URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #:	15-006-072-051
Adjudicator:	Chris Forbes
Appellant:	Gary Churchill
Respondent/Authority:	Town of Witless Bay
Date of Hearing:	September 19, 2024
Start/End Time:	11:00 a.m. – 1:00 p.m.

In Attendance

Appellant:	Gary Churchill
Respondent/Authority:	Jennifer Aspell, Chief Administrative Officer Town of Witless Bay
	Stephen B. Jewczyk, FCIP Town of Witless Bay
Interested Party:	Edward Vickers, by teleconference
Appeal Officer:	Robert Cotter, Departmental Program Coordinator Municipal and Provincial Affairs
Acting Appeal Officer:	Synthia Tithy 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 *Witless Bay Municipal Plan* (the "*Municipal Plan*") and the *Witless Bay Development Regulations* (the "*Development Regulations*") when it made the decision to rescind a motion to support a septic system located at 0 Mullowney's Lane, Witless Bay (the "Property").

Procedural Background

The appeal was initially filed on January 20, 2022 and came before the Eastern Newfoundland Regional Appeal Board, who issued a decision on April 22, 2022. The Appeal Board determined that it had no jurisdiction to hear the appeal since the matter being appealed did not involve an application to undertake development or a decision to allow/approve development.

Mr. Churchill appealed this decision to the Supreme Court of Newfoundland and Labrador. That Court issued a decision in *Churchill v. Eastern Newfoundland Regional Appeal Board*, 2024 NLSC 66, allowing the appeal and revoking the decision of the Appeal Board. The Court expressly referred the matter back to the Appeal Board "with the direction that it has jurisdiction to consider the Rescission Motion" (namely, Rescission Motion #2021-372 of Council for the Authority, as set out below).

The original motion stated (the "Original Motion"):

> "2021- 267 It was moved by Councilor Paul, seconded by Councilor Swain, to support the application and refer back to Digital Government and Service NL for final system approval. The mayor called for discussion."

The rescission motion stated (the "Rescission Motion"):

> "2021-372 Councillor Ralph Carey/Deputy Mayor Lorna Yard
> Move that Council rescind Motion #2021-267 – a motion 'moved by Councillor Paul, seconded by Councillor Swain, to support and refer back to Service NL for final system approve: regarding septic system application, Mullowney's Lane (which was listed as Agenda item 8.d.3, public meeting of August 17, 2021)."

The appeal herein is therefore to consider the Rescission Motion per the direction of the Court.

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 Faith Ford dated May 21, 2024 (the "Technical Report"). This report is supplemental to an earlier technical report prepared by Elaine Mitchell and dated March 22, 2022.

The Technical Advisor began her presentation by reviewing the chronology set out at page 3 of the Technical Report. She noted that the appeal was filed on January 20, 2022 and that it was unclear whether the Appellant received the decision letter of the Authority in relation to the Rescission Motion.

She then noted the definition of "development" found in section 2(g) of the *Act* and indicated that installation of a septic system and well, in isolation of other development such as the development of a dwelling, meets that definition. Based on the material provided, the Technical Advisor noted that the septic/water system of the Appellant was intended for use with a gazebo. The Appellant did not seek approval of a septic/water system at the time he first applied for development of the gazebo. Typically such a system is associated with a building or dwelling and approval of such a system is not a stand-alone process.

The Technical Advisor indicated that obtaining approval from Digital Government and Service NL for a septic/water system does not preclude the need for approval from the Town.

She noted that section 195(1) of the *Municipalities Act, 1999* prohibits a person from constructing a "privy or sewer system, septic tank, or sewer" except in accordance with a permit from council. Section 195(2) also says that council cannot approve such a permit "without the prior written approval" of the Department of Health and Community Services and the Department of Municipal and Provincial Affairs.

