

CENTRAL NEWFOUNDLAND REGIONAL APPEAL BOARD
URBAN AND RURAL PLANNING ACT, 2000

Central Newfoundland Regional Appeal Board

Appeal #	15-006-072-027
Appellant(s)	Justine Hurst Ackerman
Respondent / Authority	Town of Gambo
Date of Hearing	April 27, 2022

Board Members

Chair (Acting)	Allan Scott
Member	Rebecca Redmond MacLean
Member	Charles Irving

Also in Attendance

Appellant(s)	Justine Hurst Ackerman
Representatives for the Appellant(s)	Jennifer Ackerman
Representatives for the Authority	John Baird, Planning Consultant
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Keith Batstone, MCIP
Start/End Time	9:00 am – 10:00 am

The authority for appeals comes from section 42 of the *Urban and Rural Planning Act, 2000* (The Act).

Board's Role

The role of the Central Newfoundland Regional Appeal Board (the "Board") is to determine if the decision of the Town of Gambo (the Authority) refusal of permit to operate a sawmill (home-based business) at 525 JR Smallwood Blvd., Gambo is in accordance with the Town of Gambo Municipal Plan and Development Regulations and the Urban and Rural Planning Act, 2000.

LEGISLATION, MUNICIPAL PLANS AND REGULATIONS CONSIDERED BY THE BOARD

- Urban and Rural Planning Act, 2000
- Town of Gambo Municipal Plan, 2014
- Town of Gambo Development Regulations, 2014

Background:

On May 3, 2021 the Authority (Town of Gambo) received an application for a home-based business (commercial sawmill) at 525 J.R. Smallwood Boulevard in Gambo NL.

May 27, 2021 the Authority's Public Works Committee reviewed the permit application and directed staff to request further development proposal information from the applicant.

June 15, 2021 the Authority sent a correspondence letter outlining a list of detailed development proposal information required of the Committee to make an informed decision.

June 17, 2021 the Appellant provided additional development proposal information to satisfy the Authority's request for complete application information.

June 23, 2021 the Authority published a Discretionary Use Notice as notice of an application for proposed 'Light Industry' use in the Mixed Development (MD) Use Zone.

July 8, 2021 the Authority received and considered correspondence provided in response to the advertised Discretionary Use Notice (Light Industry – Commercial Sawmill) and resolved to refuse the development permit application at the regular scheduled meeting of Council.

July 13, 2021 the Authority delivered a letter, as notice of the Council decision to refuse the permit application for a proposed Commercial Sawmill.

July 15, 2021 the Appellant received a mailed letter confirming Council's decision to refuse the development permit application.

July 28, 2021 the Appellant submitted an Appeal Application Form to the Secretary of the Central Newfoundland Regional Appeal Board.

September 10, 2021 Appeal registered by the Secretary of the Central Newfoundland Regional Appeal Board.

September 26, 2021 the Authority provided an Appeal Submission Package to the Secretary of the Central Regional Appeal Board.

Presentations During Hearing

The following is synopsis/summary of the verbal representations made to the Board during the Appeal Hearing. The Board also received and reviewed written submissions from the Technical Advisor, the Appellant and the Authority.

The Board heard from the following:

Technical Advisor:

The technical advisor (Keith Batstone) to the Board presented the background and the chronology of the matter under appeal. The technical advisor noted that the Municipal Plan contemplates development standards to be implemented to alleviate concerns about compatibility of uses in the Mixed Development designation:

5.5.3 Compatibility of Uses

- (1) In evaluating development proposals in Mixed Development areas, Council will pay particular attention to ensuring new development is compatible with existing uses and the general character of the area. (...)
- (3) Where an area within or adjacent to the Mixed Development designation is predominantly residential in character, proposed non-residential uses will not be approved if they are considered incompatible with that character.
- (4) Before approving a non-residential development, Council must be satisfied that its requirements with respect to building setbacks, buffering between uses, off-street parking, outdoor storage, and other site related matters can be met.

The Development Regulations provide for various land uses in the 'MD' Use Zone as: Permitted Uses (eg. Accessory Building, Home Occupation, Single Dwelling, etc.) and Discretionary Uses (eg. Light Industry).

The regulations establish definitions for the proposed use of lands (Schedule 'A') and development standards intended to provide for compatibility between residential and non-residential uses in the Mixed Development designation (Schedule 'C'):

HOME OCCUPATION means a secondary use of a dwelling by at least one of the residents of the dwelling to conduct a gainful occupation or business activity.

