

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-073-002
Appellant(s)	Robert Bussey
Respondent / Authority	Town of Conception Bay South
Date of Hearing	June 7, 2022

Board Members

Chair	Cliff Johnston, MCIP
Member	Lisa Slaney
Member	Paul Boundridge, MCIP

Also in Attendance

Appellant(s)	Robert Bussey
Representatives for the Appellant(s)	Ron Rowsell
Representatives for the Authority	Corrie Davis, MCIP Director of Planning & Development Daniel Barrett, Development Control Officer John Whalen, Planning and Development Manager
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Keith Batstone, MCIP
Start/End Time	11:00 am – 12:15 pm.

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

Board's Role

The role of the Eastern Newfoundland Regional Appeal Board (the "Board") is to determine if the decision of the Town of Conception Bay South (the Authority) to refuse Development Permit application #2021-163 which proposed to backfill land with roughly 200 loads of soil at 39 Cables Road in Conception Bay South to the Appellant is in accordance with the Urban and Rural Planning Act, 2000, and the Town of Conception Bay South Municipal Plan and Development Regulations.

LEGISLATION, MUNICIPAL PLANS AND REGULATIONS CONSIDERED BY THE BOARD

- Urban and Rural Planning Act, 2000
- Town of Conception Bay South Municipal Plan
- Town of Conception Bay South Development Regulations

Background:

On July 15, 2021, the Authority (Town of Conception Bay South) issued a letter as notice of the Council decision to refuse Development Permit application #2021-163 which proposed to backfill land with roughly 200 loads of soil at 39 Cables Road in Conception Bay South.

On July 20, 2021, the Appellant (Robert Bussey) received the Authority's letter as notice of Council's decision to refuse the application involving the proposed backfilling of vacant land.

On July 27, 2021, the Appellant filed an appeal with the Secretary of the Eastern Newfoundland Regional Appeal Board.

Presentations During Hearing

The following is synopsis/summary of the verbal representations made to the Board during the Appeal Hearing. The Board also received and reviewed written submissions from the Technical Advisor, the Appellant and the Authority.

The Board heard from the following:

Technical Advisor:

The Appellant is appealing the decision of Council to refuse Development Permit application #2021-163 which proposed to backfill land with roughly 200 loads of soil at 39 Cables Road in Conception Bay South on the following grounds:

- A river borders my property as well as another piece of land...
- This person has been allowed to backfill his land...
- the river can no longer disperse the way it once did and now floods my land, making it unusable.
- I have applied for a permit to backfill my land to the same degree as this person's property to prevent the continuation of the flooding, staying back an equal distance from the river so that there would be no interference with the natural river flow.

- Since the other person was clearly permitted to backfill his land (...), I am requesting that I be given the same opportunity to protect the integrity of my property while respecting the preservation of the area.
- The degree to which I want to backfill my land would not cause any further disruption to the wetland area and the river flow could continue (...).
- My application to backfill my land would not alter the wetlands.

The applicable legislation, policies, and regulations with respect to this appeal are:

- Urban and Rural Planning Act, 2000
- Town of Conception Bay South Municipal Plan, 2011-2021
- Town of Conception Bay South Development Regulations, 2011-2021

The following is a summary of development planning regulations and other technical information relevant to the evaluation of this appeal for the purpose of informing the Board's consideration of:

1. the decision of Council
2. the grounds of appeal of the Appellant

Municipal Plan and Development Regulations

The Town of Conception Bay South Municipal Plan and Development Regulations, 2011-2021 came into effect on July 20, 2012.

The subject property is located primarily within the 'Open Space Conservation' land designation; however, a small portion of the lot is located in the 'Residential Medium Density' designation, as per the Future Land Use Map (see: Municipal Plan).

The subject property is located in both the 'Open Space Conservation (OSC)' and 'Residential Medium Density (R-2)' Use Zones, as established in the Zoning Map (see: Development Regulations). Schedule A (see: Classification of Land Uses and Buildings) of the regulations indicates that 'buffer strips' are an example of uses not directly related to building within the 'Conservation' Use Class.

The Municipal Plan outlines a general policy goal for the 'Open Space Conservation' land designation at Section 5.8.1: "To enhance and encourage environmental protection and the preservation of the community's special natural areas." The Plan also outlines a separate policy goal for the 'Residential Medium Density' designation at Section 5.2.1 to: "...provide a range of housing options within Conception Bay South that meets the needs of a variety of age groups and incomes."

