

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Brian Perry (Third Party) **Appellant**

AND City of Mount Pearl **Authority**

RESPECTING Decision to approve the Discretionary Use Application and issue a Development Permit (DP-16-060) to allow an assisted living facility in an existing apartment building at 835 Blackmarsh Road (MAE File #: 15-006-044-35)

BOARD MEMBERS Cliff Johnston, Chair
Paul Boundridge, Member
Robert Warren, Member

DATE OF HEARING October 31, 2018

IN ATTENDANCE

Appellant: Brian Perry; Christine Perry, Appellant's Lawyer

Respondent: Catherine Howell, City of Mount Pearl Manager of Planning and Development; and Felicia Tupper, Legal Counsel for Respondent

Interested third party: Sylvia Hussey

Robert Cotter, Secretary to the Eastern Newfoundland Regional Appeal Board

Kim Blanchard, Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

On September 6, 2016 the City of Mount Pearl Municipal Council gave Discretionary approval to an application by Rockmount Properties Inc. and Sundara Condominium Corporation to establish an assisted living facility at an existing condominium apartment building located at 835 Blackmarsh Road. The subject property is zoned Apartment (APT) under the City of Mount Pearl Development Regulations. On September 9, 2016 the City issued a Development Permit for the application.

On September 23, 2016 Brian Perry, an interested third party, filed an appeal of the decision to issue a Development Permit with the Secretary of the Appeal Board. Mr. Perry's grounds for appeal are contained in a letter dated September 23, 2016 and can be generally summarized as follows:

- Mr. Perry's presentation of August 9, 2016 to a public briefing session was not taken into consideration by the City and not referenced in Council's decision.
- Councillor John Walsh was "blatantly biased" in the way he, as Chair of the August 9, 2016 public briefing session, allowed the session to be conducted.
- Mount Pearl Mayor Randy Simms was "clearly in a conflict of interest".
- The City of Mount Pearl treated Rockmount Properties as the single owner of the subject property. Mr. Perry is the registered legal owner of an apartment dwelling unit and common areas in the residential property.
- Rockmount Properties/Sundara Condominium Corporation made a subsequent application dated August 18, 2016 to change the use of the subject property. This subsequent application was not properly subjected to the public process.

- The Appellant advises that he and all condominium dwelling owners responded to an application for a change of use made by Rockmount Properties only. The Appellant notes that the Sundara Condominium Corporation was not properly constituted and generally that Rockmount Properties acted as though the entire property was its own.

In accordance with the *Urban and Rural Planning Act, 2000*, a public notice of the appeal was published in *The Telegram*; and a notice of the time, date, and place of the Hearing was provided to the Appellant and Respondent.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

City of Mount Pearl Municipal Plan and Development Regulations 2010

City of Mount Pearl Act, 1990

Matters presented to and considered by the Board

[Note for Information from the Eastern Newfoundland Region Appeal Board: In addition to the information package provided to the Board prior to the October 31, 2018 appeal hearing on this appeal and verbal representations made at the hearing, subsequent to the appeal hearing, the Board received from the Respondent a copy of the August 9, 2016 public briefing session notes and a copy of the Minutes of the Mount Pearl Planning and Development Committee of August 17, 2016 and the Committee of the Whole of August 23, 2016 which was presented to the Public Meeting of Council of September 6, 2016. This information was verbally requested by the Board of the Respondent at the appeal hearing. The Board was of the opinion that it needed this information in order to inform itself prior to making its decision on the appeal.]

Q: Do the City of Mount Pearl Development Regulations require that a development application be submitted by the legal owner of a property or a person acting with the express written consent of the legal owner?

Section 4.7 of the Mount Pearl Development Regulations states:

“The Application

4.7.1 An application for a Development Permit shall be made only by the owner or by a person authorized by the owner to Council on such form as may be prescribed by Council, and every application shall include such plans, specifications and drawings as Council may require, and be accompanied by the permit fee required by Council.

4.7.2 Council shall, on request, supply to every applicant a copy of the application forms referred to in Regulation 4.7.1 and a description of the plans, specifications, and drawings required to be provided with the application.

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

4.7.4 Applications shall be submitted to the Director of Planning and Development or designate for review, referral, and, where applicable, approval.”

Section 4.8 of the Mount Pearl Development Regulations states:

“4.8 Owner’s Permission An application to develop or subdivide a property shall be made by the owner, a person operating under the owner’s written consent, or a lessee under the terms of a lease. A copy of the written consent or lease must accompany the application.”

The Board is of the opinion that the City of Mount Pearl was aware of and confident that Rockmount Properties Inc. and the Sundara Condominium Corporation were authorized to make the application, in accordance with Sections 4.7 and 4.8 of the Mount Pearl Development Regulations before Council made the decision to approve the change of use application.as the single owner of the subject property.

Q: Was there a second or subsequent application dated August 18, 2016 submitted to the City of Mount Pearl to change the use of the subject property from an apartment building to an assisted living facility?

