

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-091-013

Adjudicator: John Baird

Appellant(s): Gregory Johannessen

Respondent / Authority: Town of Woody Point

Date of Hearing: January 30, 2025

Start/End Time: 9:00 AM – 12:00 PM

In Attendance

Appellant: Gregory Johannessen, Sheilagh Murphy, Q.C.

Respondent/Authority: Sherry Avery, Town Manager

Appeal Officer: Synthia Tithi, Departmental Program Coordinator, Municipal and Provincial Affairs

Technical Advisor: Geralyn Lynch, Planner, Department of Municipal and Provincial Affairs

Adjudicator's Role

Part VI of the Urban and Rural Planning Act, 2000 (URPA) authorizes adjudicators to hear appeals and establishes the powers of adjudicators.

In the matter of Appeal No. 15-006-091-013, the role of the Adjudicator is to determine if the Authority acted in accordance with the Urban and Rural Planning Act, 2000 and the Woody Point Municipal Plan and Development Regulations when it refused an application to develop a wharf, boathouse, and slipway near Fisherman's Road in Woody Point (coordinates 49.5056N, 57.9141W).

Appeal No. 15-006-091-013

Hearing Presentations

Technical Advisor

The role of the planner is to act as a technical advisor to the appeal process and act as an expert witness as outlined in the Appeal Board (Rules of Procedure) Order, 1993. 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 the proposal under appeal

conforms, is contrary to, or could be discretionarily approved pursuant to the Municipal Plan, Scheme or Regulations.

At the Hearing, the technical adviser provided a history and overview of the application, Council's reasons for refusal, and the provisions of the Woody Point Municipal Plan and Development Regulations related to the matter of the appeal.

The technical advisor highlighted the following provisions in the Woody Point Development Regulations related to the matters of the appeal.

- The land in question is located in the Environmental Protection (EP) zone
- Wharves, docks, and boathouses are listed as Discretionary Use Classes in the EP zone
- Condition 1 of the EP Use Zone Table specifies that discretionary uses may be allowed provided the proposed use is compatible with permitted uses.
- Condition 5 states that no development will be permitted below an elevation of 1.5 metres above the high water mark except for wharves, docks, boathouses, etc.
- Regulation 40 of the Development Regulations states that developments shall not be located or made in such manner as would impede the safety or amenity of public use of public trails
- Regulation 22 of the Development Regulations states that when refusing a permit, Council shall state the reasons for so doing.

Council notified the Appellant in a letter dated May 28 that the application was refused for the following reasons.

- The applicant does not have a necessary development
- The applicant is not the upland property owner
- There is no vehicular access to support the development
- Bringing in fill would disturb the natural beauty of the area and the personal sewer lines of other residents.
- Beaches that are left in the community need to be preserved for public to enjoy

The following is a summarized chronology of relevant events.

Date	Description
2020/10/06	Council received a Crown Lands referral for a license to occupy for wharf and boathouse.
2021/02/12	Council issued a letter of support for the application.
2021/03/31	The Appellant obtained a permit to occupy Crown Lands for a boathouse and wharf.
2021/09/18	The Appellant applied to Council for boathouse and wharf.
2021/11/22	Council refused the application citing concerns about impeding public access and future trail development.
2022/05/11	An appeal hearing was held, which resulted in a reversal of Council's decision and an order that Council review application anew following due process.
2022/07/05	The Appellant's lawyer requested an update on the application status.

