

In the Matter of the Town of
Gander Municipal Plan
Amendment No.10, 2015, and
Development Regulations Amendment
No. 16, 2015.

Report of Commissioner

Aidan B. Beresford, Q.C.
Commissioner

September 21, 2015

Background

In April 2009 the Town of Gander formally adopted and passed into law a new Municipal Plan with accompanying Development Regulations for the period of 2009-2019. This Plan and Regulations were completed through a process of a needs assessment study by consultants who produced various background reports and suggestions. From this study and other consultations and discussions a proposed Plan and Regulations were developed and posted on the Town's website. The Town held a series of Town Hall meetings to allow for comments and suggestions from the general public. The Town then followed the procedure as set down by the Urban and Rural Planning Act, SNL. 2000, c. U-8, as amended, (hereinafter called "the Act") which required a review and release by the Department of Municipal Affairs and then a further public hearing to allow for objections from the citizens of the Town. That citizen's hearing took place on July 8, 2009 and a report from the Commissioner was filed on August 18, 2009. Following receipt of that report the Town proceeded to have the Municipal Plan and Development Regulations passed into law through publication in the Newfoundland and Labrador Gazette, with the Plan and Regulations being registered on April 15, 2010.

The present Amendments being recommended by the Town propose to add a **General Industry** classification to the Discretionary Use Classes of the **Commercial General** zone to accommodate an application for a General Repair Garage. Conditions limiting General Repair Uses to General Garages would be added to the General Intent of the Commercial General policies in the Municipal Plan. The impetus for this amendment stems from the above-noted application with respect to property at 10 Roe Avenue. Under current legislation a repair garage cannot be approved for this location, and the proposed development cannot be passed by Council without an amendment to the classification of the Discretionary Use Classes for this Commercial General Zone.

The Town Council, in a meeting on June 10, 2015, moved to proceed with the amendment to the Discretionary Use Classes of the Commercial General zone that would add **General Industry** to the list of uses, with the condition that General Industry be

limited to **General Garage** as a use that may be permitted by Council. Notices of an open forum concerning the proposed amendment were circulated to all parties holding properties in any of the Commercial General Zones within the Town. An open house and public information session was held on Wednesday, July 8, 2015 at which time only two persons together with a number of Town Councillors and Town Officials were present. As is required by law, a draft of the proposed amendments was sent to the Department of Municipal Affairs and was approved in principle and released. By motion dated August 12, 2015, the Town formally adopted a motion to give effect to the amendments as set out earlier. Subsequently the proposed amendments were published by notices in the local paper on August 20, 2015 and August 27, 2015. These notices advised the public that if written objections to the proposed amendment were received on or before Friday, September 4, 2015 at noon, a public hearing would be held in Council Chambers in Gander on Wednesday, September 9, 2015 at 7:00 p.m. If no written objections were received by that time the hearing could be cancelled. By September 4, 2015, one (1) written objection was received and accepted by Town Council. The undersigned, Aidan B. Beresford, Q.C., was appointed Commissioner, and conducted the hearing on September 8, 2015. The following is the Commissioner's report and recommendations made after due consideration of the issues and objections raised respecting the proposed amendments.

Jurisdiction

At this stage I wish to outline the purpose of a public hearing as authorized and mandated under the Urban and Rural Planning Act, SNL 2000, c. U-8 (the Act) so that interested parties will understand the process and the limited powers exercised by a Commissioner in this process..

Pursuant to the Act, the Town Council has powers, rights and responsibilities with respect to amendments to the Municipal (Town) Plan and Regulations, as per the following sections:-

Section 25 - The Council can amend its Town Plan and Development Regulations registered under section 24 of the Act by using sections 14 to 24 of the Act, with necessary changes.

Section 14 - If Council wishes to amend its Plan, it shall provide an opportunity to interested parties to give input and information. Council can ask for written submissions.

Section 15 - After a proper consultation, the Council may approve and complete the Plan and submit it to the Minister for review. The Department shall review the proposed changes and may itself recommend changes.

Section 16 - Following review, Council may adopt the Plan or adopt an amended Plan.

Section 17 - The notice of adoption of Plan shall be advertised for at least 14 days in the local paper. The Act stipulates the basic contents of this notice.

