

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-064-048
Appellant(s)	Ray Didham & Tammy Mansbridge (via teleconference)
Respondent / Authority	Town of Conception Bay South
Date of Hearing	December 8, 2021

Also in Attendance

Solicitor for the Appellant(s)	Robert Escott c/o Gittens & Associates
Representatives for the Appellant(s)	
Representatives for the Authority	Corrie Davis, MCIP - Director of Planning and Development John Whalen – Manager of Planning and Development Daniel Barrett – Development Coordinator
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Christopher Hardy, MCIP/Elaine Mitchell, MCIP
Interested Parties	
Start/End Time	9: 00 am/ 10:03 am.

The authority for appeals comes from section 42 of the *Urban and Rural Planning Act, 2000* (The Act).

Board's Role

As clarified at the Hearing, the role of the Eastern Newfoundland Regional Appeal Board is to determine if the Town of Conception Bay South acted in accordance with the *Urban and Rural Planning Act, 2000*, the Town of Conception Bay South Municipal Plan and Development Regulations when the Town Council made a decision on February 4, 2020 to reject the application from Ray Didham & Tammy Mansbridge, to construct a concrete foundation and a 25 foot high pole to support a windmill system at their property, 82 Lawrence Pond Road East, Upper Gullies.

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Presentations during the Hearing

The following is a synopsis/summary of the verbal presentations made to the Board during the Appeal hearing. The Board also received and reviewed written submissions from the Technical Advisor, as well as representatives for the Appellant and the Authority.

1. Technical Advisors Report:

Grounds of Appeal

This appeal is based on the following section of the Act:

42. (1) A person or an association of persons aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to

(a) an application to undertake a development;

The Appellants are appealing the refusal through a representative and based on the following grounds:

1. The Appellants received reassurance from Town staff that there would be no issue installing the windmill,
2. That the section of the Town's Development Regulations on which the refusal was based does not give the Town authority to order removal of the windmill, and
3. The Town breached its "duty of procedural fairness" by not responding to the Appellants for two years

According to the documents provided, the appeal was filed on February 19, 2020. The Appellant's submission included the grounds of appeal, an appeal summary form and the required fee.

The subject land is zoned R-1 (Residential Low Density) under the Town of Conception Bay South Development Regulations.

The full definition of Accessory Building as per the Town of Conception Bay South Development Regulations is:

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"2. Accessory Building includes:

- a) A detached subordinate building not used as a dwelling, located on the same lot as the main building to which it is an accessory and which has a use that is customarily incidental or complementary to the main use of the building or land;
- b) For residential uses, domestic garages, carports, ramps, sheds, swimming pools, greenhouses, cold frames, fuel sheds, vegetable storage cellars, shelters for domestic pets or radio and television antennae;
- c) For commercial uses, workshops or garages; and
- d) For industrial uses, garages, offices, raised ramps and docks."

Procedural Compliance

The Town's Development Regulations include the following sections:

1.6 Licenses, Permits and Compliance with Other Bylaws

Nothing in these regulations shall exempt any person from complying with the requirements of any by-law in force within the Town of Conception Bay South, or from obtaining any license, permission, permit, authority or approval required by any statute or regulation of the Province of Newfoundland and Labrador or the Government of Canada.

83 Prohibited Use means a use that is not listed in a use zone within the permitted use classes or discretionary use classes or a use that an authority specifies as not permitted within a use zone.

4.1 Development Approval Required

No person shall carry out any development within the Planning Area except where otherwise provided in these Regulations unless Development Approval for the development has been issued by the Authority.

4.3 Decisions of the Authority

As required by these Regulations, shall be made in writing and state the reasons for a refusal of, or conditions contained within the Development Approval. The Authority shall also advise the person to whom the decision applies of their right to appeal, in accordance with Section 42 of the Act and the requirements of Section 3, Regulation 5 of these Regulations.

