

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

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Appeal #: **15-006-091-018**

Adjudicator: Paul Boundridge, MCIP

Appellant(s): Michael St. Pierre-Caron

Respondent / Authority: Town of Pouch Cove

Date of Hearing: 8 November 2024

Start/End Time: 9:00 a.m. – 9:50 a.m.

In Attendance

Appellant: Michael St. Pierre-Caron

Authority Representative(s): Rodney Hynes, Town CAO

Appeal Officer: Synthia Tithi, Department of Municipal & Provincial Affairs

Technical Advisor: Setare Vafaei, Planner II, Department of Municipal & Provincial Affairs

Planning Considerations: *Urban and Rural Planning Act, 2000; Town of Pouch Cove Municipal Plan and Development Regulations 2020-2030; Municipalities Act, 1999*

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 Pouch Cove Municipal Plan and Development Regulations 2020-2030 when it refused the application for an accessory building at 9 Sullivan's Loop, Town of Pouch Cove, on July 16, 2024.

HEARING PRESENTATIONS

The Adjudicator heard oral presentations from the following parties at the appeal hearing. The Adjudicator also received written presentations from the Planner/Technical Advisor, the Appellant and the Authority prior to the appeal hearing date. The Adjudicator also had access to the digital recording of the appeal hearing made by the Appeals Officer.

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Planner's Presentation

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness.

Under the Section 10 (a) of the Rules of Procedure:

"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.

The Planner from Municipal and Provincial Affairs shall provide the framework with respect to the appeals process under the Urban and Rural Planning Act, 2000 and provide an overview of how an application was received from a developer and processed by Council as prescribed in their roles and responsibilities."

- The Technical Advisor advised that Appellant submitted an accessory building application (a shed) on May 30, 2024, at the property known as civic # 9 Sullivan's Loop. On June 19, 2024, a site inspection was conducted for the proposed accessory building. The Town of Pouch Cove also engaged the services of its planning consultant, Plan-Tech Environment Inc., who reviewed the development application and recommended refusal. On July 16, 2024, the Town of Pouch Cove (Authority) informed the Appellant of the refusal letter.
- The Technical Advisor also informed the Adjudicator that the appeal was valid in terms of its conformity with URPA Section 41. (3) and (4) which state:
 41. (3) An appeal made under this section shall be filed with an appeal officer not more than 14 days after the person who made the original application receives the decision.
 41. (4) An appeal shall be made in writing and shall include
 - (a) a summary of the decision being appealed;
 - (b) the grounds for the appeal; and
 - (c) the required fee.

According to the documents provided, the appeal was formally filed on July 23, 2024. According to the Appellant, they learned of the decision on July 16, 2024. The appeal was filed within 14-day timeframe established under Section 41(3) of URPA.

- The Technical Advisor also informed the Adjudicator of the provisions of the URPA and the Town of Pouch Cove Municipal Plan and Development Regulations 2020-2030 which were relevant to the decision made by Council that is the subject of this appeal; and that Council's decision was communicated to the Appellant in conformity with the requirements of URPA and the Town's Development Regulations – the reason for Council's decision was clearly stated and the Appellant/Applicant was informed of his right to file an appeal of the Council decision.

Appellant's Presentation and Grounds

The Appellant is appealing the refusal based on the following stated grounds:

- The Appellant argues that the Authority did not consider Regulation 38(4)(c), which states that the property's physical limitations would prevent the development of an accessory building behind his house as required under Regulation 38(2).
- The Appellant asserts that their property is situated on an irregular lot, with the house attached to a neighboring property and approximately 10 feet from the back property line, leaving no space for building behind the house.
- The Appellant asserts that the proposed barn shed meets the specified dimensions in the permit application and will be located within the outlined limits, at a sufficient distance from the street.
- The Appellant argues that the Town has the discretionary authority to permit construction of an accessory building in front of the main building when there is no possibility of building behind it.

