

URBAN AND RURAL PLANNING ACT, 2000**Section 40-46**

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

Appeal #: 15-006-091-001
Adjudicator: Chris Forbes
Appellant: Asphalt Product Industries Inc.
Respondent/Authority: Town of Come By Chance
Date of Hearing: August 21, 2024
Start/End Time: 2:00 p.m. – 4:30 p.m.

In Attendance

Appellant's Representative: John Taylor-Hood, Solicitor for Asphalt Product Industries Inc.
Alicia Cochrane, Articled Clerk

Appellant: Sharon Keats, General Manager for Asphalt Product Industries Inc.

Respondent/Authority's Representative: Robert Bradley, Solicitor for the Town of Come By Chance

Respondent/Authority: Dave Boucher, Councillor of the Town of Come By Chance

Appeal Officer: Robert Cotter, Departmental Program Coordinator,
Municipal and Provincial Affairs

Technical Advisor: Setare Vafaei, Planner II
Municipal and Provincial Affairs

Adjudicator's Role

Part VI of the *Urban and Rural Planning Act, 2000* (the “Act”) authorizes adjudicators to hear appeals and establishes the powers of adjudicators. The role of the Adjudicator is to determine if the Authority acted in accordance with the *Urban and Rural Planning Act, 2000*, the *Town of Come By Chance Municipal Plan* (the “Municipal Plan”) and the *Town of Come By Chance Development Regulations* (the “Development Regulations”) when it refused to issue the Appellant a permit to install a gate to control access to a cargo wharf at 105 Refinery Road, Come By Chance, on February 20, 2024.

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. Section 10 of that Order reads:

10. The Hearing will proceed in the following manner:

- (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 in effect, ...

At the hearing, the Technical Advisor outlined a report of the Department by Setare Vafaei dated August 14, 2024, noting that, on November 1, 2021, the Appellant (“API”) submitted a Development Permit application for the “installation of a gate to control access to cargo wharf” on the subject property at 105 Refinery Road. The Authority denied the application on February 20, 2024, and notice of this decision was sent to the Appellant by letter on March 22, 2024. This appeal was filed on April 9, 2024.

The Technical Advisor provided the following as a background summary (see p. 6 of the Appeal Package):

“In April 2020, the Authority (Town of Come by Chance) received a complaint from the members of the Boat Owners Association regarding a barricade placed by Asphalt Products Industries Ltd. (“API”) in an area referred to as ‘Wharf Road’. Subsequently the Authority issued a Stop Work Order for a barricade on April 28, 2020. On April 29, 2020, the Supreme Court of Newfoundland and Labrador mandated that any barricade must permit emergency access to the Marina, and this order was amended on October 1, 2020.

On December 9, 2020, the Authority issued a second Removal Order for a metal gate that had been installed without a permit at the subject property, referred to as ‘105 Refinery Road’. API submitted a development application for the installation of the gate, and on November 18, 2021, the Appeal Board confirmed the December 9, 2020, Removal Order.

On November 1, 2021, API submitted a Development Permit application for the ‘installation of a gate to control access to cargo wharf’ at the subject property.

On December 7, 2021, the Authority requested additional information from API regarding the application, which API provided on August 24, 2022. On June 6, 2023, API filed an appeal regarding the Council’s deemed refusal of their application but subsequently withdrew it.

After an agreement between the parties, the Authority agreed to review the application on its merits. On February 20, 2024, Council reviewed and ultimately refused the development application for the installation of the gate at the subject property.”

The Technical Advisor then reviewed the definition of “development” in section 2(g) of the Act and confirmed that the proposed steel gate is a development within the meaning of that definition.

She noted that the subject property is within the Industrial Designation, according to the Future Land Use Map and *Municipal Plan* for the Authority and is zoned Industrial General (IG) under the Land Use Zoning Map and *Development Regulations*. As indicated in the submission materials, the existing use of the subject property is a liquid asphalt terminal, which falls within the General Industry and Transportation use classes, both of which are a permitted use within the Industrial General zone.

The Technical Adviser observed that a permit is required for the installation of a gate per Regulation 2 of the *Development Regulations*.

As discussed by the Technical Advisor, four reasons were cited by the Authority in its refusal of the Appellant’s permit application. Those concerns, as they appear in the decision letter, are as follows (quoting directly):

- Article 6 of Part II of the Town’s Development Regulations provides a list of considerations as to whether to grant a permit to carry out a development – including public safety and convenience;
- There is an easement leading to the Marina and the Town will not approve a development which would interfere with the rights of easement holder [sic]. The Town has not received any consent from the easement holders;
- There are significant safety concerns relating to the restriction of emergency vehicular access to the Marine;
- The Town’s snow clearing policy identifies the Marine and access to same as needing to be plowed. This again is a safety concern.