A: Based on the information presented to it, the Board is of the opinion that the “second application”, a letter dated August 18, 2016 from Sundara Condominium Corporation (submitted to the City at the request of the City’s Planning and Development Committee) which indicated that from the onset Sundara was a partner to the development application, was for the purpose of clarifying for the City who the applicant was. Subsequent to the appeal hearing, the Board was provided with documentation from the City (copy of the Committee of the Whole Minutes of August 23, 2016) which makes clear that it was on the advice of the City’s legal counsel that this letter of August 18, 2016 was sought.

It made clear that the sole development application was a joint effort of Rockmount Properties and Sundara Condominium Corporation – this was evident by correspondence dated September 9, 2016 from the City’s former Director of Planning and Development to Mr. Jason Trask, c/o both Rockmount Properties Inc. and Sundara Condominium Corporation at 835 Blackmarsh Road advising of Council’s approval of the discretionary change of use application on September 6, 2016. There was no second development application and there was no requirement to restart the processing of the application dated June 1, 2016 and received on June 2, 2016.

Q: Is an assisted living facility allowed in the Apartment (APT) Zone?

A: Yes. An assisted living facility falls under the definition of Personal Care Use as defined by the City’s Development Regulations. A Personal Care Use is allowed as a Discretionary Use in the Apartment (APT) Zone, subject to the requirements of Section 7.24 of the Development Regulations.

Q: What process is the City required to follow under the Mount Pearl Development Regulations before the Council can consider a Discretionary Use application for approval?

A: After determining that the proposed development could satisfy the requirements of Section 7.24 of the Development Regulations, the City then began referral of the application to the public consultation process – public advertisement; a public briefing session on August 9, 2016; and subsequent submission of a report to the Council Meeting of September 6, 2016 from the City’s

Planning and Development Committee. At the public briefing session, presentations were given by the applicant/proponent and other interested parties, including the Appellant.

At a meeting of the City's Planning and Development Committee held on August 17, 2016, the Committee agreed to recommend to Council that the proposed development application be approved subject to compliance with several specific conditions. Council subsequently considered and approved the application on September 6, 2016 and a Development Permit was issued to the applicant on September 9, 2016.

Q: Was Mr. Perry's presentation of August 9, 2016 to the City's public briefing session taken into consideration by the Council prior to making its decision to approve the application?

A: The information provided to the Board by the Respondent indicates that the Appellant's written submission prepared for the August 9, 2016 public briefing session, and the Appellant's letter dated May 14, 2016 regarding the proposed text amendment to allow personal care homes in the Apartment Zone, were given specific consideration by the City's Planning and Development Committee and the Committee of the Whole of Council before Council made its decision to approve the application.

Section 4.18.5 of the Mount Pearl Development Regulations requires that "notes of the proceedings of public briefing sessions shall be undertaken and these notes, together with any written representations, shall be considered by Council when it makes its decision on the matter, which is the subject of the briefing session." Based upon the information presented, it is apparent to the Board that the written representation Mr. Perry made at the August 9, 2016 public briefing session was provided to Council, along with meeting notes, when Council was in the process of making its decision on the subject under appeal.

Conclusion

In arriving at its decision, the Board reviewed the submissions and comments given by all parties present 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:

- (1) That the decision of the City of Mount Pearl to approve the Discretionary Use Application for the proposed assisted living facility and to issue a Development Permit for the project is in compliance with the Mount Pearl Development Regulations.
- (2) It is apparent to the Board that the written representation Mr. Perry made at the August 9, 2016 public briefing session was provided to Council, along with meeting notes of the public briefing session, when Council was in the process of making its decision on the subject under appeal; and that Section 4.18.5 of the Mount Pearl Development Regulations has been satisfied. The City of Mount Pearl had the discretionary authority to approve the application and did so in accordance with Section 4.18.5 of the City's Development Regulations.
- (3) In coming to its conclusion and decision on this appeal, it should be noted that the Board did not find any evidence of bias on the part of the councillor referenced by the Appellant in his grounds for appeal. It should also be noted that the Board did not consider the matter of alleged conflict of interest by a member of Council as set out by the Appellant in the grounds for appeal - it is the Board's understanding that Section 22 of the *City of Mount Pearl Act, 1990* provides a system of dealing with conflict of interest and as outlined by Justice Robert P. Stack in *Faulkner v. City of Mount Pearl, 2015 NLTD(G) 118*, the Board shall not deal with a matter of conflict of interest as it is only the councillor, the City

Council, and the Court that may address the issue of conflict in accordance with the *City of Mount Pearl Act, 1990*.

ORDER

Based on the information presented, the Board orders that the decision by the City of Mount Pearl to approve the change of use application and to issue the Development Permit (DP16-060) for the assisted living facility at 835 Blackmarsh Road be confirmed.

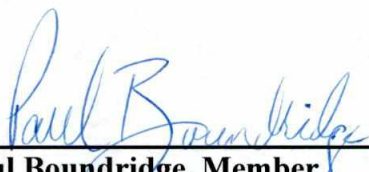
The Respondent and the Appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Eastern Newfoundland 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 Board's decision has been received by the Appellant(s).

DATED at St. John's, Newfoundland and Labrador, this 8th day of November, 2018.



Cliff Johnston, Chair
Eastern Newfoundland Regional Appeal Board



Paul Bounridge, Member
Eastern Newfoundland Regional Appeal Board



Robert Warren, Member
Eastern Newfoundland Regional Appeal Board