

URBAN AND RURAL PLANNING ACT, 2000

Sections 40 to 46

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

Appeal #: 15-006-087-028
Adjudicator: Elaine Mitchell, RPP, MCIP
Appellant(s): Keith and Kathy Kelly
Respondent/Authority: Town of Avondale
Proponent/Developer: Debbie and Martin Murphy
Respecting: An approval in principle, issued by the Town of Avondale on July 18, 2023, for a single dwelling at 35 Goat Shore Road, Avondale
Date of Hearing: Tuesday August 20, 2024
Start/End Time: 9:00 a.m./10:23 a.m.

In Attendance

Appellant: Keith and Kathy Kelly
Respondent/Authority: Mayor Don Lewis
Applicant/Developer: Debbie and Martin Murphy
Appeal Officer: Robert Cotter, Departmental Program Coordinator, Department of 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* (the Act) authorizes adjudicators to hear appeals. The role of an adjudicator is to determine if the Authority acted in accordance with the Act and the Avondale Municipal Plan and Development Regulations 2020 when it issued an Approval in Principle subject to government approval of an on-site septic system, on July 18, 2023, for a single dwelling located at 35 Goat Shore Road, Avondale.

Hearing Presentations

Technical Advisor

The role of the planner is to act as a technical advisor to the appeal process 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 verbally summarized her report. With respect to validity, the Technical Advisor noted that the appeal was filed on November 1, 2023, but that the decision to issue the approval in principle was made on July 18, 2023 and the letter to Mr. and Mrs. Murphy outlining the Authority's decision was dated July 20, 2023. The Technical Advisor advised that correspondence sent to the Appellant's by the Authority did not raise their right of appeal until a letter dated October 19, 2023.

The Technical Advisor further noted that the subject property at 35 Goat Shore Road is located within the Residential designation in the Avondale Municipal Plan and zoned Residential in the Avondale Development Regulations. Single detached dwellings are listed as a permitted use in the Residential zone subject to compliance with the applicable development standards. These development standards require 30 metres of frontage for an unserviced residential lot in the Residential zone and lot area of 1860 square metres. The survey of the subject property shows a frontage of 20.6 metres and lot area of 0.1799 ha (1799 square metres).

The Technical Advisor stated that an approval in principle does not give permission to start development even though the Department of Digital Governance and Service NL issued a Certificate of Approval on October 18, 2023, which was revised and re-issued on October 27, 2023.

Appellant

In their presentation, the Appellants stated that the Authority did not adhere to the Development Regulations when it issued an approval in principle for a dwelling at 35 Goat Shore Road as the subject property did not meet minimum development standards for lot frontage and area. The Appellants noted that the Avondale Municipal Plan and Development Regulations are binding on Council. The Appellants explained that section 46 of the *Urban and Rural Planning Act, 2000* requires that work stop once an appeal is filed.

Mrs. Kelly stated that they were not advised of their right of appeal at any time prior to the letter from the Authority on October 19, 2023, despite submitting multiple letters and emails as well as attendance at Council meetings.

The Appellants expressed their concern that a septic system on a substandard lot may affect their well which is currently in pristine condition. They are concerned that the subject property does not have sufficient area to position the septic system without any impact on their existing well. The Appellants noted that two structures have been placed on the subject property.

The Appellants stated that they had also approached the Department of Digital Affairs and Service NL and the Department of Municipal and Provincial Affairs about their concerns and found that it is the Authority's responsibility to abide by its standards and regulations.

Authority

Mayor Lewis stated the information provided in the appeal package adequately explains the decision of the Authority. Mayor Lewis explained that the Authority has been in disarray since January and has only recently hired a new Town Manager and Maintenance Supervisor. He explained that Council depends upon its staff to complete the necessary research and provide the information to Council. He explained that the Authority is aware that the subject property did not meet minimum standards but that it used its discretion to grant approval in principle. Mayor Lewis noted that government approval of the septic system was a key consideration in the decision. Mayor Lewis shared that Council is contemplating changing its Municipal Plan and Development Regulations.

Applicant

The Applicants stated that the development bylaw is not a law but a guideline which the Authority can apply on a case-by-case basis.

