

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal # : **15-006-077-046**

Adjudicator: Garreth McGrath

Appellant(s): Weir's Construction

Respondent / Authority: Town South River

Date of Hearing: 26 February 2024

Start/End Time : 14:00-15:00

In Attendance

Appellant: Weir's Construction

Appellant Representative(s): Lauren Walker; Counsel

Respondent/Authority: Town of South River

Respondent Representative(s): Marjorie Dawson, Josh Merrigan; Counsel

Proponent/Developer: Weir's Construction

Developer Representative: N/A

Interested Party: N/A

Appeal Officer: Robert Cotter, Departmental Program Coordinator, Municipal and Provincial Affairs

Technical Advisor: Faith Ford

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 South River Municipal Plan and Development Regulations when it denied an application for a gravel pit operation at 148-152 Hodgewater Line, South River on 1 March 2023.

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 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 Adjudicator heard from the planner that this appeal relates to the denial of a discretionary mineral working permit by the Town of South River at 148-152 Hodgewater Line, South River which among its zoning areas includes a mineral workings zone, to which this application pends. The planner outlined the Appellant's grounds for appeal at pages 9 and 10 of the appeals package as:

- 1) There is already another gravel pit on an adjacent property and the denial of the similar pit by the Authority is unfair to Weir's.
- 2) The refusal letter sent by the Authority did not appropriately consider the application or have appropriate public hearings after the refusal in May 2022.

The Appellant's Presentation and Grounds

The presentation of the Appellant focused on the grounds as outlined in their written application and the planner's report. The Appellant first discussed the fairness of the application and the assessment. It is the Appellant's position that the actions of the Authority were not performed properly, and that the Appellant was denied their permit without adequate consideration as per the town rules. The Appellant also submits that while the Authority has discretion to consider the applications to the land, they must do the same level of consideration on each application or else they do not meet the threshold required even for a discretionary decision.

Authority's Presentation

The Authority's presentation focused on the discretionary use of the Town to approve the development. The Authority stated that the Town did take into account the positions of the public and that the position of the public they relied upon could be found in the prior public hearings that were held by the Authority when the Appellant previously applied for a similar discretionary permit on the property. The Authority states that due to these prior applications being denied and prior consultations having taken place for the property leading to their denial, the Authority has met their burden by denying the permit of the Appellant.

Adjudicator's Analysis

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

Question/Answer .

Q: Was the denial of the permit with only consideration from the prior applications unfair, and therefore a breach of natural justice?

In answering this question, the Adjudicator first must reiterate the standard for reviewing the discretionary decisions of an administrative body. It is helpful in this case to look at the oft cited commentary of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at Para 53:

"In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised."

The discretion granted to the Authority by Section 11(1) of the Authority when reviewing applications is incredibly broad and ultimately allows the Authority to review any material it so chooses when deciding whether or not to approve a discretionary permit. When the Authority reviewed the materials from the 2018 and 2022 applications when deciding whether to approve the 2023 application, the Authority acted within their powers and discretion.

The Authority can decide an application with whatever information is allowed by their bylaws and can use that information however they wish so long as the outcome of the application is a reasonable decision. If the Authority felt in their discretion that another gravel pit, particularly one that is applying to open after the town bylaws were put in place unlike the neighboring gravel pit which was grandfathered into the area, the Adjudicator is unable to step in and exercise their own discretion. It is entirely within the discretion of the Authority to decide

that, based on prior public consultations and hearings, that they can deny a discretionary application to develop on the property. While each application must be determined on a case-by-case basis, this doesn't exclude information obtained previously regarding the same or similar applications from being considered when the authority makes a decision. As such, the Adjudicator finds that in making their decision, the Authority acted within the scope of their discretion.

Q: Did the Authority meet their requirements to consider the application of the Appellant as per the requirements of Section 30(1)(c) and 30(4) of the Development Regulations?

In a similar, but distinct question of fairness to the Appellant, the issue was raised that as per Section 30:

30. Notice of Application (Refer to Provincial Development Regulations, Sections 13 & 15)

(1) Notice of an application shall, at the applicant's expense, be given when:

(a) A proposed variance is to be considered under Regulation 12 - Variances,

(b) A proposed change in a non-conforming use is to be considered under Regulation 50 - Non-Conforming Uses,

(c) A proposed discretionary use is to be considered in accordance with Regulation 95 — Discretionary Uses [emphasis added].

(d) A proposed comprehensive development is proposed in accordance with Regulation 45 - Comprehensive Development, or

(e) Council deems an application is such that that the public should be notified.

4) In accordance with Regulation 95 — Discretionary Uses, notice of an application to develop a discretionary use will be given directly to persons who are likely to be affected, and in addition will be posted on one or more of the following: the Community Channel, local bulletin boards, or by advertisement in a newspaper circulating in the area. A minimum of seven (7) days from the posting of the notice will be provided for persons to respond.

It is clear on the evidence that the Authority has not met their obligations to the Appellant under Section 30. As mentioned above, each application is to be considered on a case-by-case basis and the rules of the Authority must be evenly applied to each application.

In this case, the need for the 7 days from the time of posting of the notice is necessary to a fair hearing an application by the Appellant. Without this time, people in the community who may have changed their minds from 2018 do not have the ability to express their opinions on whether the property should be developed. In that period, there could be major changes as to the character of the area, including the planned closure of the neighboring gravel pit, that could greatly impact the feelings of the surrounding community members towards this development. Without giving parties this opportunity, the town will not meet their duty as per the Development Regulations.

While the Authority may have said that it was their position that they felt that this was an attempt by the Appellant to make applications over and over to the authority, I cannot agree. This is a case of 3 applications being received over a period of 6 years. There is no authority I can point to

or any rule stating that there is a limit on the number of times one can apply to the authority for a permit on the property, nor do I believe that there is anything unfair or unacceptable in the conduct of the Appellant making these submissions. If the Authority wishes to cap the number of applications on a given property in a period of time, they are enabled to do so through their bylaws and governing legislation. As no such rule is in place, the Authority is bound by the rules as they are and must ensure that every application is given the same opportunity to be heard, even when there had been prior applications for the same or similar development on a piece of property.

As such, the Adjudicator finds that the Authority did not meet their requirements for notice prior to a decision under Section 30. I must reverse the decision of the Authority to be sent back for reconsideration, with the Authority ensuring adequate notice and time for submissions are followed as per the Development regulations, as well as all other requirements for determining whether or not an application meets the requirements for a discretionary approval.

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 erred in their decision not to follow their rules under Section 30 of the development regulations. As such the Adjudicator must reverse the decision of the Authority and send it back for the Authority to properly hear the application. While the Authority may have had the discretion to make the decision based on the information that they had in 2018 and use that information in

making their decision, the Authority cannot skip steps in the procedure required to exercise that discretion. They must apply the same rules to each application as it comes before them.

That is to say that while this decision has been reversed, the Authority still holds the power to deny the application. The Adjudicator has no power to substitute their own discretion when deciding whether to approve the application or what considerations need to be made when deciding to exercise that discretion. The role of the Adjudicator is to ensure that the rules and bylaws of the Authority are properly followed in their decision making, and in this case the Authority has failed their requirements under Section 30 of the Development Regulations to give proper notice.

Order

The Adjudicator orders that the decision of the Town of South River to be reversed. The appeal by Weir's Construction is allowed.

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 19 March 2024.

Garreth McGrath

Adjudicator

Urban and Rural Planning Act, 2000