

## URBAN AND RURAL PLANNING ACT, 2000

### Section 40-46

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

Appeal #: 15-006-072-044 and 15-006-072-045

Adjudicator: Elaine Mitchell, RPP, MCIP

Appellant(s): YBC Development Limited

Respondent / Authority: Town of Torbay

Date of Hearing: November 24, 2023

Start Time: 9:05 a.m. End Time: 3.12 p.m.

In Attendance:

Appellant: Jerome Coady, YBC Development Limited

Appellant Representative(s): F. Richard Gosse, Cox & Palmer

Respondent/Authority: Town of Torbay

Respondent Representative(s): Julia Schwarz, MCIP, CSLA, Director of Planning and Development  
Jonathan Dale, Steward McKelvey

Proponent/Developer: Walter and April Gosse (Appeal # 15-006-072-044)

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

Technical Advisor: Tolulope Victoria Akerele, Department of Municipal and Provincial Affairs

Not in Attendance:

Developer: Silver Ridge Properties Inc. (Appeal #15-006-072-045)

Interested Party: 89688 Newfoundland & Labrador Inc.

### Introduction

This hearing involves two appeals filed by YBC Development Ltd. on November 26, 2021, against decisions made by the Authority on November 15, 2021. The applicable decisions are: 1) approval in principle subject to conditions of an application by Walter and April Gosse for a 14-unit residential development at 7 Darryl Pye Drive (Appeal #15-006-072-044) and 2) approval in principle subject to conditions of an application of a residential development consisting of three buildings (13 units) by Silver Ridge Properties

Inc. at 51 North Pond Road (Appeal #15-006-072-045). As the facts and arguments are the same with respect to the two appeals, all parties agreed to proceed with a single hearing.

### 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 Torbay Municipal Plan and Development Regulations when it approved two applications for residential development on November 15, 2021. The Authority's decisions submitted to appeal are: 1) approval in principle subject to conditions of an application from Walter and April Gosse for a 14-unit residential development proposed for 7 Darryl Pye Drive (Appeal #15-006-072-044), and 2) approval in principle subject to conditions of an application by Silver Ridge Properties Inc. for a 13-unit residential development at 51 North Pond Road (Appeal #15-006-072-045).

### Hearing Presentations

#### Technical Advisor's Presentation

According to the Appeal Boards (Rules of Procedure) Order, 1993, made under the *Urban and Rural Planning Act, 2000*, the role of the technical advisor is to provide an analysis of the matters subject to appeal with respect to planning documents in effect.

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.

Ms Akerele, a planner with the Department of Municipal and Provincial Affairs served as technical advisor and advised that the Torbay Municipal Plan and Development Regulations came into legal effect on February 10, 2017. According to these documents, the properties at Darryl Pye Drive and North Pond Road are zoned Residential Medium Density. Apartment buildings and row dwellings are listed as discretionary uses in the Residential Medium Density zone. Section 33 of the Torbay Development Regulations requires that an application for a discretionary use to be advertised.

33. Notice of Application (Refer to Minister's Development Regulations, Section 13 and 15)

The Council may, and when a variance is necessary under Regulation 11 and the Council wishes to consider whether to authorize such a variance, when a change in nonconforming use is to be considered under Regulation 49, or when the development proposed is listed as a discretionary use in Schedule C of the Regulations shall, at the expense of the applicant, give notice of an application for a permit or for approval in principle, by public advertisement in a newspaper circulating in the area or by any other means deemed necessary, and under

Regulation 12 and the Council shall give written notice of the proposed variance from development standards to all persons whose land is in the immediate vicinity of the land that is the subject of the variance, and allow a minimum period of 7 days for response.

Ms. Akerele's report outlined how the public advertisement was carried out noting that a public meeting was held on May 10, 2021, with respect to the North Pond Road application only.

Ms. Akerele advised that under section 90 of the Torbay Development Regulations, Council must be satisfied that the development is not contrary to the intent of the Municipal Plan and Development Regulations, public interest and that Council must consider objections and representations received.