Section 18 - A public hearing can be set for the parties to make representation.

Section 19- The Town can appoint a Commissioner who has the power set forth in the Public Inquiries Act.

Section 20 - At least two (2) clear days prior to a hearing, any objections or representations to the planned amendments should be filed with the Town.

Section 21 - If there are no objections, the Council will cancel the hearing. If there are objections, Council shall hold a hearing and hear all interested parties.

Section 22 - When the hearing is completed, the Commissioner shall prepare a written report to Council, detailing recommendations respecting objections and representations that were considered and those that were not considered.

Section 23 - Once Council receives the report, it shall consider it and change the Plan, if necessary. If the Plan is changed the whole process outlined herein could be repeated. If Council deems it appropriate not to make any change to the Plan as proposed and advertised, it may consider the Plan and approve it.

Section 24 - Once approved by the Town Council, after the above process is duly followed, the plan will go to the Minister, who, if he/she deems the plan to be in order, shall approve it. After approval, the plan is to be gazetted and published in the local paper.

Having considered the foregoing statutory conditions and processes, it is the finding of the Commissioner that the amendments to the Town Plan and Development Regulations have been properly adopted and published by Council; that interested parties have been informed by various processes; that objections have been received; and a public hearing with the Commissioner has been properly constituted.

Proposed specific changes to the Town Plan and Development Regulations

1. To add a **General Industry** classification to the Discretionary Use Classes of the **Commercial General** zone to accommodate an application for a General Repair Garage at 10 Roe Avenue. Conditions limiting General Industry uses to General Garages shall be added to the General Intent of the Commercial General policies in the Municipal Plan.

Repair Garage is a “**General Industry**” use and is currently not permitted in the Commercial General Zone.

Written Submissions

Prior to the September 9, 2015 public hearing, a written submission was received from:

1. Dr. Garry Best

This written submission was reviewed in detail prior to the public hearing, and the submitting party also attended the public hearing and was invited to address the public in person with his concerns.

Public hearing

A number of Town Councilors, Town Hall officials, the landowners of the property at 10 Roe Avenue, as well as Dr. Best, attended the hearing. Town Councilor, Mr. Gerry Parrott, opened the hearing and welcomed those attending. He briefly outlined the purpose of the hearing. It was, as stated earlier to allow for an amendment to the Town Plan which would permit a repair garage to operate at 10 Roe Avenue. At present the classifications and permitted uses do not allow Council to grant the repair garage application. This hearing is for the purpose of hearing objections and comments respecting the Town's proposed amendment, Mr. Parrott then handed the meeting over to the Commissioner.

Appearing on behalf of the Town were Councilors Mr. Gerry Parrott, Mr. Brian Dove and Deputy Mayor Mr. Cyril Abbott., Mr. John Boland, Town Planning and Control Technician, and Mr. Derm Chafe, Chief Administrative Officer.

Appearing on behalf of the owners of the property at 10 Roe Avenue, L.J. Holdings Limited, were Mr. Scott Granville, Mr. Jack Granville, and Mr. Brad Granville.

The Commissioner then explained the procedure as set forth in the legislation and advised of the proposed method for conducting the hearing. The hearing was opened to the public for comments.

The following persons were heard from at the hearing

Mr. Scott Granville	Landlord
Mr. Jack Granville	Landlord
Dr. Garry Best	Landowner
Mr. Gerry Parrott	Town Councillor
Mr. Brian Dove	Town Councillor
Mr. Cyril Abbott	Town Councillor
John Boland	Town of Gander

Before opening the meeting to the floor, the Commissioner spoke to the parties present. He advised that the purpose of this meeting was very specific. He pointed to a diagram posted in the room which delineated the areas in the Town which are designated as Commercial General areas. These areas are shown in blue on the diagram included in the information brochure attached to this report. For clarity sake Commercial General zones include property on both sides of Airport Boulevard from Cooper Boulevard to the Town Square; property between the Trans Canada Highway and Elizabeth drive in School Board area; Armstrong Boulevard; Magee Road from Regency Apartments to the Trailways; property at Memorial Drive East from Cooper Boulevard to the All Saints Cemetery; property at the Eastgate Commercial site; and property along Roe Avenue and Garrett Drive. The Commercial General area comprises a large portion of land within the Town's boundaries. The classifications in place at present do not allow for the present General Repair Garage application to go ahead.

