

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Douglas Chafe **Appellants**

AND Town of Bay Bulls **Respondent**

RESPECTING Approval

BOARD MEMBERS Michelle Downey – Acting Chair
Bruce Strong
Mary Thorne-Gosse

DATE OF HEARING September 18, 2015

IN ATTENDANCE

Douglas Chafe – Appellant
Virgina Chafe – Appellant
Sean Montague – Solicitor for Appellant
Russell Lundrigan – Applicant
Dominic Foley – Lawyer for Applicant
Patrick O’Driscoll - Authority
Jonathan Dale – Solicitor for the Authority
Reginald Garland – Planning Consultant for Authority
Robert Cotter - Secretary to the Eastern Newfoundland Regional Appeal Board
Lindsay Church - Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

This appeal arises from the Town of Bay Bulls issuing a conditional approval to Mr. Russell Lundrigan. On June 1, 2015, Mr. Lundrigan submitted a new application to the Town of Bay Bulls for permission to operate Russ's Tire Service at 135 Northside Road. A letter, dated June 25, 2015, was also submitted by Mr. Lundrigan to the Town outlining his business. At the July 14, 2015 Regular Meeting of Council, the Town considered and approved Mr. Lundrigan's application. Mr. Lundrigan was notified of Council's decision in a letter dated July 17, 2015.

Mr. Douglas Chafe, an interested party, filed an appeal with the Eastern Newfoundland Regional Appeal Board against the Town's decision to approve Mr. Lundrigan's application. In accordance with section 42(4) of the Urban and Rural Planning Act, 2000 (URPA), the appeal was filed within the fourteen (14) day requirement. Additionally, Mr. Chafe included the required information as per section 42(5) of URPA.

In accordance with the *Urban and Rural Planning Act, 2000* a public notice of the appeal was published in *The Telegram* on September 1, 2015 and a notice of the time, date, and place of the Hearing was provided to the appellant and authority by registered mail sent on September 3, 2015.

Legislation, Municipal Plans and Regulations considered by the Board

Town of Bay Bulls Municipal Plan and Development Regulations, 2014
Urban and Rural Planning Act, 2000

Matters presented to and considered by the Board

Is Mr. Lundrigan's business a light industrial use?

The Town reviewed the following definition of light industry as defined in the Schedule "A" of the Town of Bay Bulls Development Regulations:

LIGHT INDUSTRY means the use of land or buildings for 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 appellant's lawyer presented information in the form of photos and video/sound clips to demonstrate the ongoing nuisance occurring at the subject property. The appellant stated that Mr. Lundrigan's business has been in operation for approximately two years at 135 Northside Road. This point was not contested by any other party present. The types of nuisance sustained by the appellant included noise, odour, dust and increased traffic.

It is evident that the Town was aware of how Mr. Lundrigan has been using his property. However, the Board is unsatisfied that the Town exercised its due diligence when reviewing Mr. Lundrigan's June's application as there was no indication that the Town considered previous usage of the property.

Based upon the information presented at the hearing, the Board found that Mr. Lundrigan's business does not fall under the definition of light industry. Specifically, the Board found that there is excessive noise, smell, dust, and increased traffic caused by the activities associated with the business.

Furthermore, the Board reviewed the definition of general industry as defined by Schedule "A" of the Town's Development Regulations, which states:

GENERAL INDUSTRY means the use of land or buildings for the purpose of storing, assembling, altering, repairing, manufacturing, fabricating, preparing, processing, testing, salvaging, breaking up, demolishing, or treating any article, commodity or substance, and "Industry" shall be construed accordingly.

The Board found that Mr. Lundrigan's business would more accurately be classified as a general industry use.

Did the Town have the authority to approve Mr. Lundrigan's application?

