

URBAN AND RURAL PLANNING ACT, 2000**Section 40-46**

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

Appeal # : 15-006-077-008

Adjudicator: John V O’Dea KC

Appellant(s): Sandra Barry

Respondent / Authority: Town of Victoria

Date of Hearing: 21 September 2023

Location of Hearing: Comfort Inn, St. John's

Start/End Time : 9:15 – 10:45am

IN ATTENDANCE

Appellant: Sandra Barry (“Appellant”)

Interested Party: Paul Hennessey of Hennessey’s Excavating (“Hennessey’s”) and his legal counsel Darren O’Keefe

Respondent/Authority Representative(s) Shelly Butt, Town Clerk/Manager (“Clerk/Manager”), Town of Victoria (“Authority”)

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

Technical Advisor: Faith Ford, Planner III, Technical Planning Expert, Department of Municipal and Provincial Affairs (“Planner”)

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 (“URPA”) and the Town of Victoria Municipal Plan (“Plan”) and Development Regulations (“Regulations”) when the Authority’s council (“Council”) issued a Stop Work Order on 30 May 2022 to Hennessey Excavating to cease industrial business operations at 64-66 Swansea Road, Town of Victoria, which Stop Work Order was subsequently amended on 4

June 2022 to allow parking, limited operation of, and minor repairs to heavy equipment at that address, all pursuant to Motion 2022-133 and 2022-134.

APPEAL HEARING PRESENTATIONS

A. PLANNER'S PRESENTATION ON THE TECHNICAL REPORT

In the technical report prepared for this appeal and in the presentation, the Planner outlined the main points in the chronology of this appeal. **A copy of the Planner's Technical Report prepared for this appeal is on file with the Appeal Officer.**

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:

- 10 (a) there shall be a technical advisor to the panel 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.

The Planner from Municipal and Provincial Affairs shall provide the framework with respect to the appeals process under the URPA and provide an overview of how an application was received from a developer and processed by the Authority as prescribed in their roles and responsibilities.

The Adjudicator heard from the Planner.

- a. On 2 May 2021 the Authority was notified of a business operating at a residence located at 64-66 Swansea Road ("Property").
- b. On 6 May 2021 the Authority issued a letter to Mr. Hennessey stating that a permit was required.
- c. On 24 May 2022 the Appellant submitted a written complain to the Authority regarding the operation of an industrial business on the Property. The Appellant raised the concerns of "excessive noise/vibration, dust/grit and an unpleasant effect on all senses".
- d. At a privileged meeting of the Council on 28 May 2022 a Stop Work Order was approved, which was delivered to Mr. Hennessey on 30 May 2022.
- e. Mr. Hennessey filed a development application for the business operations dated 30 May 2022 seeking approval of "operating excavating off-site business". He amended that on 1 June 2022 to remove from the application "offsite business" activity. He also submitted a second development application on 30 May 2022 for "backfilling land to fill in property".
- f. Mr Hennessey then contacted several Council members to request an amendment to the Stop Work Order.
- g. On 4 June 2022 the Council held a privileged meeting and amended the Stop Work Order to permit heavy equipment used by Hennessey's Excavating at 64-66 Swansea Road,

Victoria, can start up the equipment & leave for offsite work, may complete minor repairs at this location, and resolved no screening operation, no excavating, or any type of construction activity to take place there until further notice.

- h. At a public meeting of Council held on 14 June 2022, both decisions of Council were ratified.
- i. On 16 June 2022 the Appellant filed the appeal.

The Planner further advised as follows:

1. The Property is located within the Residential Zone.
2. Compatible residential and non-residential uses may be allowed as permitted or discretionary uses within the Residential designation, in such a way as to be compatible with nearby residential development (Part 4.2 of Plan).
3. The Authority's Development Regulations, Schedule B Classification of Uses of Land and Buildings, establishes use classes and provides examples of uses that fall within each class. Any use that does not fall within a permitted use class or a discretionary use class as set out in Schedule C Use Zone Table is considered a prohibited use and not permitted in the zone.