There are now some commercial operations on Roe Avenue that do not appear to be any different than what is being asked for in the present repair garage application. The history of development in the Roe Avenue area has included a number of different classifications

and uses over the years. Originally it was set up as an industrial park. When that concept did not appear to be progressing, the use of the land was changed to allow for mixed development. During this period there were some commercial ventures started that were permitted under that designation. The last and present Municipal Plan saw the property being designated as a Commercial General zone with the permitted classes and uses being specifically set out. Businesses that were already established were permitted to stay under the process of being “grandfathered in.” The use is now a nonconforming use but there is no problem with these businesses operating and being continued in their present form.

The present application has a history. It is the fourth attempt by the landlord to seek Town approval for a planned operation on the site. Before an application was made at all, the landlord went to the Town and discussed the plan. The landlord was told at that time that the use being sought was not a permitted use under the Municipal legislation. The first application was a request to have an amendment made to the Town Regulation to accommodate a General Repair Garage at 10 Roe. That application went to the Engineering and Works Committee and the Committee did not recommend approval. At a Town Meeting on January 14, 2015, Council turned down the application. A second application asking for a review of the landlord’s proposal came before Committee and again was rejected by Council on April 29, 2015. A third application came before the Committee on May 13, 2015 and the Committee was not in favour of any changes. The landlord sought a privileged meeting with the Town to discuss the proposal. This meeting was held on May 22, 2015. The landlord presented its case to Council. Town officials were asked for their input and the matter was debated by Council. Council eventually agreed to make the necessary changes that would allow adding General Industry as a discretionary use to the Commercial General Plan.

The proposed change to the Town Plan has to follow the set down procedure for implementation. At the end of the day, if the change is okayed by the Provincial Government after passage by the Town, the landlord will be required to apply for the

permit asking the Town to use its discretion in granting the application for proposed use of the land at 10 Roe.

The Commissioner briefly outlined how the Town has developed a ten-year plan that has already seen a number of amendments to that plan. There is a continual tension between the security of a long term plan and the need to answer needs that arise from time to time. While plans are developed with the professional expertise of consultants, there are always matters that are never within the contemplation of planners at every stage. The need is to provide security for those who plan and invest long-term and, at the same time, have a living plan that will answer to the needs of a growing community. Both sides need the protection and cooperation of the Town in that process.

The Commissioner posed the question as to why the Town moved to accommodate the landlords after three rejections on the same application. Councillor Parrott felt that the Town moved as it did in an effort to be business friendly. Sometimes the Town gets the rap for not being attentive to business. Council felt that it needed to see if there was a way that the project could be moved along.

Councillor Abbott stated that it was not Council's move to initiate the change. That impetus came from the landlord. The Town's adoption of a planned amendment is to accommodate this business application.

Mr. Scott Granville, on behalf of the landlord company, spoke to the history of the property at 10 Roe Avenue. One of his companies had put up the large building on the land to serve as a hangar for the late Mr. Bill Bennett. He owned a smaller office building at the front of the large building. After Mr. Bennett died, the present landlord purchased the property. For a while after the purchase the property was operated as a garage by McCormack's Towing. When McCormack's moved into their own building, 10 Roe was rented and occupied by the RCMP for storage of vehicles and equipment. When the RCMP moved out the Landlord advertised the property for rent. An inquiry from Mr. Ross Coates about setting up a Meineke Car Repair franchise outlet prompted the

landlord to talk to the Town about the proposed use under either a rental or sale approach. The landlord was advised by the Town that the intended use would require an amendment to the Town Plan and Regulations. The parties were working together to see how the project could be facilitated. The present proposal would see the front building being torn down and the large building would be renovated with proper curbside appeal. If the Landlord cannot get the repair garage proposal in place, and use by the Landlord for its own vehicles would also not be permitted, the Landlord will be left with a building which cannot be used for General Industry. Mr. Granville stressed that the parties have been cooperative in all aspects of this matter and the process has been followed as required by law. The aim for the landlord is to use the property for a purpose as it was used in the past, both by McCormack's Towing and, to a degree, by the RCMP. The Landlord only wanted to deal with its own piece of property and was not contemplating an extensive Town Plan change.