No. The Board found that Mr. Lundrigan's business appears to be a general industry use. The Board reviewed the Mixed Development Use Zone Table in Schedule "C" of the Town's

Development Regulations, and determined that general industry uses are neither listed as permitted nor discretionary. An excerpt of the Mixed Development Use Zone Table is below:

ZONE TITLE	MIXED DEVELOPMENT (MD)
PERMITTED USE CLASSES - (see Regulation 89) Single dwelling, double dwelling, recreation open space and open space conservation.	
DISCRETIONARY USE CLASSES - (see Regulations 22 and 90) Row dwelling, apartment building, boarding house residential, commercial residential, cultural and civic, general assembly, passenger assembly, club and lodge, catering, funeral home, child care, indoor assembly, medical & professional, office, personal service, general service, communications taxi stand, medical treatment and special care (home for the aged only), shop, convenience store, light industry, place of worship and antenna	

The Board accepts that when uses are not listed in a Use Zone Table, they are considered prohibited in accordance with section 91 of the Town’s Development Regulations. Section 91 states:

Uses that do not fall within the Permitted Use Classes or Discretionary Use Classes set out in the appropriate Use Zone Tables in Schedule C, shall not be permitted in that Use Zone.

Does the Board have the authority to overrule a discretionary decision of Council?

The Board understands and accepts that the Town made a discretionary decision when it conditionally approved Mr. Lundrigan’s application. The Board referred to the Stroud v. Central Newfoundland Regional Appeal Board NLTD 2010 25 Supreme Court case for guidance on discretionary decisions of Council. Justice Richard D. LeBlanc stated in that case that when an authority bases its decision on an erroneous view of the fact, “the discretion exercised is not immune from being overruled.” (para. 12) With respect to this appeal, the Board found that the Town erred when it only considered Mr. Lundrigan’s June letter of application.

Conclusion

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.

Based on its findings, the Board determined that the Town of Bay Bulls incorrectly classified the Mr. Lundrigan's business as a light industrial use. The Board also found that Mr. Lundrigan's business is a general industrial use, in accordance with the Town's definition of general industry. Since general industrial uses are prohibited in the Mixed Development zone,

That is to say, that the decision made at the July 14, 2015 Regular Meeting of Council to conditionally approve Mr. Lundrigan's application for a Tire Service business at 135 Northside Road is reversed. The Board derives its authority to reverse the decision being appealed from section 42(10) of the *Urban and Rural Planning Act, 2000*, which states:

In determining an appeal, a board may confirm, reverse or vary the decision appealed from and may impose those conditions that the board considers appropriate in the circumstances and may direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have its decision implemented.

Also in accordance with section 42(10) of the *Urban and Rural Planning Act, 2000*, the Board directs the Town of Bay Bulls to carry out the Board's decision. In doing so, the Town must issue a refusal letter to Mr. Lundrigan in accordance with the Town's Municipal Plan and Development Regulations.

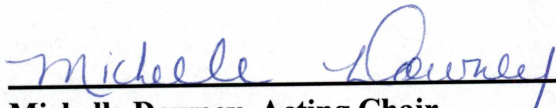
Order

Based on the information presented, the Board orders that the decision made by the Town of Bay Bulls on July 14, 2015 to conditionally approve a permit to Mr. Lundrigan for a Tire Service business at 135 Northside Road, be reversed.

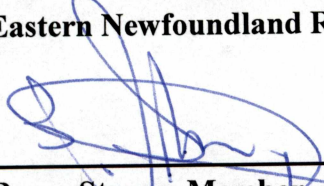
The Board further orders that the Town of Bay Bulls pay an amount of money equal to the appeal filing fee of \$113.00 paid by the appellant to the appellant.

The Town of Bay Bulls and the appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

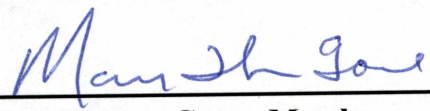
DATED at St. John's, Newfoundland and Labrador, this 18th day of September, 2015.



Michelle Downey, Acting Chair
Eastern Newfoundland Regional Appeal Board



Bruce Strong, Member
Eastern Newfoundland Regional Appeal Board



Mary Thorne-Gosse, Member
Eastern Newfoundland Regional Appeal Board