

URBAN AND RURAL PLANNING ACT, 2000

Section 40-46

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

Appeal #: 15-006-087-018

Adjudicator: Chris Forbes

Appellant(s): Walter Hennessey, Greenland Development Ltd.

Respondent/Authority: Town of Witless Bay

Dates of Hearing: May 28, 2024 (in person) and June 10, 2024 (by teleconference)

Start/End Time: 9:00 a.m. – 10:16 a.m. (May 28, 2024)
9:30 a.m. – 9:53 a.m. (June 10, 2024)

In Attendance

Appellant: Walter Hennessey, Greenland Development Ltd.

Appellant's Representative: Dale Bickford

Respondent/Authority: Jennifer Aspell, Chief Administrative Officer, Town of Witless Bay
Megan Hartery, Planning and Development Officer, Town of Witless Bay
Stephen B. Jewczyk, FCIP

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 Witless Bay Municipal Plan 2013-2023* (the "Municipal Plan") and the *Town of Witless Bay Development Regulations 2013-2023* (the "Development Regulations") when it refused to issue the Appellant a permit to develop an 11-lot subdivision on Deans Road, Witless Bay, on August 24, 2023.

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 May 22, 2024, noting that, on June 19, 2023, the Authority received an application from the Appellant to develop an 11-lot subdivision on Deans Road in Witless Bay. The Authority denied the application on August 24, 2023, and notice of this decision was sent to the Appellant by letter on August 29, 2023. This appeal was filed on September 11, 2023.

The Technical Advisor reviewed the definition of “development” found in the Act. She noted that the subject property was designated as residential under the Municipal Plan and is zoned Residential (RES) under the Development Regulations. She referenced section 2.1 of the Municipal Plan and the objectives set out therein and sections 3.1.1.2 and 3.2.1.10 of the Municipal Plan, which sets out general land use policies for subdivisions and in particular residential subdivisions.

The Technical Advisor indicated that, according to the submission of the Authority, the proposed residential use and lot sizes of the proposed lots would comply with the Municipal Plan and Development Regulations; however, the application was refused on the basis the Authority wished to consider a full design of the overall subdivision area. As the Technical Advisor noted, section 9 of the Development Regulations provides that development permits and approvals shall not be granted if the Authority deems the development premature.

The Technical Advisor also referenced section 73 of Development Regulations, pursuant to which applications for subdivision development will be denied if the development does not promote orderly growth or meet specified design standards.

Lastly, the Technical Advisor indicated that the refusal letter provided by the Authority to the Appellant indicated that the Appellant’s application was refused because it included only a part of the total land area and the Authority required a complete design submission that complied with the Authority’s Development Regulations and Engineering Subdivision Design Standards.

Appellant’s Presentation and Grounds

During his presentation on behalf of the Appellant, Mr. Bickford indicated that the subject property was purchased in 2005. Since that time the Appellant has been trying to develop 14 lots along Deans Road. He indicated that, when Mr. Jewczyk became planner for the Authority, he reached out to him to find out what was necessary in order to get the land approved for development. Three of the lots along

Deans Road were approved for development by the Authority. Mr. Jewczyk gave guidance on what was needed for the Appellant to then apply for development of the remaining 11 lots. Once the Appellant applied for those lots, the response from the Authority was that a "full design" was needed for the back lot of the large parcel of property. Mr. Bickford indicated that Mr. Hennessey had no plan to develop this area and estimated the cost of providing such a design at \$300,000.

Since the Appellant purchased the land in 2005, the Authority has provided agreement in principle for two different proposed layouts relating to the back land. Mr. Bickford indicated that, in his forty-year experience, he has never had anyone request a full design for property that is not intended to be developed, and he has been involved in the development of hundreds of subdivisions. Council had approved in principle the proposed development of the backlot in 2009 and then again in 2013.

During the hearing, Mr. Hennessey indicated that he did not have specific plans in mind for the back land yet. A sale of the land is possible but he has not determined his intention one way or another.

Mr. Hennessey indicated that half of the people who had worked on the Council at the time his application was refused are no longer with the Authority. He said, "when one crowd comes in, they are unaware of what happened before."

Originally, in 2009, the Authority approved the design for the entire parcel which had included 55 lots. This approved design was subsequently modified at the request of the Authority in 2013.

The Appellant indicated that 4 lots in total have been sold off to date, as approved by the Authority, and those lots are in various stages of development.

Mr. Hennessey provided an email from Mr. Jewczyk in which Mr. Jewczyk indicated that, for the remainder of the land on Deans Road outside of the approved 3 lots, a subdivision application and accompanying subdivision plan were to be submitted to the Authority as phase 2 of the subdivision, for review by Council.

The Appellant indicated that he provided the information as indicated by Mr. Jewczyk in this email.

Mr. Bickford confirmed that Mr. Jewczyk indicated subsequently that, while this had been his understanding, Council had the ultimate decision as to what information was required.

He also indicated that Service NL had given approval for 15 lots. This had been required by the Authority as a precondition to permission being given to develop the 3 approved lots. Approval was given for the development of the 3 lots in 2021.

Mr. Bickford confirmed that information relating to grading/sloping, water testing and so on was not provided with the application because it was not requested by the Authority.

He stated that, when the 3 lots were approved, stormwater management was undertaken for those lots. Any subsequent lots along Deans Road would need to obtain the same management, ditching, etc. He agreed that the backlot would affect the lots along Deans Road; however, he indicated that this could be managed on a per-lot basis.

