

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal # : **15-006-087-021**

Adjudicator: Garreth McGrath

Appellant(s): Concern Citizens of Mount Pearl

Respondent / Authority: City of Mount Pearl

Date of Hearing: November 30, 2023

Start/End Time : 9:00/10:30

In Attendance

Appellant: Concern Citizens of Mount Pearl

Appellant Representative(s): Heather Burke, Peter Oliver

Respondent/Authority: City of Mount Pearl

Respondent Representative(s): Alana Felt, Stephanie Walsh

Proponent/Developer: "Republic Pets"

Developer Representative: Kelsey Sooley, Russell Sooley Interested

Party:

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

Technical Advisor: Faith Ford

Adjudicator'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 the City of Mount Pearl Municipal Plan and Development Regulations when it approved a kennel at 5-7 Commonwealth Avenue on 5 September 2023.

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 Adjudicator 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 an approval by the city to approve a discretionary use in principle to build a dog kennel at 5-7 Commonwealth Ave. The technical advisor outlined the regulations cited by the parties and their application to the matter at hand, as well as a chronological order of what took place leading to the appeal. The report of the Technical Advisor also showed that the appeal was filed validly according to the Urban and Rural Planning Act.

The Appellant's Presentation and Grounds

In their written and oral submissions, the Appellant outlined that their grounds for appeal are:

- 1) Their concerns were not addressed properly by council in the briefing session of the city on whether or not to allow the use.
- 2) The application did not comply with Section 4.7.3 and Section 4.11.1 of the City's Development Regulations.
- 3) The Authority cannot quantitatively measure the negative impacts the proposed use will have on the surrounding neighborhood, including noise, and as such should not be approved.
- 4) The Kennel would have an external run which would abut the zone in contravention of Section 7.21.2 of the Development Regulations.
- 5) The kennel was approved in a flood risk corridor in contravention of Section 6.14.7 of the Development Regulations

The Adjudicator here would reiterate their comments in the hearing regarding the issue of the fact that there are other pet-related businesses in the vicinity. This question is clearly beyond the scope of this appeal and the powers of the Adjudicator. Whether or not to approve a discretionary business and the number of discretionary approvals allowed in the area is clearly a

power within the discretion of the Authority. Whether they approve 1 or 100 similar businesses in an area is a question for council and there is no authority for the Adjudicator to find that there is a limit on the number of similar businesses in an area unless there are rules or regulations that dictate those limits.

Authority's Presentation

The position of the Authority is they met all of their requirements in considering the approval of this discretionary use in the area of 5-7 Commonwealth Avenue. Specifically, it is their position that:

- 1) The requirements for public consultation and input were met and that the parties concerns were heard by council in making their decisions.
- 2) That the application was an approval in concept and that there was no requirement at the time of the application for full approval as per Section 4.7.3 and Section 4.11.1, and that these would be met later as the development was still to be subject to all development standards of the property.
- 3) That noise regulation is a matter for the Authority to determine once the plans had been submitted to the Authority for approval.
- 4) That no authorization was given for the development within the flood risk corridor.

Adjudicator's Analysis

The Adjudicator reviewed The Urban and Rural Planning Act, 2000 and the City of Mount Pearl Municipal Plan and Development Regulations and determined the following:

- 1) Did Council address the concerns of the residents of the surrounding area?

In reviewing the Technical Report, we can see the steps that were taken by Council before approving the Kennel at 5-7 Commonwealth Avenue. On August 9 2023 property owners within 150m, the Mount Pearl-Paradise Chamber of Commerce, local MP and local MHAs were all given notice of the application. On 12-22 August 2023 notice was published in The Telegram that parties had an opportunity to submit comments, with 4 written and two phone called received regarding the application. 24 August 2023 public consultations were held and 31 persons were in attendance with feedback and comments received and these comments were brought to the Planning, Engineering, and Development Committee who then recommended the Discretionary Use Application. On 5 September 2023, Council then moved to approve the discretionary use application.

In the submissions of the Appellant felt that their submission were not directly or appropriately addressed. They state that they were not met after the meeting of 5 September 2023 to ask whether their concerns had been mitigated. However, this is not a standard set under any of the City of Mount Pearl rules, regulations, or bylaws. The requirements of the City are those which they performed. There was notice given to surrounding property owners and interested parties as required by the Development Regulations. A comment period was established and comments received. Public consultations were held. There is no duty on the Authority to individually speak with each constituent or group of constituents to ensure that their concerns are sufficiently mitigated to their subjective standards. Indeed, decisions of council may impact residents in a way that is authorized by the rules and regulations in a way that raises ongoing concerns with residents, but if that decision is permitted by the rules and regulations of the Authority, the Adjudicator has no authority to override that decision.

