

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-087-006

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Adjudicator:

Paul Boundridge, MCIP

Appellant(s):

Steve Sharpe and Gail Simoes Re

Location:

92 Cherry Lane, Conception Bay South

Respondent / Authority:

Town of Conception Bay South

Date of Hearing:

29 May 2024

Start/End Time:

11:00 a.m. – 11:59 a.m.

In Attendance

Appellant:

Ryan M Belbin, Solicitor for the Appellant

Steve Sharpe and Gail Simoes Re

Authority Representative(s):

Corrie Davis, MCIP, Director of Planning and Development

Daniel Barrett, Development Control Coordinator

Appeal Officer:

Robert Cotter, Departmental Program Coordinator,
Department of Municipal and Provincial Affairs

Technical Advisor:

Faith Ford, MCIP, Planner III,
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*; the Town of Conception Bay South Municipal Plan and Development Regulations; and, the Town of Conception Bay South Road Reserve Regulations when it placed conditions [# 4 - that the applicant will be required to survey and convey land to the Town at the corner of Cherry Lane and Flats Toad, at no cost to the Town, for the purpose of widening the road right-of-way to accommodate future re-alignment of the intersection.] on an approval for an application to subdivide property at 92 Cherry Lane on June 23, 2023.

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.

standards are to be applied" on questions of law or jurisdiction." On appellate standards of review, the standard of correctness applies to questions of law, including interpretation and those concerning the scope of a decision maker's authority..." emphasis added)

- In paragraph 13, the Appellant's solicitor contends "...that as it relates to the third issue [Was the Town's decision to issue the Conditional Development (approval) a proper use of the Town's authority pursuant to Section 4.6 of the Development Regulations?], the Board should review the Council's statutory interpretation of the scope of its discretionary authority under Section 4.6 of the Development Regulations, on the same standard which would be applied on appeal, namely, the reasonableness standard would apply." (emphasis added)

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Authority's Presentation

The Town's Director of Planning and Development, verbally and in writing:

- Provided a chronology of events leading to the decision to issue a conditional approval to the Appellant(s) on June 23, 2023 to subdivide the subject property into two residential building lots, and the Appellant subsequently filing "an appeal to condition #4 of the June 23, 2023 Development Approval. Condition #4 of the June 23, 2023 Development Approval states:

"The applicant will be required to survey and convey land to the Town at the corner of Cherry Lane and Flats Road, at no cost to the Town, for the purpose of widening the road right-of-way to accommodate future re-alignment of the intersection. A sketch of the required land to be conveyed was provided to the applicant on May 16, 2023."
- Advised that the Town's policy and regulatory requirements regarding development is primarily addressed by the Conception Bay South Municipal Plan and Development Regulations. These came into effect on July 20, 2012 and are binding on the Town, owners of property within the Town, and anyone wishing to develop property with the Town of Conception Bay South Municipal Planning Area Boundary.
- Stated that the Town has other policies and regulations that have been enacted from time to time under its general discretion and authority of the Municipalities Act, 1999.
- Identified the relevant municipal policies and regulations that the Town was guided by when considering the Appellant's subdivision development application and arriving at its decision to use conditional approval as represented in the June 23, 2023 letter to the Appellant(s). "The cumulative effect of the noted policies and regulations is that the Town has authority, and is obligated, to require conveyance of land for future road upgrades when considering a development proposal where the proposed development fronts onto an existing town road that is not built to a current standard. There can be no argument that the Town does not have authority for requiring conveyance of land for future road improvements as a condition of development approval."
- Like the Appellants' solicitor, the Town maintains that "Adjudicator is required to determine this question on a "reasonableness" standard of review. This means that the Adjudicator has to look at whether the decision is "reasonable". There can be more than one "reasonable" outcome. The Adjudicator must accept any decision that is "reasonable". The

Adjudicator must accept the Town's decision even if they would have decided something different themselves. If the Adjudicator finds that the Town's decision isn't "reasonable", the Adjudicator has authority under Section 44(1) of the Urban and Rural Planning Act, 2000 to vary the Town's decision with instructions on any errors in the Town's use of its discretion."