LIGHT INDUSTRY means the use of any land or buildings for any general 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.

The technical advisor noted that the appellant applied for a permit for a home occupation/sawmill which is a permitted use in the mixed development zone. The Authority assessed whether the proposed development is consistent with the regulatory definition of home based business or permitted under light industry as a discretionary use.

Municipal Plan and Development Regulations

The Town of Gambo Municipal Plan and Development Regulations, 2014 came into effect on November 14, 2014. The subject property is located in the 'Mixed Development' land designation, as per the Future Land Use Map (see: Municipal Plan) and the Mixed Development (MD) Use Zone, as established in the Zoning Map (see: Development Regulations).

Mr. Batstone pointed out that the Municipal Plan outlines a general land use policy for the 'Mixed Development' land designation at Section 5.5.2(1) to: "...accommodate a compatible mix of land uses to enhance the potential of areas along J.R. Smallwood Blvd..." from the Municipal Plan

3. Mixing of Residential and Non-Residential Land Uses

(1) Non-Residential Development in Residential Areas

A proposed non-residential development may be subject to conditions set by Council to ensure it is compatible with neighbouring residential uses. Notwithstanding the Permitted Uses listed in the Use Zone Table, where an area within the Mixed Development designation is predominantly residential in character, a proposed non-residential use will not be approved if it is deemed by Council to be incompatible with existing dwellings and the residential character of the area.

The Municipal Plan contemplates development standards to be implemented to alleviate concerns about compatibility of uses in the Mixed Development designation:

3. Mixing of Residential and Non-Residential Land Uses

(1) Non-Residential Development in Residential Areas

A proposed non-residential development may be subject to conditions set by Council to ensure it is compatible with neighbouring residential uses. Notwithstanding the Permitted Uses listed in the Use Zone Table, where an area within the Mixed Development designation is predominantly residential in character, a proposed non-residential use will not be approved if it is deemed by Council to be incompatible with existing dwellings and the residential character of the area.

The Appellant:

The Board heard from the appellant and representative that they are appealing the Authority's decision to refuse a development permit application for a proposed Commercial Sawmill at 525 J.R. Smallwood Boulevard.

The Board heard from Jennifer Hurst Ackerman and she explained that it was small operation and processing one customer at a time. She also stated that the issue of parking was a result of a child's birthday event. The Board learned from the appellant that other industries similar to the proposed application were operating in the area. With respect to sawdust into the brook, the appellant representative explained that there was 200 feet of Crown Land separating the location of the sawmill and the waterbody. In addition the appellant's noted that they had called in after the meeting date to see if a decision was made, the only thing that was said is that it raised environmental issues, but did not tell of us the decision. The Board heard that on July 15th a letter came in the mail that cited a different reason being that it was a residential area. The appellant's went on to say that the discretionary use application cites that the area is a mixed business and residential area. As you can see the letter mentions no reasons to deny only the fact that it is residential. The appellant has explained that they approached their neighbors of their intention to operate a sawmill business within the hours of 8-5 and no concerns were told to us. Other grounds that the appellants noted are:

- The main road that goes through Gambo is a highway and is zoned mixed business and residential all through the town.
- There are many more businesses that would be of environmental concern then that of a sawmill that we are proposing.
- A sawmill that will mill customers logs brought to the site or purchased logs from a supplier will leave no environmental concerns. This mill is located in a garage on site and any products left behind will be sold as well and the property kept clean.
- Conflict of interest – the appellants alleged that there was a perceived conflict of interest.
- Feels town should promote home business and bring others to area

The Authority:

The Board heard from the Town representative John Baird and in their opinion the Town correctly applied its Municipal and Development Regulations in making their decision. The Town reviewed its home base business policies and regulations and determined that the application did not meet the criteria and refused the application.

The Authority stated that the application was received and reviewed by the Public Works Committee and additional information in a letter dated June 15, 2021 was requested from the applicants. Upon review the information the Town considered the application regarding the development to be Light Industry. The Town then posted a Discretionary Use Notice. The Notice, as required by legislation, was posted in various places in the Town of Gambo. The representative for the Town of Gambo explained that the application was refused due to:

Objections from the public for reason including, noise, traffic, safety, increased timber harvesting, and encroachment on neighboring properties.

