

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-087-046

Adjudicator: Chris Forbes

Appellant: Andrew Clarke

Respondent/Authority: Town of Conception Bay South

Date of Hearing: August 22, 2024

Start/End Time: 2:00 p.m. – 3:00 p.m.

In Attendance

Appellant: Andrew Clarke

Respondent/Authority: Daniel Barrett, Development Coordinator
Town of Conception Bay South

John Whalen, Planning and Development Manager
Town of Conception Bay South

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

Technical Advisor: Setare Vafaei, Planner II
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 Municipal Plan* (the “Municipal Plan”) and the *Town of Conception Bay South Development Regulations* (the “Development Regulations”) when it refused to issue the Appellant a permit for the storage of U-Haul trucks and trailers at 71 Greenslades Road on January 23, 2024.

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 a report of the Department by Setare Vafaei dated May 6, 2024, noting that, on December 22, 2023, the Appellant submitted an application for a permit to store U-Haul trucks and trailers on the subject property at 71 Greenslades Road. The Authority denied the application on January 23, 2024, and notice of this decision was sent to the Appellant by letter on January 25, 2024. This appeal was filed on February 7, 2024.

The Technical Advisor noted the definition of “development” in the *Act*. She further noted that the majority of the subject property fell within the Residential Low Density designation under the Future Land Use Map in the *Development Regulations*, with a portion located within the Residential Medium Density designation. According to the Authority’s submission, they determined the proposed use was prohibited in the R-1 and R-2 zones, although the submission did not indicate how the Authority classified the use. Regardless, according to the Technical Advisor, a U-Haul truck and trailer storage business would not fall within any of the permitted or discretionary use classes for those zones.

She then referenced section 10.8 of the *Development Regulations* which states that uses that do not fall within the permitted or discretionary use classes are prohibited.

The Technical Advisor indicated that the Authority had considered the application of section 108 of the *Act* respecting non-conforming uses. This section permits a Council to vary an existing use where certain requirements are met and it is deemed more compatible with the Authority’s *Municipal Plan* and *Development Regulations*. Section 3.15 of the *Development Regulations* requires the Authority to give public notice before making a decision to vary an existing use. According to the Technical Advisor, no such notice was given and she indicated that the Authority had determined the proposed use was less compatible with the *Municipal Plan* and *Development Regulations*.

The Technical Advisor then referenced section 4.6 of the *Development Regulations* which grant to the Authority the discretion to refuse an application.

Appellant’s Presentation and Grounds

In his presentation, the Appellant noted that he operates an electrical contracting business using the building located on the subject property, which is a “commercial building” insofar as commercial taxes are payable in relation to it. He noted that many commercial activities are carried out in the general

area of the subject property and that the addition of U-Haul trucks and trailers would not contribute much to the traffic in that area.

The Appellant discussed his intentions respecting the U-Haul business, which includes picking up vehicles and trailers and temporarily storing them on the subject property to then distribute them back to dealerships. This would then give him better rates for renting equipment.

He currently uses the building on the property for storage of things used in his electrical contracting business.

He discussed the history of his relationship to the building on the subject property, which used to be McCarthy's Mechanical. The Appellant is a tenant of a purchaser of that business/building. The former business was involved in plumbing and mechanical contracting as well as some manufacturing (ie. tin knocking used in ductwork). That business had been quite loud, with 4-5 people regularly coming to work there.

The Appellant indicated he wanted to pursue the U-Haul business to supplement his business income. He is self-employed and works on his own. The disturbance caused by the U-Haul business is no different than what had occurred there under the prior business. The U-Haul vehicles are not used in his electrical contracting business.

Authority's Presentation

The Authority noted the zoning for the subject property, as set out in the Technical Report, and confirmed that an existing approved business operates on the property at present: A.B. Clarke Electric Ltd. This business was approved by the Authority on December 9, 2022 as an office and indoor storage for an electrical contracting company. The Authority approved this business as a continuation of a non-conforming use in accordance with the Authority's *Development Regulations* and the *Act*, since the building had previously been used and occupied by another contracting business.

The Authority reviewed the Appellant's application for a permit for the storage of U-Haul trucks and trailers but found that such a use is prohibited under the zoning for the subject property. Further, the proposed change in use and intensification of use would be less compatible with the *Municipal Plan* and *Development Regulations* than the existing legally non-conforming use.