The Commissioner acknowledged receipt of a written objection from Dr. Best and gave him the opportunity to explain his position. He has no specific complaint with the proposal for the development of 10 Roe. His problem is that if this amendment goes through, all lands in Commercial General Zones within the Town are faced with prospect of a general repair garage opening next door to them. He, himself, has invested in a professional building and would not like to see an amendment in place that would allow this type of development. If it were a change that was only affecting the 10 Roe property he would not have an issue with it. But the proposed change affects the whole Town. He questioned whether or not a way could be found for the project to move ahead without this major amendment to the plan. If the property has been used as a repair garage before why cannot it be used as such now?

Questions arose as to the use of the building by the late Mr. Bennett and parties after him. The meeting was informed that the building was originally put on the site as an accessory building to the business operated at the front from a much smaller building. At that time there were no specific regulations governing the size of accessory buildings as there are now. The large building was not operating as a business. The building was never used in

such a manner by the late Mr. Bennett to allow a grandfather approach. The RCMP use was not a use that would be grandfathered in. The present Landlord did not notice the change in zoning that affected this property under the Municipal Plan adopted in 2009.

The options available to the Town with this application were: (1) to proceed and do a spot rezoning of the particular piece of land at 10 Roe or (2) to proceed to change the permitted use for the land. Councillor Parrott stated that it was not his intention in voting for the adoption of this amendment that it would apply to all Commercial General zones in the Town. The Council and the Landlord were not concerned with anything other than this parcel of land. The Council's choice was to go with a limited general use. Once this amendment goes ahead, all lands in the Commercial General zones are subject to the same rules. While it can be said that the discretionary use control can be maintained over what goes on the land, Councillor Abbott felt that the discretionary use designation gave control over development. Control for future councils remains a real issue. Councillors Abbott and Dove felt that they had considered the overall application of the amendment to all Commercial General zones when they voted for the adoption of the amendment. At it stands now, once all the information is in, Council will make its final decision on the matter. The present proposed use as set forth for 10 Roe Avenue will enhance the area.

A discussion respecting spot rezoning ensued at the meeting. Spot rezoning does not appear to be a good approach to Town planning. The approach does not protect any property owners and destroys the essence of Town planning as a concept. Spot zoning sets a precedent that will create problems for Council. Spot zoning has not been done in the Town. The Department of Municipal Affairs does not look too kindly on the concept. It still remains an option but it has its problems. A spot rezoning application would require the same process as this present application process.

The objective for the Landlord is to try and find a good and profitable use for existing property. This project is but one in a long line of developments that the Landlord has been involved in within the Town and its aim is to work within the legislation. The present process has been costly and frustrating to the Landlord and there was never an

indication that there was going to be a problem. The Landlord has advertised the property for lease for a while now and there has not been a great expression of interest in the property. The permission of the present application requires a wholesale change that will affect all commercial zones. There is no way under existing legislation to approve the present application. The land was rezoned to Commercial General around 2006.

The Landlord is concerned that the property does not appear to have a use. If it cannot be used, it could go to disrepair and be an eye sore for everyone. It is unfortunate that the repair garage use is not permitted, especially given the uses that have occurred in the property over the years. There is not a great difference between what was there before and what is being proposed today. The Department of Municipal Affairs has given approval in principle to the proposed amendment,

The Town will have to make its decision at the end of this process.

Time frames were discussed with respect to the report, the process and when the road would be clear for proceeding with the project, if indeed the Town adopts the amendment. It has been going on for a while now.

Issues

These issues are considered in the analysis which follows:

1. Should the proposed amendment to the Municipal Plan and the Development regulations be approved so as to add a **General Industry** classification to the Discretionary Use Classes of the **Commercial General** zone to accommodate an application for a General Repair Garage?

The proposed amendment also calls for conditions limiting General Industry uses to General Garages be added to the General Intent of the Commercial General policies in the Municipal Plan.

