URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #:	15-006-087-024
Adjudicator:	Chris Forbes
Appellant(s):	Ches Penney
Respondent/Authority:	Town of Conception Bay South
Date of Hearing:	March 11, 2024
Start/End Time:	2:00 p.m. – 2:50 p.m.

In Attendance

Appellant:	Ches Penney
Respondent/Authority:	Corrie Davis, Director of Planning & Development, Town of Conception Bay South Daniel Barrett, Development Coordinator, Town of Conception Bay South
Interested Party:	Pierre Gauvreau
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 Development Regulations 2011-2021* and the *Town of Conception Bay South Municipal Plan 2011-2021* when it refused an application to renovate and construct an addition to an existing structure at 59 Villa Nova Road on September 5, 2023.

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 February 26, 2024, noting that, on August 1, 2023, the Authority received an application on behalf of the Appellant to renovate and construct an addition to an existing structure at 59 Villa Nova Road (also referenced in the materials before me as 55B Villa Nova Road). The Technical Advisor noted that a recommendation was made by the Authority's Planning and Development Committee on August 28, 2023, to refuse the application on the grounds it did not meet the requirements imposed under the Town's *Development Regulations* for residential dwellings. Council subsequently resolved to refuse the application at its regular meeting on September 5, 2023. The Technical Advisor sent notice of the refusal by letter on September 13, 2023.

The Appellant's submission indicates he initiated the appeal on September 18, 2023. The submission includes a receipt of the same date for payment of the appeal fee. The Appellant submitted the completed appeal form on October 3, 2023.

The Technical Advisor then reviewed the definition of "development" set out in section 2(g) of the Act. She indicated that the subject property was located within a "high hazard vulnerability area" as identified in the Authority's *Municipal Plan* and is zoned residential low density (R1) under the Authority's *Development Regulations* and *Land Use Zoning Map.* Single dwelling uses are a permitted use in that zone. According to the Technical Advisor, however, section 5.16 of the *Development Regulations* indicates that no residential building is to be erected unless the lot on which it is situated fronts directly onto a street constructed according to the Town's standards. Similarly, section 4.3.18 of the *Municipal Plan* states that residential developments shall have direct frontage on publicly owned and maintained streets.

As the Technical Advisor noted, the Authority's submission indicated the existing structure on the subject property was approved as an accessory building (boathouse) in November 2001 when the subject property and 55 Villa Nova Road were under the same ownership. According to the Technical Advisor, the Authority submitted that the property (civic address 3757 Villa Nova Road) was subdivided at some point.

The Technical Advisor referenced section 5.3.4 of the *Development Regulations* and its prohibition against using accessory buildings for human habitation. She also referenced 5.10 (1)(a) of the *Municipal Plan* which prohibits "new residential development" in "areas identified as high hazard."

Lastly, the Technical Advisor outlined section 4.6 of the *Development Regulations*, which grants Council discretionary power to refuse or conditionally approve an application to carry out development. Under sections 4.1 and 4.2 of those *Regulations*, approval is required prior to carrying out development and such development must be in accordance with the *Municipal Plan* and *Development Regulations*.

Preliminary Issue of Jurisdiction

At the conclusion of the Technical Advisor's presentation, the Authority sought clarification on the dates of various documents that had been submitted in relation to this appeal. The Technical Advisor confirmed that the fee for the appeal had been received on September 18, 2023 but that the appeal form itself had not been received until October 3, 2023.

The Appellant provided clarification on the documentation and dates. On September 18, 2023, he went to file his appeal without knowing what was required or how to go about it. He stated he went to the Department of Municipal and Provincial Affairs but no one was allowed into the building at that time. A security guard advised him he had to use another entrance and speak to a different security guard, at which time he might have to proceed through a metal detector to be allowed to enter the building. The security guard advised him to proceed to the cashier's office to pay the appeal fee and then return and provide the documents to the security guard, who would then send it up to the Department after which someone would be in touch with him.