#### 90. Discretionary Uses

Subject to these Regulations, the uses that fall within the Discretionary Use Classes set out in the appropriate Use Zone Table in Schedule C may be permitted in that Use Zone if the Council is satisfied that the development would not be contrary to the general intent and purpose of these Regulations, the Municipal Plan, or any further scheme or plan or regulation pursuant thereto, and to the public interest, and if the Council has given notice of the application in accordance with Regulation 33 and has considered any objections or representations which may have been received on the matter

Ms. Akerele noted that Council has discretionary authority under section 10 of the Torbay Development Regulations.

#### 10. Discretionary Powers of Council

(1) In considering an application for a permit or for approval in principle to carry out development, the Council shall take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto, and shall assess the general appearance of the development of the area, the amenity of the surroundings, availability of utilities, public safety and convenience, and any other considerations which are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, the Council may, in its discretion, and as a result of its consideration of the matters set out in this Regulation, conditionally approve or refuse the application.

When questioned by the Respondent, Ms. Akerele corrected her report noting that statement that the approval was subject to the installation of municipal water and sewer services at Pine Tree Line was not applicable to either application.

#### Appellant's Presentation

The Appellant presented three issues to be determined:

1. Whether the Authority failed to appropriately apply the test for discretionary uses as prescribed by section 90 of the Torbay Development Regulations. The Appellant argued that Council failed to consider whether the development proposals would be contrary to the Torbay Municipal Plan and Development Regulations and that Council did not adequately consider the responsible distribution of water resources.
2. Whether the Authority misconstrued the meaning of infill development in that it was a term that should be applied to single dwellings along existing roads rather than multi-unit developments such as the applications under appeal.
3. Whether the Authority breached its duty of administrative fairness and good faith with respect to the Appellant's development application. The Appellant provided an outline of the Appellant's dealing with the Town with respect to a property located on North Pond Road. The Appellant argued that the Town had a responsibility to consider the development proposal by YBC Development Limited when allocating water capacity in that YBC Development Limited had on-going dealings with the Town and that the Town had changed its approach without any notification.

#### Authority's Presentation

The Authority responded to the arguments presented by the Appellant:

1. The Adjudicator is restricted by legislation from substituting their discretion for that of Council except in certain circumstances, that Council fulfilled its responsibilities to advertised and consider submissions, and that Council appropriately exercised its discretion when it approved the applications by Walter and April Gosse and Silver Ridge Properties Inc.
2. Council appropriately applied the 2020 resolution and that Council has the discretion to formulate and interpret its own policy with respect to water allocation from North Pond.
3. The Authority did not breach any duty of fairness to YBC Developments Limited in that previous approvals with respect to the subject property have expired, the application from YBC Developments Limited for a 180-lot development was submitted after the applications from Walter and April Gosse and Silver Ridge Properties Inc. and that the 180-lot proposal is incapable of approval given the 2020 resolution.

#### Developer Presentation

Ms. Gosse spoke indicating that the development proposal for Darryl Pye Drive has taken 10 years to bring to development approval. She stated that the onus is on the developer to meet the Authority's requirements.

## Adjudicator's Analysis

### Did Council appropriately exercise its discretionary authority?

According to the Torbay Development Regulations, higher density uses such as apartments and row dwellings are listed as discretionary uses in the Residential Medium Density zone. In accordance with section 33 of the Torbay Development Regulations, the Authority gave notice of the applications by public advertisement and allowed for public response. During their deliberations, Council considered the public objections and representations as well as the broader provisions of the Torbay Municipal Plan, received a detailed background report prepared by town staff and a briefing by Wood with respect to the portable water supply status. The Authority also has overriding discretionary powers as expressed in section 10 of the Torbay Development Regulations. From the evidence presented, Council was fully aware of the implications of their decision, took into account public objections, and in so doing, exercised its discretionary authority to approve in principle, subject to conditions, the two development applications. Council appropriately exercised its discretionary authority when it resolved to give approval in principle with conditions to the two subject developments.

### Did Council misinterpret infill development?

From the evidence presented, the Authority has been aware of the limitations associated with the North Pond water supply for a long time. Over the years, the Authority has commissioned reports into the capacity of the North Pond water supply and has kept a running list of available connections. Following a study by Wood Canada Limited, Council adopted a new policy with respect to new connections to the water supply on September 21, 2020 which remains in effect:

Adopt a new policy relating to North Pond Water Allocations, so that the Town of Torbay can consider incrementally adding up to 60 dwellings units (infill only) hooking into the existing municipal water supply; to be able to achieve this, that Town staff may review all active applications for approval; and for Town staff to contact all remaining parties as outlined in the existing list by registered mail and advise that should they still be interest in connecting to municipal water, that an application would be to be received ty the Town or Torbay for consideration by December 31, 2022.

