

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal # : **15-006-091-015**

Adjudicator: Garreth McGrath

Appellant(s): Nora Cahill

Respondent / Authority: Town of Conception Bay South

Date of Hearing: 20 September 2024 & 26 November 2024

Start/End Time : 9:00-12:00

In Attendance

Appellant: Nora Cahill

Appellant Representative(s): Pierre Gauvreau

Respondent/Authority: Town of Conception Bay South

Respondent Representative(s): Cory Davis, Daniel Barrett

Proponent/Developer: Chesley Penney

Developer Representative: Sarah Clarke

Interested Party: N/A

Appeal Officer: Synthia Tithi, Departmental Program Coordinator, Municipal and Provincial Affairs

Technical Advisor: Setare Vafaei

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 and Town of Conception Bay South Municipal Plan and Development Regulations when it approved an application for an approval to renovate a boat house at 59 Villa Nova Road, Conception Bay South, NL on 11 June 2024.

Hearing Presentations

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 Rules of Procedure:

(a) there shall be a technical advisor to the Adjudicator who shall provide data relative to the Municipal Plan or other Scheme in effect and an interpretation on whether 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 Adjudicator heard from the planner that this appeal relates to the approval to renovate a boat house at 59 Villa Nova Road, Conception Bay South, NL on 11 June 2024 (hereinafter the "Subject Property").

The Planner's outlined that the position of the Appellant is focused on four grounds of appeal which are found in the appeal presentation of the Appellant:

1. The structure in question is a confirmed non lawful non-conforming building, with no historical or grandfathered status as a boat house.
2. The initial permit was for a boat house, the structure was built and used as a dwelling, thereby emphasizing the non-lawful non-conforming nature of the current use.
3. The unauthorized subdivision in 2019 further expanded the non-conforming status of the structure by separating it from the main dwelling.
4. The Council's discretionary powers under section 4.6 must align with the Town's Municipal Plan and Development Regulations.
5. The proposed change in use from a dwelling to a boat house necessitates adherence to current zoning and development regulations.

The technical report of the planner outlines that the subject property is in a Residential Low Density (RLD) zone. As per the Regulations, a RLD zone allows the building of boat houses as a Discretionary Use as per the Development Regulations. Discretionary Uses are allowed in RLD zones where "Subject to these Regulations, the uses that fall within the Discretionary Use Classes set out in the appropriate Use Zones may be permitted in that Use Zone if the Authority is satisfied that the development would not be contrary to the general intent and purpose of these Regulations, the Municipal Plan, or any further scheme or plan or regulation pursuant thereto,

and to the public interest, and if the Authority has given notice of the application and has considered any objections or representations which may have been received on the matter. “The technical report also outlined the requirements for development on the property and general standards required for development.

The Appellant’s Presentation and Grounds

The presentation of the Appellant focused on the position that the decision of the Authority allowed a “boat house” to be built which was used as a residence by the owners. The Appellant asserted that it was due to this use as a residence and the fact that the boat house was originally on a piece of property that was “unlawfully” subdivided which meant that there were no grounds for the granting of the permit to renovate the boat house located at the Subject Property. The Appellant also emphasized that they felt it was unreasonable that there not be further requirements for a stand-alone boat house in the Authority’s Regulations, however the Adjudicator does not have authority to impose a standard for requirements on the Authority, simply to ensure that those Regulations which the Authority imposes on themselves are followed. The Appellant also submitted that they felt that because the property was not used as a boathouse, it lost its approved use when it was used as a residential premises.

Authority’s Presentation

The Authority’s presentation focused on the decision of the Authority being a discretionary one and as such the Adjudicator should not interfere in the decision-making process. The Authority’s position was that the Subject Property has an existing boat house there and that the changes being made were within the Rules and Regulations of the Authority, including the requirement to restrict the roof to 8m which was a requirement of residential buildings under the Authority’s Regulations but not a regulation specific to the construction of a standalone boat house. The Authority also noted that the Regulations allowed the construction of a freestanding boat house and nothing about the regulations prohibited them from authorizing the construction of a boat house.

Interested Party Presentation

The Adjudicator also heard from counsel for the Interested Third Party owner of the Subject Property. The Third Party emphasized the position of the Authority, that the Town had authority to issue the permit, that the use of the property as a boat house was still valid, and that the town’s decision to approve the construction was within the Authority’s power. The Third Party also noted that it was their position that many of the grounds of appeal raised by the Appellant were outside the scope of authority for the Adjudicator to hear as per the *Urban and Rural Planning Act, 2000* and the Town’s Development Regulations.