The Appellant claimed no one contacted him in relation to his appeal, despite his having left messages. When the appeal period was near expiration, he hired a lawyer to assist with the process. The Appellant's lawyer then submitted the appeal form on October 3, 2023. Mr. Cotter confirmed having received an email from the lawyer on that date attaching the appeal form.

The Appellant confirmed he did not submit any forms in respect of the appeal prior to October 3, 2023.

Mr. Davis raised as a preliminary matter the jurisdictional issue of whether an appeal had been properly filed in accordance with the Act. Mr. Davis took no issue with payment of the appeal fee within the time frame required by the legislation; however, he indicated that the failure to submit the appeal form meant the grounds for appeal had not been submitted within that time frame as required. As such, he submitted I lacked jurisdiction to hear the matter.

The parties agreed that I might defer consideration of this issue until the time I rendered my decision and agreed that the hearing might proceed in the event I ultimately determined I had jurisdiction to hear the matter.

The Appellant's Presentation and Grounds

In his written submitted grounds for appeal, the Appellant argued that the Authority erred in its interpretation of the *Development Regulations* and/or its exercise of discretion. Further, the Appellant argued the Authority did not consider the fact that the structure being renovated already exists on the subject property and that other "residential structures" in the immediate vicinity of the subject property are likewise in the "high hazard vulnerability" area and not fronted on a public road.

During the hearing, in response to my questions, the Appellant advised that the accessory building in question had been built by his father in 2001. At that time, his father had obtained a permit to build the building, which he and his family referred to as a "boathouse." The Appellant was not present at all

during the construction of the boathouse. He recalled having been to the boathouse for the first time sometime during the period 2004-2006, as his mother had resided at the boathouse recovering from surgery.

The Appellant confirmed the boathouse had never been used to store boats, despite it having been referred to as a "boathouse." It was, in fact, a "guest house," containing two bedrooms, one and a half baths, laundry facilities, a full kitchen, washer/dryer, dishwasher, stove, microwave, refrigerator and air conditioning. He further confirmed that his father had never obtained a permit to use the building as a dwelling.

The Appellant indicated that the boathouse contained a spiral staircase. In 2019, while renovating his residence, he had lived in the boathouse and had found the spiral staircase to be dangerous, so the renovations for which he sought the permit included getting rid of the spiral staircase. He also wanted to add on as an extension a porch with dimensions of approximately 6' x 8'.

Mr. Penney indicated he suspected his father had applied for a permit for a boathouse rather than a guest house because it was his father's way of "getting around the red tape." He argued that this was not a "new development" because the boathouse was built in 2001 and the Town's *Development Regulations* changed in 2011. Further, he stated he was being taxed on the property as though the boathouse was a residence. According to the Appellant, the Town knew the boathouse was a residence and treated it as such.

The Authority's Presentation

The Authority confirmed during the hearing that the Town had only ever approved the building in issue as a "boathouse," as an accessory to the dwelling that was on the same property at the time. The property has since been subdivided such that the property featuring the boathouse is now separate. To approve the boathouse as a dwelling would trigger an entirely different analysis from the Town's perspective under the *Development Regulations.* Even if an application had been made to build the boathouse as a dwelling in 2001, there would have been inspections required to ensure, for example, that it met the requirements of the National Building Code for habitable spaces. The Town undertakes no inspections whatsoever for accessory buildings. A change in use from accessory building to a dwelling would trigger the definition of "development" under the Act, since it would constitute making a change in the use or intensity of use of the land or building. This also triggers a review to ensure the proposed renovations comply with the Town's *Regulations* respecting dwellings. In the area of the subject property, this puts two specific issues in play.