Council has the authority to make policy and can interpret and apply that policy. Council considered whether the two proposed developments complied with this policy. Council determined that neither of the two proposed developments would require an extension of municipal water infrastructure. As Adjudicator, I cannot override Council's interpretation of its own policy.

### Did the Town breach its duty of fairness to YBC Development Limited?

YBC Development Limited held an approval in principle for a 24-lot serviced development on North Pond Road which was issued by the Authority on July 2, 2010. The Authority

subsequently confirmed by email that the approval in principle was only valid until July 2012. YBC Development Limited failed to submit the documentation to fulfil the terms of the approval in principle and this approval in principle expired. Since 2018, YBC Development Limited has been advised by the Authority that there is no water allocation for the subject property. And in 2020, the Town advised YBC Developments Limited that the Town's current policy does not allow for road/service extensions.

The Appellant argues that this expired approval in principle and subsequent discussions with the Town vests water allocation rights. I find that development rights and/or water allocations are only vested by a formal approval in principle or development approval and only for the time limits specified in Torbay Development Regulations.

The Authority did not breach its duty of fairness. The 2010 approval in principle issued to YBC Development Limited expired. Any follow-up, including the application for 180-lot serviced subdivision, has been considered by the Authority who has advised of the limitations associated with water connection allocations. The Authority has been facing difficult decisions with respect to allocation of water connections from North Pond. The Wood Canada Limited study and the subsequent resolution by Council is the most recent approach to the allocation of water capacity for development. It is unfortunate that YBC Development Limited experienced a negative outcome because of the water capacity limitations of North Pond but this is the reality that the Authority is dealing with. The Authority has received professional advice that places a limitation of 60 lots that can be supported by the existing water capacity at North Pond. Council has the discretion to determine how to allocate water capacity.

### Adjudicator's Conclusion

Based on the information presented at the Hearing and in the written submissions, the Authority acted in accordance with the Torbay Development Regulations. The Authority advertised two applications which were listed as discretionary uses in the Residential Medium Density in accordance with section 33 of the Torbay Development Regulations, received and considered objections and representations and considered the broader implications of the proposed developments in accordance with section 90 of the Torbay Development Regulations and exercised its discretion by approving the issuance of an approval in principle with conditions in accordance with section 10 of the Torbay Development Regulations. I find that Council made a discretionary decision to approve in principle, subject to conditions, the development applications at 7 Darryl Pye Drive and North Pond Road after due consideration and with no evidence of procedural unfairness.

Decisions of an adjudicator must be in accordance with section 44 (1) of the *Urban and Rural Planning Act, 2000*. As adjudicator, I do not have the right to insert my discretion for that of the Authority. I find that the Torbay Council made a discretionary decision to approve the two developments and that I did not have the authority to insert my discretion for that of Council. That is to say, the decisions of the Authority to issue approval in principle, with conditions, to Walter and April Gosse and to Silver Ridge Properties Inc. are confirmed.

## **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
  - © 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

Concerning Appeal No. 15-006-072-044, the Adjudicator confirms the decision of the Town of Torbay to approve in principle, with conditions, an application by Walter and April Gosse for a 14-unit residential development at 7 Darryl Pye Drive. The Adjudicator orders that a written approval in principle, with conditions, be issued by the Authority to Walter and April Gosse.

Concerning Appeal No. 15-006-072-045, the Adjudicator confirms the decision of the Town of Torbay to approve in principle, with conditions, an application by Silver Ridge Properties Inc. for a residential development consisting of three buildings (13 units). The Adjudicator orders that a written approval in principle, with conditions, be issued by the Authority to Silver Ridge Properties Inc.

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 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 5<sup>th</sup> day of December 2023.



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Elaine Mitchell, RPP, MCIP  
Adjudicator  
*Urban and Rural Planning Act, 2000*