2022/08/31	The Appellant's lawyer requested an update on the application status and a schedule of Council meetings. Council affirmed that application was being reviewed and that it would post the required public notice of a discretionary use application when it received payment from the Appellant to cover advertising costs.
2022/10/28	The Appellant's representative questioned the requirement that Council advertise the application at the Appellant's expense given that public notice of appeal and the Crown Lands application was previously published.
2022/11/07	Council received advice from Municipal Affairs that Regulation 32 must be followed, i.e., public notice must be given of an application for a discretionary use. Also, that it was at Council's discretion whether they wish to collect advertising fees.
2023/06/26	Council received payment from the Appellant to cover advertising costs.
2023/07/05	Council posted discretionary use notice for the proposed development with a deadline of July 18 for written submissions.
2024/02/04	Appellant's lawyer requested an update on application status.
2024/02/12	Council requested two of its councillors to meet with applicant for clarification of the plan to ensure concerns are considered before decision completion.
2024/04/07	After meeting with the appellant on site, the deputy mayor emailed other members of Council that there are "no reasons to reject the permit."
2024/05/27	Council passed a motion to refuse the application.
2024/05/28	Council sent a refusal letter to the appellant citing the reasons listed above.
2024/06/13	Appellant's lawyer submitted an appeal against Council's decision.
2024/06/17	Appellant attended Council meeting and presented a case for his application. Council passed motion to affirm its previous motion to refuse the application.
2025/01/30	Appeal hearing held.

Appellant

The Appellant was represented by legal counsel and provided testimony himself through answers to his lawyer's questions. References below to the Appellant apply to both the Appellant and his lawyer.

The Appellant argued that Council's decision should be overturned for two main reasons. First, based on the reasons Council provided, the decision was based on several factual errors. Second, Council failed to follow proper procedures in accordance with Appeal Board order 15-006-072-050 and the principles of procedural fairness and natural justice.

Council's refusal decision was based on factual errors.

In its letter to the Appellant of May 28, 2024, Council listed several reasons for its decision to refuse the application. The following discussion provides the Appellant's response to why five of the reasons are not valid.

1. The applicant does not have a necessary development.

Response: The wharf is necessary for the Appellant because he has no practical alternatives in Woody Point to dock his boat. Existing public docking facilities include the town wharf and the Small Craft Harbours facility. He has used both facilities, but because personal watercraft have lower priority than commercial users, his boat was frequently moved from its berth to other locations without his knowledge. His other option is to move the boat in and out of the water every time it's used, but the only available slipway is a distance away. He said the development is necessary for him because he needs a place to keep an eye on the boat and use it conveniently.

2. The applicant is not the upland property owner.

Response: The Crown is the actual immediate upland owner, as all water bodies in the province are surrounded by a Crown land reserve that provided a space separation between adjacent private properties and the shoreline. The appellant's submission referenced other storefront wharves in the area that are owned by people other than the owners of the adjacent private properties.

3. There is no vehicular access to support the development.

Response: The gravel laneway that connects the beach site to Cross Lane is a public access road available for anyone to use. This was confirmed in Crown Lands correspondence included in the appeal package. This road will provide the Appellant with vehicular access to the site.

4. Bringing in fill will disturb the natural beauty of the area

Response: The Appellant proposes to use armour stone as the fill for the wharf and slipway. He said it will be placed in a manner that will not disturb the area's natural beauty. He indicated that his design using armour stone was approved by Fisheries and Oceans Canada and is also the fill material recommended in the engineering design of the public trail that will pass close to the wharf.

5. The development will disturb private sewer lines in the area

Response: The nearest sewer line crosses the beach a significant distance west of the proposed wharf, therefore will not be disturbed.

Council did not follow proper procedures.

The Appellant argued that Council failed to follow proper procedures in reviewing the Appellant's application anew as ordered in the decision by the West Newfoundland Regional Appeal Board (Appeal No. 15-006-072-050).

Instead of considering the same application anew, they delayed action and eventually reposted public notice of the application. They led the Appellant to believe directly and through his lawyer that he would be given opportunity meet with Council before a decision was taken. However, despite requests by the Appellant to be given notice of when his application would be heard, it was only by happenstance that he found out. On a day that he went to the Council office to pay his taxes, he found out only then that his application was on the agenda for that night.