The first such issue relates to the zoning. In 2011, the provincial government undertook a geological hazard study for the Town and it identified areas of what were referred to as low, moderate or high geological hazard. The boathouse is located entirely within the high geological hazard area. This determination is made on a variety of factors including proximity to shorelines, elevation above sea level, slope of land, etc. New residential development is prohibited within the high geological hazard area per the Town's *Municipal Plan* and *Development Regulations.*

The second such issue is that the Town's *Development Regulations* prohibit new construction on private roads. New residential buildings must have frontage on publicly maintained roads. The Town does not

provide any service in the area of the private road at issue and does not do snow removal or other maintenance on that part of the road.

There are multiple homes on that part of Villa Nova Road, with Mr. Davis indicating that the last such home was likely built there prior to 2010 if not considerably earlier.

Mr. Davis indicated that staff had no option, in light of these two specific issues, but to recommend to Council that the Appellant's application be refused.

Subsequently during the hearing, he confirmed that the Town was unaware of any approved septic system on the subject property.

Lastly, Mr. Davis indicated that, for the Appellant to rely on the rules surrounding non-conforming use, he has to establish that the original use of the subject property had been legally undertaken. He indicated that, notwithstanding that the "high hazard vulnerability" designation may not have come into effect until 2012, in 2001 the Town's applicable regulations contained a similar clause regarding lot frontage. Regardless, however, the structure was approved as a "boathouse" at the time and not as a dwelling.

Interested Party's Presentation

During the hearing, Mr. Gauvreau also gave evidence. He and his wife are currently the owners of 55 Villanova Road (civic number 3575), which abuts the parcel on which the boathouse is situated. They purchased their property in 2020. Mr. Gauvreau indicated that there is an easement over his property in relation to the septic field which runs from the boathouse. He indicated that the easement was specific to a "boathouse," which he assumed was limited use and which would be different than any type of residential use. The easement runs at least in part beneath the asphalt on Mr. Gauvreau's property and possibly under his garage; he is unsure. The septic field is within the high hazard vulnerability area and also within a number of feet from the water mark, all of which would make it difficult for such a field to be permitted.

Mr. Gauvreau confirmed that the boathouse itself sits a couple of inches if not exactly on the property line with his property. He indicated that changes to the subject property raised concerns with him as he was interested in maintaining the value of his home.

Analysis

The following questions arise from this Appeal:

1. **Was the Appeal Filed in Accordance with the Act?**

No.

Section 41(1) of the Act sets out the requirements that must be met in order for a party to appeal a decision. It reads:

> 41. (4) An appeal shall be made in writing and shall include
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> (a) a summary of the decision being appealed;
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> (b) the grounds for the appeal; and

(c) the required fee.

The decision of the Authority was communicated to Mark Whalen, architect for the Appellant, who had submitted the original Building Permit & Development Application, by letter dated September 13, 2023. Pursuant to section 41(3) of the Act, the appeal was required to be filed no more than 14 days after the date upon which "the person who made the original application receive[d] the decision." This means the appeal in this matter was required to be filed on or before September 27, 2023.

The Appellant paid the fee for the appeal on September 18, 2023; however, neither the appeal form nor any grounds of appeal were submitted with the fee. Further, those items were not filed until October 3, 2023, which was after the expiration date for the filing of the appeal. As such, the appeal did not comply with the requirements of section 41 of the Act.

I note the difficulties raised by the Appellant in filing the necessary documentation within the 14-day period imposed by the legislation; however, the Appellant clearly felt it appropriate to retain counsel for assistance in filing the appeal by early October, and I see no reason why he could not have done this earlier had he chosen to do so.

Section 6(5) of the *Development Regulations* under the Act reads:

> "6. (5) Where an appeal of a decision and the required fee is not received by a board in accordance with this section and Part VI of the Act, the right to appeal that decision shall be considered to have been forfeited."