The Technical Advisor noted that the approval granted by Digital Government and Service NL ("Service NL") referenced a system intended to service a structure with "three bedrooms." She referenced the initial permit for construction of a gazebo and indicated that the submission materials do not indicate whether the Appellant is seeking to change the use or intensity of use of the subject property (for example, converting the existing structure into a residence). She noted that any such change would constitute a "development" and require the submission of a development application that included sufficient information for the Authority to make a decision in compliance with legislation and its *Municipal Plan* and *Development Regulations.*

The Technical Advisor referenced the discretion of the Authority to revoke a development approval under section 21(6) of the *Development Regulations.*

Appellant's Presentation and Grounds

Mr. Churchill emphasized the judgment of the Supreme Court in the *Churchill* decision. He stated that the Town gave approval to the septic system and the judgment constituted a refutation of the Town's reasoning. Specifically, he referenced page 6 and this was read into the record. He also referenced page 7, paragraphs 23 through 29. In summary, he stated an approval and permit was granted by the Authority that was triggered by the Certificate of Approval by Service NL.

He also indicated that the Certificate of Approval was not granted specifically for a three bedroom house. When he applied to Service NL, he applied for a "leisure building." He does not intend to build a three bedroom house. The simplest septic system that Service NL will approve is a septic bed for a three bedroom house and not a privy.

Mr. Churchill also referenced page 8, paragraph 32 of the *Churchill* decision and reiterated that the permit in question was a development permit.

He concluded his presentation by asking why any party would object to having someone install a proper septic system on their property. He indicated the property in question features a leisure building that he and his wife use a few times a week and he does not know what they will do with waste disposal if not permitted to install a septic system. He does not understand why the Town would not want him to install a system that is safe and approved.

In relation to receipt of notice from the Authority as to the Rescission Motion, Mr. Churchill indicated he never received any such notice letter. Instead, he was told by his septic designer Francis Luby that Mr. Luby had heard about that motion. This conversation likely happened before the end of November of that year.

Mr. Churchill said that the Appeal Board previously agreed with him that he had not received a notice letter from the Authority in relation to the Rescission Motion. He also stated that, when the Authority communicated to him generally, they would send material by registered mail. He said that, after he heard about the Rescission Motion from Mr. Luby, he went online and found the relevant Council minutes pertaining to the Rescission Motion and based his appeal on those.

Authority's Presentation

Mr. Jewczyk indicated that the *Churchill* decision is about jurisdiction of the Appeal Board, not the validity of the Rescission Motion.

The Authority has concerns with the validity of the appeal since it was not filed within the 14-day period set out in the *Act*. When asked, the Authority indicated the letter outlining the Rescission Motion was sent to Mr. Churchill by email, but the Authority did not have a copy of that email to produce. The Authority referenced the chronology found in the original appeal package as confirmation that the letter was sent to the Appellant. The Authority also indicated that generally they do not send correspondence by registered mail but instead by regular mail or by email with attachments.

The Authority indicated it never received a development application for the septic system. What it did receive was an application for support for the Appellant to consult with Service NL on such a system.

It also indicated that, during 2021, there was a lot of upheaval in Council. From the available records, it appears there was no approval by Council to issue a letter of approval for a septic tank system. This was because the minutes for the meeting on the Original Motion were never ratified by Council. The Authority produced print-outs from the Town's website that showed the public posting of Council minutes since 2013. The minutes of 2021 do not include anything from between July and October of that year. This is because the minutes during that time were not ratified, because if ratified, they would have been posted to the website.

Further, the letter granting approval, per the Original Motion, dated August 31, 2021, was signed by Pat Curran, after Mr. Curran had submitted his letter of resignation. The Authority argued this also rendered the approval invalid.

The Authority discussed the original application that came into the Town for the subject property, and how it had been for a "gazebo" – a freestanding roofed structure that is open on all sides. It was not for a "leisure building", as the Appellant referred to it. As such, no septic system had been submitted as

part of the original application for development of that structure. Six years later, the application was received by the Authority for approval to consult on a septic system.

The Authority referenced the Certificate of Approval issued for the septic system and the fact that it referenced a "three bedroom" house. It introduced photographs into evidence of the structure located on the subject property and argued the structure currently existing on that property was not a gazebo.

The position of the Authority is that the installation of a septic system in and of itself constitutes a "development" for the purpose of the *Act*.

In relation to the "error" that justified the Rescission Motion, the representatives for the Authority referenced the Certificate of Approval from Service NL, which was copied to the Town. This would have been included in the agenda package that went to Council prior to consideration of the Rescission Motion and was therefore likely the basis for its decision on that motion.

