

**URBAN AND RURAL PLANNING ACT, 2000**

**Section 40-46**

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

Appeal # : **15-006-077-007**

Adjudicator: Garreth McGrath

Appellant(s): Anita Walsh

Fusion Holdings LTD

Respondent / Authority: Town of Portugal Cove-St. Philip's

Date of Hearing: 20 September 2023

Start/End Time : 9:00 – 9:30

In Attendance

Appellant: Fusion Holdings LTD

Appellant Representative(s): Anita Walsh

Respondent/Authority: Town of Portugal Cove-St. Philip's

Respondent Representative(s): Les Spurell, Ashley Leyhan, Brian Peach

Proponent/Developer: N/A

Developer Representative: N/A

Interested Party: N/A

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

Technical Advisor: Faith Ford

Board'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 Portugal Cove – St. Philips Municipal Plan and Development Regulations when it denied the application for a Business Development Permit and issued a Removal order and Stop Work order at 374 – 376 & 378–456 Bauline Line Extension.

## **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 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.

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 a denied permit by the Town of Portugal Cove – St. Philips at 374 – 376 & 378–456 Bauline Line Extension as well as the issuance of Stop Work and Removal Orders for the property. The planner outlined the Appellant's grounds for appeal at pages 6 and 7 of the appeals package as:

1. That during the undertakings Environmental Registration process, the Town considered the proposed use as an agricultural use but later changed that opinion.
2. That the Authority erred in determining the proposal was not an agricultural use and ultimately refused a Business Development Permit application based on the Authority's determination of use.
3. That the Province considers the activity to be agricultural since it is regulated by the Canadian Food Inspection Agency.
4. The issuance of an Equipment Removal Order after an appeal has been filed with the Board. (there are no grounds for this appeal – Only the Appellant is required to cease all operations relating to the development as required by s. 45(1) of the Act. The Town is within its rights to issue the Order.)
5. That email correspondence between a PCSP Development Officer and a Provincial Soil Scientist does not reflect Provincial Policy regarding whether or not the subject farm process is an actual agricultural process. (a copy of the email was not provided )
6. That the Town Council made an exception to the normal consideration of a development proposal while placing undue hardship and risk on the applicant by requesting individual product registrations prior to considering permit issuance.
7. That the Town issued a Stop Work Order while the product registration enquiries were in process with the Canadian Food Inspection Agency which could be a 30-90 day process.
8. That the fish hydrolysate nutrient is allowable on the site as per the issued agricultural lease.

### The Appellant's Presentation and Grounds

The Appellant started by discussing April/May 2021 when Fusion Holdings allowed Newfoundland and Labrador Marine Organics (NLMO) to bring their equipment and a batch of liquid fish of approximately 12,000L of liquid fish to the farm after the plant of NLMO was damaged.

The Appellant states that the only bottling of liquid fish that took place was liquid fish that had come from NLMO prior to the equipment being moved and that no liquid fish was ever produced on the Appellant property. August 2021 all the equipment was then moved to the farm and a batch of liquid fish was brought in and produced. It was made with the intention of using on the farm unless the town permit was approved. The Appellant states that the production was within the allowed amount of production for personal use in agricultural work and did not require a permit for that production of fertilizer.

In November 2021 there was an issue that the Business Permit application originally made was lost by the town. By January 2022 the batch from August 2021 was still on the property.

April/May 2022 the liquid fish was bottled and brought to stores by NLMO.

In May of 2022 the Appellant was still waiting on their business permit approval. When the stop work order arrived the Farm used the batch that had been produced there on the farm as fertilizer on the farm.

### Authority's Presentation

The Authority started by outlining that the focus of the hearing confirmed that the subject of the Appeal was the Stop Work and Removal order at the extension. The appeal that was read into record noted that in the planner's report also included the refusal of the business development permit as well as the Stop Work and Removal Order. The Authority states that the question of the business development permit was not in the subject of the appeal with all parties agreeing to the subject matter, however the planner's report also contained reference to the appeal also relates to the refusal of a business development permit. The Authority's position is that any reference to the processing and refusal of a business development application by the town is beyond the subject of the appeal in the notice as provided and what was entered into record. As per the council minutes, there was no reference, no motion, and no discussion referencing the refusal of a business development permit to relocate NLMO to the property. The Authority requests that all references to the processing and refusal of a business development permit be discarded as outside of the subject of the appeal. Their position is that there is further information required to understand why the business development permit is denied.

The Authority states that prior to issuance of their orders they corresponded with the Land Management Department of the Provincial Government as specialists in the province to confirm if the matter was agricultural. No party confirmed if it was a permitted agricultural use.

The Authority never issued a permit, confirmed by the appellant, for bio processing of marine ingredients on the subject property as required by development regulations. It is the position that the town acted within their authority when they issued the stop work order.

### **Adjudicator's Analysis**

The Adjudicator reviewed The Urban and Rural Planning Act, 2000 as well as the Town of Portugal Cove – St. Philip's Municipal Plan and Development Regulations and determined the following:

With regards to point 1, the adjudicator had no information regarding the Environmental Registration process and the question of the stop work and removal order are ultimately different questions that may arise at different points in the approval process. The Adjudicator therefore will not consider the Environmental Registration process as part of this application.