B. THE APPELLANT'S PRESENTATION AND GROUNDS

In addition to making an oral presentation at the hearing, the Appellant's written submission had been provided in the record of the appeal. **A copy of the Appellant's written submission is on file with the Appeal Officer.**

The Appellant, whose residence is at 54 Swansea Road, Town of Victoria, submitted the Appeal and related correspondence, dated 16 June 2022, providing grounds of appeal. The Appellant's position:

- a. The decision of the Authority is "not in conformance with the plan, development, regulations or applicable legislation because an amendment to the Stop Work Order that was made on June 4/22 at a privileged meeting to allow an excavating/construction business to operate from a residential zone (64-66 Swansea Rd, Victoria). This goes against the Town of Victoria's Development Regulations that is set out on their website that is a legally binding piece of legislation and it is not permitted under a discretionary classification."
- b. The Authority allowed parking and maintenance which is a violation of the Regulations.

C. AUTHORITY'S PRESENTATION

The Clerk/Manager spoke to the appeal. A written submission had also been provided in the record of the appeal. **A copy of the Authority's written submission is on file with the Appeal Officer.**

In the Authority's written submission are the following extracts from the regular public Council meeting of 14 June 2022:

1. **"Mayor Dooley, on behalf of Council, informed both delegates that the Stop-Work Order issued May 30/22 stands in effect with the amendment issued on June 4, 2022. It was reiterated that no industrial activity is permitted on the property as identified in a residential zone and in compliance with the town's plan and development regulations. Council agree to allow to the owner/operator to park all equipment used for the purpose of the Hennessey's Excavating at #64-66 Swansea Road, can start-up the said equipment and leave for off-site work, may complete minor repairs at this location, and resolved no screening, no excavating, or any type of construction activities can take place at 64-66 Swansea Rd until further notice and further resolved this notice is to be issued immediately to the owner/operator of Hennessey's Excavating.
(TCM advised Council their decision contravened adopted town plan and development regulations. (Schedule A-Definitions, B-Classification Of Uses, & C-Residential Zone) & Sections of Urban and Rural Planning Act, 2000)" [underlining added by Adjudicator]**
2. **"Privileged Meeting May 28/2022
Motion 2022-133 PM 05-28-2022 DM Moores/Snooks
Be it resolved Council agree to issue the Stop Work Order as reviewed, revised and sanctioned at Privilege Meeting held Saturday, May 28/2022, to be delivered to owner/operator of Hennessey's Excavating at 64-66 Swansea Road by a legal document server on Monday, May 30, 2022. Favour 5; Opposed 0; Carried."**
3. **"Privileged Meeting June 4/2022
Motion 2022-134 PM 06-04-2022 DM Moores/Penney
Be it resolved that it is the decision of Council that heavy equipment used by Hennessey's Excavating can park at 64-66 Swansea Road, can start-up the said equipment and leave for off-site work, may complete minor repairs at this location, and resolved no screening operation, no excavating, or any type of construction activities can take place at 64-66 Swansea Road until further notice and further resolved this notice is to be issued immediately to the owner/operator of Hennessey's Excavating. Favour 5; Opposed 0; Carried."**

The Clerk/Manager summarized the written submission of the Authority, and made the following additional comments:

1. There is nothing in the discretionary use class that would allow a heavy equipment operation to take place in a residential zone.
2. Regarding the underlined portion of the Council meeting in 1 above, the Clerk/Manager reiterated that the Council decision was in violation of the Plan because the Property is zoned Residential and that it is the job of the Clerk/Manager to inform Council if it is contravening the Plan.
3. Section B Classifications of Uses of Land for “General Industry” and “Light Industry” are not permitted in Schedule C Residential Zone.
4. There were no complaints regarding the Stop Work Order in 2023.
5. The Council decision goes against the Plan and is not permitted even under the discretionary classification.
6. Development cannot take place without a permit.

D. INTERESTED PARTY’S PRESENTATION

Paul Hennessey of Hennessey’s Excavating was represented by his legal counsel, Darren O’Keefe.

The following are the pertinent statements submitted on behalf of Mr Hennessey:

1. The Authority’s letter dated 17 June 2022 signed by the Clerk/Manager was incorrect when the Clerk/Manager asserted that under the URPA the Stop Work Order was ineffective, as under section 41 of the UARPA, if the Stop Work Order is under appeal, the effect of the Stop Work Order and the enforcement of the order is suspended until the Adjudicator hears the appeal.
2. Therefore, the activity that is subject to the Stop Work Order can carry on until the appeal is heard.
3. Amended Stop Work Order is under appeal, not the development application.
4. Section 41 of the UARPA suspends a development, but what Mr. Hennessey was doing post the Stop Work Order was not considered a development – parking, repairing does not fit within development. It’s a development activity for business purposes.
5. Mr. Hennessey cannot carry out backfilling but can carry out other activities as stated in the amended Stop Work Order because they are not development.
6. The development application was submitted after the Stop Work Order was issued.
7. Clerk/Manager’s advice to Council at its meeting of 14 June 2022 was wrong.
8. Mr. Hennessey is seeking:
 - a. That the Stop Work Order be confirmed, and
 - b. Determination that the 17 June 2022 letter from the Authority to Mr. Hennessey was incorrect and that only commercial activity should be prevented at the site.