Further, the Town explained that they used their discretion to refuse the application because the area is primary residential and more appropriate in another location.

The Town also contemplated development standards in section 5.5.3 of the Mixed Development designation. (5.5.3 Compatibility of Uses).

The Board also heard that Council considered the application as Discretionary Use as a Light Industry due to the scale of the operation. The Town also considered its Municipal Plan and section 4.2.2. Compatibility of Uses and Land Development and Subdivision Proposals. Home Business under the Town's Development Regulations section 37.

The Town considered the development to be Light Industry. If the Town considered it to be General Industry they would have rejected and not continued with the application. The Town further explained that any home business should be located inside a residence or inside an accessory building on the property.

The Town stated that the Town also considered section 3 of the Town's Development Regulations.

Mixing of Residential and Non-Residential Land Uses

(1) Non-Residential Development in Residential Areas

A proposed non-residential development may be subject to conditions set by Council to ensure it is compatible with neighbouring residential uses. Notwithstanding the Permitted Uses listed in the Use Zone Table, where an area within the Mixed Development designation is predominantly residential in character, a proposed non-residential use will not be approved if it is deemed by Council to be incompatible with existing dwellings and the residential character of the area.

The Town takes the position that they exceeded the minimum requirements for publication of the advertising requirement. Council adhered to all requirements to its Discretionary authority in considering the application.

BOARD ANALYSIS

What is proposed by the appellant's?

The Board learned that the appellant's application dated May 3, 2021 is to operate a commercial sawmill/home-based business at 525 JR. Smallwood Blvd.

What is a Home Based Business?

The Board reviewed the definition of the Home-Based Business policies as defined in the Town's Municipal Plan.

HOME OCCUPATION means a secondary use of a dwelling by at least one of the residents of the dwelling to conduct a gainful occupation or business activity.

What is the operation of the Sawmill?

The operation would occur from 8: 00 am to 5: 00 pm. Access via property driveway and one customer at a time. Sawmill will mill logs provided by customer and mill will be located in the accessory building on property and all remaining products will be sold and no heavy equipment will be used.

How did Council process the application?

Council reviewed the application under the Town's Home Based Regulations and decided that they needed more information to make a decision. The property is zoned Mixed Development. Under that Zone sawmills are not listed as neither permitted nor discretionary. However, Council considered the matter as Light Industry. The Board reviewed the General Assembly Uses for Commercial Uses: Sawmills are not listed. The Board reviewed Industrial Uses under the General Assembly Regulations and found that Light Industry (as defined) may be considered as a Discretionary Use.

GROUP	CLASS	EXAMPLES
INDUSTRIAL USES	Hazardous Industry	Bulk storage of hazardous liquids and substances, chemical plants, distilleries feed mills, spray painting shop
General Industry		Factories, cold storage plants, bulk storage facility, freight depots, warehouses, workshops, planing mills, contractors yards
Service Station		Gasoline service stations, gas bars
Light Industry		Workshops, light industry , indoor storage centres, warehouses, greenhouses, recycling depots, general garages

Upon receipt of the information, Council considered the application under Light Industry that states:

LIGHT INDUSTRY means the use of any land or buildings for any general 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.

Under the Town's Regulations Light Industry is considered discretionary in a mixed development zone.

As a discretionary use, Council advertised the proposal, received feedback from the public and refused the application based on the following:

5.5.3 Compatibility of Uses

Objections from the public for reason including, noise, traffic, safety, increased timber harvesting, and encroachment on neighboring properties. Council determined that the area is primary residential.

The Board learned that based upon feedback from the Public Notice the Town rejected the proposed development.

What reasons did the Town state in their letter of refusal on July 13, 2021?

The Board reviewed the letter dated July 13, 2021. It stated,

"Council was not opposed to this business endeavor; however, it was the general consensus of Council that this activity not be permitted at this location as it is primarily a residential area."

The Board review the Urban and Rural Planning Act, 2000 Section 35 (g) which states:

Council and regional authority etc. regulations

35. (1) *A council or regional authority shall, to ensure that land is controlled and used only in accordance with the appropriate plan or scheme, make development regulations*

(g) *requiring that a decision of a council or regional authority with respect to a permit be in writing and state reasons for a refusal of or conditions placed upon a permit.*

Did the Town state reasons of refusal?

