

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-083-007
 Adjudicator: Christopher Forbes
 Appellant(s): Andrew Tilley
 Respondent / Authority: Town of Paradise
 Date of Hearing: December 11, 2023
 Start/End Time : 1:30 p.m. – 2:10 p.m.

In Attendance

Appellant: Andrew Tilley
 Respondent/Authority: Alton Glenn, Director, Planning and Protective Services,
 Town of Paradise
 Steve Batten, Foreperson, Enforcement,
 Town of Paradise
 Interested Party: Scott Young
 Appeal Officer: Robert Cotter, Departmental Program Coordinator,
 Municipal and Provincial Affairs
 Technical Advisor: Faith Ford, Planner, MCIP,
 Municipal and Provincial Affairs

Adjudicator's Role

Part VI of the *Urban and Rural Planning Act, 2000* (the “Act”) authorizes adjudicators to hear appeals and establishes the powers of adjudicators. The role of the Adjudicator is to determine if the Authority acted in accordance with the Act, the *Municipalities Act, 1999*, the *Town of Paradise Municipal Plan 2016*, the *Town of Paradise Development Regulations 2016* and the *Town of Paradise Noise and Nuisance Regulations, 2013*, when it issued an Order to cease operation of a wood stove at 50 Donna Road unless smoke is deterred from entering the neighbour's property to prevent the nuisance from occurring, on April 12, 2023.

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. Section 10 of that Order reads:

10. The Hearing will 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 outlined her report dated November 1, 2023, noting that according to the Town of Paradise (the “Authority”), a complaint was received by the Authority on March 6, 2023 that a chimney had been installed in an accessory building at 50 Donna Road, the subject property, and smoke from it was drifting onto a neighbour’s property. As indicated by the Authority, a permit was issued for the wood stove on March 8, 2023. According to the Authority, representatives for the Authority visited the subject property and advised the Appellant that an order would be issued if the smoke continued to cause a nuisance.

The Authority indicated that a second complaint was received about the smoke and on April 10, 2023, the Authority issued a Municipal Regulation Warning Notice, advising the Appellant that he had violated the Town’s *Noise and Nuisance Regulations*.

According to the Authority, the Appellant continued to operate the wood stove and the Authority continued to receive complaints about smoke. Thereafter, on April 12, 2023, the Authority issued an Order requiring the Appellant to stop operating the wood stove unless smoke was deterred from entering the neighbouring property.

The Technical Advisor referenced the Town’s *Nuisance and Noise Regulations* passed pursuant to section 414(2)(ee) of the *Municipalities Act, 1999*. Section 4(b) of those *Regulations*, which is referenced in the Order issued by the Town, states that no owner of occupier of any property shall knowingly permit or allow any nuisance to occur on the subject property. The Technical Advisor also referred to section 2 of those *Regulations*, which sets out the definition of “nuisance.” Lastly, the Technical Advisor referenced section 404(1)(j) of the *Municipalities Act, 1999* which permits the issuance of an order requiring a person causing a nuisance to cease doing so.

The Appellant’s Presentation and Grounds

At the outset of his presentation, the Appellant confirmed that the primary ground of his appeal is that the smoke created by the operation of his wood stove cannot reasonably be deemed a nuisance for a variety of reasons including the fact that the determination of what constitutes a nuisance is largely subjective.

During the hearing, he outlined the ways in which the wood stove at issue in this Appeal is more efficient than the average stove and produces much less smoke. He did acknowledge there is smoke on start-up, but once up to temperature, the secondary tubes of the stove operate to reduce the smoke. At one point, he had extended the chimney length for the stove in the hopes it would remedy the problem.

The Appellant confirmed that other neighbours on his street burn wood and have wood stoves, and questioned how it can be established that the smoke in issue is coming from his chimney and not others.

The Appellant also confirmed that he only burns wood in his wood stove.