- Advised that the Town's assessment of road infrastructure is a routine component of the due diligence undertaken by staff when considering any form of proposed infill development. It is necessary for the Town to assess future road infrastructure needs when considering development for two reasons. First, it is imperative to ensure that any proposed development will comply with setbacks, lot area and other such standards in the event that roads are upgraded to a modern standard. Second, if a road is substandard, and if there were no provisions for future upgrading to a current or modern standard, the development would not meet the intent of the Municipal Plan policies and Development Regulations. Specifically, Municipal Plan Policy 4.3.18 and Section 5.16 of the Development Regulations..."
- The Town has developed a "Road Widening Checklist" for use by staff when assessing the current state of the roads with respect to their width, infrastructure, and in this case, the intersection of the roads that border the property. That assessment of road adjoining the subject property identified deficiencies in the current situation. The Town through development and implementation of its Municipal Plan, Development Regulations, and Road Reservation Regulations has strived to strike a balance of allowing development on sub-standard roads while acquiring land for future road upgrading projects. The Town has acquired innumerable parcels of land in this manner. The right to develop land is not absolute; development can only proceed in accordance with a sound land use planning and regulatory regime; the Town submits that the requirement for conveyance of land for future road upgrades is a consideration to be given by a property owner in exchange for the ability to develop, but only when it is reasonable to do so.
- Through the conditional approval granted by the Town, both the property owner and the residents of the Town derive a net benefit.
- Section 4.6 of the Town's Development Regulations allows the Town to consider material considerations when assessing an application.

Section 4.6 of the Development Regulations States:

"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, **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)

- The Town takes the position that the requirement to convey land to the Town to allow for future improvements to the road infrastructure is a reasonable condition in exchange for approving development that fronts onto roads that are not currently built to a modern municipal standard.
- In closing, the Town is of the opinion that the Town's decisions in respect to condition #4 of the June 23, 2023 Development Approval requiring land to be conveyed to the Town for future road improvements, is in accordance with the Conception Bay South Municipal Plan, Development Regulations, and Road Reservation Regulations and must be confirmed by the Adjudicator appointed under authority of the Urban and Rural Planning Act, 2000.

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ADJUDICATOR'S ANALYSIS

Q: Does the Town of Conception Bay South have the authority to approve a development application, with conditions?

R: Yes. Both parties acknowledge this, and that this discretionary authority flows from Section 4.6 (Discretionary Powers) and Section 4.11.2 (Development Approval) of the Conception Bay South Development Regulations.

Q: Does the Town have the authority to require that land be conveyed to it at no cost to the Town when land is being subdivided?

R: Yes. The Town's authority to require the conveyance of land at no cost to the Town is derived from the following:

1. Under the Town's Municipal Plan, Cherry Lane is classified as a local street. Policy 6.3.1 speaks to infill development along existing streets, as follows:

6.3 Policies (Transportation policies)

 4. Infill development along existing streets shall be required to convey property to the Town to ensure adequate street reservations are retained;
2. The Town of Conception Bay South Road Reservation Regulations regulate street widening, upgrades, and road reservations within the Municipality and are enabled by Section 414(2)(ff) of the *Municipalities Act, 1999*. Under the Road Reservation Regulations, road reservations must be minimum 12.2 metres unless otherwise specified by Council.

Section 4 of the Road Regulations states:

“The minimum road reservation shall be 12.2 metres unless otherwise specified by Council.”

Section 5 of the Road Regulations states:

“(a)Where the development of a vacant property or a dwelling or commercial building is being demolished to facilitate development of a property located on street that has less than the minimum road reservation, development of the property shall not proceed until:

- i)The road reservation is widened to a minimum of 6.1 metres measured from the centerline;
- ii)The roadway is widened and upgraded as directed by the Engineering and Public Works Department; and
- iii)Other works within the road reservation, as directed by the Engineering and Public Works Department, are completed.

(b) The Department of Engineering and Public Works shall determine the amount and location of the land to be conveyed to the Town.

(c) Street widening, upgrading and other works within the road reservation shall be completed to the satisfaction of the Engineering and Public Works Department.”

3. Section 7.11.1(j) of the Development Regulations establishes the minimum street reservation width for streets in residential subdivisions.

“For local residential streets where more than 50% of the units are single or double dwellings, the minimum street reservation is 12.2m.”

Q: Does the Town have the authority to establish/determine a road reservation to be greater than 12.2 metres?

R: Yes, the Town has the authority to require a road reservation greater than the minimum of 12.2 metres and require the conveyance of such land to the Town.

Section 4 of the Town of Conception Bay South Road Reservation Regulations states:

“The minimum road reservation shall be 12.2 metres unless otherwise specified by Council.”

Section 5(b) of the Town of Conception Bay South Road Reservation Regulations states:

“The Department of Engineering and Public Works shall determine the amount and location of the land to be conveyed to the Town.”

In this case, the Department of Engineering and Public Works has determined the amount and location of the land to be conveyed to the Town, and Council has specified

this in condition # 4 of the Conditional Approval it gave to the Appellant's subdivision development application.