Adjudicator’s Analysis

The Adjudicator reviewed The Urban and Rural Planning Act, 2000 as well as the Town of Town of Conception Bay South Municipal Plan and Development Regulations and determined the following:

1. Was there an unauthorized subdivision in 2019 that could impact this application?

While the Appellant may feel the subdivision was unauthorized, the Adjudicator has no powers under the Urban and Rural Planning Act, nor any act of the Provincial Legislature to determine the validity of a subdivision of property in 2019. This is a decision that is strictly within the purview of the Supreme Court of Newfoundland and Labrador to make determinations on whether the exercise of authority to subdivide property outside of the appeals period and grounds of appeal allowed under the Urban and Rural Planning Act.

As such, I can make no determination that the application was invalid based on whether the subdivision of the property in 2019 was “unauthorized.”

2. Is the boat house an unlawful non-conforming use that did not predate the establishment of the Town of Conception Bay South Development Regulations?

The non-conforming use in question which arises from the decision of Adjudicator Forbes is not the question of whether the use as a boat house is non-conforming. The decision in Decision# 15-006-087-024 upheld that the Subject Property did not have a non-conforming use as a residential property. This meant that when the Third Party applied to renovate the boat house into a residential dwelling, they could not as the land was only authorized for use as a boat house and could not be used as a residential home due to the Subject Property being in a High Hazard Vulnerability area.

This is important because the use that was authorized on the property, confirmed by Adjudicator Forbes, is the ability to use the property for a boat house, as it was granted on 16 November 2001. The use of the land and the use that continues with the land when the land is subdivided is the use that the land is authorized for.

In this case, we cannot overturn the decision of the Authority in November 2001 when they authorized the use of the property as a boat house. The subdivision of a property does not sever the use of the property, as that would require every subdivision of any property to go through the process to approve uses again for already existing buildings. Instead, there are specific rules and regulations around when and where a subdivision can take place which have appeals mechanisms under the Urban and Rural Planning act and the Supreme Court.

As such, it is clear to the Adjudicator that the use of the property as a boat house is the authorized use of the property as of the order 16 November 2001, which can be found on page 25 of the Appendixes for Appeal of the town’s submissions from the Department of Environment of the Province of Newfoundland and Labrador. Therefore, an application to renovate a boat house is within the authorized uses of the property that already exist.

3. Does the fact that the boat house is used as a residential dwelling impact the Subject Property’s use?

The property being used unlawful as it is, creates a problem with the argument of the Appellant. If this application is denied, the decision leads to an unreasonable outcome.

This application is to remediate the historical wrong that has appeared here, that a boat house has been used as a residential premises for over 20 years. The application is to take what is currently used as residential property and was denied the continued use as a residential property and convert it into its intended use as a boat house. To deny this application would, in essence, bring the property back to an unlawful state continuing the problem that the Applicant has with the property, instead of allowing the Third-Party developer to remediate the unlawful use and bring it into conformity with what was authorized by the council. Forcing the property to continue to be used in an unlawful way is an unreasonable reason to reject the application on the basis that the Subject Property is being used unlawfully.

It is for this reason that the Adjudicator cannot find that the Authority acted unreasonably when they authorized the application to renovate the non-conforming property into a boat house to ensure that it met the allowed use of the land.

4. Has the Authority discharged their duty under Regulation 4.6?

Under regulation 4.6:

“Discretionary Powers: In considering an application 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,”

Here the Appellant argues that the Authority exceeded their discretionary authority and acted outside of the scope of authority that is allowed under the Town’s regulations. Specifically emphasized is regulation 5.16 which states:

“5.16 Lot Frontage: Except where specifically provided for in the Use Zones set out in Section 10 of these Regulations, no residential or commercial building shall be erected unless the lot on which it is situated fronts directly onto a street constructed to standards established by the Authority.”

This section applies in part as the Town’s regulations define erect as:

“Erect means to build, construct, reconstruct, alter or relocate and without limiting the generality of the foregoing, shall include any preliminary physical operation such as excavating, grading, piling, cribbing, filling or draining, or structurally altering any existing building or structure by an addition, deletion, enlargement or extension.”

