

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-077-020

Adjudicator: John R. Whelan Q.Arbitrator

Appellant(s): Gerald Drover

Respondent / Authority: Town of Upper Island Cove

Decision Dated: October 24, 2023

Re: Appeal of Gerald Drover v. Town of Upper Island Cove Regarding the Approval of a Development, Light Industrial Use (Personal Workshop) at 2-10 Pit Road, Upper Island Cove.

Procedural Background

The Authority (Town of Upper Island Cove) received an application for a personal workshop (light industry use) at 2-10 Pit Road. A light industry use is considered a discretionary use in the Residential I Zone. According to the submission package, the development was approved in principle by the Authority on May 9, 2022, pending public advertisement. The Authority advertised the discretionary use notice and received two submissions opposing the development. The application was discussed at a public Council meeting on May 30, 2022, and Council requested more information on the proposed use from the applicant. The Authority also sought input from the Town's planner. According to the submissions, the application for a personal workshop and indoor storage (light industry use) was approved at a special Council meeting on August 18, 2022. The Authority's decision to approve this development application is the subject of this Appeal.

On August 30, 2022 the Appellant filed the Appeal. The Appeal was heard on October 10, 2023 at 1100am at the Comfort Inn Hotel, 106 Airport Road, St. John's.

Grounds of Appeal

The Appellant is appealing the approval of the development on the following basis:

- The public notice did not include a civic address and location description of the proposed development was not clear;
- Respondents voiced opposition to the proposed development;

- The Application does not conform to Municipal Plan land use policies contained in Section 3.2.1 of the Municipal Plan;
- That Amendment No. 11 of the Municipal Plan is not applicable to the subject property as the subject property is not within the “older areas of town”;
- Concerns that the approved development would be used for hazardous industrial uses instead of the personal workshop and light industry use;
- That approval of the application herein was inconsistent with the decision of an adjudication panel on Appeal #15-006-067-020 from March, 2021 that decided the approval of a light industry use was not allowed unless it was in conjunction with a residential home.

The Appellant also expressed concern over matters considered to be at Council’s discretion, such as increased traffic, vandalism, noise, and health/safety concerns.

Position of the Authority

That Authority has taken the position that approval of the application was consistent with Amendment 11 to the Town plan. Further, the Authority states that it has complied with all procedural requirements respecting the approval.

Relevant Portions of the Technical Report

While the Technical Report is not determinative of the issue, it does provide an assessment of the relevant portions of the statute and municipal regulations. I note the following:

The policies for the Residential Designation are set out in Section 3.2.1 of the Municipal Plan, including Section 3.2.1(2) which states:

2. Land Use

Within lands designated Residential, single-family detached dwellings shall be permitted. Complementary uses such as double dwelling, row dwelling, apartment building, child care, office, home office, boarding house residential (bed and breakfast), place of worship, education, education, agriculture (hobby farming), cultural and civic, personal and professional services, recreation, light industry, convenience store or a small scale business use where they are part of a residence may be permitted throughout the area under the discretion of the Council.

Council shall consider the impact of the scale of proposed uses in residential designations to ensure that development does not adversely affect the residential character and amenity of the area; provision of adequate space for on site parking, loading, and buffering is provided; and the primary use of the lot remains residential. A compatible use will occupy only a minor part of the floor area of the dwelling [emphasis added].

Residential growth shall be accommodated in approved comprehensive subdivisions and through the orderly infilling of existing areas serviced in the town to ensure the efficient use of available lands. Subdivisions will be located adjacent to existing built up areas where municipal servicing can be easily and economically provided in the future.

All new development and all newly created residential lots shall have direct frontage onto a publicly-maintained road or in the case of a new subdivision shall have frontage on a road being constructed under the terms of a development permit issued by Council. The costs of providing services to any new subdivision development shall be the responsibility of the developer.