ADJUDICATOR'S ANALYSIS

The Adjudicator reviewed The Urban and Rural Planning Act, 2000, (“**URPA**”) the Municipalities Act, 1999 (“**MA**”), the Town of Victoria Municipal Plan 2010 (“**Plan**”) and Town of Victoria Development Regulations 2010 (“**Regulations**”).

Relevant extracts from these are attached as exhibits.

Also attached is a chronology as an aid to the analysis that follows.

1. Residential zone

The Property at 64-66 Swansea Road is classed in the Residential Zone.

Section 4.2 of the Plan, under Land Policies, deals with Residential Designation and contains the following definition:

“In addition to single dwellings, other uses that can be entertained as permitted or discretionary uses include apartment buildings, double dwellings, green houses (agricultural uses), home businesses, mobile homes, row dwellings and non-residential uses that are deemed to be compatible with residential uses.”

Schedule C of the Regulations sets out a use zone table for Residential Zone. Under the heading ‘Municipal Services – Discretionary Use Classes’ there is no reference to a commercial operation/activity of any kind in the permitted use classes or in the discretionary use classes. [As a point of interest, there is reference under a discretionary use class to Regulations 23 and 101 – any discretionary use requires a public notice via a newspaper and written notice to owners in the vicinity of the use.]

Schedule B of the Regulations contains the classifications of land and buildings, two relevant groups are “General Industry” and “Light Industry”, neither of which are permitted in a Residential zone.

2. Chronology of events

- a. On 4 May 2021, the Authority was notified by the Appellant of a business operating at the Property.
- b. On 6 May 2021 the Town sent Mr Hennessey an application form to complete together with a copy of the Regulations. No application for a permit was filed by Mr Hennessey in 2021.

- c. On 24 May 2022, the Appellant emailed the Authority regarding excessive noise and dust coming from the Property. For some time Mr Hennessey had been operating a business from the Property that involved excavating and sifting soil and gravel material.
- d. At a privileged meeting held on 28 May, the Council approved a Stop Work Order be issued to Mr Hennessey.
- e. On 30 May 2022, Mr Hennessey filed an application to operate an excavating business from the Property. There was a second application that stated: “backfilling land to fill the property”.
- f. Mr Hennessey later requested an amendment to the Stop Work Order.
- g. On 4 June 2022 the Council held a privileged meeting to amend the Stop Work Order that provided that equipment could leave for off-site work and minor repairs could be carried out, but that no screening operations or excavating be carried out until further notice.
- h. On 14 June 2022, at a regular meeting, the Council ratified the decisions of Council made at the privileged meetings held on 28 May 2022 and 4 June 2022.
- i. On 16 June 2022, the Appellant filed an appeal that the decision of Council “is not in conformance with the plan, development regulations or applicable legislation”.

3. Application of legislation

- (i) Section 213(3) of the MA states:
“A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.”
Therefore the Stop Work Order only became effective on 14 June 2022.
- (ii) Under section 41(1)(b)(i) of the URPA provides that an appeal can be in respect of an application to undertake a development.
- (iii) Section 2(g) of the URPA defines “development” to include “...the making of any material change in the use of or intensity of use of any land, building or premises...”. The same definition is found in Schedule A of the Regulations.
- (iv) Under section 102 of the Regulations, uses that do not fall within “the Permitted Uses Classes or Discretionary Use Classes...shall not be permitted in that Use Zone and are deemed to be prohibited uses”.
- (v) Section 11 of the Regulations deals with discretionary powers of the Authority. Section 11(2) states that if the proposed use is in accordance with the applicable zone under Schedule C, “...the exercise of discretionary powers under this Regulation does not enable the Town to permit the development of a use that is not set out as a permitted use or discretionary use under Schedule C”.