Interested Party's Presentation

The Interested Party indicated he was curious as to why the Town was considering the permit for a septic system given that the structure located on the subject property was not a gazebo, which was what was initially approved.

He indicated that the Town has no power to give an approval based on what Service NL can do. The powers of Service NL and the Town are mutually exclusive. He has a legal opinion to this effect.

When Council approved the permit for the structure, they were following the direction of the Appeal Board only, and the Board has no authority to change the specifications of what Mr. Churchill sought approval to build.

Analysis

Was Proper Notice of the Rescission Motion Given to the Appellant?

No.

The Appellant states that he did not receive any notice from the Authority of the Rescission Motion, a statement he also made during the previous hearing before the Appeal Board.

The Authority did produce a letter dated November 10, 2021. This letter was addressed to Mr. Churchill and confirmed the Rescission Motion. The letter also notified Mr. Churchill of the right to appeal but did not contain the specifics required pursuant to section 5 of the Development Regulations proclaimed pursuant to the *Act*. Specifically, while the letter included a statement referencing "the time by which an appeal is to be made," it did not actually stipulate what that time frame was. In other words, it appears to be a "cut and paste" of section 5 as opposed to providing the information that the section directs the Authority to provide.

Section 107 of the *Act* requires that a notice "required to be given" under the *Act* be "delivered personally or sent by registered mail."

The Authority did not produce any evidence confirming personal service of the notice letter on Mr. Churchill, nor any evidence such as a receipt confirming it was sent by registered mail. I note that Ms.

Aspell indicated that it was the Authority's practice to send such documents by registered mail; however, this is insufficient evidence of compliance with section 107.

In *Freake v. Gander (Town)*, 2020 NLSC 87, the Supreme Court of Newfoundland and Labrador (General Division) considered the kind of evidence must be adduced by a municipality to show compliance with section 107. The Court stated:

> "[25] Section 107(1) requires a notice to be served personally or sent by registered mail. There is a purpose for the legislature requiring registered mail. A notice sent by registered mail is not 'sufficiently given, delivered or served' without proof of receipt by the addressee. … [W]hy require the trouble and additional expense of registered mail if the intended purpose is not to secure proof of receipt. The legislature would have simply stipulated sent by mail, if proof of receipt was not a material element of satisfying service of the Notice."

For the above reason, I find that the 14-day appeal period did not begin to run on the date of the letter (November 10, 2021).

I understand from Mr. Churchill that he learned of the Rescission Motion prior to the end of November, 2021, in speaking with Francis Luby, his septic designer. As such, it could be argued that the 14-day period began to run from that date; however, I find that doing so would be inequitable, as there was no evidence that this conversation made Mr. Churchill aware of his right to appeal or any of the other information required to be included in a notice pursuant to section 5 of the Development Regulations passed under the *Act*.

I therefore find that no notice was given to Mr. Churchill in compliance with the Regulations at any time prior to his filing of the appeal. As such, to the extent the Authority has raised non-compliance with section 41(3) of the *Act* as a bar to his appeal, I find in favour of Mr. Churchill that the appeal was filed within time.

The question then becomes whether non-compliance by the Authority with section 5 of the Development Regulations passed under the *Act* invalidates the Rescission Motion.

Did the Failure of the Authority to Give Notice Invalidate the Rescission Motion?

No.

As noted above, I find that the Authority did not provide notice as required by section 5 of the Development Regulations passed under the *Act*.

In *Janes v. Embree (Town)*, 2022 NLCA 36, the Court of Appeal of Newfoundland and Labrador considered the validity of an order issued by the Town of Embree under section 404 of the *Municipalities Act, 1999*, to remove material and equipment from a property. The order did not contain a reference to the right of appeal in the manner prescribed by section 5 of the Development Regulations and the Town began demolition and removal activities on the property. Mr. Janes subsequently sued the Town for trespass.