The Technical Advisor went on to note that the Authority’s Snow Clearing Policy establishes a specific priority order for snow-clearing operations, including municipal roads, public buildings, specific community areas and additional areas such as Fisherman’s Wharf Road.

Two deeds are also in issue in this appeal. The first is from the Province to API dated April 13, 2012 and purports to convey to API certain lands comprising at least in part the subject property (the “Land Deed”). The second is from the Province to API dated September 18, 2017 and purports to convey to API certain lands “covered by water” and situated in Placentia Bay, which lands relate at least in part to the wharves at the end of the subject property (the “Water Deed”). Each of these deeds contains a similarly worded easement.

The Technical Advisor indicated that, based on the Appellant’s submission, the Water Deed conveyed ownership of the water lot, including floating and private wharves within its boundaries, to API. However, the Authority alleges a municipal interest and refers to the area in question as a “marina.”

She went on to observe that Regulation 7 of the *Development Regulations* requires that an application for a development permit be made “only by the owner or by a person authorized by the owner to the Authority.” She then indicated that the substance of the issue on appeal appears to be a property dispute.

The Technical Advisor noted that Regulation 1 of the *Development Regulations* prohibits development within the defined “Planning Area” except in accordance with the Authority’s *Development Regulations* and that the Authority refused the Appellant’s permit application on February 20, 2024. She closed her presentation by reiterating the four reasons given by the Authority for the refusal.

Preliminary Matters

Counsel for API raised points of clarification with respect to certain matters raised in the Technical Report. He confirmed that the Fire Chief of the Town had indeed been provided with the key needed to unlock the gate that is in issue in the appeal. He also indicated that API’s position is that it does not claim ownership of the floating or private wharves along the Wharf Road and that it does not know who owns them, although it is not API. Lastly, he confirmed that the argument raised at the end of the Technical Report respecting jurisdiction would not be raised in the hearing.

Counsel for both parties further clarified that the subject property of 105 Refinery Road goes by more than one name (such as “Wharf Road”) but they were in full agreement as to which gate and road were the subject matter of the appeal.

Evidence

It was agreed by counsel that most of the evidence at issue was already as set out in the written materials but that additional evidence would be introduced through Mr. Boutilier on behalf of the Authority and Ms. Keats on behalf of API.

Under direct questioning from counsel for the Authority, Mr. Boutilier confirmed that the subject property was constructed in the 1970’s, after which the road was used by the general public. It was used by the public for picnicking and fishing. There is a boat launch currently located behind the gate that is the subject of the appeal. The gate is as shown on page 373 of the Appeal Package.

There is currently one permanent wharf along Wharf Road with three finger piers and then, within that, there are two private wharves. The only way to access the wharves is by water or by foot on Wharf Road. Before the gate was installed, boat owners would drive up to the wharves.

There is another gate past the wharves that is locked. This gate leads into the cargo wharf operated by API. Mr. Boutilier indicated that, in his experience, API rarely if ever used the Wharf Road.

There is a “partial plate” across the lock on the gate in question. According to Mr. Boutilier, the Fire Chief claims he cannot access the lock because of the plate. This information was shared by the Fire Chief with the entire Town Council. According to Mr. Boutilier, the Fire Chief also said he could not get the key to turn in the lock. In relation to this evidence, counsel for API noted that it was hearsay and that the Fire Chief could have been present for questioning at the appeal hearing but was not. In response, counsel for the Authority noted that he had learned of that information only that morning and thus it was too late to invite the Fire Chief to attend. I indicated that, as I am not bound by the rules of evidence, we should proceed notwithstanding the Fire Chief’s absence.

Under questioning by counsel for API, Mr. Boutilier confirmed that his evidence respecting access of the Wharf Road by API was speculative.

Counsel for API then questioned Ms. Keats, who indicated that no one has ever reported to API that they could not unlock the gate in question. She stated that, in the past, the lock on the gate had been cut off and so a metal box (approximately 8" x 8") had been placed around the lock. A user can unlock the gate by putting their hand up under the box and using the key.

Under questioning by counsel for the Authority, Ms. Keats confirmed that API uses Wharf Road for access to lighting and fencing, though such access is also available from the other side of a fence that runs along Wharf Road and separates it from a pipeline that runs adjacent to the end of the wharf.

Appellant's Presentation and Grounds

Counsel for the Appellant noted the four grounds of appeal raised in the documentation and began his presentation with reference to the issue of the easement (which was the second reason given by the Authority in its letter refusing the permit application).