They explained that they identified an environmentally sensitive septic system which does not require a leeching field. An engineering company worked to obtain approval from the Department of Digital Governance and Service NL. The Applicants expressed their desire to work within the legislative framework and have done so by applying to the Authority for development approval and obtaining approval from the relevant government department for an on-site septic system. The Applicants explained that they used due diligence before purchasing the property by contacting the Town and receiving a positive response to their proposal for a small dwelling supported by an environmentally sensitive septic system.

The Applicants explained that they attempted to obtain a permit from the Authority for the second structure but there was no way to contact Town staff as the office was closed and the answering system was full. The Applicants stated that they are heavily invested in the subject property.

Analysis

Was an appeal filed within the time limits set out in Section 42 (3) of the Act?

The technical report, prepared on March 1, 2024, and shared with all parties by the Appeal Officer, raised questions about the validity of the appeal under section 41 (3) of the Act. Section 41 (3) of the Act states:

41. (3) An appeal under this section shall be filed with an appeal officer not more than 14 days after the person who made the original application received the decision.

According to the information provided, approval in principle, based on the condition that appropriate approvals be obtained from the Department of Health (sic. Department of Digital Governance and Service NL, Government Service Centre) was approved at the July 18, 2023, Council meeting, and that the applicants were informed of the decision in a letter dated July 20, 2023. The Appellants filed an appeal on November 1, 2023, after receiving correspondence from the Authority, dated October 19, 2023, advising them of the right to appeal.

The Appellant's testified that they were unaware that they could file an appeal, despite multiple conversations, letters, emails and attendance at meetings, until they received the October 19, 2023, correspondence from the Authority and that their appeal was filed within the time limits.

On the question of validity, the adjudicator considered the following case law:

In **Laurell Construction Ltd. v. St. John's (City)** (1997), 157 Nfld. & P.E.I.R. 343 (Nfld. S.C. (T.D.)), the Court found that the commencement of the appeal period for third party appeals should be interpreted as the time the public becomes aware of the decision being appealed.

In **Gillespie v. Newfoundland & Labrador (Eastern Regional Appeal Board)**, 2012 NLTD(G) 59, the Court found that the appropriate interpretation of the 14-day appeal period for a third-party appeal was from notification of the public of the decision being appealed. Further, the basis of evidence should be considered in relation to the appropriate notification of the public.

In **Petty Harbour-Maddox Cove (Town) v. Eastern Regional Appeal Board, 2015, NLTD (G) 111**, the Court found that reasonableness to be the standard of review with respect to the timelines for filing an appeal.

In this case, I find that the Authority failed to advise the Appellants of the right of appeal, despite repeated contact with respect to their concerns. I accept the testimony of the Appellants that they were unaware of the right to appeal until they received the October 19, 2023, correspondence from the Authority.

In addition, the letter from the Authority to the Applicant, dated July 20, 2023, giving approval in principle did not contain the right of appeal as required under section 5 of the Development Regulations made under the Act. This section requires the authority, in writing, to notify the person to whom the decision applies of the right to appeal the decision, the timelines by which the appeal shall be made, the right of others to appeal the decision and how to make an appeal. As a result, neither the Appellant nor the Applicant was aware of the right to appeal or the timelines for filing an appeal.

After considering the information shared in the package distributed to all parties by the Appeal Officer as well as the testimony of the Appellants, a reasonable date from which an appeal could be considered under Section 41 (3) of the Act would be the date that the Appellant received the correspondence from the Authority outlining right of appeal and the process for filing an appeal. As this correspondence was dated October 19, 2023, the appeal filed on November 1, 2023, was within the 14-day appeal period identified in section 42 (3) of the Act and, as such, considered to be a valid appeal.

Is the decision of the Authority to issue an approval in principle consistent with the Avondale Development Regulations?

Section 2.4.5 of the Avondale Development Regulations gives the Authority the right to grant approval in principle subject to compliance with the Municipal Plan and Regulations. The Authority may also attach conditions to ensure that the development is in accordance with the Municipal Plan and Regulations. The Authority has the right to issue an approval in principle and add conditions such as requiring approval of the on-site septic system by the Department of Digital Governance and Service NL.