2. Would spot rezoning be a more acceptable approach in the present circumstances?
3. What happens to the discretionary powers of Council in the present process?
4. What, if any, protection is there for other landowners in other Commercial General zones throughout the Town?

Analysis

Should the proposed amendment be approved?

While the majority of the discussion at the hearing centered on the proposed application by the landlord at 10 Roe Avenue, I think it is important that the amendment itself be considered in the abstract. That general amendment is what is up for present review.

Council is proposing to change a discretionary use class by adding a General Industry classification and then seeking to limit that use by adding conditions to limit General Industry to General Repair Garages. Considered on its own, there does not appear to be any reason for proceeding with this amendment. While the Commercial General zones have been largely identified as the areas in blue on the diagrams used at the hearing, there are, within the large blue areas and adjacent to them, a number of areas that allow General Repair Garages. Within the Town Plan there are plenty of areas for these garages. The Town Plan has been drawn up and passed after numerous consultations and input by professionals. There does not appear to be a reason, on face, to disturb the plan already in place. It is surprising that there was only one objection to this amendment.

It is clear, but needs to be reiterated, that the proposed change could have far-reaching effects on lands within the other Commercial General zones throughout the Town of Gander. The proposed change is not and cannot be regarded as a minor tweak in the Town Plan. If accepted the change to the Town Plan opens all lands in Commercial

General zones to the possibility of the establishment of General Repair Garages anywhere in these zones. That concept may not be a major problem for future investors in as-yet-undeveloped Commercial General zones, but it does create problems for present and future owners of already-developed properties within these zones. The fear, as expressed by the one objector present at the public hearing, is real and is well-founded. The change can be seen as prejudicial to other landowners in these zones. Council has an obligation to consider the effect of this change in making its final decision on the matter.

A corollary to the above analysis is that there is really no way that the proposed amendment can go through while allowing Council discretionary powers that could be used to veto future applications for General Repair Garages in any of the Commercial General zones. There was a sentiment expressed at the Hearing that Council could, somehow or other, retain its discretion in being able to control the existence of General Repair Garages. It is possible that Council will still retain some control over the proposed plans for any other repair garage applications that may come along. It does not follow that Council will retain the discretionary right to veto outright any such application. The intended use of Town's discretionary powers could very easily be challenged on the basis of being discriminatory as opposed to discretionary. Once one repair garage is permitted in a Commercial General zone, how can Council stop the development of a second one? The use of discretion is used up once Council accepts a use as being permitted. Discretion is then gone and vetoing a second application for the same use in a Commercial General zone is discriminatory and will most likely be successfully challenged.

There was a great deal of sentiment expressed at the meeting as to why Council had to make a wholesale change through the proposed amendment as opposed to just addressing the particular property in question.

Should the property at 10 Roe Avenue be addressed under Spot Rezoning?

The concept of spot rezoning has its problems. It shows little respect for adjacent landowners. It creates a patchwork of uses within zones. It appears directly contrary to

what Town Planning is supposed to be all about. A Town Plan should set up general areas for certain types of development so that investors and owners know what they are getting into and can plan accordingly. Spot rezoning has been probably used by different municipalities, but no one could provide an example where the Town of Gander has followed that route. There seems to be a general reticence by the Department of Municipal Affairs to go along with spot rezoning, mainly perhaps because it goes against the good sense of Town Planning in general.

Consider for a moment the parcel of property at issue in this application. The building at the center of the proposal was built as a very large accessory building at a time when there were no limitations on accessory buildings. Initially the building was used as a storage hangar for the owner's plane. There was no real business activity associated with the storage, although it is generally accepted that the late Mr. Bill Bennett used the plane for business purposes. Subsequently the property was sold and acquired by the present landowner. For some time the building was used by McCormack's Towing. That company did car repairs, car towing, and storage until they moved further up on Roe and established a repair garage. This was done at a time when a Repair Garage was a permitted use in the zone. After McCormack's vacated the property at 10 Roe, the property was leased to the RCMP for storage and other uses. It is agreed that there was nothing in the RCMP usage that would have enabled this property to achieve the status of a Repair Garage. Since the RCMP moved out, the property has been vacant. While some properties on Roe exist as Repair Garages, they do so under being 'grandfathered in' to the present zoning regulations under a non-conforming use. To be able to be grandfathered in under a non-conforming use requires continued usage up to the time of a rezoning change. That continued use as a repair garage does not appear to be present in the case of the property at 10 Roe. Without that continued use it is not possible for Council to allow what is now a non-conforming use. The property cannot make use of the 'grandfathering in' clause.