He attended the meeting but was not permitted to speak because he had not given the required 48-hour notice. When his application came up for discussion, the mayor read out the factors that

Council had to consider in their decision. He attempted to interject to correct what he felt was incorrect information but was told he could not speak and would be ejected if he continued.

The Appellant pointed out the deputy mayor had previously met with him on behalf of Council and had emailed the other Councillors recommending approval of the application. But the deputy mayor was absent from the meeting at which the decision to refuse was made.

The Appellant's lawyer argued that Council had predetermined its decision before the meeting, pointing out that the letter of refusal was dated May 28, 2024, but the meeting didn't take place until May 29.

In summary, the Appellant's lawyer stated that Council relied on factually incorrect information and failed to be guided by principles of procedural fairness in its refusal of the application. She referred to Council's actions as "egregious, high handed, and bad faith behaviour, contrary to the rules of natural justice and a clear breach of the [planning act] and the Town's own rules and regulations."

Authority

Council's representative stated that after receiving the previous Appeal Board order, Council moved ahead carefully to ensure it followed proper procedure in reconsidering the application. It consulted with and received advice from a planner with the Department of Municipal Affairs. This is substantiated in correspondence between the town manager and the planner included in the appeal package.

With regard to the Appellant's claim that Council delayed moving ahead with the application, the town manager referred to her consultation with the planner after the appeal board decision. In an email to her on June 14, 2022, the planner laid out a step-by-step process for Council to take in considering a discretionary use application. This included the procedure for giving public notice and receiving comments and indicated Council can collect fees to cover advertising costs. Other correspondence between the two ensued over the summer to address the town manager's queries.

Council sent a letter to the Appellant's lawyer on August 31 that it would post public notice of the application in the September 21 and 28 editions of the local newspaper if the Appellant paid the advertisement fee. This payment was not received until June 26, 2023, delaying the posting of the notice for almost 10 months. The notice was advertised in the newspaper on July 5 and 6 and posted at the Woody Point post office with a deadline of July 18 for written comments. Twenty-one submissions were received, some supporting the application and some objecting.

Council's decision on the application was not taken until its meeting of May 27, 2024, ten months after the deadline for written comments had passed. Council minutes indicate some discussion took place on the application in the interim, including a meeting between the applicant and the deputy mayor, no compelling reason is obvious for this further long delay.

At the May 27 meeting, the mayor presented the factors that were to be weighed as part of the decision. All Councillors present voted in favour of refusing the application. The deputy mayor,

who had recommended approval, was not present. A letter was sent to the Appellant and his lawyer the next day advising of the refusal.

The Appellant requested and was granted an opportunity to speak to Council at its next meeting on June 17, 2024. After hearing his arguments, Council voted to confirm its earlier decision. Again, the minutes indicate that the deputy mayor was absent.

Adjudicator's Analysis

What is the matter under appeal?

The matter under appeal is the decision by the Town of Woody Point to refuse the development of a wharf and boathouse near Fisherman's Road. Council's stated reasons for the decision included that the development is not necessary, the applicant is not the upland property owner, there is no vehicular access to support the development, bringing in fill will disturb the natural beauty of the area, the development will disturb private sewer lines in the area, and the beaches that are left in the community need to be preserved for the public to enjoy.

Did Council's reasons for refusing the application contain factual errors?

Yes.

First, Council stated that the wharf is "not a necessary development" but provided no explanation of this reason. On the other hand, the Appellant stated that the available alternatives for keeping his boat are not practical or satisfactory. This reason does not correspond to the reality of the situation experienced by the Appellant.

Council's second reason was that the Appellant is not the upland property owner. In fact, the immediate upland is located within the Crown shoreline reserve, which extends 15 metres inland from the high water mark. While one might be sympathetic that storefront development should not create a barrier between adjacent private properties and the water, in this case the steep 6-metre bank behind the beach is a natural barrier to physical access from adjacent properties to the beach. Given that the wharf and boathouse would be considerably lower than the ground level of adjacent private properties, it would not obstruct scenic views from those properties. It also appears that corresponding ownerships between storefront facilities and adjacent private properties are not necessarily the case in this area.