However, the subject property does not meet the minimum development standards established in Avondale Development Regulations for the Residential zone. These standards require lot area of 1860 square metres and 30 metres frontage. The survey of the subject property shows lot area of 0.1799 ha (1799 square metres) and frontage of 20.6 metres.

Given the deficiencies in development standards, Council should have refused the application or proceeded to amend its Development Regulations to revise its development standards. Issuing an approval in principle for a single dwelling on the subject lot was contrary to section 2.4.5 of the Avondale Development Regulations where Subsection 1 requires an approval in principle to comply with the Development Regulations.

Does the Authority have the discretion to override development standards in the Avondale Development Regulations?

Section 2.4.13 of the Avondale Development Regulations gives the Authority the discretion to assess various aspects of the application and its suitability. In my opinion, Council incorrectly relied on this section which does not give the Authority the ability to override its development standards. Section 2.4.13 gives the Authority the right to impose conditions on a permit (conditionally approve) or to refuse a permit despite its conformity with the Development Regulations.

Section 12 of the Act states that a plan and development regulations are binding on Council and the person undertaking development.

- 12 A plan and development regulations are binding upon
 - (a) municipalities and councils within the planning area are governed by that plan or those regulations; and
 - (b) a person undertaking a development in the area are governed by that plan or those regulations.

A plan and development regulations give legal certainty to a council for decision making and to an applicant. The Authority does not have the arbitrary authority to override standards unless it makes a formal amendment to those standards. Such an amendment includes a public process which makes the change transparent and binding upon future applications and permits.

Section 44 (2) of the Act states that a discretionary decision of council cannot be overruled by an Adjudicator's decision. In this matter, it is my opinion that the Authority did not have the authority under section 2.4.13 of the Avondale Development Regulations to make a discretionary decision.

Adjudicator's Conclusion

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.

After reviewing the information presented, I conclude that the proposed development of a single dwelling on the subject property located at 35 Goat Shore Road, Avondale, does not meet the development standards for the Residential zone as outlined in the Avondale Development Regulations. The Authority acted prematurely in issuing an approval in principle with conditions. When faced with the deficient lot standards, the Authority should have either refused the application or deferred consideration pending an amendment to its Development Regulations.

That is to say, the Authority should not have issued an approval in principle as doing so was contrary to section 2.4.5 of the Avondale Development Regulations.

During the hearing, there was reference to the role and responsibilities of the Department of Digital Government and Service NL and the issuance of a certificate of approval for an on-site septic system. This provincial approval is based on a technical evaluation of the lot and its circumstances. As Adjudicator, I cannot override that approval nor comment on whether it was appropriate in these circumstances.

Despite receiving approval from the Department of Digital Government and Service NL, the Applicants are still bound, as is the Authority, by the development standards of the Avondale Development Regulations. Which brings me to the development that has occurred on the subject property. Section 46 of the Act requires development to cease until the adjudicator renders a decision.

46 (1) Where an appeal is made under section 41, the development with respect to the appeal, work related to that development or an order that is under appeal shall not proceed or be carried out pending a decision of the adjudicator.

While I recognize that the Applicant's sought and received a permit for one structure and attempted to obtain a permit for the second structure, the Authority should not have

proceeded to issue a permit while this decision was pending. This is unfortunate circumstances which unfairly penalizes the Applicant's who, by their testimony, wished to abide by legislative requirements but were unable to do so because of the disarray within the Authority and its operations.

Order

The Adjudicator orders that the decision of the Town of Avondale to issue an Approval in Principle for a single dwelling at 35 Goat Shore Road be reversed. That is to say that the Approval in Principle, issued on July 18, 2023, shall be rescinded.

Further, the Adjudicator orders that the Town of Avondale resolve the status of the second structure placed on the subject property by March 1, 2025.

And further, the Adjudicator orders the Town of Avondale to pay the Appellants an amount of money equal to the appeal fee in accordance with section 45 (2) of the *Urban and Rural Planning Act, 2000*.

The Authority and the Appellants 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 Appellants.

DATED at St. John's, Newfoundland and Labrador, this 30th day of August 2024.



Elaine Mitchell, RPP, MCIP
Adjudicator
Urban and Rural Planning Act, 2000