Authority's Presentation

The Authority reiterated the arguments set out in its written submission, namely that Council for the Town had the discretion to determine what constitutes a nuisance under the applicable *Noise and Nuisance Regulations*.

Mr. Young's Presentation

Mr. Young lives at 59 Imogene Crescent, which runs parallel to Donna Rd. Mr. Young's property backs onto the property of the Appellant, and the Appellant's home is therefore closer to Mr. Young's house than other houses that burn smoke. Mr. Young confirmed he and his wife are the complainants who made complaints to the Authority.

Mr. Young has lived at his current address for 23 years without any issues. While visiting his home in response to a complaint, a municipal enforcement officer confirmed to him the smoke present in his house.

Mr. Young noted that the Appellant's property is 6-7 feet lower than his property and the smoke is carried into his property at eye level from the Appellant's chimney. He confirmed west winds produce the greatest effect from the smoke. He also indicated that the smell is offensive when it is present, and exacerbates the chronic dry eye issues his sons have. He has also had visitors to his home ask if something was on fire when the smoke has been bothersome.

Analysis

The following questions arise from this Appeal:

1. Did the Town have the authority to issue the Order of April 12, 2023?

Yes. The Authority had the discretion to issue the Order pursuant to section 404(1)(j) of the *Municipalities Act, 1999*.

The Authority passed its *Noise and Nuisance Regulations* pursuant to section 414(2)(ee) of the *Municipalities Act, 1999*. Section 4(b) of those *Regulations* provides that "no Owner or Occupant of any property in the Town shall knowingly permit or allow any Nuisance or raucous or unseemly behavior to occur on the Owner or Occupant's property."

The word “Nuisance” is defined in section 2(e) of those *Regulations* as meaning “anything, in the opinion of Council or any Person authorized by Council, that ... gives offence to the senses ... or obstructs reasonable and comfortable use of property in any way, and includes any obnoxious substances [or] smoke ... that has an unpleasant effect on the senses.”

Pursuant to section 404(1)(j), a council is permitted to make an order requiring any person “who causes a nuisance contrary to the regulations of council” to cease causing that nuisance.

It was within the Town’s authority to determine that the smoke created by the operation of the wood stove on the subject property constituted a “nuisance” for the purpose of the Town’s *Noise and Nuisance Regulations*. Indeed, smoke is specifically referenced in the definition. Once this determination was made, the Authority had the discretion to issue an Order pursuant to section 404(1)(j) requiring the Appellant to cease causing that nuisance.

2. If yes, was the issuance of the Order in issue in accordance with, and a reasonable exercise of, the Town’s authority?

Yes. The evidence adduced in the hearing confirmed that the smoke created by the operation of the wood stove from the subject property “gave offence to” or had an “unpleasant effect on” “the senses” of Mr. Young and obstructed the comfortable use of his property. As such, it was reasonable for the Town to find that such smoke constituted a “nuisance” for the purpose of the *Noise and Nuisance Regulations*.

While I sympathize with the Appellant, particularly since he properly obtained a permit for the installation of his wood stove and it is clear other wood stoves are in use in his neighbourhood, I do not find the exercise by the Town of its discretion pursuant to section 404(1)(j) of the *Municipalities Act, 1999*, was in excess of its powers under the legislation. No evidence was adduced at the hearing showing that the Authority acted in error or beyond its authority in any way in issuing the Order.

Further, no evidence was provided indicating that procedural requirements were not appropriately followed with respect to the issuance of the Order or indicating the Authority acted in a biased manner or otherwise contrary to principles of natural justice. There was also no evidence indicating any dispute as to the basic facts in issue and, as such, Council’s decision was not based on any material factual error.

Decision of Adjudicator

As Adjudicator, I am bound by section 44 of the Act, which states:

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.

Order

The Adjudicator dismisses the Appeal and upholds and confirms the Order dated April 12, 2023.

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 the 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 2nd day of January 2024.



Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000