The subject property is located in the Residential I (R-I) Zone, per the Town of Upper Island Cove Development Regulations and Land Use Zoning Map. The permitted use classes and discretionary use classes for the Residential-I Zone are listed in Schedule C of the Development Regulations and are as follows:

Permitted Use Classes: Single dwelling: recreational open space.

*Discretionary Use Classes: Double dwelling, row dwelling, apartment building, collective residential, boarding house (includes tourist homes and bed and breakfasts), place of worship, educational, convenience store, medical and professional, personal service, child care, office, cultural and civic uses, antenna, **light industry**.*

Within the Residential Zone, light industry uses are a discretionary use class. Light industry use is defined in Schedule A of the Development Regulations as:

LIGHT INDUSTRY means the use of land or buildings for industrial use that can be carried out without hazard or intrusion and without detriment to the amenity of the surrounding area by reason of noise, vibration, smell, fumes, smoke, grit, soot, ash, dust, glare or appearance.

Within the Residential Zone, light industrial uses may be permitted in conjunction with a residential use. The Development Regulations lists the requirements for light industry uses as home occupations in Condition 9 of the Residential I Zone (Appendix A).

The Town of Upper Island Cove Development Regulations Amendment No. 11, 2014 contains an additional condition for light industry uses within the Residential I Zone. This amendment came into legal effect on August 29, 2014 and amended the Development Regulations by:

*B) **Adding** the following to the list of conditions as found in the Residential I and Residential II Land Use Zones Tables as shown below:*

Light Industry Uses:

Light Industry Uses may be permitted in a standalone building provided there is no outdoor storage. Light Industry Uses shall be limited to non-hazardous, non-intrusive uses that may cause a negative effect on surrounding properties. Uses shall be small in scale and limited to repair shops, woodworking and workshops and indoor storage.

This condition allows for light industry uses in standalone buildings in the Residential I Zone, and does not state that a light industry use must be in conjunction with a residential use. Based on this amendment to the Development Regulations, within the Residential I Zone, Council may consider a standalone light industry use as a discretionary use provided it is small scale and contains no outdoor storage.

Section 90 of the Town of Upper Island Cove Development Regulations states:

90. Discretionary Uses

Subject to these Regulations, the uses that fall within the Discretionary Use Class set out in the appropriate Use Zone Table in Schedule C may be permitted in that Use 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 in accordance with Regulation 32 and has considered any objections or representations which may have been received on the matter.

Section 32 of the Development Regulations requires the Authority to advertise an application for a discretionary use prior to making a decision:

32. Notice of Application

The Authority may, and when a variance is necessary under Regulation 11 and the Authority wishes to consider whether to authorize such a variance, when a change in nonconforming use is to be considered under Regulation 49, or when the development proposed is listed as a discretionary use in Schedule C of the Regulations shall, at the expense of the applicant give notice of an application for a permit or for approval in principle, by public advertisement in a newspaper circulating in the area or by any other means deemed necessary, and under Regulation 12 and the Authority shall give written notice of the proposed variance from development standards to all persons whose land is in the immediate vicinity of the land that is the subject of the variance, and allow a minimum period of 7 days for response.

Issue 1: Was there appropriate and sufficient public notice?

The Appellant states that the Authority failed to properly advertise the application. In reply, the Authority states that it advertised the application on its social media channels and posted public

notices at various businesses and public spaces. The Authority states that there is no local newspaper available in the region for advertising.

I find that in this instance the Authority has complied with its obligation to provide public notice. The Authority ensured that notification of the application was disbursed through sufficient channels for it to have reasonably complied with the “public notice” requirement of the Development Regulations.

While the Appellant states that the notice lacked a civic number, I find that the description of the subject property was sufficient to provide fair notice to individuals of the development application.

While additional notification could have been made from a technical perspective, I find that those options (such as publication in the *Evening Telegram*, or *Gazette*) would have little practical effect on the notice provided to residents.

Issue 2: Residents voiced opposition to the proposed development.

