

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-087-047
Adjudicator: Elaine Mitchell, RPP, MCIP
Appellant(s): Fahey Building Limited
Respondent/Authority: Town of Happy Valley-Goose Bay
Respecting: Refusal of a permit for an assisted living facility at 380 Hamilton River Road, Happy Valley-Goose Bay
Date of Hearing: Wednesday November 6, 2024

In Attendance:

Appellant: William Dormody, Fahey Building Limited
Duncan Wallace, O'Dea Earle

Respondent/Authority: Randy Dillon, Director of Engineering Services
Nadine MacAulay, Chief Administrative Officer
Robert Bradley, Stewart McKelvey

Appeal Officer: Synthia Tithi, 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* authorizes adjudicators to hear appeals. The role of an adjudicator is to determine if the Authority acted in accordance with the *Urban and Rural Planning Act, 2000* and the Happy Valley-Goose Bay Municipal Plan and Development Regulations when it refused an application for an assisted living facility at 380 Hamilton River Road on February 27, 2024.

Hearing Presentations

Technical Advisor

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness 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 the technical report which was circulated to all parties as part of the appeal package. She noted that the Happy Valley-Goose Bay Municipal Plan, which came into legal effect on July 2, 2021, designates the subject property as Commercial. Municipal Plan Policy 3.3.3 identifies Assisted Living, Residential as a discretionary use. The subject property is zoned Commercial (COM) and Assisted Living, Residential is listed as a discretionary use. Section 5.6.10.1 of the Development Regulations identifies Assisted Living, Residential to be personal care-residential, licensed by the regional health authority, and includes on-site hospitality and personal-care support services.

According to section 3.1.2.2 Discretionary Uses of the Development Regulations, a discretionary use may be permitted after providing public notice of the application and considering any objections or representations.

Section 2.4.1 of the Development Regulations outlines Council's discretionary decision-making powers.

The Technical Advisor noted that when refusing an application, the Authority is required to state the reasons for refusal and notify the Appellant of the right to appeal in accordance with section 2.4.13 of the Development Regulations.

The Technical Advisor also outlined section 2.2.2, which identified the application requirements for all applications and section 2.2.3, which identified the additional application requirements for a discretionary use. The Technical Advisory noted that where a building is proposed, additional information is required about the siting, size, parking and circulation, access and landscaping.

Appellant Presentation and Grounds

Duncan Wallace of O'Dea Earle represented the Appellant, Fahey Building Limited, who was the applicant. He outlined arguments with respect to whether:

- the reasons contained in the decision were sufficient,
- the Authority acted within its statutory authority in considering the application, and
- the decision to refuse the application was an appropriate use of Council's discretion.

The Appellant argued that the reasons contained in the decision letter were insufficient and did not meet the test of reasonableness or the duty of procedural fairness citing *Paradise (Town) v. Newfoundland & Labrador (Eastern Regional Appeal Board)*, 2010

NLTD. 116 and Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65.

The Appellant further argued that the Authority failed to appropriately exercise its statutory authority by not meeting the procedures outlined in Section 2.4.5 of the Development Regulations which allows Council to hold a public meeting and requires it to keep a record to be considered, along with written submissions, when Council made its decision.

Finally, the Appellant argued that the Authority failed to act in good faith when it neglected to consult with the Applicant and that the Applicant was not provided with an opportunity to respond to concerns raised by the public.

Authority Presentation

Robert Bradley of Steward McKelvey represented the Authority.

The Authority argued that the Council's decision-making process included consideration of public submissions, including a verbal submission by the Applicant, and a comprehensive debate at the Council meeting of February 27, 2024. Given that there was a review of the application by Council, along with public submissions, there was no breach of procedural fairness. The Authority further argued that the reasons for denying the permit need not be detailed and must be considered holistically and contextually as outlined the decision of *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.

Further, the Authority followed appropriate processes and acted within its statutory authority when refusing the application. The Authority noted that the requirement for a briefing session, and subsequent notes, are not mandatory.

The Authority further argued that there was no evidence of bias or bad faith that affected Council when it exercised its discretionary authority to refuse the application. On these grounds, the Authority asked that the appeal be dismissed.

Upon questioning by the Adjudicator, the Director of Engineering Services with the Authority indicated that no site plan was contained in the application file.

Analysis

Did Council follow appropriate processes?

The evidence of the Technical Advisor identifies the subject property as Commercial and that Municipal Plan policy 3.3.3 identifies Assisted Living, Residential as a discretionary use. The subject property is zoned Commercial (COM) and Assisted Living, Residential is listed as a discretionary use. According to section 5.6.10.1 of the Development Regulations identify Assisted Living, Residential to be personal care-residential, licensed by the regional health authority, and includes on-site hospitality and personal-care support services.

The Adjudicator accepts that the site is appropriately zoned to accommodate the application and that, as a discretionary use, the Authority must advertise the application

and consider any submissions. The Authority advertised the application and received both written and verbal submissions.