At the appeal hearing, the Appellant advised:

- That he familiarized himself with the Town's regulations concerning accessory buildings before he submitted his development application; that when he submitted the application Town staff had acknowledged that Council had discretion under Development Regulations Section 38 to approve his application; and, that it could not be assumed in advance how Council would view the application and decide to apply its discretionary power or not.
- That he had surveyed the area of Town in which his home is located and found that a number of properties had accessory buildings placed in front of the building line of the houses.
- That he had consulted with his immediate neighbour about his application and if she had any concerns related to it, and that she gave him a written statement of support.
- That, as outlined in Section 38(4)(c), the unique physical limitations of the property, including its irregular lot shape and its attachment to the adjacent house, provides Council a rationale for an exemption from Section 38(2) and gives the Town the authority to issue the permit under these circumstances, supported by Section 38(4)(c).

- It was not evident from the information provided by the Town how the Town's Planning and Development Committee and/or Council came to the conclusion that it would not be appropriate for Council to use its discretionary power as outlined in Section 38(4)(c) of the Development Regulations, and no reason for this was given in the letter of refusal the Town issued.

Authority's Presentation

The Authority's written and verbal submissions can be summarized as follows:

- "In review of the application, it was determined that your accessory building could not readily be approved as it did not meet regulation 38(2) of the 2020-2030 Town of Pouch Cove Development Regulations:

Part II - General Development Standards

38. Accessory Buildings

(2) No accessory building or part thereof shall project in front of any building line."

- The Appellant's Accessory Building Application was received on May 30, 2024 and had been referred to the Town's planning consultant, Plan Tech Environment (Reg Garland) for review. The consultant's terse, undated report referenced only part of the accessory buildings regulation Section 38.(2), omitting any reference to Section 38.(4) and Council having the discretion to allow placement of the accessory building as proposed if Council took into account the criteria specified in Section 38.(4). It is not known why the consultant's report was so short and omitted any reference to Section 38.(4) and Council having the discretion to allow placement of the accessory building as proposed.
- The Town's former Planning, Development and Infrastructure Coordinator (PDIC) had recommended at the end of June 2024 that the application be referred to the Planning and Development Committee because the use of Council's discretionary power could be involved in the handling of the application by Council.
- The Town's Planning and Development Committee ordinarily meets monthly. However, the application and planning consultant's report was not discussed at the June 2024 meeting of the Committee, and the Committee did not meet in July 2024 to discuss the planning consultant's report and recommendation. Nevertheless, the two Council members who (with the PDIC and Town Clerk) comprise the Planning and Development Committee (having met online or by phone – and no Meeting Minutes or Meeting Notes maintained) "said (to the Town Clerk) to go ahead with what Reg suggested".
- Each month a Permit Log/Report that was approved by the Committee is presented to Council. "As far as (the Town's CAO) can determine this particular application, the report on the application by Plan-Tech, the decision to deny the permit, etc. was not discussed and formally approved by Council. As noted above it was part of a larger package that was discussed and voted on and approved by Council."

- No Minutes or Notes for the Meeting of the Planning and Development Committee at which the Appellant's application and the planning consultant's recommendation are available. There are no adopted Minutes of the Council Meeting of July 16, 2024 or earlier at which the Planning Committee's recommendation on the matter now under appeal was presented which would record Council had consciously weighed whether to exercise its discretionary authority as provided for in Section 38.(4) of the Town's Development Regulations.

In summary, under the Town's Municipal Plan and Development Regulations, the Town was not required to exercise its discretionary authority to approve the development application submitted by the Appellant and was within its rights to reject it without exercising its discretionary authority.

ADJUDICATOR'S ANALYSIS

Q: What is the Zoning of the subject property?

R: The subject property, 9 Sullivan's Loop, Town of Pouch Cove, is in the R-1 Zone, as per the Town of Pouch Cove Development Regulations.

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Q: Is an Accessory Building a Permitted Use in the R-1 Zone in the Town of Pouch Cove?

R: Yes. An Accessory Building is permitted under R-1 Zone and is subject to Section 38 of the Pouch Cove Development Regulations. Section 38 of the Town's Development Regulations outline the requirement for an accessory building as follow:

38. Accessory Buildings

(1) Accessory buildings shall be clearly incidental and complementary to the use of the main buildings in character, use and size, and shall be contained on the same lot.