The Municipal Plan contemplates the regulation of development in the Open Space Conservation designation in order to protect environmentally sensitive areas such as wetlands, and outlines an objective to: "...encourage environmental stewardship of private and public lands" (see Section 5.8.2).

The following Plan policies appear relevant to development in this land designation:

5.8.3 Policies

1. Areas designated for Open Space Conservation are to be left in a relatively natural state for scenic purposes, to prevent development on steep slopes, protect wetlands, waterways and coastal areas. (...) Agricultural uses, nature parks, and uses related to recreational marine uses such as wharves and docks may be considered.
6. The Open Space Conservation policies of this Plan shall apply to any property or portion of a property that falls within the Open Space Conservation land use designation.

The Open Space Conservation (OSC) Use Zone standards provide for a limited range of uses – examples include:

- Permitted – Conservation including trails, boardwalks, and lookouts; Utilities
- Discretionary – Agriculture; Public Parks; Wharves, marinas and docks

The zone standards specifically outline development regulations that appear intended to restrict development of buildings/structures on private lands, but include provisions for appropriate Agricultural, Conservation, and Park uses – examples include:

10.25.3 Agriculture

Agricultural uses such as the pasturing of animals and use of land for growing hay may be permitted within the Open Space Conservation Use Zone as accessory to an existing agricultural use, where, in the opinion of the Authority, the use will not have an adverse impact on streams or wetlands, by virtue of pollution from runoff or erosion.

10.25.5 Boardwalks

Boardwalks, trail development, look-off structures and interpretive signage shall be properly planned, constructed and maintained to ensure a high level of environmental protection.

The General Development Standards establish provisions that appear intended to preclude the disturbance / placement of soil within 15 metres of water or a wetland, and any adverse effects upon a watercourse. However, the regulations also provide for Council's consideration of: grading plans, reports/studies, and financial guarantees provided by an applicant to ensure adequate setbacks and site rehabilitation, consistent with the Environmental Overlay Map (Municipal Plan Schedule A).

5.10 Development in Hazard Areas

1. In addition to development complying with the development standards and conditions outlined in the Use Zones set out in Section 10, the following conditions will also apply (...)
 - c) For commercial, industrial or other non-residential development located in areas identified as High Hazard, the Authority shall require a site specific study in the form of a Land Use Impact Assessment, prepared by suitably qualified person(s) to evaluate the level of hazard risk, taking into consideration the susceptibility of the proposed development to storm surges, coastal erosion or flooding. Such studies will consider elevation, topography and geomorphology;
 - e) The Authority may require additional engineering design or other measures to mitigate identified hazards as a condition of development, or may refuse development where, in the opinion of the Authority, identified hazards cannot be mitigated.

5.27 Soils and Drainage

Development shall only be permitted on lands having soil and drainage conditions that are suitable to permit the proper siting and development of the proposed uses.

5.28 Soil Removal, Deposit and Site Grading

1. Removal or placement of soil or other material, or alteration to the natural grade or drainage of a property which adversely affects a watercourse or adjacent property shall not be permitted.
(...)
3. Where not part of an approved development, any land disturbance that involves removal or deposition of soil or other material on a property, or any excavation within a lot carried out so as to change the natural grade of the lot, or, if in an approved subdivision the grade established in the grading plan, shall require approval from the Authority. Applications submitted to the Authority will be required to show the full extent of disturbance that is intended. A Land Use Impact Assessment Report may be required to assess geotechnical aspects, visual and environmental impacts, as well as impacts on adjoining properties and land use zones; and
4. Where alterations to the landscape are approved, financial guarantees may be required to ensure adequate site rehabilitation and/or landscaping.

5.34 Watercourse Protection

1. No development shall be permitted within 15 metres of the high water mark of any body of water or wetland without approval from the Department of Environment and Conservation, and, if fish habitat is affected, from Fisheries and Oceans, Canada. The Authority may require larger buffer areas around watercourses where identified flood plains, steep slopes, unstable soil or other conditions could result in damage to watercourses and wildlife habitat as a result of development. For the purposes of assessing applications in areas at risk of flooding, the high water mark shall be the 1:100 year flood level.

(...)

3. Filling in or alterations of wetlands shall be prohibited. Where development is proposed adjacent to a wetland area identified on Map 2 Environment Overlay Map (Schedule A of the Municipal Plan), the Town may require the developer to undertake a wetland analysis study to delineate more precisely the limits of the wetland in order to establish appropriate setbacks for the development.