It is clear that the application to change the building to the proposed building meets the definition of “erect” in the Town’s regulations.

As per the technical report, when the Authority denied the application to change the use of the property from a boat house to a residential lot, a ground for the refusal in the letter was that there was a lack of frontage on a publicly maintained street. No further evidence was adduced as to whether the portion of Villa Nova Road, which was determined to be private in Decision# 15-

006-087-024, has been changed to be a publicly maintained road. As such, the Adjudicator must find that the property is currently not on a publicly maintained road.

This leaves one last question, whether a boat house is a “residential or commercial building” or if it is another class of building which Regulation 5.16 would not apply to. In the submissions of the Authority at Paragraph 35, the Authority takes the position that the boat house is not a commercial enterprise and implies that because the boat house is not intended to be used as a space that someone resides in, then it is not residential building. Essentially the argument is that the boat house is a type of discretionary structure that can exist separate of the categories of residential and commercial buildings. There is no doubt to the adjudicator that there is the ability for the Authority to allow construction of a standalone boat house as per regulation 6.3, and that the requirements for a standalone boat house are limited.

However, we must look at the fuller body of the regulations to understand the types of buildings that exist under the Town’s regulations to determine whether the general provisions of 5.16 apply to a standalone boat house. As per the regulations under Regulation 10 of the Authority we can see the types of authorized uses for property depending on their zoning category starting at Regulation 10.10 until 10.31. Under these regulations, we can see what types of buildings are permitted and allowed to be constructed with discretionary permission of the Authority. When the regulations are canvassed for zones that allow boat houses, a boat house is specifically a residential building as it something that is only contemplated to exist in residential zones, those being under regulations 10.10, 10.11, and 10.12 which are all residential use zones. Further we see other types of “residential” buildings listed such as single dwellings, apartment buildings, or family and group care homes. There are no other zones in which a boat house is a permitted or discretionary use. While a property may not be intended to reside in, that does not mean that it is not a residential building. Instead, it is clear that a boat house is a residential building for the purposes of the Authority’s regulations and the requirements for the boat house to conform to Regulation 5.16.

The boat house only being listed under residential use zonings shows that the Authority intended to include boat houses in the category of residential buildings and as such must adhere to the specific and general regulations required when constructing a boat house, whether as an accessory building to a residence or stand alone. As such I must find that Regulation 5.16 applies to the construction of a boat house and as such the Authority could not issue the permit as it was in contravention of the requirement for a lot to front on a street constructed to the standards established by the Authority.

5. Was there a change in the use of the property?

There is no change in use of the property, and specifically the use that the Authority authorized for the property to have a boat house. Here, there is a distinction between legal language and plain language.

When speaking of the “use” of a property, in law what is being discussed is what is authorized to be built on the property. Commonly those are things like a residential dwelling, shed, garage, or

in this case a boat house. The “use” of the property in this case is the authorized “use” for the property to have a boat house constructed on the property.

Instead, as per the decision of Adjudicator Forbes, what took place is that the authorized “use” of the property was not conformed to, and the property was not used for the authorized “use.” This becomes particularly clear as we see that the Town’s regulations define a “use” “use means a building or activity situated on a lot or development permitted on a lot” which in this case was for the use of the property to build a boat house. Whether the property had been used as per its use is not a question for denying a later permit application, but instead a question for enforcement solely for the Authority in their discretion to act when property is not being used for its approved use.

Adjudicator’s Conclusion

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.

After reviewing the information presented, the Adjudicator concludes that the Authority acted unreasonably by authorizing a permit for 59 Villa Nova Road, Conception Bay South, Newfoundland and Labrador as they did not have the authority to issue a discretion permit for a lot that did not comply with Regulation 5.16. As such the Adjudicator must reverse the decision of the Authority.

That is to say that the Authority was not able to authorize the reconstruction of a boat house on the Subject Property because the Subject Property did not meet the requirements for lot frontage on a street constructed to standards established by the Authority.

Order

The Adjudicator orders that the decision of the Town of Conception Bay South to be reversed.

The Authority and the Appellant(s) are bound by this decision.

In accordance with section 45(2) of the Urban and Rural Planning Act, 2000, the Adjudicator further orders the Authority pay an amount of money equal to the appeal filing fee of \$230.00 to the Appellant.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this 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 16 December 2024.

Garreth McGrath

Adjudicator

Urban and Rural Planning Act, 2000