Council's third reason that there is no vehicular access to support the development is incorrect. The Appellant provided documentation from Crown Lands that shows the gravel lane connecting the site to Cross Lane is in fact a Crown-owned road available for public use. As long as care is taken in delivering fill and construction materials to the site, it should be able to accommodate vehicle access without damage to the road.

The fourth reason is that fill brought in to build the wharf would disturb the area's natural beauty. The Appellant's proposal is to use armour stone for fill material. He indicated that armour stone was in the design approved by Fisheries and Oceans Canada and is also the material planned for constructing the public trail that will pass by site. Because this reason is based on a value judgment by Council, it cannot be considered factually incorrect, however it is evident that armour stone, if

installed with care, will have less aesthetic impact than alternative sources of fill such as loose gravel.

The fifth reason is that the development will disturb a private sewer line at the site. This reason is incorrect as the nearest sewer line is not close to the site.

The final reason provided by Council is the need to preserve the town's remaining beaches. This is a value judgment by Council, which cannot be argued on the basis of fact.

Did Council give notice of the application in accordance with its Development Regulations?

Yes.

Regulation 32 of the Development Regulations states that when a proposed development is listed as a discretionary use, the Authority shall, at the expense of the applicant, give notice of an application by public advertisement in a newspaper circulating in the area.

Council had the public notice ready for posting in September 2022. However, the Appellant's lawyer disagreed that it was necessary and no payment was forwarded to cover the advertising cost until June 26, 2023. When the payment was finally received, Council promptly posted the notice. It was published on July 5 and 12 in the local newspaper and posted at the Woody Point post office. This initial delay can be attributed to the amount of time it took to receive payment from the Appellant, not to any shortcoming by Council.

Was the long delay in Council's decision justified?

No.

Given the order from the previous appeal board that the application be considered anew, one would expect Council to proceed expeditiously with the review process. In the beginning the town manager did move quickly to expedite the process. She sought advice from Municipal Affairs on proper procedure and had the public notice ready for posting by September 2022. As mentioned above, the initial 10-month delay occurred because the Appellant argued that the public notice was not necessary and if was, Council should cover the advertising cost because it had made procedural errors the first time around.

After the Appellant did make payment on June 26, 2023, the town manager wasted no time to post the notice. The notice was published in the local paper on July 5 and twenty-one submissions were received by the deadline of July 18, 2023

It then took another ten months for Council to come to a formal decision. Although Council minutes indicate the application was discussed at several meetings, no compelling reason is evident to why it took this long. The minutes from October 3/23 indicate that two councillors were requested to visit the site to respond to the applicant. The February 12/24 minutes indicate the same, making it obvious that no visit had yet taken place. On April 7/24, the deputy mayor emailed the other councillors indicating he had visited the site and saw no reason to reject the permit. The

April 15 minutes indicate that because the deputy mayor was absent and there were further questions, a decision would be held over. Although the deputy mayor was present at the April 29 meeting, the minutes indicate further discussion was needed. The decision to refuse the application finally was made at Council's May 27/24 meeting.

Was the Appellant provided a reasonable opportunity to make representation on his application?
No.

The Appellant's submission references numerous requests for an opportunity to meet with Council to discuss his application. Other than meeting with the deputy mayor at the site, he never did get an opportunity to meet Council as a whole before they decided at their May 27/24 meeting to refuse the application. He was not notified that Council intended to make a decision at that meeting and found out only because he went to the town office that day to pay his tax bill. He did attend the meeting but was informed he was not permitted to speak because he hadn't given the required 48-hour notice. When he did speak up to correct what he said was incorrect information, he was told he would be ordered to leave if he continued. The only time he actually did get to address Council was at its subsequent meeting on June 17 when he asked them to reverse their decision.