The Court of Appeal reviewed the notice sent by the Town to Mr. Janes and stated:

> "[31] When proceeding under section 404, notice of the order must be given to the owner or occupier of the property and must include specified information regarding the right to appeal the order to the regional appeal board. This conclusion follows from a reading of sections 404 and 408 of the *Municipalities Act* together with section 42 of the *Urban and Rural Planning Act* and section 5 of the *Development Regulations*, which states that the information regarding the right to appeal 'shall' be included in the notice.
>
> [32] … Being mandatory, the effect of non-compliance is to render the order a nullity or invalid. … In the result, where information regarding the right to appeal the order to the Board is not included in the notice, the order is invalid and may not be relied upon by the town council."

It would seem this reasoning means that the Rescission Motion is invalid on its face; however, the *Janes* decision is distinguishable. That case concerned demolition and removal under the *Municipalities Act, 1999.* The consequences to Mr. Janes of non-compliance by the Town in that case were severe, insofar as he potentially lacked the information needed to dispute the Town's activities and protect his property. As such, I read the comments of the Court of Appeal as being restricted to an order made under the relevant provisions of the *Municipalities Act, 1999* and not section 42 of the *Act* more generally.

In this case, I find Mr. Churchill was not prejudiced in any way by the failure of the Authority to provide notice as required by section 5 of the Development Regulations. He was clearly aware of his right to file an appeal and did so, and was provided adequate opportunities to be heard. As such, I will proceed to consider the appeal on its merits.

Was the Purported Approval of the Septic System As Referenced in the Original Motion Properly Granted?

The Authority argued that the Original Motion was never ratified by Council and that this was proven by the fact that no minute of the Original Motion was posted to the Town's public website. The Authority stated that, as a matter of practice, all such minutes, *once ratified*, are posted in that manner. The question is therefore whether this alleged failure of the Authority to ratify the Original Motion means that the approval purportedly contained in the Original Motion was invalid and therefore no permit was properly issued.

I find that I do not have the discretion to re-consider the validity of the Original Motion as doing so would constitute a collateral attack on the decision of the Supreme Court of Newfoundland and Labrador (General Division) in *Churchill v. Eastern Newfoundland Regional Appeal Board*, 2024 NLSC 66.

In that decision, Justice MacDonald expressly stated, "I find that the Town by making the approval motion approved the design and development of the septic system and well, subject to approval by Service NL" (see para. 30).

To find that the Original Motion was not ratified and therefore not a valid decision of Council would undermine this finding of the Court. If the Authority wished to challenge the validity of the Original Motion, it should have done so in the proceeding before the Supreme Court.

Accordingly, the Authority's argument in this regard must fail.

Did the Authority Have the Discretion to Revoke the Permit Issued Under the Original Motion?

Yes.

As Justice MacDonald noted, the Original Motion concerned a "development," as that phrase is defined in section 2(g) of the *Act* (see para. 28 of the *Churchill* decision). The Original Motion approved the design and development of a septic system and well.

Section 21(6) of the *Development Regulations* states:

> "21. Development Permit
>
> (6) The Authority may revoke a permit for failure by the holder of it to comply with these Regulations or any condition attached to the permit or where the permit was issued in error or was issued on the basis of incorrect information." [my emphasis]

So long as the Authority issued the approval permit pursuant to the Original Motion "in error" or "on the basis of incorrect information," it had the discretion under section 21(6) to revoke it.

The Original Motion was passed on August 17, 2021. Thereafter, on behalf of Mr. Churchill, a septic design was prepared and submitted to Digital Government and Service NL ("Service NL") by designer Francis Luby. The documentation submitted appears to have included a layout plan for a 3-bedroom dwelling.

By letter dated October 14, 2021, Service NL granted a "Certificate of Approval" for "the construction and installation of a sewage system/water supply to service a premises with three bedrooms at 0 Mullowneys Lane in the Town of Witless Bay." This letter was copied to the Authority.

Thereafter, the Rescission Motion was passed on November 9, 2021.

The Authority argued that, when Council received a copy of the Service NL "Certificate of Approval," it likely noted that the Certificate referenced "three bedrooms." This likely would have been viewed by the Council as problematic considering the only structure previously approved by the Authority for construction on the Property was a "gazebo." However, I understood from Mr. Churchill that the reference to "three bedrooms" in the Certificate of Approval is not indicative of the kind of structure that is to be located on the Property but rather the threshold or category into which septic designs of the sort he was contemplating generally fell for purposes of evaluation by Service NL. As such, the reference to "three bedrooms" in the Certificate of Approval was not information that would justify revocation of the permit under section 21(6).