The rules and procedures for what constitutes adequate public consultations are a matter properly for the democratic processes of the Authority and it is not within the powers of the Adjudicator to substitute the equally subjective standards of the Appellant over the Authority. As there were several meetings and opportunities for public engagement, with the Authority having met their duties under the Development Regulations, the Adjudicator finds that there were also no natural justice or equitable reason to find that the Authority breached their obligations for public consultation.

2) Did the application comply with Section 4.7.3 and Section 4.11.1 of the City's Development Regulations?

The City's Development regulations at Section 4.7.3 and Section 4.11.1 outline that:

4.7.3 The applicant is required to supply all information required to process the application in accordance with the Regulations.

4.11.1 Standard Application

An application for a Development Permit shall contain the information needed to satisfy the applicable requirements in these Regulations. Such information shall include at least the following:

- (a) location;
- (b) use;
- (c) lot area and lot frontage;
- (d) access;
- (e) availability of water supply and waste disposal; and
- (f) a legal survey plan prepared by a registered Newfoundland and Labrador land surveyor.

Where the application involves a building, the following information shall be added to the preceding list:

- (g) siting of building, including building line setback and yards;
- (h) bulk and height, in terms of floor area and building height
- (i) off-street parking, circulation, and loading, in terms of variables specified in Section 9; and
- (j) landscaping.

In the submitted appeal by the Appellant, they outline that there was a failure on the developer when they brought forward their application to meet the requirements of subsection g-j of the regulations.

However, in reviewing the Regulations of the Authority, we can see under Section 9.7.2 outline the development permit system, the Authority has specifically carved out the authority to approve a proposal in principle without the requirement for detailed site plans, specifically so that applicants can proverbially “test the water” on their application without the cost of preparing a fuller application. This doesn’t exempt the application from the requirements of Section 4.11.1. For the final approval and permit to go ahead, the requirements to provide the information required in subsection g-j still exist. The Developer will still be bound to those requirements before any construction is given final approval by the Authority.

The Authority has properly exercised their discretion to approve the permit in principle, with the requirements of Section 4.11.1 remaining intact and still being a requirement for development before final approval for construction.

- 3) Can the Authority quantitatively measure the negative impacts the proposed use will have on the surrounding neighborhood, including noise?

At the forefront of this discussion, it is appropriate to note that there is no quantitative standard of what the noise regulations for a Kennel are under the Regulations. Indeed, it is the position of the Appellant that because there is no quantitative standard established for noise, the Appellant submits that the standard is subjective. However, the Appellant has failed to submit any materials showing that there is an objective standard to an acceptable level of noise mitigation or decibel level emitted from a kennel.

The Appellant in their written materials submitted a report from the Causeway Coast & Glens Borough Council regarding the standards that were established in this jurisdiction located in Northern Ireland. This is an area that at the time of this decision encompassed land approximately 50 times larger than the City of Mount Pearl and had a population nearly 7 times larger. It is difficult for the Adjudicator to see the applicability of such recommendations to a jurisdiction such as the Authority. However, upon reviewing the submissions of the Appellant, the Adjudicator finds that an equally subjective standard is submitted in these recommendations which can be found on page 56 of the appeals package. This report gives suggestions for what noise management plans should be included in a submission to their borough council. It does not make objective findings on how to manage the noise, requirements for health and safety, or any other objective finding upon which the Adjudicator could find that there is a factual standard for

noise mitigation. As such, the Adjudicator cannot find that there is some objective standard for noise mitigation to impose on the authority.

As well, in addressing the question of noise, the Appellant raised the distinction between “white noise” of cars and the sudden noise of a dog barking. However, the Adjudicator rejects this distinction. The Appellant here is relying on the best case scenario that they cite that a car is producing only 60db of noise as it drives past, comparing that to the approximately 95-100db that may be produced by a dog barking. Indeed, it may be the case that these are the noise levels that dogs produce, it should also be noted that similar to a dog bark, cars often produce noise beyond that of simply driving. As an intersection that was noted to have nearly 12,000 cars travel across it on a given day. It is safe to assume that it is possible to hear a car horn once or twice a day in the roadway between 5-7 Commonwealth Ave and the properties of the Appellant. On an examination of the range of noise that a horn produces, a cursory examination of available materials shows that horns can exceed 110db, with emergency sirens exceeding that. All of this is to say that while one Council may prepare a report on the subjective standards of noise in an area, the Authority is not required to adopt those standards, particularly when there may be similar levels of noise already extant in the area.

The Adjudicator would agree, that this standard is subjective, but that does not mean that the subjective standard chosen by the Authority is an appealable issue. The Authority has the ability to set subjective standards, and may wish to do so with the understanding that each and every development is unique. Appropriate noise mitigation in one area may not be appropriate in another. It is only upon satisfaction of the Authority that the requirements for noise mitigation are met that they will approve the construction.