Q: What reasons have been given by the Town for requiring a road reservation greater than 12.2 metres on the southern corner of the subject property where the property abuts Flat's Road and Cherry Lane, the proposed road reservation measures 33.87 metres?

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R:

- The subject property is in an older part of the municipality that was initially developed as a cottage area. Its development preceded the incorporation of the municipality of Conception Bay South. Roads in this area are not built to contemporary engineering standards. The Town has policies and regulations concerning road improvements and the requirement of property owners to convey land to the Town at no cost for road widening. As the Town has stated, "The cumulative effect of the noted policies and regulations is that the Town has authority, and is obligated, to require conveyance of land for future road upgrades when considering a development proposal where the proposed development fronts onto an existing town road that is not built to a current standard. There can be no argument that the Town does not have authority for requiring conveyance of land for future road improvements as a condition of development approval."
- The Town's assessment of road infrastructure is a routine component of the due diligence undertaken by staff when considering any form of proposed infill development. It is necessary for the Town to assess future road infrastructure needs when considering development for two reasons. First, it is imperative to ensure that any proposed development will comply with setbacks, lot area and other such standards in the event that roads are upgraded to a modern standard. Second, if a road is substandard, and if there were no provisions for future upgrading to a current or modern standard, the development would not meet the intent of the Municipal Plan policies and Development Regulations. Specifically, Municipal Plan Policy 4.3.18 and Section 5.16 of the Development Regulations..."
- The Town has developed a "Road Widening Checklist" for use by staff when assessing the current state of the roads with respect to their width, infrastructure, and in this case, the intersection of the roads that border the property. That assessment of road adjoining the subject property identified deficiencies in the current situation. The Town through development and implementation of its Municipal Plan, Development Regulations, and Road Reservation Regulations have strived to strike a balance of allowing development on sub-standard roads while acquiring land for future road upgrading projects. The Town has acquired innumerable parcels of land in this manner. The right to develop land is not absolute; development can only proceed in accordance with a sound land use planning and regulatory regime; the Town submits that the requirement for conveyance of land for future road upgrades is a consideration to be given by a property owner in exchange for the ability to develop, but only when it is reasonable to do so.

- Section 4.6 of the Town's Development Regulations allows the Town to consider material considerations when assessing an application.

"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, 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."

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Q: What is "bad faith"?

R: "Bad faith" generally has been defined by the Supreme Court of Canada ("SCC") as "conduct involving 'malicious intent' or that 'exceeds the limits of discretion reasonably exercised. (<https://www.dentons.com/en>)

bad faith n. intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards of honesty in dealing with others. (<https://dictionary.law.com/>)

Q: Is the Council's interpretation and application of its Discretionary Authority, as set out in Section 4.6 of the Town's Development Regulations, reasonable?

R: The Council's decision is based on sound consideration of the circumstances associated with the subdivision development application that it was asked to approve: the routine assessment of road infrastructure is part of the due diligence carried out by the Town when it is being asked to consider infill development; the state of the roads in the area in which the subject property is situated; the need for the roads to be eventually improved through widening and realignment of street intersections which necessitates the acquisition of land from abutting property owners; the mandate given Council by the Conception Bay South Road Reservations; and the Municipal Plan Policy 6.3.1.(4) which applies to infill development and states "Infill development along existing streets shall be required to convey property to the Town to ensure adequate street reservations are retained." Based on the evidence presented to the Adjudicator, Council's interpretation of its discretionary authority is not an act of bad faith – it does not appear to be an unreasonable interpretation and application of its discretionary authority.

ADJUDICATOR'S 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.

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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."*

After reviewing the information presented, the Adjudicator concludes that the Town of Conception Bay South was within its authority and acted in accordance with the *Urban and Rural Planning Act, 2000*; the Town of Conception Bay South Municipal Plan and Development Regulations; and, the Town of Conception Bay South Road Reservation Regulations when it placed condition # 4 - that the applicant will be required to survey and convey land to the Town at the corner of Cherry Lane and Flats Toad, at no cost to the Town, for the purpose of widening the road right-of-way to accommodate future re-alignment of the intersection.] on an approval for an application to subdivide property at 92 Cherry Lane on June 23, 2023.

ADJUDICATOR'S ORDER

The Adjudicator orders that the decision of the Town of Conception Bay South as contained in a letter dated June 23, 2023 to attach condition # 4 - that the applicant will be required to survey and convey land to the Town at the corner of Cherry Lane and Flats Toad, at no cost to the Town, for the purpose of widening the road right-of-way to accommodate future re-alignment of the intersection.] on an approval for an application to subdivide property at 92 Cherry Lane be confirmed.

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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 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(s).

DATED at St. John's, Newfoundland and Labrador, this 16th day of June, 2024.



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