No evidence was called by either party confirming or disputing the argument put forth by Mr. Churchill. However, the onus is on the Authority to prove there was an "error" or "incorrect information" underlying the permit issued under the Original Motion. I am not convinced that the information contained in the Certificate of Approval triggered the discretion of the Authority under section 21(6).

However, the contemporaneous minutes of Council pertaining to the Rescission Motion are telling. They read:

> "Councillor Ralph Carey reported that this was a motion moved by Fraser Paul and seconded by Vince Swain regarding a septic system on Mullowney's Lane on August 17, 2021. This application was to consult with Service NL related to a septic system. Council encourages all applicants for development to consult with Service NL before submitting a development application to the Town. Applicants don't need approval from the Town to Consult. Council does require a development application to be completed in full before approving development applications and forwarding to Service NL."

It is clear from these minutes that Council viewed the Original Motion as having been made in error – namely, that the Original Motion had been unnecessary, since approval was not required for consultation with Service NL. Further, it is clear from these minutes that Council viewed the Original Motion as inappropriate and premature, since development applications are required before septic systems are to be approved. Clearly Council believed that the application submitted by Mr. Churchill did not meet its ordinary requirements for a development application pertaining to a septic/water system.

The Authority's concern that the Original Motion had been made in error is likewise reflected in the *Churchill* decision. Para. 20 of that decision confirms that the Authority's position was that, in the Original Motion, it "only agreed that the Town would support Gary Churchill's application to Service NL" and had simply made "a gratuitous statement of support."

It is clear Council viewed the Original Motion as having been made in error, since it did not follow Council's normal process for approval of a septic system.

I appreciate that Justice MacDonald ruled that the Original Motion constituted an approval of a development, pursuant to the *Act*, and that the application submitted by Mr. Churchill seeking this approval constituted a development application. However, this finding does not mean that the Authority did not make an error when it passed the Original Motion. The findings of Justice MacDonald relate to the legal consequences of the Authority's actions in relation to the Original Motion as opposed to why those actions were taken and on what basis. Nor do those findings concern the reason underlying the Rescission Motion.

I therefore find that the Authority had the discretion under section 21(6) to revoke the permit issued pursuant to the Original Motion.

Is the Authority Precluded From Revoking the Permit On the Basis of Estoppel?

One of the grounds of appeal raised by Mr. Churchill was that work had begun "on-site" at the time the Rescission Motion had been passed and, as such, the Authority did not have the discretion to revoke the permit issued under the Original Motion.

It is clear from the evidence that work was undertaken on the Property in relation to waste disposal well before the permit was even issued under the Original Motion. I note, for example, Mr. Churchill's "Application to Develop Land" that was submitted to Service NL dated August 13, 2019, in relation to a proposed water supply and sanitary pit. No permit had been obtained by Mr. Churchill before he submitted this application.

I also note a letter from Service NL to Mr. Churchill dated October 19, 2020 in which Service NL stated it had conducted an inspection of the Property and observed "that a premises and an outhouse had been constructed." These observations were confirmed by photographic evidence provided by the Authority at the hearing.

In light of this, I find that the work undertaken by the Appellant on the Property was done before the Authority issued the permit in question. As such, it cannot be said that Mr. Churchill undertook such expenditures in reliance on the permit and that this gave rise to an estoppel.

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:
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> (a) confirm, reverse or vary the decision that is the subject of the appeal;
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> (b) impose conditions that the adjudicator considers appropriate in the circumstances; and
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> (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.
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> (3) An adjudicator shall not make a decision that does not comply with
>
> (a) this Act;
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> (b) a plan and development regulations registered under section 24 that apply to the matter being appealed; and
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> (c) a scheme, where adopted under section 29.
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> (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 to rescind a motion to support a septic system located at 0 Mullowney's Lane, Witless Bay is hereby 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 11th day of October, 2024.

Christopher Forbes
Adjudicator
Urban and Rural Planning Act, 2000