The Authority's appeal package outlines that the Town received a permit application proposing the backfilling of vacant lands at 39 Cables Road with roughly 200 loads of soil. The Town indicates that the Planning & Development Committee reviewed the application, a staff report, the relevant Municipal Plan and Development Regulation standards, and forwarded a recommendation to Council.

The Authority's meeting minutes for the Council meeting of July 13, 2021 establish that Council also considered the application details, the Committee recommendation, and passed the following motion:

Resolution #21-282

Hillier / Youden

Be it so resolved that, in accordance with Policy 5.8.3 of the Town's Municipal Plan and Section 5.34(3) of the Town's Development Regulations, Application No. 21-163 received on June 10, 2021 seeking to infill land at 39 Cables Road be refused given that lands within the Open Space Conservation Zone are meant to be left in a relatively natural state to protect waterways and wetlands and that filling in or alteration of wetlands is prohibited.

- carried unanimously

The Town provided to the Appellant written confirmation, dated July 15, 2021 that Council refused the Development Permit application with stated reasons.

The Appellant contends that it is pertinent to the Board's consideration of the appeal matter that:

- A neighbouring property has been allowed to backfill land along the river
- The river floods the subject lands, making it unusable
- The application proposes to backfill land consistent with neighbouring property, maintain equivalent distance from the watercourse and not interfere with the natural river flow, all the while protecting the integrity of the lands
- The backfill is also not intended to further disrupt the wetland area

The Development Regulations, 2011-2021 provide the authority for the Council to approve, with conditions, or refuse a Development Permit application for a proposed use of land which is listed as either a permitted or discretionary use:

Subject to Regulations 4.5 and 4.6, a Development Approval shall be issued for development within the Planning Area that conforms to:

- a) The policies expressed in the Municipal Plan and any further scheme, plan, or regulation pursuant thereto;
- b) The general development standards set out in Section 5 of these Regulations, the requirements of Section 10 of these Regulations including the use classes, standards, requirements, and conditions prescribed for the use zone in which the proposed development is located;
- c) The standards set out in the Building Code and/or other ancillary codes, and any Building Regulations, Waste Disposal and Property Regulations, and/or any other municipal regulation in force in the Planning Area regulating or controlling development, conservation and use of land and buildings;
- d) The standards set out in Section 7 of these Regulations in the case of subdivision;

The Development Regulations also establish that Council may request information needed to render an informed decision and approve an application with conditions requiring further development proposal information from the proponent demonstrating conformance with plan policies and development standards, prior to permit issuance:

4.10 Approval in Principle

1. An application for a proposed development shall include;
 - a) a description of the proposed development;
 - b) a description of the limits of the land to be used with the proposed development, and may include a survey description of the subject lands;
 - c) submission of detailed plans; and

d) any additional information that may be required by the Authority.

2. The Authority may issue an Approval in Principle if it determines the application conforms to the Municipal Plan and these Regulations, and attach conditions that are

- a) required to be met prior to the issuance of a development approval; and
- b) necessary to ensure the development occurs in a manner consistent with the policies of the Plan and these Regulations.

3. An Approval in Principle shall be valid for 2 years.

4. No development shall be carried out under an Approval in Principle.

The Authority contends that the Development Permit application was reviewed in consideration of the broad purpose and intent of the existing Municipal Plan and Development Regulations, prior to rendering a decision.

The Authority's appeal submission package indicates that consideration of the permit application involved:

- The Planning and Development Committee's evaluation of the proposal and recommendation to refuse with reasons
- Council determination that the development permit application was contrary to the intent of the Open Space Conservation (OSC) Use Zone and the General Development Standards
- Issuance of a letter as confirmation of Council's decision to refuse with reasons
- Notice of the right of appeal and the associated appeal application process for the Eastern Newfoundland Regional Appeal Board

The Appellant appears to contend that the Authority did not satisfy the requirements of the Act and the Development Regulations because:

- the proposed development would be consistent with similar, surrounding land uses in the OSC Use Zone
- the application to backfill lands would not alter the wetlands

The Appellant:

- The Town's decision to reject the application was made on the basis of incomplete information. Specifically, the Appellant may decide to grow vegetables on his property if he were to receive approval for backfilling to make the land usable.
- There has been backfilling by neighbouring properties which he feels has contributed to the flooding of his property. He would like the same consideration.

- He was unaware of the current zoning and the restrictions on his property and how it would adversely impact the processing of his application.