(2) No accessory building or part thereof shall project in front of any building line.

(3) The sideyard requirements set out in the use zone tables in these Regulations shall apply to accessory buildings wherever they are located on the lot but accessory buildings on two (2) adjoining properties may be built to property boundaries provided they shall be of fire resistant construction and have a common firewall.

(4) Notwithstanding Regulation 38(2), Council may approve a location of an accessory building closer to the street line than the main dwelling where Council:

(a) considers that the proposed location complements the historical development pattern in the surrounding area, such as the heritage homes and areas that have reduced setbacks:

(b) considers that the location as required under Regulation 38(2) would pose a threat to road safety;

(c) finds that the physical limitations of the property would not allow for the development of an accessory building as required under Regulation 38(2); and,

(d) considers that the proposed location as required under Regulation 38(2) would adversely affect the view from neighbouring homes.

(emphasis added)

Q: When an application for an Accessory Building is unable to meet the requirements of Section 38.(2) of the Pouch Cove Development Regulations that a building must be placed at or behind the building line of the dwelling on the lot, does Council have the authority to approve placement of the proposed Accessory Building in front of the Building Line?

R: Section 38.(4) of the Pouch Cove Development Regulations appears to be intended for use in such a situation in that it gives Council the discretionary authority, subject to specified criterion, to approve placement of the proposed Accessory Building in front of the Building Line.

Q: In this case, is Council required to exercise its discretionary authority (per Section 38.(4) or to give consideration to exercising its discretionary authority (per Section 38.(4))?

R: While an Applicant may have a legitimate expectation that Council would use its discretionary power as provided for in Section 38.(4), Council is not compelled to exercise its discretionary authority. However, Section 10 of the Town's Development Regulations establishes the Authority's discretionary powers and directs that Council **shall** take into

account the policies of the Municipal Plan “and regulations pursuant thereto” and consider the criteria outlined below when making a decision on an application:

10. Discretionary Powers of Authority

(1) In considering an application for a permit or for approval in principle to carry out development, the Authority 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 Authority 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. (emphasis added)

In other words, all decisions of Council involve some degree of discretion; and Council must make a conscious decision whether or not to use its Discretionary Powers in considering an application to carry out development, even for those involving an Accessory Building.

Q: Is there any indication that the Authority (Town of Pouch Cove Council) took into account the entirety of Development Regulations Section 38 (Accessory Buildings development standards) and its discretionary authority under Section 38.(4) to approve the proposed location of the accessory building, and its overarching Discretionary Powers as set out in Section 10 of the Pouch Cove Development Regulations, in arriving at the decision communicated to the Appellant on July 16, 2024?

R: No, there is no documentation to support that the Authority gave any consideration to the exercise of its Discretionary Powers in its consideration of the Accessory Building application. The Authority has not supplied a copy of the Adopted Minutes of the Public Meeting of Council at which the decision to reject the Accessory Building Application was made or a copy of the document from the Planning and Development Committee (“Permit Log”) which was the basis for the decision made. [It is noted that Section 215 of the Municipalities Act, 1999 requires that Council maintain for public viewing a copy of all adopted Minutes of Public Council Meetings and copies of all other documents tabled or adopted by council at a public meeting.]

Q: Can Council delegate designated municipal staff to exercise Discretionary Power, per Sections 10 and 38.(4) of the Development Regulations, and make decisions on behalf of Council?

R: Section 109.(2) of the URPA gives a Council discretion to appoint, in writing, an employee to approve or reject applications to develop land in accordance with the Municipal Plan and Development Regulations. It does not state that a Council may designate a staff member to exercise discretionary power on behalf of Council.

The Town’s CAO has advised that the Council has designated the Planning, Development and Infrastructure Coordinator (PDIC) to deal with (review and approve) application for a

Permitted Use that meets all requirements. The Town's CAO further advises that an application which involves a discretionary use, a variance or the "councils' discretion" would be brought to the monthly Planning and Development Committee (PDC) "where a decision is made". The PDC decision (recommendation) on each application is contained in a monthly report, which includes a Permit Log, which is brought to a Public Meeting of Council and voted on by Council.