The Authority submitted that the Appellant's arguments are essentially in the nature of opinions (for example, that there are other businesses operating in the area and that the impact of the U-Haul storage business would not cause disruption any more than the previous business on the subject property). The Authority submitted that the Appellant had not raised a ground of appeal that would permit me to vary the decision of its Council.

Analysis

Did the Authority have the discretion to refuse the Application of the Appellant for a permit to store U-Haul trucks and trailers on the subject property?

Yes.

Section 2(g) of the *Act* defines "development" as including "the making of a material change in the use, or in the intensity of use of land, buildings or premises ..." In my view, the Appellant seeks to make such

a change in the business being operated on the subject property. At present, he is permitted by the Authority to operate an electrical contracting business out of the building located on the property; however, storing U-Haul trailers and trucks, even temporarily, would not be connected with the existing business. Indeed, the Appellant confirmed this new business was not related to his existing business but would hopefully be used to generate supplemental income.

Since the permit application relates to a “development,” as defined in the *Act*, it is subject to the Authority’s *Municipal Plan* and *Development Regulations*.

Section 4.4 of the *Development Regulations* provides that approval shall be issued for development that conforms to the requirements of section 10 of the *Development Regulations* (respecting use classes), but also provides that the section is subject to section 4.6. Section 4.6 of the *Development Regulations* sets out the Authority’s discretion to accept or refuse a permit application regardless of conformity under section 4.4 and mandates that the Authority take into account both the *Municipal Plan* and *Development Regulations* among other things.

I find that, pursuant to section 4.6 of the *Development Regulations*, the Authority had the authority to refuse the permit application in accordance with that section.

If yes, was the Authority’s decision to refuse the application of the Appellant in accordance with, and a reasonable use of, its authority?

Yes.

It is clear that, pursuant to section 10.8 of the *Development Regulations*, uses that do not fall within the Permitted or Discretionary Use Class for a property are not permitted in that use zone. A U-Haul truck and trailer storage business is not permitted in the use zones of the subject property. As such, it could only be permitted as a non-conforming use or variation of an existing non-conforming use in accordance with section 108 of the *Act* and the *Development Regulations*.

The existing electrical contracting business operated on the subject property is a legal non-conforming use pursuant to section 108 of the *Act*. That section allows for a variation of such use “to a use that is, in [Council’s] opinion more compatible with a plan and regulations applicable to it” (see section 108(3)(d)).

Section 5.19(2) of the *Development Regulations* sets out the various situations in which a non-conforming use will be deemed to be discontinued. These include where a change in the type of use results from “the scale or intensity of the activity,” “the addition of new activities,” or “the modification of old activities” that are remote from previous activities. The Authority submits that, since the *Development Regulations* indicates a non-conforming use will be deemed discontinued where any of these criteria are met, it would be reasonable to infer that if a proposed variation to a non-conforming use meets any of these criteria, that variation should likewise not be permitted. I agree.

It is clear the U-Haul storage business proposed by the Appellant would constitute a new activity on the subject property that is remote from his existing electrical contracting business. As he indicated, the two businesses are unconnected, although he hopes to make supplemental income from the U-Haul business. Similarly, adding the U-Haul storage business would result in a change in the scale of the activities conducted on the subject property. While I appreciate that tin-knocking carried on the

property years ago would likely have created a degree of disturbance in the area, I am required to focus not on the activities carried on on the property years ago but on the activities that were previously the subject of the Appellant's non-conforming use approval issued by the Authority – specifically, his electrical contracting business.

Regardless, it is clear the Authority had the discretion to determine whether or not to vary the non-conforming use of the subject property. Since a U-Haul storage business is not permitted under the zoning for the property, and is not directly related to the current use of the property as an electrical contracting business, it was within the Authority's discretion to refuse the permit application. I find this to be a reasonable exercise of its authority.

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 the Authority to refuse the application of the Appellant to carry on a U-Haul truck and trailer storage business at 71 Greenslades Road, be 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 11th day of September, 2024.



Christopher Forbes

Adjudicator

Urban and Rural Planning Act, 2000