCA 100, which was followed by at least one court in this province (see *58663 Newfoundland and Labrador Ltd. v. Kippens (Town)*, 2018 NLSC 223), the Manitoba Court of Appeal considered the validity of terms of a removal order with respect to unsightly premises. The Court noted the following at p. 21:

> "The sufficiency of the notice must be determined in the context of the facts of the case rather than looking at the notice in isolation. In this case, the trial judge, who heard the evidence, found that Mr. Tuteckyj knew what he was required to do and that the wording of the order was reasonable and sufficiently specific to inform him of what he was required to do. …"

In this Appeal, I find that the omission of the reference to section 102(1) of the Act from the terms of the Order does not create a real possibility of prejudice to the Appellant. It is clear the Appellant knew what was expected of him. Ms. Malloy visited him and spoke with him on several occasions and outlined the problems with the condition of his property. The Town had also sent correspondence to him prior to the issuance of the Order outlining what it required him to do. He knew he had to clean up the property. Further, even though there was no reference to section 102(1) in the Order, there was a reference to section 106 of the Act and section 5.21 of the Town's *Development Regulations*, which by implication brings the Act into play at least insofar as the removal of the debris on the property is concerned.

In addition the Order properly cites section 404(1) of the *Municipalities Act, 1999*, and the various *Regulations* made under that legislation, with respect to the part of the Order requiring the removal of various items.

With respect to the issue of the fence, I find that the Order does not fully set out the legislative authority under which the Town has the power to require the Appellant to obtain a permit to repair or dismantle the existing fence. However, applying the same standard outlined above, I find that the wording of the Order is reasonable and sufficiently specific to inform the Appellant of what he is required to do. The fact remains that the Town has the authority to require the

Appellant to repair or dismantle the fence, and that the Appellant must obtain a permit before doing so.

(2) Does the reference in the Order to "miscellaneous debris" have any bearing on the validity of the Order?

One might also argue that the reference to "miscellaneous debris" in the Order is too vague as to be capable of enforcement. Indeed, in *Janes v. Embree (Town)*, 2022 NLCA 36, the Newfoundland and Labrador Court of Appeal commented as follows at para. 18 and 19:

> "[18] Before proceeding with a consideration of the legislative provisions for purposes of this case, a comment on the scope of authority granted to a council is necessary. Care must be taken to avoid imprecise language when a council takes action under section 404. In this case, the Town and the trial judge referred to "debris", which is not language found in the legislation and is not an appropriate descriptor.
>
> [19] Under section 404, a council has authority only to make an order for the removal of items that fall within those specified in the legislation. Accordingly, the order must clearly identify with specific language any items that are properly characterized as 'solid waste, noxious substances and substances or things which may be a hazard to public health and safety or which adversely affects surrounding properties.' This is necessary because a lack of precision may lead to confusion and misunderstanding and the consequent destruction or removal of items for which authority is not granted by the legislation."

Again, however, I find in the circumstances that "miscellaneous debris" is an appropriate descriptor of the items located on the subject property, and that "miscellaneous debris" constitutes "things" for the purpose of section 404. A review of the photographs contained at pages 81-96 of the Appeal Package, which were submitted by the Authority, shows that, at or about the date of issuance of the Order, the subject property was overwhelmed with a large variety of materials, including windows, wood and metal scrap and other items the nature of which is not readily identifiable. These items are clearly unsightly and constitute "waste material" under the Town's *Waste Disposal and Property Regulations.* They also constitute "things … which adversely affect surrounding properties" for the purpose of section 404(1) of the *Municipalities Act, 1999.* As the Court of Appeal noted in the *Tuteckyj* case, it would not have been reasonable in the circumstances for the Town to "make a list of all of the items to be removed – there were simply too many items in the yard" (p. 20). Indeed, in light of the snow covering the property, the Town would have had an even harder time doing this, and it would have been unreasonable to expect the Town to add a new item to the Order every time it was discovered in clearing away the snow.

I also find the Authority acted in good faith throughout this process. As such, the reference in the Order to "miscellaneous debris" was fully capable of being understood and applied. Ms. Malloy repeatedly showed a willingness to work with the Appellant and even made suggestions on how to re-organize his rear yard to accommodate some of the items such as the woodpile.

I therefore find that the Order is not invalidated by the reference in it to "miscellaneous debris."

(3) Was the Order in accordance with and a reasonable exercise of the Town's authority?

I find that no evidence was provided at the hearing showing the Authority acted in error or beyond its authority in issuing the Order or that procedural requirements were not appropriately followed. 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 with respect to the issuance of the Order was not based on any material factual error.

The decision to issue a removal order is a discretionary decision of Council. I am generally not permitted to interfere with such a decision, barring an error of law. In that regard, I refer to section 44(2) of the Act.

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:
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> (a) confirm, reverse or vary the decision that is the subject of the appeal;
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> (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.

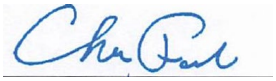
Order

The Adjudicator orders that the issuance of the Order of March 24, 2023 be upheld and 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 4th day of January, 2024.



Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000