

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-087-038
Adjudicator: Mary Bishop
Appellant(s): Ian Gosse
Respondent/Authority: Town of Portugal Cove- St. Phillips
Date of Hearing: May 30, 2024
Start/End Time : 1:30pm - 2:30pm

In Attendance

Appellant: Ian Gosse, Pam Miles
Appellant Representative(s):
Respondent/Authority: Town of Portugal Cove-St. Phillips
Respondent Representative(s): Les Spurrell, Planning and Development Coordinator
Brian Peach, Director of Planning
Ashley Linehan, Planning Technician
Proponent/Developer: NA
Appeal Officer: Robert Cotter, Departmental Program Coordinator,
Municipal and Provincial Affairs
Technical Advisor: Setare Vafaei, Planner II, Department of Municipal and
Provincial Affairs

Adjudicator's Role

Part VI of the *Urban and Rural Planning Act, 2000* 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*, and the Town of Portugal Cove-St. Phillips Municipal Plan and Development Regulations when it refused an application to construct a fence at 1 Druken's Lane on November 1, 2023.

Hearing Presentations

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.

10. The Hearing shall 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 her report noting that in 2021, the Appellant applied for and received a permit to construct a fence on the subject property. The fence is located within an identified floodway fringe and required a permit from the Province under the *Water Resources Act* and from the Town. Two years later, the Appellant made a request to the Water Resources Management Division of the Department of Environment and Climate Change for permission to extend the fence under the existing permit. This was granted, but the Town advised the Appellant that they would require a new application for the extension.

The application was brought before Council on two separate occasions – October 3, and November 1 – with a recommendation from the Planning and Development Committee that the application be approved subject to the applicant receiving approval from the Province. On each occasion, Council refused the application.

The Planner indicated that the developed residential property is located within a Mixed Use Zone in the Town's Development Regulations and that for non-residential uses that may be permitted, Condition 3 containing specific requirements for outdoor storage, would apply.

The Planner's report also indicated that under Section 10 of the Town's Development Regulations, Council has discretion to approve or refuse an application taking into consideration a number of factors including:

"the amenity of the surroundings, potential environmental effects, availability of municipal services and utilities, public safety and convenience, and any other considerations which are, in its opinion, material."

The Planner indicated that the Town refused the application under Section 34 (1) and (2) of its Occupancy and Maintenance Regulations, 2010 that limit outdoor storage to the rear yards of properties and that stored items be neatly arranged.

The *Occupancy and Maintenance Regulations* under the *Urban and Rural Planning Act, 2000*, apply to the Town of Portugal Cove-St. Philip's. The Authority cited Section 34 of Of these regulations as the reason for refusing the application. Section 34 states:

On site storage

34. (1) The storage of materials or equipment on the site of a building or

dwelling unit shall be at the rear of the lot.

(2) All items shall be neatly arranged and shall not cause inconvenience or imposition to adjoining properties.

Appellant's Presentation

At the Hearing, the Appellant outlined the grounds of the appeal:

1. The Water Resources Management Division granted permission to extend the fence under existing permit #ALT12003-2021.
2. Council denied the permit application despite the approval from Water Resources Management Division and the positive recommendation from the Planning and Development Committee.
3. Council's reasons for denying the application are unrelated to the fence permit. Specifically, Section 34, of the Occupancy and Maintenance Regulations which pertain to the storage of materials or equipment on the building site, a provision that should not directly apply to fence construction.

The Appellant argued that he had received a permit from both the Town and the Water Resources Management Division for the existing fence and that he had obtained permission to extend the fence under his current permit. As such, he should be allowed to extend the fence along the remainder of his property boundary. He further argued that the application for the fence had nothing to do with the issues of storage of materials in the portion of the yard that the fence would be placed in front of, and that these issues should have been dealt with separately.

He outlined his efforts to remove materials from the property, indicating that fishing gear was being used and would not be brought back to the property and that other materials had been cleaned up.

Upon questioning by the Adjudicator as to the purpose of the fence, given the shape of the property, the Appellant indicated that the purpose of the fence was to screen the narrow portion of the property from the street and to enable him to better use the space.

Authority's Presentation

The Authority argued that there has been an ongoing issue with the storage of fishing gear and other materials in the front yard of this property. At the Hearing, the Authority described the efforts it had made with respect to having the Appellant remove materials stored on the property. They indicated the Planning and Development Committee recommended the approval of the fence, subject to approval from the Province, as a means of potentially resolving the ongoing issue. However, Council, which is the decision-making body, disagreed and considered that construction of the fence would facilitate continued storage of materials in the front yard, contrary to the Town's Occupancy and Maintenance Regulations.

Adjudicator's Analysis

The following questions arise from this appeal:

1. Was the Authority correct in requiring a new application for the extension to the existing fence?

Yes, the application constituted new development and thus required an application to the Town.

2. Was Council bound by a recommendation from the Planning and Development Committee to approve the application?

No. Council is the final decision-making body. Committees of Council make recommendations for the consideration of Council. In this case, Council rejected the recommendation of the Planning and Development Committee to approve the extension of the fence, taking into consideration the apparent use of the residential property for the storage of materials and equipment in the front yard.

3. Did the Authority have discretion to approve or refuse the application?

Yes. Council had the discretion to refuse the application under Section 10 of the Development Regulations.

4. Did the Town correctly apply its discretionary authority under Section 10 of its Development Regulations in rejecting the application for the extension to the fence?

No. The letter dated November 28, 2023 advising of Council's decision of November 1, 2023 to reject the application did not indicate that Council had used its discretionary authority under Section 10 of the Town's Development Regulations to reject the application. Instead, reasons for refusal of the application were that the proposed development was not in compliance with Section 34 of the Town's Occupancy and Maintenance Regulations, which, as the Appellant argued, have nothing to do with the application for the fence.

Decisions of adjudicator

As Adjudicator, I am bound by Section 44 of the URPA, 2000, 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.

After reviewing evidence presented and the applicable provisions of the Town's Municipal Plan and Development Regulations, the Adjudicator concludes the Town had discretion to refuse the application for an extension of a fence at Civic No. 1 Druken's Lane. However, the Town, in stating its reasons for refusal of the application, incorrectly applied Section 34 of the Town's Occupancy and Maintenance Regulations which pertain to outdoor storage.

Order

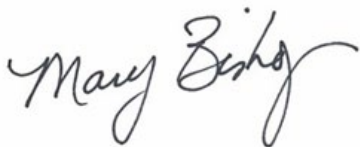
Concerning Appeal No.15-006-087-038 the Adjudicator orders that the decision of the Town of Portugal Cove-St. Phillips Municipal Council made on November 1, 2023 to refuse an application to extend a fence at Civic No. 1, Druken's Lane, be reversed. That is to say, the Adjudicator orders that the application be referred back to the Town for re-consideration and processing in accordance with the full requirements of the Town's Municipal Plan and Development Regulations.

The Adjudicator finds that the appeal under file no. 15-006-087-035, is successful. Therefore, in accordance with section 45(2) of the *Urban and Rural Planning Act, 2000*, it is further ordered that the Authority pay an amount of money equal to the appeal filing fee of \$230.00 to the Appellant.

The Authority and the Appellant(s) 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(s).

DATED at St. John's, Newfoundland and Labrador, this 13th of June, 2024.



Mary Bishop, RPP, MCIP, FCIP
Adjudicator
Urban and Rural Planning Act, 2000