I find that this ground of appeal is immaterial to whether the municipality properly exercised its authority. It is not determinative of the issue.

Assessment of resident opposition to a development is solely within the discretionary authority of the Town.

Issue 3: The Application did not conform to the Municipal Plan land use Policies in Section 3.2.1.

Section 3.2.1 is quoted above. Section 3.2.1 must be read in conjunction with Amendment 11 to the Municipal Plan. I find that when Section 3.2.1 is read in conjunction with Amendment 11, it provides broad discretion to Council to approve developments such as the one in the instant case. While I agree with the Appellant that Section 3.2.1. seems to prohibit light industrial development absent a residence, that requirement was modified by Amendment 11.

The relevant portion of Amendment 11 states:

Light Industry Uses

Light Industry Uses may be permitted in a standalone building provided there is no outdoor storage. Light Industry Uses shall be limited to non-hazardous, non-intrusive uses that may cause a negative effect on surrounding properties. Uses shall be small in scale and limited to repair shops, woodworking and workshops and indoor storage.

Consequently, I find that the approval was not contrary to Section 3.2.1. when read in conjunction with Amendment 11.

Issue 4: That Amendment No.11 only applied to the “older areas of the Town.”

Amendment 11 actually contains three amendments. Amendment A modifies lot standards within the “older areas of the Town.” Amendment B adds “Light Industry Uses” to Residential 1 and

Residential II Land Use Zone Tables. Amendment C deletes and replaces certain conditions respecting accessory buildings. Amendment B, which is the relevant amendment within Amendment 11, is not restricted to the “older areas of Town.” Consequently, I find the approval of Light Industry Uses within Residential I or Residential II is not restricted to “older areas of the Town.”

Issue 5: Concerns the Workshop Building would be used for Hazardous Industry Use

While I appreciate the concern raised by the Appellant, the potential future misuse of a property does not preclude its approval. Any approval has the potential of being misused. The potential for misuse should not preclude the approval of permitted or discretionary uses. I do not find this argument demonstrates any technical or practical deficiency in the Authority’s application of its discretionary authority.

Assessment of misuse risk falls within the discretionary authority of the Town and I am prohibited from substituting my discretion for theirs.

Issue 6: Inconsistency with the Decision in Appeal #15-006-067-020 – March 10, 2021

I have reviewed the decision of the Adjudication Board in 15-006-067-020. I note that decisions of Adjudication Boards are not binding but do carry persuasive weight. It is important to recognize that the Board in 15-006-067-020 did not consider the effect of Amendment 11 when considering whether a Light Industry Use was consistent with a similar development application in the Residential I zone.

Accordingly, I find that while the decision in 15-006-067-020 warrants consideration in this instance, the effect of Amendment 11 clearly allows the Town to approve a Light Industry Use absent a residence within the zoning of the subject property.

Issue 7: Additional Matters within Council’s Discretion

While I appreciate the Appellant’s concern that development of the subject property may result in additional traffic flow, unwanted noise, and the potential for vandalism; I find that these concerns are beyond my jurisdiction in this matter. These are the exact types of ancillary matters that are solely within the discretion of the elected Council, not the appointed Adjudicator. Accordingly, I provide them no weight when reaching my decision.

Decision

I have reviewed the material and submissions given by the parties along with the analysis of the Technical Advisor Ms. Ford.

After reviewing and considering the information presented, I find that:

1. The Town complied with its technical obligations for public notice;

2. That the nature of the notice provided a sufficient description of the subject property to adequately identify the land in question;
3. That the Town was within its discretionary authority to approve the development of a building for a personal workshop or light industry use at the subject property.

Order

1. The Appeal is dismissed;
2. The decision of the Town to approve the development at 2-10 Pit Road is confirmed; and,
3. The Appellant is not entitled to a reimbursement of the appeal fee.

DATED at St. John's, Newfoundland and Labrador, this 24th day of October 2023.



John R. Whelan Q.Arb

Adjudicator