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The Authority has not supplied a copy of the Adopted Minutes of the Public Meeting of Council at which the decision to reject the Accessory Building Application was made or a copy of the document from the Planning and Development Committee ("Permit Log") which was the basis for the decision made. Therefore, it is not known if the decision to reject the application was in conformity with the Town's Development Regulations and its policy delegating authority to the PDIC to approve applications for a Permitted Use that met all requirements, and with the PDC's authority to make recommendations to Council on applications which could involve employing Council's discretionary authority.

CONCLUSION

In arriving at his conclusion, the Adjudicator has reviewed the submissions and evidence presented by all parties, along with technical information and planning advice.

The Adjudicator is bound by Section 44 of the Urban and Rural Planning Act, 2000 and must therefore make a decision that complies with the applicable legislation, policy, and regulations.

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."*

Having considered the facts and circumstances associated with the treatment of the development application which is the subject of this appeal, the regulatory regime and the related provisions of the Town of Pouch Cove Municipal Plan and Development Regulations, I find that the Town's refusal to consider applying its discretionary power under Section 38.(4) of the Development Regulations in order to grant the development permit was *in error* and *contrary* to Section 10 of the Town of Pouch Cove Development Regulations.

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The Development Authority considered the Appellant's application and decided that the application was not in compliance with the Town's Development Regulations without having taken into consideration its instruction under Section 10 of the Town's Development Regulations which directs that Council ***shall*** take into account the policies of the Municipal Plan "and regulations pursuant thereto" and consider the criteria outlined in Section 10 and elsewhere in the Municipal Plan and Development Regulations (i.e. Section 38.). The Development Authority rejected the application without informing Appellant of why it had chosen not to use its discretionary authority as provided for in Section 38. (4) of the Development Regulations.

I find also that there is a procedural deficiency with the Development Authority's conduct in this instance – the failure to maintain and provide to the Appeals Officer a Report or Minutes for the PDC meeting at which the Appellant's application was discussed, and Minutes for the Public Council Meeting at which the PDC Report/Minutes ("Permit Log") which recommended Council reject the application was tabled is inexcusable and contrary to Section 215 of the Municipalities Act and Section 7.(3) of the Minister's Development Regulations under *the Urban and Rural Planning Act, 2000* which states:

- (3) Where an authority has been notified of an appeal that authority ***shall*** forward to the appropriate board a copy of the application being appealed, all correspondence, *council minutes, plans and other relevant information relating to the appeal* including the names and addresses of the applicant and other interested persons of whom the authority has knowledge.

The absence of the Minutes of Committee and Council Minutes leads to the possibility that the decision being appealed may not have been made by Council but by staff (administration) or a Committee of Council.

Based on these findings, the Adjudicator concludes that the Town did not come properly to its decision to refuse Mr. St. Pierre-Caron's application. That is to say that the Adjudicator will vacate/reverse the Town's decision and refer the application back to the Town to reconsider with respect to the entirety of Section 38 and Section 10 of the Town of Pouch Cove Development Regulations.

ORDER

1. The Adjudicator orders that the decision of the Development Authority of July 16, 2024 to refuse an application for an accessory building at 9 Sullivan's Loop, Town of Pouch Cove, is vacated/reversed and refer the application back to the Town to reconsider with respect to the entirety of Section 38 and Section 10 of the Town of Pouch Cove Development Regulations. Page | 10
2. The Appellant is successful in this matter and, in accordance with Section 46.1 of the *Urban and Rural Planning Act, 2000*, therefore entitled to repayment of his appeal fee by the Town of Pouch Cove.

The Authority and the Appellant are bound by this decision.

According to Section 46.1 of the *Urban and Rural Planning Act, 2000*, the decision of this Appeal 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 29th day of November, 2024.



Paul Boundridge, MCIP
Adjudicator
Urban and Rural Planning Act, 2000