In *Clarke's Trucking and Excavating Ltd. v. Paradise (Town)*, 2015 CanLII 20033, the Newfoundland and Labrador Supreme Court considered the effect of non-compliance with this section of the Act on the jurisdiction of an Appeal Board to hear an appeal. The Court stated as follows

> "[20] Section 42(5)(b) of the URPA ("... shall include the grounds for the appeal") is a provision that exists so that the opposing party knows the case to meet and has adequate time to respond. In this case, it is a provision that exists for the sole benefit of the Town, and it is a provision that can be waived by the Town. When such waiver occurs, the failure to include the grounds for the appeal with the Appeal Summary Form does not result in a loss of jurisdiction to the Board. The waiver meant that the filing of the Appeal Summary Form and required fee within the 14-day appeal period effected a valid appeal, in accordance with Part VI of the URPA. Section 6(5) of the Development Regulations is not engaged. The non-compliance with section 42(5)(b) does not impact the Board's authority to hear the appeal. The Board's jurisdiction is derived from section 42(1) of the URPA and limits on the Board's jurisdiction are identified in section 42(2) and (3)."

I note that the references to section 42 in the above quotation are to the equivalent section 41 that I have discussed above.

During the hearing of this matter, the Authority did not waive non-compliance with section 41. Instead, the Authority argued that, because there was non-compliance in the circumstances, I lacked jurisdiction to hear the matter. With the consent of both parties, I indicated I would set the jurisdictional issue

aside for the meantime to allow the hearing to proceed and thus avoid the need to reconvene in the event I decided I retained jurisdiction.

I find as a matter of fact that the Authority did not waive non-compliance by the Appellant with section 41 of the Act. In light of the decision in *Clarke's Trucking* and the express wording of section 41, I find that the right of the Appellant to appeal this matter was forfeited in the circumstances and the appeal is to be dismissed.

Notwithstanding this finding, I have set out my analysis with respect to the substance of the appeal.

2. Did the Town have the authority to deny the Appellant's application?

Yes.

The renovations proposed by the Appellant clearly met the definition of "development" under the Act. That definition reads:

> "2. (g) 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change in the use, or the intensity of use of land, buildings or premises and the
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> (i) making of an access onto a highway, road or way,
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> (ii) erection of an advertisement or sign,
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> (iii) construction of a building,
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> (iv) parking of a trailer, or vehicle used for the sale of refreshments or merchandise, or as an office, or for living accommodation,
>
> and excludes the
>
> (v) carrying out of works for the maintenance, improvement or other alteration of a building, being works which affect only the interior of the building or which do not materially affect the external appearance or use of the building,
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> (vi) carrying out by a highway authority of works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road reservation,
>
> (vii) carrying out by a local authority or statutory undertakers of works for the purpose of inspecting, repairing or renewing sewers, mains, pipes, cables or other apparatus, including the breaking open of street or other land for that purpose, and
>
> (viii) use of a building or land within the courtyard of a dwelling house for a purpose incidental to the enjoyment of the dwelling house as a dwelling;"

The proposed renovations would "materially affect the external appearance or use of the building" insofar as they included the addition of a new enclosed porch. Further, the proposed renovations would result in a material change in the use of a building, since that building had been originally constructed under a permit for an accessory building rather than habitable space.

Since the Appellant's application met the definition of "development" under the Act, it triggered Council's discretion under section 4.6 of the *Development Regulations* to reject the application.

Notwithstanding this, the issue arose during the hearing as to whether the Appellant could claim that the subject property was a "non-conforming use." This is relevant to the issue of the Authority's jurisdiction. Section 108 of the Act reads:

> "108. (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."

If the subject property constituted a "non-conforming use" under section 108, then Council had no authority to reject the application so long as it met the requirements of that section. Indeed, the primary ground of appeal argued by the Appellant was that the renovations did not constitute a "new" residential development, since the guest house in question had been there since 2001 and the Town had treated the building as such for taxation purposes since that time.

I note the onus of proof in establishing that a "non-conforming use" was lawful rests on the Appellant (see for example *Prince George (City) v. Geisser*, 2015 BCSC 697).