At some point in making a decision on this issue Council has to ask what options it has, and which option provides the best alternative for all immediate parties and the Town as

a whole. The proposed amendment will look after the immediate needs of the present landlord for the property at 10 Roe. That is what the Landlord seeks. It is what the Landlord has proactively pursued since day one in this process. The Landlord has gone about its business in a proper way, recognizing that the property is subject to Town legislation. The Landlord has been persistent in its approach, with three applications having put before Council. At the same time Council has been very accommodating in its approach. Council has come to the table with a mindset of trying to help business and not turn it away. Both parties are to be commended for their conciliatory approaches to this issue.

The problem for Council is that the method of approval being pursued in this application creates a much larger impact on Commercial General zones than what the parties appear to have wanted when they started the process. The change, while assisting one landlord, jeopardizes the rights of many other Commercial General zone property owners. It provides no security or protection for these landowners. Council's hope of being able to use its discretionary powers to protect these owners is really a faint hope and does little for the existing landlords in these zones. Council will have to decide what route it will take and whose investment needs to be protected.

While Council might be averse to going by way of spot rezoning on this particular property, it might be worth taking a second look at that process, especially in light of the past history and use of the land in question. It may be the lesser of two evils in the present circumstances. It will deal directly with the parcel of land involved and will leave and protect the status quo for other properties in all Commercial General zones.

Conclusion and Recommendations

Having reviewed the terms of my appointment, the specific objections to the proposed Municipal Plan Amendment No. 10, 2015, and Development Regulations Amendment No. 16, 2015, and having listened to and carefully considered the recommendations and objections presented orally, and in writing, I respectfully recommend that the Municipal

Plan Amendment No. 10, 2015 and Development Regulations Amendment No. 16, 2015 be rejected as presently proposed. I make this recommendation on the basis of accepting the premise that a Town Plan should provide security for landowners by respecting the investments made. Considering the amendments in isolation and without any reference to the 10 Roe Avenue application, there is no reason for moving ahead with this amendment especially in view of the potential problems it could create for many Commercial General zone landowners.

Considering the amendment in the context of the application by the landlord at 10 Roe Avenue, I hold that the possible negative impact of the proposed change greatly outweighs the prejudice to the present landlord at 10 Roe Avenue.

The Town may wish to consider the other option presented to the hearing: to proceed with spot rezoning of the specific property at 10 Roe Avenue to permit the development of a General Repair garage on the land at 10 Roe. This approach, while seemingly not the best way to do town planning, would recognize, to a degree, the history of use for the property at 10 Roe and would allow for the landlord to proceed with its proposed plan. In suggesting this route I recognize that this recommendation prolongs the application process, but it appears to be the best alternative if any development is to proceed at 10 Roe Avenue.

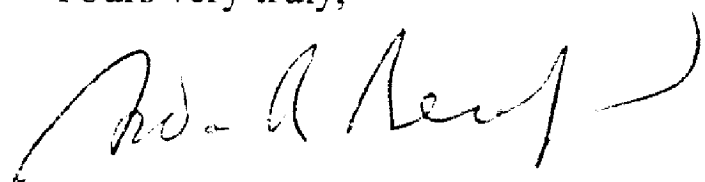
On the basis of the evidence heard and considered, I hold that there have been valid objections raised to the proposed amendments that would constitute a sufficient basis to refuse to recommend the adoption of the proposed amendments. ..

I enclose herewith the following:

- a) Copy of letter of appointment as Commissioner
- b) Copies of the letter of objection filed by a Town resident
- c) Information Brochure provided at the Hearing

I trust that this is satisfactory.

Yours very truly,

A handwritten signature in black ink, appearing to read "Aidan B. Beresford". The signature is written in a cursive style with a long, sweeping tail that curves upwards and to the right.

Aidan B. Beresford, Q.C.

Encls.