

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal # : **15-006-077-018**

Adjudicator: Garreth McGrath

Appellant(s): Rita Farrell

Respondent / Authority: Town of Flatrock

Date of Hearing: 19 September 2023

Start/End Time : 9:00 – 9:30

In Attendance

Appellant: Rita Farrell

Appellant Representative(s): N/A

Respondent/Authority: Town of Flatrock

Respondent Representative(s): Andrew Tobin

Proponent/Developer: Philip Jones

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 Flatrock Municipal Plan and Development Regulations when it approved an application for a Nordic Spa at 251 Windgap Road, Flatrock on 1 August 2022.

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 permit granted by the Town of Flatrock with conditions in the Residential Medium Density (RMD) zoned area of 251 Windgap Road, Flatrock. The planner outlined the Appellant's grounds for appeal at pages 9 and 10 of the appeals package as:

- 251 Wind Gap Road" but it was unclear how the proposed development is a discretionary use in the RMD Zone;
- The notice letter stated the proposed development required a town plan amendment to change the zoning of the subject property from RMD to "Commercial Zone" but during the August 1, 2022 Council meeting it was stated the subject property would be rezoned to "Mixed-Development";
- The survey plan/site plan is not to scale and does not include dimensions or setback distance from neighbouring properties or stream;
- The application does not conform to the Municipal Plan and Development Regulations;
- The subject property is not presently zoned for a commercial use, and there has not been a motion of Council to rezone the area; and
- Appellant and other residents/property owners submitted feedback and comments outlining concerns to Council but it is unclear if or how Council reviewed and considered the concerns and feedback.

The Appellant's Presentation and Grounds

The presentation of the Appellant focused on the grounds as outlined in their written application and the planner's report. The Appellant focused on the fact that the town has to hear an application to the Town as it is at the time that the application was made. That means that the

town has to hear a application for the development under the zoning as it is in the Town Plan and Regulations. The Appellant requests the approval of the development be overturned on the basis that the town could not grant the development permit under the current zoning. The Appellant also stated that they didn't have sufficient information at the time that the hearing took place on whether or not she felt a Mixed Use Zone would be appropriate. The appellant stated she would need further information before she could comment on the possibility of rezoning.

Authority's Presentation

The Authority's presentation focused on the discretionary use of the Town to approve the development. The Authority stated that the Town did take into account the positions of the public and that the position of the public were reflected in the conditions that the Authority attached to the conditional permit to address the concerns of the public. The Authority also noted that the intention of the Authority was to ensure that the Developer was not going to undertake a development that would be "dead in the water" before it even began, fearing the developer would be investing in a property that never could be developed as a Nordic Spa. The Authority stated that their requirements to rezone the property are a discretionary use of the Authority and as such the permit should be upheld.

Developer Presentation

The Developer took an opportunity to speak after the questions to the Authority by the Applicant. The intention of the Developer was to give information to the Authority to the starting steps to ensure that the property was able to be developed.

Adjudicator's Analysis

The Adjudicator reviewed The Urban and Rural Planning Act, 2000 as well as the Town of Flatrock Municipal Plan and Development Regulations and determined the following:

Question/Answer .

Q: Did the proposed use for 251 Windgap Road conform with the requirements for Residential Medium Density in the Town of Flatrock?

In examining the Municipal Plan and Development Regulations, as well as the technical report, the first question that arises from the application is whether or not the development could have been approved in the first place. The application for development of 251 Windgap Road was for a "Nordic Spa," which while not defined in the Development Regulations for the Town, ultimately falls under a Personal Service in Schedule B. In an RMD, an application for development can only be made where a Personal Service is carried out as a home occupation, business operated on in the dwelling, or in a building subsidiary to the dwelling on the same lot.

As this was not the case for the Development at 251 Windgap Road, the Town decided to move forward to approve the lot with the condition that the lot first be rezoned as Mixed Development.

Here we find the central flaw with the decision of the Authority. The Authority only has the ability to make decisions that conform to the Town's Municipal Plan and Development Regulations. Here we find that the town has approved a Personal Service business which is not carried out as a home occupation, business operated on in the dwelling, or in a building subsidiary to the dwelling on the same lot has been approved. In making a condition that the lot be rezoned after granting a conditional permit, the Authority has proverbially "placed the cart before the horse." It is necessary that should any approval be granted to a Personal Service business, there must first be the authority from the Municipal Plan and Development Regulations to allow that development. As the Authority acted in a way that it did not have the authority to do so in granting a permit where it had no authority to do so, the application conditionally approved by the Authority on 1 August 2022 cannot be upheld.

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 outside the scope of their authority by approving the development as they had no authority to approve a Nordic Spa under the *Town of Flatrock Development Regulations*, and the *Town of*

Flatrock Municipal Plan in an area zoned for Residential Medium Density. It is logically necessary that for any permit to be approved, even a conditional one, the use must be permitted in the zone as it is when the decision of council is made. The conditional approval must meet the requirements of the zoning before the approval is granted, and as such a condition that the area first must be rezoned cannot be grounds for a conditional approval. As the Nordic Spa did not meet the test for a discretionary use in the Residential Medium Density zone, no permit may be granted for the Nordic Spa, even with the condition that 251 Windgap Road must be re-zoned to be approved.

That is to say, that while the adjudicator understands that the developer of this Spa and the Town may have been interested in ensuring that the developer didn't incur excessive costs in the development of the property, the Town still must follow proper procedures when issuing decisions on whether or not to allow development. As the Adjudicator has reversed the decision of the Town of Flatrock, which for further clarity means that the decision has the effect of reversing the issuance of the permit, leaving 251 Windgap Road with no permit in place and no approval to develop, meaning any development on the property will have to wait until a new, valid permit is approved. This decision does not stop the Town from moving to rezone the property, nor stop the developer from petitioning the Town to rezone the property to allow development. This decision states that before council issues any permit, conditional or otherwise, there must be authority from the Town Plan and Development Regulations to allow the development within the zoning requirements of the property at the time of council's decision.

Order

The Adjudicator orders that the decision of the Town of Flatrock to be reversed. The appeal by Ms. Farrell is allowed.

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 4 October 2023.

Garreth McGrath

Adjudicator

Urban and Rural Planning Act, 2000