Did Council predetermine its decision to refuse the application?
That is uncertain.

The Appellant's lawyer stated that Council had fettered its discretion by predetermining its decision prior to the meeting at which the decision was taken. She stated that Council's letter informing the Appellant of their decision was dated May 28, but the letter references the meeting taking place on May 29. That does not correspond to the meeting minutes, which are dated May 27. While the May 29 date in Council's letter could easily be a typo, email correspondence between the town manager and the Municipal Affairs planner dated May 28 and 29 seems to suggest that Council had still not made its decision. Given this inconsistent information, it is inconclusive whether Council had predetermined its prior to the meeting.

Adjudicator's Conclusion

Based on my review, I find that Council failed to follow principles of procedural fairness in its review of the Appellant's application. After receiving public comments, it took Council another ten months without clear justification for the delay to reach a decision. It did not notify the Appellant of the meeting at which it intended to decide on the application. More importantly, despite repeated requests, Council failed to give the Appellant a reasonable opportunity to make representation on his application.

Furthermore, several of Council's stated reasons for refusing the application were factually incorrect.

Council failed to deal with the application in an expeditious and fair way that should be expected, especially given the order by the previous appeal board.

The relief sought in Appellant's written submission is that Council's decision be set aside, that Council be required to reconsider the application, and that the Appellant and/or his representative be allowed to make representation before Council makes its decision. At the hearing, the Appellant's lawyer went further asking the Adjudicator to order Council to grant the permit.

Adjudicator's Decision

In arriving at a decision, the adjudicator reviewed the submissions from the parties and comments at the hearing by the technical adviser and representatives of both parties.

After reviewing the information presented, it is my decision that the Town of Woody Point did not act in accordance with the principles of natural justice when it refused the application for a wharf and boathouse near Fisherman's Road. In addition, based on the evidence, several reasons Council gave for its decision appear not to be substantiated by the facts.

As Adjudicator I am bound by section 42 of the Urban and Rural Planning Act, 2000 and must make a decision that complies with the applicable legislation, policy and regulations.

I am also bound by section 44 of the Act, which states:

- 44.** (1) In deciding an appeal, an adjudicator may do one or more of the following:
 - (a) confirm, reverse, or vary a 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.

It is noted based on section 44(2), that I do not have the authority to accommodate the Appellant's requested relief to order Council to issue a permit for the wharf and boathouse.

Order

The Adjudicator orders that the decision of the Town of Woody Point to refuse by Mr. Gregory Johannesen's application for a wharf and boathouse be reversed. That is to say the Town's refusal letter is reversed.

The Adjudicator further orders that the Town of Woody Point review the application once again in accordance with its regulations and ensure it follows principles of natural justice and procedural fairness in coming to a decision.

The Adjudicator further orders the Town to comply with the following conditions in considering the application anew.

1. Council shall proceed expeditiously in reviewing the application anew and shall not delay a decision except where there are clearly justifiable reasons for so doing.

2. Given that it previously gave proper public notice of the application and received a significant response in return, Council shall not provide further public notice. Instead, it shall consider the submissions previously received.
3. Council shall give timely notice to the applicant whenever it intends to discuss and/or make a decision on the application at a public meeting.
4. Council shall give the applicant and/or his representative reasonable opportunity to make representation to Council on his application.
5. Council shall ensure reasons it provides to support its decision are reasonable and factually correct.

In accordance with section 45(2) of the Urban and Rural Planning Act, 2000, the Adjudicator further orders Council to pay an amount equal to the appeal filing fee of \$230 to the Appellant within 30 days of receipt of this decision.

Council and the Appellant are bound by this decision.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of the 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 parties.

DATED at Traytown, Newfoundland and Labrador, this 5th day of March 2025.



John Baird, MCIP
Adjudicator
Urban and Rural Planning Act, 2000