- (vi) Under section 46(1) of the URPA where an appeal is made, “the development with respect to the appeal, work related to that development...shall not proceed or be carried out pending a decision of the adjudicator.”
- (vii) Under section 8(1) of the Regulations, “Immediately upon the notice of registration of an appeal the appropriate authority shall ensure that any development upon the property that is subject to the appeal ceases.”
- (viii) Under section 102(3) of the URPA, “an order made under this section continues in force until it is revoked by the council...”. The same language is found in section 404(3) of MA.

ADJUDICATOR'S CONCLUSION AND DECISION

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.

Council Decision

Mr. Hennessey acknowledged that he was carrying out commercial activity at his Property, a personal home that is zoned Residential. On 16 July 2021, the Authority sent him a development application form, but he did not file a development application until 30 May 2022, and a further one on 1 June 2022.

In response to the 30 May 2022 application, the Council had issued a Stop Work Order at a privileged meeting on 28 May 2022. Following a request by Mr. Hennessey that the Stop Work Order be amended, the Council issued an amendment at a subsequent privileged meeting held on 4 June 2022.

However, pursuant to section 213(3) of the Municipalities Act, 1999, decisions made by the Council at privileged meetings were not valid until those decisions were ratified at a subsequent public meeting of the Council, which did not take place until 14 June 2022. Therefore, no valid permit had been issued as the Stop Work Order granting certain activity was not valid until it was approved at the 14 June 2022 regular meeting of the Council.

Both the Municipalities Act, 1999 (section 404(3)) and the Urban and Rural Planning Act, 2000 (section 102(3)) provide that an order made by a council continues in force until it is revoked by that council. The decision of the Council as of 14 June 2022 continues in force.

However, under section 81(1) of the Regulations on an appeal, "any development" on the Property must cease.

Notwithstanding the above, the decision of the Council is not in accordance with the Plan and Regulations.

The Development Application

Mr Hennessey submitted his two development applications dated 28 May, one of which was amended on 1 June 2022, before the Stop Work Order, as it only became valid on 14 June 2022.

The Property is zoned Residential. Nothing in that zone permits a business activity of the nature of what Mr. Hennessey was undertaking. At paragraph 5 of the application of 30 May 2022, he

applied for a development for the purpose of: “operating Hennessey’s Excavating off-site business”.

This was later amended on 1 June 2022 to delete “off-site business”, which meant that he still intended to operate his business from the Property.

His intention is further elaborated when he indicated at paragraph 6 of the application that the present use of the site was “operating Hennessey’s Excavating from yard”.

The definition of a “development” in the Urban and Rural Planning Act, 2000 and the Regulations states in part: “...the making of any material change in the use of or intensity of use of any land...”. What Mr. Hennessey was doing through the whole period (2021 – 2022) was making a material change of use of his residential property.

The development is not something that can be parsed by the nature of the activity. The business activity of excavating, sifting, parking, repairing is inclusive of the commercial activity that Mr Hennessey was carrying out. By no longer carrying out excavation and sifting did not eliminate the business operation being carried on at the site, it merely removed some of the activity.

The Appeal

What the Appellant appealed was “decision” of the Council, “that is not in conformance with the plan, the development regulations or applicable legislation...” and that “This business (Hennessey’s Excavating) is operating without a permit...”. This appeal is in conformity with section 41(1)(b)(i) of the Urban and Rural Planning Act, 2000.

The Property is in a Residential zone and the use to which Mr Hennessey was carrying on his business on the Property was not permitted under the Plan or the Regulations to be carried on in a Residential zone, even under a discretionary power. Therefore the decision of the Council is not in compliance with the applicable legislation, the Plan and the Regulations.

The Authority exceeded its authority in permitting a development at 64-66 Swansea Road, Town of Victoria, namely the operation of an excavating business.

ORDER

After reviewing the written submissions and evidence presented by the parties along with the technical information and planning advice, the Adjudicator orders that the decision of the Authority be reversed and:

1. The Appellant’s appeal is allowed, and
2. The Stop Work Order is to be revoked.

In accordance with section 44(3) of the Urban and Rural Planning Act, 2000, the Adjudicator further orders that the Authority pay to the Appellant an amount of money equal to the appeal filing fee paid by 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 11 October 2023.

A handwritten signature in black ink, appearing to read "John V O'Dea". The signature is written in a cursive, flowing style with a prominent initial "J".

John V O'Dea KC
Adjudicator