While the Adjudicator understands that noise nuisance is a problem, the Appellant are not left without redress in this situation. The Common Law tort of Nuisance is still live and should the noise create problems for the surrounding residents and they feel that the standards established by the Authority are not sufficient, the Appellant can still avail themselves of the court system to seek redress for said Nuisance. As such the Adjudicator finds there is no grounds to overturn the decision of the Authority.

4) Would the Kennel abut the RMD zone in contravention of Section 7.21.2?

During the hearing, an important concern was raised regarding the definition of “abut” as it related to this matter. The zoning areas here are clearly next to each other, however, the questions arises, where Commonwealth Avenue divides the property, are the properties abutting?

Comments by Technical Advisor Faith Ford during the hearing would indicate that the definition of abut in this matter would indicate that the roadway is a breach in the contiguous property of the kennel, meaning that the Residential Medium Density zone of Blade Cres abuts Commonwealth Ave, but does not abut the subject property of 5-7 Commonwealth Ave. While the Adjudicator always appreciates the input of the technical advisor in this matter, the Adjudicator would also look to canvass the regulations to see how they use “abut” and if there is any indication within the regulations to ground this expert opinion.

While the City of Mount Pearl Development Regulations do not define a situation such as this specifically, nor do they explicitly define abut, an examination of the regulations and the use of “abut” help to clearly inform how this should be interpreted. In particular, two sections of the Development Regulations show that the regulations do, as stated by the Technical Advisor Faith Ford, consider the roadways to be separate properties that would divide the zones, meaning that 5-7 Commonwealth Ave does not abut the Residential Medium Density zone of Blade Cres.

First, we can look to Section 6.4.3 Flanking Street Side Yards: “Where an industrial, commercial or civic development permitted in any Use Zone abuts a street that is used as an access into a residential area or zone...” Here we see our first example in the regulations that there is a distinction in the regulations between abutting upon a zone and abutting on the street that abuts a zone.

Second, we can see this precision of language again in Section 7.15 discussing general industry and hazardous industry uses. Specifically, the language used that helps to define “abut” can be found in Section 7.15.4: “the use shall not abut a residential area or highway.” (emphasis added) Here we can see that the Authority in their regulations do consider residential areas and highways to be separate things upon which a use may abut. This use of the specific language shows that the interpretation put forward by the Technical Advisor is the correct one.

If council wanted to ensure that a kennel could not abut a residential zone or its connecting road, they could do so with proper language in their regulations, but absent this regulation the Adjudicator cannot find that the Kennel would abut Blade Crescent, as it abuts on Commonwealth Ave.

5) Was the kennel approved in a flood risk corridor in contravention of Section 6.14.7 of the Development Regulations?

In the discussion of question 2 of this decision, the approval of the Authority was an approval in principle. It still required that if the final approval for development was to be given, all rules would need to be followed, including those requirements under Section 6.14.7. No detailed drawings or outlines had been submitted at the time to show that any of land would fall within the flood risk corridor.

While the Appellant had submitted maps of the area indicating that the subject property would be developing into the flood risk area and thus require the approval of the Minister of Environment and Conservation. Upon reviewing these maps, the Authority rebutted to indicate that the maps provided were visual aids given to the community to assist in understanding of the application and were not the authoritative, instead pointing to maps provided from the publicly available GIS system. Indeed, we can see from the maps visible on page 59 of the Appeal Package, the maps relied on by the Appellant are far less accurate than the GIS maps. While the map on Page 59 may show that the property is within the flood risk corridor, when we review it on the more accurate GIS mapping we can clearly see that the conservation area is much further from the subject property than on this map. It would appear that the property as it is does not enter the

conservation area. As well there has been no approved site plan that would have construction going into the flood risk corridor.

As such, the Adjudicator cannot find that there was a breach of the requirements to seek the approval of the Minister of Environment and Conservation as there was no approval for construction within the conservation area.

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 Authority met their duty under the Urban and Rural Planning Act, 2000 and the City of Mount Pearl Municipal Plan and Development Regulations. As such, the decision of the Authority is confirmed.

That is to say, the approval in principle is confirmed as the Appellant did not show that the Authority did not do their duties as required per the Urban and Rural Planning Act, 2000 and the City of Mount Pearl Municipal Plan and Development Regulations.

This is not the final step of the process for the Developer "Republic Pets," as there are still many hurdles to meet under the City of Mount Pearl Municipal Plan and Development Regulations before their business can open. The subjective requirements of the city to ensure that there is adequate noise mitigation still exists.

As well, nothing in this decision bars the Appellant from seeing redress from the courts should a cause of action arise. The separation of powers between the Adjudicator and a court of competent jurisdiction are clear and the powers of both are separate. However, the finding of the Adjudicator in this appeal is that the decision of the Authority must be confirmed.

Order

The Adjudicator orders that the decision of the City of Mount Pearl to be confirmed. The appeal 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 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 21 December 2023.

Garreth McGrath

Adjudicator

Urban and Rural Planning Act, 2000