Counsel argued there was a lack of procedural fairness insofar as the refusal letter did not provide adequate reasons in relation to the easement issue. The burden was on the Authority to provide such reasons. Since the reasons do not set out the rationale for the decision, they are inadequate.

It was argued that the Authority had indicated in its refusal letter that the consent of the easement holders had not been provided with the application but had never asked API to obtain any such consents. API further argued that the easement in question is an express one, set out in the Land Deed and the Water Deed, and that the terms of that easement were clear and the gate did not in any way interfere with the rights granted in that easement.

In response to questions posed by myself, counsel indicated that two prior Court Orders (found at pages 302 and 312 of the Appeal Package) had related to a prior proceeding commenced by the Authority that had since been discontinued. The Court Orders specifically provide for emergency vehicular access on Wharf Road through the barricade and to the marina, though a provision of the Orders indicates they are made on a "without prejudice" basis. Counsel for API confirmed that the terms of these Orders were consented to by the parties and further that the Land Deed and Water Deed had been before the Court in that proceeding, but that the Court had made no findings of fact.

In reference to the interpretation of the Deeds, counsel for API referenced a letter from the Province to the Authority dated April 3, 2018, which makes it clear that the limitation to foot access by land included in the Deeds was done to ensure safety concerns on the property were addressed.

When asked if he was requesting me to interpret the Deeds, counsel indicated that this was not the case, that instead he was asking me to consider the Deeds on their face.

API referenced arguments brought forward by the Authority that the Authority perhaps has a prescriptive easement in relation to the subject property or that the easement is broader than what is written in the Deeds; however, counsel indicated that this has no bearing on the permit application under consideration, since no finding has been made confirming either of those possibilities to be the case.

Further, according to API, the Authority has not produced any documentation confirming ownership of the floating wharves. Counsel for the Appellant submitted that, even if the wharves had been constructed in 2004, they would not have met the then-existing requirements of the *Development*

Regulations. The wharves were therefore illegal. Accordingly, ownership of the wharves should not have factored into the consideration of the permit application.

Lastly, with respect to the easement issue, API referenced the Authority's argument that beneficiaries of the easement required, in exercising their right to bring materials and fuel over Wharf Road, greater access than the gate would permit. API submitted that no evidence had been put forward demonstrating this to be the case.

Counsel for the Appellant then made submissions with respect to safety concerns, specifically in relation to emergency vehicles and snow clearing. Counsel argued that, again, the Authority had breached its obligation of procedural fairness in failing to provide sufficient reasons in relation to these concerns.

API noted that the concerns raised by the Fire Chief were over four years old and, regardless, were currently being addressed. No current safety issued had been raised in relation to the gate. Further, before API had undertaken maintenance to the road, it would have been inaccessible by emergency vehicles in any event because it was in such poor shape. API's actions in repairing the road had thus improved its safety.

In relation to the Authority's Snow Clearing Policy, counsel indicated there were questions as to its proper enactment. In any event, he said the position of the Authority rests on Wharf Road being a public highway. Counsel stated that, regardless, there were no grounds for the Authority to look behind the Deeds, which purported to grant ownership of Wharf Road to API and contained no reservation of the road. Wharf Road was therefore private property. Counsel submitted that the Authority's efforts to expropriate that road were further evidence that it regarded Wharf Road as owned by API.

Authority's Presentation

Counsel for the Authority began by noting that I had two significant jurisdictional hurdles to overcome. The first was that there are clear issues as to title and ownership in relation to Wharf Road, which are beyond my jurisdiction to address. The second was that the Appellant was asking the adjudicator to overrule a discretionary decision by the Authority.

Counsel confirmed that attempts are still being made by the Authority to expropriate the subject property.

The Authority indicated that, even if one of the reasons given by the Authority in its decision letter to reject the permit application is found adequate, the appeal must fail.

According to the Authority, the appeal needs to be considered in the context of the larger disputes and context. The parties have been engaged in litigation now for years in relation to the rights of parties to the Wharf Road and the wharves located on it.

Counsel noted that, even if the reasons given by the Authority in its decision letter were insufficient, insufficient reasons do not as a matter of law go to procedural fairness. Further, it is not reasonable to expect volunteer councilors to outline every step in their logic. All that is required is that the reasons be understood.

The Authority referenced Regulation 6 of the *Development Regulations* and noted that an adjudicator is not permitted to overrule a discretionary decision of Council.

In relation to the safety issue raised by the Authority in its decision letter, counsel indicated that having to stop an emergency vehicle to obtain the key to the gate and unlock it does potentially create a safety concern.