However, the Development Regulations specify the contents of an application which, for a building, includes the siting of the building on the lot, setbacks, floor area and height, parking and access (section 2.2.2). Additional information is required with an application for a discretionary use (section 2.2.3). My review of the submitted documents found no evidence of a site plan, or the information required to be included with a discretionary use application, and the Director of Engineering Services confirmed no site plan was included in the application file. I find that the lack of information within the application file creates ambiguities about the details of the proposal before Council and for which public input was invited.

Was Council required to hold a briefing session?

Section 2.4.5 of the Development Regulations specifies that Council may hold a public meeting or briefing session. The holding of such a meeting is at the discretion of Council. In this matter, Council did not hold a public meeting and as no public meeting was held, no briefing notes could be produced. In this respect, I find the Authority acted within its statutory authority.

Are the reasons contained in the decision letter sufficient?

Section 2.4.13 of the Development Regulations requires Council, when refusing to issue a permit to state the reasons for doing so and to advise the applicant of their right to appeal.

2.4.13 Written Reasons for Refusing a Permit or Setting Conditions on a Permit

- (1) Council shall, when refusing to issue a permit or attaching conditions to a permit:
 - a. state the reasons for so doing; and,
 - b. advise the applicant of their right to appeal in accordance with Section 42 of the Act.

Both the Appellant and the Authority provided case law regarding the extent of reasons to be provided with respect to an administrative decision in particular *Paradise (Town) v. Newfoundland & Labrador (Eastern Regional Appeal Board)*, 2010 NLTD. 116, Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011, SCC 62 [2011] 3 SCR 708 and *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.

Baker v. Canada (Minister of Citizenship and Immigration) recognized that the duty of procedural fairness requires a written explanation of a decision especially where the

decision is an important one for the individual or when there is a statutory right of appeal. In *Paradise (Town) v. Newfoundland & Labrador Regional Appeal Board*, it is recognized that the reasons shall be sufficiently detailed to be understood by the party and the reviewing body. *Mason v. Canada (Citizenship and Immigration)* recognized that reasons should be considered in context of the proceeds that may explain the decision-makers reasoning which may not be apparent from the reasons given.

In this matter, I find that the reasons included in the decision letter were insufficient. While I recognize that the reasons do not have to be written to a high standard, they do need to be clear and in sufficient detail that they can be understood by the Applicant. I do not find the reasons to meet this test. They are vague and do not provide a clear overview of the planning rationale regarding the Council decision to exercise its discretionary authority. I do not find that the reasons to meet the test of providing justification for the decision or being intelligible.

I do not dispute the fact that Council, in accordance with section 2.4.1 of the Happy Valley-Goose Bay Development Regulations that Council has discretionary decision-making powers and, upon review of an application may approve, approve with conditions, or refuse an application. However, the onus is on the Authority to give clear reasons especially when using its discretion to override other provisions in the Municipal Plan and Development Regulations such as in this case.

Board's Conclusion

Section 44 (2) of the *Urban and Rural Planning Act, 2000* binds the hands of the Adjudicator with respect to discretionary decisions made by the Authority.

Notwithstanding subsection (1), a decision of an adjudicator shall not overrule a discretionary decision of a council, regional authority or authorized administrator.

However, *Paradise (Town) v. Newfoundland & Labrador Regional Appeal Board* articulates principles in relation to the review of discretionary decisions and allows a decision to be overturned where:

- the Authority acts in clear abuse of statutory authority or disregarding a statutory condition,
- there is evidence of misconduct,
- the Authority failed to act in good faith,
- there is evidence of an improper motive or illegality,
- the Authority failed to understand the application under consideration.

While Council debated the application in public, considered public input, and permitted delegations to address their concerns, two of these delegations presented at a closed meeting and the applicant was not afforded the same opportunity. At the February 27, 2024 Council meeting, the Applicant was provided with a limited opportunity to present the application. This creates a perception of procedural unfairness and a failure of Council to act in good faith.

For these reasons, I confirm the appeal and return the matter to the Authority for reconsideration.

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 reasons given in the decision letter, dated March 1, 2024, does not provide sufficient reasons, especially where the Authority exercised its discretionary decision-making powers, and the process used by the Authority raises questions of procedural fairness.

That is to say, the Appeal is confirmed, and the application is returned to the Authority for reconsideration.

Order

The Adjudicator confirms the Appeal and orders that the decision of the Town Council of Happy Valley-Goose Bay, made on February 27, 2024, to refuse an application for an

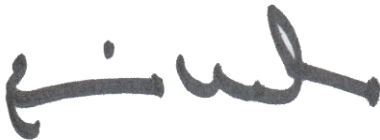
assisted living facility located at 380 Hamilton River Road be overturned. The application shall be returned to the Town Council of Happy Valley-Goose Bay for reconsideration.

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 Regional Appeal Board 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 22nd day of November 2024.

A handwritten signature in dark ink, appearing to read 'Elaine Mitchell', is positioned above the printed name.

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