Development Approval

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A plan or drawing which has been approved by the Authority and which bears a mark and/or signature indicating such approval together with a development approval shall be deemed to be permission to develop land in accordance with these Regulations but such permission shall not relieve the applicant from

a) full responsibility for obtaining permits or approvals under any other regulation or statute prior to commencing the development;

4.19 Stop Work Order and Prosecution

Where a person begins a development contrary or apparently contrary to these Regulations, the Authority may order that person to pull down, remove, stop construction, fill in or destroy that building or development and may order the person restore the site or area to its original state, pending final adjudication in any prosecution arising out of the development;

As per the Urban and Rural Planning Act, 2000:

Order

102. (1) Where, contrary to a plan or development regulations, a person has undertaken or commenced a building or other development, the council, regional authority or authorized administrator responsible for that plan or those regulations or the minister where he or she considers it necessary, may order that the person pull down, remove, stop construction fill in or destroy that building or development and may order that the person restore the site or area to its original state.

(2) A person ordered to carry out an action under subsection (1) shall be served with that order and shall comply with the order at the person's own expense.

(3) An order made under this section continues in force until revoked by the council, regional authority, authorized administrator, or minister that made the order.

(4) A council, regional authority, authorized administrator or the minister may, in an order made under this section, specify a time within which there shall be compliance with the order.

(5) Where a person to whom an order is directed under this section does not comply with the order or a part of it, the council, regional authority, authorized administrator or minister may take the action that it considers necessary to carry out the order and any costs, expenses or charges incurred by the council, regional authority, authorized administrator or

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minister in carrying out the order are recoverable against the person against whom the order was made as a debt owed to the council, regional authority, authorized administrator or the Crown.

Ms. Mitchell clarified for the Board at the Hearing that the Town of Conception Bay South, has not to date issued an Order for the removal of the pole and foundation.

2. Appellant's Presentation

- The solicitor for the Appellants noted that the Technical Report misstated the grounds for appeal and further noted that the zoning of the subject property is in fact Residential Low Density (R1).
- The Town has to show due diligence and clarify to the public how it intends to deal with alternative energy sources.
- The Appellants' solicitor maintains that applying the rules of statutory interpretation to the full definition for "accessory building", as contained in the Town's Development Regulations and the Urban and Rural Planning Act, 2000, will lead to the conclusion that the scope of the definition of "accessory building" is broad and can include the proposed windmill structure.
- The Town should have clarified early in the process for the appellants, whether a permit was required.
- Service NL has advised the appellants that they have no problem with the proposed windmill structure.
- The proposed windmill is a type of "utility", which is allowed in the R1 Zone.
- This proposed windmill project is not outside the current scope of the Town's Development Regulations. Where the Town's Development Regulations are silent on a particular development, then the Town does not have the authority to determine its own procedure in dealing with this windmill application. The solicitor referenced the decision of August 13, 2019 of the Supreme Court of Newfoundland and Labrador General Division regarding the Caregivers Inc. O/A Blue Sky Family Care.
- It does not appear that the Town requires permits to be taken out by homeowners to install rooftop solar panels which serve the same alternative energy purpose as the proposed windmill.

3. Authority's Presentation

- Mr. Davis clarified that the Town has not yet issued an Order for the removal of the concrete foundation, and pole built for the proposed windmill structure.
- The Town was compliant with regulatory and statutory requirements in the processing of this application.
- The Town does not consider the windmill pole as a "utility" as defined under the Towns Development Regulations; it is a private structure.
- The windmill structure constitutes "development" as defined under the Towns Development Regulations.
- The installation of solar panels on private homes would likely require a permit from the Town.
- The definition of "accessory building" as found the Towns Development Regulations, does not conclude with the word "etc."
- The Town does not consider a windmill structure to be an "accessory building" according to Section 2.2 (b) of the Town's Development Regulations.
- The Town is not philosophically opposed to the installation of windmill structures on private residential properties. The Town Council has instructed its staff to review the feasibility of allowing these structures on private residential properties. This review is in progress.

Board's Analysis

Q. Is the proposed windmill development (concrete base and metal pole), a "development"?

A. Yes. The Board finds that the proposed windmill development to be a "development" in accordance with the definition in section 2 (g) of the *Urban and Rural Planning Act, 2000* and included in the Town of Conception Bay South Development Regulations.