In relation to the easement issue raised by the Authority in its decision letter, counsel stated that the Authority will not grant a permit in relation to property that is the subject of easement rights that are in dispute. Regardless of whether the gate would interfere significantly with those rights or not, any interference at all would be problematic from the Authority's perspective.

In relation to the snow clearing issue raised by the Authority in its decision letter, the Authority argued that the evidence shows Wharf Road was used publicly for a variety of purposes since the 1970's. As such, it constitutes a "public highway" for legislative purposes. Counsel for the Authority suggested I should engage in a legislative analysis, notwithstanding the language of the Deeds, because legislation would trump any conveyance instrument. The applicable legislation would have required an Order-in-Council to "close" Wharf Road's status as a public highway.

According to the Authority, the Snow Clearing Policy was passed by motion of council under the *Municipalities Act, 1999*. Because this Policy applies to "Wharf Road," the Authority feels obligated to clear the road of snow, although it is not expressed in the Policy to be a priority. It became apparent in reply comments from counsel for API that some of the parking lots referenced in the Snow Clearing Policy may or may not have been private property.

Analysis

Did the Authority have the discretion to refuse the Application of the Appellant for a permit to install a gate on Wharf Road?

Yes.

The installation of a gate on Wharf Road would constitute a "development" for the purpose of section 2(g) of the Act. As such, it is required by section 12 of the Act to conform to the Authority's *Municipal Plan and Development Regulations*.

Regulation 1 of the *Development Regulations* prohibits development within the "Planning Area" except in accordance with those regulations. Regulation 2 requires that a person carrying out such development obtain a permit for it, issued by the Authority.

Regulation 4 of the *Development Regulations* specifies that a permit is to be issued for development where it conforms to certain enumerated requirements, and also that the Regulation is subject to Regulations 5 and 6.

Regulation 6 of the *Development Regulations* establishes the discretionary authority of the Authority. It states:

"In considering an application for a permit ... to carry out development, the Authority shall take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto, and shall assess the general appearance of the development of the area, the amenity of the surroundings, availability of utilities, public safety and convenience, and any other considerations which are, in its opinion,

material, and notwithstanding the conformity of the application with the requirements of these Regulations, the Authority may, in its discretion, and as a result of its consideration of the matters set out in this Regulation, conditionally approve or refuse the application.” [my emphasis]

It is therefore clear that, so long as the requirements of Regulation 6 are met, the Authority had the discretion to refuse the Appellant’s permit application notwithstanding its compliance with Regulation 4.

If yes, was the Authority’s decision to refuse the application of the Appellant in accordance with, and a reasonable use of, its authority?

The grounds of appeal raised by API can essentially be summarized as follows:

- A. Was there a breach of procedural fairness due to the insufficiency of the reasons given by the Authority in its letter denying API’s permit application?
- B. If not, or if such breach does not justify remitting the matter back to the Authority for clarification or approving the permit application outright, then was the decision of the Authority a reasonable use of its authority and in accordance with that authority?

A. Procedural Fairness

It is clear from the case law that reasons must be sufficient to allow a reviewing body to understand why a decision was made and permit the reviewing body to determine whether the decision was within the range of acceptable outcomes. I find that the reasons included in the refusal letter were sufficient to permit me to understand why the Authority made the decision that it did in relation to API’s application. This is particularly so when viewed in light of the larger context of the history between the parties and the context of what API proposed to install on Wharf Road as described in its permit application.

Further, as the Authority notes from *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, where reasons are provided (as they were here), there is no breach of procedural fairness.

In light of the above, I see no reason to remit this matter to the Authority for a more comprehensive explanation of the reasons for its refusal of API’s permit application. I now turn to my reasonableness analysis.

B. Reasonable Use of Authority

The legal principles applicable to consideration of a discretionary decision by a municipal council were fully canvassed in *Yates v. Central Newfoundland Regional Appeal Board*, 2013 NLTD(G) 173 as follows (beginning at para. 26):

“Without intending to create an exhaustive list of circumstances, a review board may overturn the actions of a municipal council where:

- (1) The council was acting in excess of its legislative powers or acting in abuse of its statutory authority,
- (2) Acting in disregard to some statutory condition upon which its authority is based,
- (3) Fails to follow procedural guidelines,
- (4) Acting upon an erroneous view of the facts, or
- (5) Acting in a biased manner.

Without question, a board should not act as a rubber stamp of a municipal council's decisions, but if the process leading to the exercise of the council's discretion is not flawed, s. 42(11) of the Act would give the board no statutory power to interfere with the council's discretion."

No evidence was adduced indicating that the Authority acted in a biased or improper manner. As such, the question remains of whether the decision of the Authority was in accordance with and a reasonable use of its authority.