In order to constitute a "non-conforming use" under section 108, the use in question must have "legally existed" before the registration of the Town's *Development Regulations*. The *Development Regulations* in question took effect in July 2012.

The Appellant did not put forward any evidence upon which I could conclude that the use of the subject property at the time the *Development Regulations* took effect in 2012 was a lawful one. In fact, the evidence of both parties at the hearing strongly suggested the use was not in fact lawful.

As the Authority pointed out, the only permit to have ever been issued in respect of the subject-property was a permit to build an accessory building, which was issued in 2001. I note that the Town's *Development Regulations 2001-2011* expressly prohibited the use of an "accessory building or structure" for "human habitation" (see section 2(a) of Schedule C to those *Regulations*). There are good reasons for this, as the Authority pointed out during the hearing. A building that is intended for human habitation needs to be constructed in accordance with applicable building codes, needs to be inspected, and so on. Such concerns do not necessarily carry over into buildings that are used only for storage, for example.

The Appellant acknowledged during the hearing that the subject property was built by his father at the time it formed part of a larger parcel on which was situated a main residence. He indicated that the

property, while referred to as a "boathouse," had never in fact been used to store boats. In fact, as far back as he could recall, it been used as a guest house, containing as it did two bedrooms, one and a half baths, laundry facilities and a full kitchen. The Appellant also confirmed that his father had never obtained a permit to use the building as a dwelling and in fact had likely applied for a permit to build an "accessory building" as opposed to a dwelling in order to "get around the red tape."

While the Town may or may not have taxed the subject property in a manner that showed it knew the property was being used as a residential dwelling, no evidence was brought forward indicating that, on this basis, I must therefore conclude that the non-conforming use "legally existed" for the purpose of the Act.

I therefore find that the Appellant has not met the onus required of him in order to establish he could rely on section 108 of the Act and that the subject property did not constitute a legally "non-conforming use" in accordance with that section.

3. **If yes, was the denial of the Appellant's application in accordance with, and a reasonable exercise of, the Town's authority?**

Yes.

Section 4.6 of the *Development Regulations* required the Authority, in determining whether to grant the Appellant's application, to take into account "the policies expressed in the *Municipal Plan* and any further scheme, plan or regulations pursuant thereto" as well as "any other considerations which are, in its opinion, material." Further, section 4.2 of the *Development Regulations* requires that all development be carried out in accordance with those *Regulations* and the *Municipal Plan.*

The Authority refused the Appellant's application for two primary reasons. First, the subject property is located in a "high hazard vulnerability area." Section 5.10(1)(a) of the *Municipal Plan* prohibits new development within that area. Since the guest house in question was not a legally "non-conforming use", and was constructed under a permit to build an "accessory building," it was reasonable for the Authority to refuse the Appellant's application on the basis it did not comply with this section of the *Municipal Plan*. While the Appellant noted the existence of other residences in the general vicinity (and therefore also within the "high hazard vulnerability area") that evidence is insufficient to override the requirements of the Act and the *Development Regulations* and *Municipal Plan.* The legal status of other buildings and structures in the vicinity has no bearing on the legal status of the subject property. It was reasonable for the Authority to refuse the Appellant's application on the basis it did not comply with the *Municipal Plan.*

Second, section 5.16 of the *Development Regulations* prohibits the erection of residential buildings on lots that do not front directly onto a street "constructed to standards established by the Authority." It is clear that the guest house in question was constructed as an accessory building to a primary residence that was originally located on the same lot (prior to its subdivision). The lot on which the guest house is located does not front onto a street serviced by the Authority; rather, it fronts onto a privately owned road. It was therefore reasonable for the Authority to refuse the Appellant's application on the basis of non-compliance with this section of the *Development Regulations.*

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 Council of September 5, 2023 be upheld and confirmed.

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 31st day of March, 2024.

Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000