Yes. The Board reviewed the refusal letter of July 13, 2021. The Board heard evidence at the hearing that provided in-depth reasons why the proposed application was refused. John Baird, town representative, explained in more detail reasons for the refusal.

What evidence did the Town provide under its Discretionary powers to refuse the application?

The Town used its discretion that the area was primarily residential and relied on concerns received from the discretionary use application notice and the concerns from the public.

Did the Authority have the right to refuse the application?

Yes. The Authority may establish plan policies and development regulations in accordance with the Urban and Planning Act, 2000, per Sections 35(1) and 36. The Town of Gambo Development Regulations re-affirm this authority at Section 98, regarding Discretionary Uses.

Does the Town of Gambo have Home Based policies or regulations?

Yes, under section 37 of the Town's development regulations.

Did the Authority follow the proper procedure in refusing Akerman's Application?

No. The application involved a proposed home occupation (commercial sawmill). The Authority assessed the original application and requested additional information prior to determining that the application was complete for the purposes of rendering an informed decision. The Town did not make a decision for a proposed Home Occupation.

Instead, the Authority erred when they determined that the application involved a proposed Discretionary Use Class (ie. Light Industry) and proceeded to post notice of an application to develop a discretionary use directly to persons likely to be affected for a minimum of seven (7) days and consider comments received.

There was not sufficient evidence supplied to the Board by the Authority to determine why the proposal was determined to be classified as Light Industry. Under Regulation 11, council did not demonstrate the following “

11. Discretionary Powers of Council

(1) In considering an application for a development permit or approval in principle, Council shall take into account the policies of the Municipal Plan and any further scheme, plan or regulations pursuant thereto, and shall assess the general appearance of the development, the amenity of the surroundings, availability of utilities, public safety and convenience, and other considerations which are, in its opinion, material, and notwithstanding the conformity of the application with the requirements of these Regulations, Council 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.

The Board reviewed and considered the following with respect to discretionary decisions of a Council : *Stroud v Central Newfoundland Regional Appeal Board Supreme Court* decision Justice LeBlanc.

The Board's role then is not merely to rubber stamp the decision solely on the basis it was one made within the discretion of the authority. The process leading up to

the exercise is important. Where the process is appropriate, it is then that the Board is not permitted to override the discretion exercised. (Paragraph 12)

The Board determined that Council erred in their decision with respect to the refusal of the application. That is to say, while Council has the authority to make a decision they did not do so in accordance the Regulation 11. While the Town received feedback from the Public, the Board did not receive enough evidence from the Authority to determine that Regulation 11 was adhered to the full extent.

BOARD'S CONCLUSION AND DETERMINATIONS

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties along with the technical information and planning advice.

The Board is bound by section 42 of the Urban and Rural Planning Act, 2000 and therefore must make a decision that complies with the applicable legislation, policy and regulations.

The Authority categorized the area as primarily residential when it is actually Mixed Development designation with compatible uses under section 5.5.3.(1)(3) of the Town of Gambo's Municipal Plan.

5.5.3 Compatibility of Uses

(1) In evaluating development proposals in Mixed Development areas, Council will pay particular attention to ensuring new development is compatible with existing uses and the general character of the area. (...)

(3) Where an area within or adjacent to the Mixed Development designation is predominantly residential in character, proposed non-residential uses will not be approved if they are considered incompatible with that character.

The Board determined that the Authority did not consider that there were other non-residential uses compatible to the Appellant's proposal.

The Town did not consider all of Development Regulation 11.

The Board reverses the Town's decision. The Town must reconsider the application and render a new decision and issue a new decision letter in accordance with Town of Gambo's Development Regulation 11, Discretionary Powers of Council.

BOARD'S ORDER


The Board orders that the decision made by the Town of Gambo on July 8, 2021 to refusal of permit to operate a sawmill at 525 JR Smallwood Boulevard be reversed.

The Board further orders the Authority to pay the Appellant in the amount equal to the Appeal Fee of \$200.00 plus HST.

The Authority and the Appellant(s) are bound by the decision of this Regional Appeal Board.

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 Appellant have received the Board's decision.

DATED at Gander, Newfoundland and Labrador, this May 12, 2022.



Allan Scott, Acting Chair
Central Newfoundland Regional Appeal Board



Rebecca Redmond MacLean, Member
Central Newfoundland Regional Appeal Board



Charles Irving, Member
Central Newfoundland Regional Appeal Board