The Authority:

- Mr. Davis indicated that the Town's planning policies and regulations as they pertain to this application are clear and that filling in or alteration of wetlands is prohibited. The Town sees its decision to refuse the application as being in conformity with the Town's Municipal Plan and Development Regulations, and not a discretionary decision on Council's part.
- The Town has checked, and has not found any record of permits for backfilling being issued by the Town for lands in this area.
- Council made its decision based solely on the written information provided on the Appellants application.

BOARD ANALYSIS

Q. What is the current planning designation and zoning of the subject property?

A. The subject property is located primarily within the 'Open Space Conservation' land designation; however, a small portion of the lot is located in the 'Residential Medium Density' designation, as per the Future Land Use Map (see: Municipal Plan).

The subject property is located in both the 'Open Space Conservation (OSC)' and 'Residential Medium Density (R-2)' Use Zones, as established in the Zoning Map.

Q. Is backfilling of property under this planning designation and zoning contemplated/allowed by the Town?

A. The Municipal Plan outlines a general policy goal for the 'Open Space Conservation' land designation at Section 5.8.1: "To enhance and encourage environmental protection and the preservation of the community's special natural areas." The Plan also outlines a separate policy goal for the 'Residential Medium Density' designation at Section 5.2.1 to: "...provide a range of housing options within Conception Bay South that meets the needs of a variety of age groups and incomes."

The Municipal Plan contemplates the regulation of development in the Open Space Conservation designation in order to protect environmentally sensitive areas such as wetlands, and outlines an objective to: "...encourage environmental stewardship of private and public lands" (see Section 5.8.2).

The following Plan policies are relevant to development in this land designation:

5.8.3 Policies

1. Areas designated for Open Space Conservation are to be left in a relatively natural state for scenic purposes, to prevent development on steep slopes, protect wetlands, waterways and coastal areas. (...) Agricultural uses, nature parks, and uses related to recreational marine uses such as wharves and docks may be considered.
6. The Open Space Conservation policies of this Plan shall apply to any property or portion of a property that falls within the Open Space Conservation land use designation.

The Open Space Conservation (OSC) Use Zone standards provide for a limited range of uses – examples include:

- Permitted – Conservation including trails, boardwalks, and lookouts; Utilities
- Discretionary – Agriculture; Public Parks; Wharves, marinas and docks

The zone standards specifically outline development regulations that are intended to restrict development of buildings/structures on private lands, but include provisions for appropriate Agricultural, Conservation, and Park uses.

Q. Based on the information provided by the Appellant to the Town in his written application, could the Town have approved the application based on the foregoing policies and regulations?

A. No. Section 12 of the Urban and Rural Planning Act, 2000, provides that a municipal plan and development regulations are binding upon (a) municipalities and councils within the planning area governed by that plan or those regulations; and (b) a person undertaking a development in the area governed by that plan or those regulations.

Section 4.2 of the Town of Conception Bay South Development Regulations entitled "Compliance with Regulations" states that Development shall be carried out and maintained within the Town's Planning Area in accordance with the Town's Municipal Plan, the Town's Development Regulations, conditions stated in a Development Approval, and any other bylaw or regulation enacted by the Town.

BOARD'S CONCLUSION AND DETERMINATIONS

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties along with the technical information and planning advice.

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.

Based on its findings, the Board determined that the Town of Conception Bay South had the authority under the Town's Municipal Plan and Development Regulations to reject the Appellant's development application to backfill land with roughly 200 loads of soil at 39 Cables Road in Conception Bay South.

Further, the Board acknowledges the Appellant's concern that he was not aware that a major portion of his property is zoned under the Town's Development Regulations as "Open Space Conservation". It is the Appeals Boards understanding that a public process under the requirements of the Urban and Rural Planning Act, 2000, was carried out by the Town during the preparation of the Town's current Municipal Plan and Development Regulations which came into effect 2012.

BOARD'S ORDER

The Board orders that the decision made by the Town of Conception Bay South on July 13, 2021 to refuse Development Permit application #2021-163 from Robert Bussey to backfill land with roughly 200 loads of soil at 39 Cables Road in Conception Bay South, 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 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 Appellant have received the Board's decision.

DATED at St. John's, Newfoundland and Labrador, this 7th Day of June, 2022.



Clifford Johnston, MCIP, Chair

Eastern Newfoundland Regional Appeal Board



Lisa Slaney, Member

Eastern Newfoundland Regional Appeal Board



Paul Boundridge, MCIP, Member