With regards to point 3, while the Province and Federal authorities may have definitions on what is an agricultural use, this is ultimately not a ground of appeal, but rather evidence to show whether or not an activity was agricultural.

Upon reviewing the grounds of appeal outlined by the Technical Advisor above, the Adjudicator agrees with the Technical Advisor on point 4 of the grounds of appeal, that there is no ability for the adjudicator to overturn the orders issued by the Authority on the grounds that it was issued after an appeal had been made and the town was within their right to issue the order.

Regarding point 5, this board does not have authority to determine whether or not a position of the Authority may or may not reflect provincial policy. The Adjudicator is bound by the legislation that governs the appeal and if that provincial policy has not been enshrined in legislation, the Adjudicator cannot use that information in making a decision unless there is some overriding natural justice consideration.

Regarding point 6, the Applicant made reference to the inability to use this facility as causing undue hardship and risk on the Applicant, but it was unclear from any of the evidence presented what the risk or hardship would have been on the Applicant. As such the Adjudicator is unable to make any findings that would have given rise to an questions of natural justice.

Finally, with regards to part 7, there is legislation to cause an Authority not issue a stop work order when there was an ongoing product registration enquiry with the Canadian Food Inspection Agency.

Question/Answer .

Q: Is the adjudicator and appeal subject only to the Stop Work and Removal order or was the business permit denial also properly heard under this application?

The issue of the proper matter to be heard on appeal was raised by the Authority in their presentation. The Authority questioned the subject matter of the appeal as outlined in the Technical Advisor's report as to the references made by the Technical Advisor to the refusal of a

Business Development Permit being listed as a ground for appeal before the Adjudicator. Specifically the town makes reference to Part II of the application of the Appellant where the Appellant stated their grounds of appeal in Appendix A.

It is clear in the reading of the application of the Appellant that the subject matter of the application is properly the question of the stop work order and not the question of whether or not the Authority complied with their duties in the issuance or denial of a permit for the subject property.

Q: Is the production of this fertilizer an allowable agricultural use of the property and was the production of the fertilizer done for an agricultural purpose?

In hearing from the parties and reading their submissions, a central question arose to this matter and the question of whether or not the stop work order was valid, and that question was whether or not the use of the property was being done for an allowed agricultural purpose.

In reviewing the arguments of the parties and their submissions, I see no objection from the Authority for the right of the Applicant to produce fertilizer on their property for their own uses. Had the Applicant been producing their own fertilizer on their property for use of their own agricultural fields, it would be clear that the actions of the Applicant would fall into an allowed agricultural use.

However, two main facts to the matter arise that the Adjudicator must deal with.

First is the initial Business Development Application made by NLMO to use the property of the Applicant. While the Authority is correct that the possibility of a denial of this application is beyond the scope of this appeal, the application is essential to informing whether the Authority was able to issue their stop work order. This application for a Business Development Application was made by NLMO to establish a new business at 374 Bauline Line Extension to produce biomass for agriculture. While the production of biomass might relate to an agricultural purpose, what begins to cast doubt on the agricultural purpose of the processing of biomass is the outlining that NLMO would be setting up new office space nearby. This indicates that this is not simply an agricultural operation on the property, but rather an operation that is aimed at the sale of fertilizer. Nowhere in this application was there discussion that the production of this biomass would be for the production of fertilizer for Fusion Holdings LTD exclusively or primarily. At this point the operations of NLMO on the subject property begin to appear to be a separate business on the subject property which may require permits if its work falls beyond an allowed Agricultural purpose.

Second were comments made by the Applicant in the hearing. In their arguments, the Applicants stated that a batch of fertilizer that had originally come from the prior NLMO facility was bottled and brought to stores. While the Adjudicator also heard that this was being done as a test batch with a “pony pump” this was nonetheless an action of NLMO to use the property at 374 Bauline Line Extension for the sale of the fertilizer off of the property of the farm. At this point it became clear to the Adjudicator that the proposes for the facility and the plant inside 374 Bauline Line was more than production of agricultural fertilizers for use on the farm property. This was a

commercial operation for the production of fertilizer that the farm may have used to their own benefit, but ultimately was established with the financial interest of NLMO to sell fertilizer at its core.

As such, the stop work and removal orders issued by the Authority were done so to stop not the agricultural ongoings of Fusion Holdings and their ability to farm, but instead the stop work and removal orders were aimed at the production of biomass fertilizer on the property by NLMO, who was not permitted to do so on the property.

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 board acted within the scope of their authority by issuing a stop work and removal order for 374 – 376 & 378–456 Bauline Line Extension. While the production of fertilizers by a farm for use on a farm generally may be seen as an agricultural use, for the above stated reason the Adjudicator finds that the actions of the Applicant and NLMO went beyond what the Adjudicator could find as an Agricultural use. The Authority issued a Stop Work and Removal order for NLMO to stop their fertilizer production on the property of the Applicant. As such, the Adjudicator confirms the Stop Work and Removal Order of the Authority.

That is to say, that the Stop Work and Removal orders issued are to be complied with immediately.

Order

The Adjudicator orders that the decision of the Town of Portugal Cove-St. Philips to be confirmed. The appeal by Ms. Walsh is denied.

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 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 9 October 2023.

Garreth McGrath

Adjudicator

Urban and Rural Planning Act, 2000