Q. Does the installation of a concrete base, pole and windmill, require a permit from the Town?

A. Yes. Section 4.1 of the Towns Development Regulations requires that any development in the Town can only proceed with approval from the Town.

"4.1 Development Approval Required

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No person shall carry out any development within the Planning Area except where otherwise provided in these Regulations unless Development Approval for the development has been issued by the Authority."

Q. What is the zoning of the subject property?

A. The Town has confirmed for the Board, that the zoning is Residential Low Density (R1).

Q. Is a windmill allowed in the R1 zone?

A. A windmill is not listed as either a Permitted Use or a Discretionary Use in the R1 zone. However, an accessory building as defined in Section 2.2 of the Town of Conception Bay South Development Regulations is allowed in the R1 zone subject to Section 5.2 and 5.3 of the Regulations.

Q. Can a windmill be defined as an "accessory building"?

A. The Town has taken the position that the listing of the types of structures that may be permitted as accessory structures is prescriptive given the absence of an inclusive or "catch-all" phrase. The Town has therefore taken the position that it does not have authority to consider accessory uses or buildings for residential uses that extend beyond the list included within Section 2(2) (b) of the Towns Development Regulations.

Board's Conclusion

In arriving at its decision, the Board reviewed the submissions and comments, given by the parties present at the Hearing, along with the technical information. The Board is bound by Section 42 of the Urban and Rural Planning Act, 2000 and therefore must make a decision that complies with the applicable legislation, policy and regulations.

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In particular, Section 42 (10) of the Urban and Rural Planning Act, 2000 specifies that the Board may only confirm, reserve or vary the decision under appeal.

42. (10) In determining an appeal, a board may confirm, reverse or vary the decision appealed from and may impose those conditions that the board considers appropriate in the circumstances and may direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have its decision implemented.

The Board notes that the Town takes the position that if a particular use of land or buildings is not specifically regulated within the Towns Development Regulations, that it cannot be permitted. The Town's representatives at the Appeal Hearing advised the Board that the Town's Development Regulations operate on a prescriptive basis, which means that items not explicitly listed are not permitted. That concept is codified in Section 10.8 of the Towns Development Regulations which states that:

"10.8 Prohibited Uses

Uses that do not fall within the Permitted or Discretionary Use Class, or are specifically identified as a Prohibited Use shall not be permitted in that Use Zone"

The Board has determined that the Town's position is reasonable. The Board notes that the installation of a new foundation, pole and windmill is not a typical accessory use or structure associated with a residential property. The Board further notes that the Urban and Rural Planning Act, 2000 authorizes the Town to make amendments to its Development Regulations to allow windmills on residential properties if that is a type of development that the Town Council may wish to allow at some point in the future.

The Board has also determined that once a formal application for the purposed windmill development was submitted by the Appellants to the Town, it was dealt with in a fair and timely fashion.

Board's Order

Based on the information presented, the Board orders that the decision by the Town of Conception Bay South on February 4, 2020 to reject the application from Raymond Didham and Tammy Mansbridge to construct a concrete foundation and 25 foot pole to support a windmill system at 82 Lawrence Pond east, Upper Gullies, be confirmed.

The Authority and the Appellant(s) are bound by the decision of this Regional Appeal Board.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this Regional Appeal Board may appeal to the Supreme Court of Newfoundland and Labrador on a question of law or jurisdiction. If this action is contemplate, the appeal must be filed no later than ten (10) days after the Appellant have received the Board's decision.

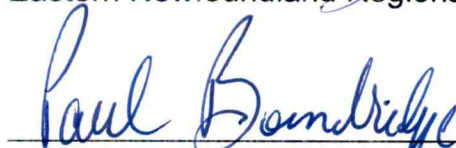
DATED at St. John's, Newfoundland and Labrador, this 8th December, 2021.



Cliff Johnston, MCIP Chair
Eastern Newfoundland Regional Appeal Board



Lisa Slaney, Member
Eastern Newfoundland Regional Appeal Board



Paul Boundridge, MCIP Member
Eastern Newfoundland Regional Appeal Board

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