While the Authority had several reasons for refusing API's permit application, I agree with the Authority that if I find any one of them is sustained by a reasonableness analysis, then I must confirm the decision of the Authority. As such, I will focus first on the potential interference by the gate with easement rights.

In its refusal letter, the Authority states:

"There is an easement leading to the Marina and the Town will not approve a development which would interfere with the rights of easement holder [sic]. The Town has not received any consent from the easement holders;"

There is clearly an express easement contained within the Deeds conveying the subject property to API from the Province. The question is therefore whether it was reasonable for the Authority to be concerned that installation of the proposed gate interfered with the rights of third parties referenced in the Deeds. I find that it was.

I start by noting the concern raised by counsel for both parties that I not make any determination with respect to ownership or other rights pertaining to Wharf Road. I agree I have no jurisdiction to do so.

The express easement in question reserves to the Minister of Transportation and Works "and those persons who have vessels and/or other watercraft at the floating wharves" the following:

"... an easement or a right of way to pass and re-pass on land by foot by day and by night over the property described ... and by water in their vessels and watercraft by day and by night over the property ... to the said floating wharves and private wharves; accessing their aforesaid vessels and other watercraft at the aforesaid floating wharves and private wharves; and bringing materials (including fuel) needed to service and/or repair the said vessels, watercraft, floating wharves and/or private wharves ..."

API submits that I should interpret the Deeds on their face and find that the proposed gate could not reasonably be deemed to infringe the rights reserved in the easement set out above. I cannot do so. It is reasonably conceivable that the transportation of materials needed to repair wharves, vessels or watercraft, even on foot, could require a great deal of space, and that the gate could interfere with this expressly reserved right. I refer specifically to the photographs of the gate and area found at Exhibit U of the Appeal Package. It was confirmed during the hearing that these photographs accurately represent the current state of the gate and surrounding area (and thus the gate that is the subject of the permit application). It is clear that large boulders are situated to one side of the locked gate (with minimal space between them and the gatepost). There is more available space to pass around the gate on its other side; again, however, it is somewhat minimal and is somewhat obstructed by another boulder. Whether or not the interference posed by the gate could potentially be substantial enough to ground an action by a rights holder is not the concern – the issue here is whether or not the Authority was reasonable in being concerned that the installation of the gate interfered with third party easement rights. I find that it was.

Indeed, to find otherwise would result in the determination that the rights granted to third parties in the Deeds would not be interfered with through the installation of the gate. Such an interpretation would in effect amount to a decision as to the extent of those rights (at least to a degree), which is beyond my jurisdiction.

I further note Regulation 7 of the *Development Regulations* which specifies that applications for a development permit or for approval in principle must be “made only by the owner.” There is obviously good reason for this – generally speaking, any development within the Planning Area should be consented to by the person or persons who have rights in the property being developed. Thus, in this case, had Council taken the view that the installation of the gate absolutely did not interfere with the rights granted to easement holders in the Deeds, it would not only have potentially exposed the Authority to legal action by such third parties if actionable interference resulted, but it might have ultimately undermined the very policy underlying its own *Development Regulations* (specifically Regulation 7).

I also find that the Authority was well aware that Wharf Road had been used as a public road for several decades before it was conveyed to API, and was aware that the wharves had been constructed and positioned along the road by parties other than API years prior to that conveyance. Whether or not Wharf Road constitutes a “public highway” as argued by the Authority (which I make no finding on), and whether or not a third party or the Authority might have a prescriptive easement in relation to that road (again, which I make no finding on), these facts, of which Council was aware, would have reasonably raised concerns with Council that third parties potentially have legal rights beyond those set out in the Deeds in relation to Wharf Road that might be interfered with through the installation of the locked gate.

I also find that permitting the gate to be unlocked by the Fire Chief does not necessarily ensure no interference with the rights of easement holders. It is true that someone entitled to exercise rights under the easement could potentially pass through the gate by obtaining key access from the Fire Chief or API, but I cannot find that this would necessarily be in accordance with the rights expressly reserved to those individuals in the Deeds.

For all of these reasons, I find the decision of the Authority to refuse the permit application was in accordance with and a reasonable exercise of its authority. In light of my comments above, it is not necessary for me to consider the other reasons for the refusal.

Decision of the Adjudicator

As Adjudicator, I am 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 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.

Order

The Adjudicator orders that the decision of the Authority to refuse the application of the Appellant to install a gate to control access to a cargo wharf at 105 Refinery Road, Come By Chance, be confirmed.

The Authority 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 Appellant.

DATED at St. John's, Newfoundland and Labrador, this 10th day of September, 2024.



Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000