Authority's Presentation

Mr. Jewczyk indicated at the outset of his presentation that the Authority has had significant turn-around over the preceding several years, including new Council members and new staff. As a result, there was an issue with the Authority's records management. Mr. Jewczyk was brought in to assist with moving forward a backlog of applications. As a result, it was suggested he reach out to applicants, find out what was being proposed and assist them in providing the information. He reached out to Mr. Hennessey and Mr. Bickford in an effort to help them bring forward their application.

Mr. Jewczyk indicated that the total area of land forming part of the subject property is in excess of 18 hectares. The proposed subdivision along Deans Road takes up only just over 3 hectares of that land. This means that more than 15 hectares (the backlot) is not part of this application. The subject property slopes down from the backlot towards Deans Road.

Council had concerns that some of the information provided in the application was very general. In Mr. Jewczyk's opinion, the information provided was insufficient to enable Council to determine where the land and lots were.

Mr. Jewczyk reiterated the discretion of the Authority found in section 3.1.1.2 of the Municipal Plan which states that all proposed subdivisions shall be subject to comprehensive review by Council. He also referenced the fourth and fifth bullets of section 3.2.1.10 of the Municipal Plan. He indicated that Council wished to consider information related to the entirety of the land as opposed to the proposed lots along Deans Road only.

Mr. Jewczyk indicated that further items to be considered by Council with respect to the proposed subdivision included the lot layout for the full property, a sloping/grading plan and how it affects things like stormwater management, road layout, open space considerations (there is a ten percent requirement) and a groundwater assessment. He indicated that, while the lots along Deans Road would be compliant with the Development Regulations, Council wanted to see a much more comprehensive plan for the whole property to ensure that what was proposed for the property along Deans Road would tie into the remainder of the property in an orderly manner and ensure that development of the backlot in the future would not create a problem for the Deans Road lots.

It was indicated by Mr. Jewczyk that any approvals from 2009 or 2013 would no longer be valid pursuant to the Development Regulations.

He indicated Council is not opposed to the development of the land but wishes to obtain further information before making a decision.

Ms. Aspell also provided evidence with respect to the backlog of development applications at the Authority when she began work there in July of 2023. She confirmed that she did not become aware that the Appellant did not have plans to develop the backlot until the day after Council made its decision to refuse the application. This was not noted in the application itself.

She indicated during the hearing that she was hearing a lot of information from the Appellant with respect to his application for the first time. She indicated that he acquired more than 18 hectares of land for the purpose of a subdivision.

Ms. Aspell also indicated that, in speaking with Service NL, she was led to understand that once more than 5 lots are sold, groundwater testing is required. She advised, with respect to the initial lots, that purchasers sought septic approval from Service NL but advised the Authority they could not obtain this because groundwater testing had not been done. Ms. Aspell told those purchasers that they would have to deal with Mr. Hennessey in this regard and she believed that Mr. Hennessey had to do some sort of groundwater testing as a result.

She indicated that the Authority would expect a phased approach to development of a subdivision be provided to Council, rather than doing it piecemeal with several lots at a time. She said Council has significant concern with protecting people along Deans Road, given that the backlot is on a hill, and the Authority takes responsibility for the development.

Subsequent Hearing By Teleconference

Subsequent to the hearing of this matter, the Authority provided correspondence from Digital Government and Service NL with respect to the subject property dated June 4, 2024 that purports to clarify a letter previously issued by that Department on September 7, 2023. The latter letter was discussed at the original hearing of this matter. The former letter clarifies that the September 7, 2023 letter only relates to the application of the Appellant to that Department for a three-lot subdivision and not fifteen lots, despite the fact that paragraph 5 of that letter states that the subdivision will have “a minimum of 2 residential building lots and a maximum of 15 building lots.”

The parties made submissions in relation to the letter of June 4, 2024 by way of teleconference. Ms. Aspell indicated that Digital Government and Service NL did not in fact grant approval for 15 lots. Justin Kennedy of the Department spoke during the teleconference and advised that any future requests for approval from the Department, even in relation to the additional 11 lots, may have to go to the Engineering Division for consideration, depending on the judgment of the recipient of the application within the Department.

Analysis

Did the Authority have the discretion to refuse the Application of the Appellant for a permit to develop an 11-lot subdivision off Deans Road in Witless Bay?

Yes.

The proposed development of the Appellant constitutes a “development” pursuant to the definition set out in section 2(g) of the Act. As such, it is required by section 12 of the Act to conform to the Municipal Plan and the Development Regulations.

The development proposed by the Appellant also constitutes a “subdivision” for the purpose of the Development Regulations, insofar as it would result in “the dividing of land ... into 2 or more pieces

(including lots), for the purpose of development” (see the definition of “subdivision” in the Development Regulations).

A permit is required for the development of a subdivision by virtue of section 7 and section 70 of the Development Regulations.

Section 10 of the Development Regulations grants broad discretion to the Authority with respect to the issuance of a permit to carry out development, so long as the Authority takes into account “the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto.” I also note that the section grants to the Authority the discretion to refuse an application “notwithstanding the conformity of the application with the requirements” of the Development Regulations.

I therefore find the Authority had the discretion to refuse the application of the Appellant for the 11-lot subdivision.

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

Yes.

Both the Municipal Plan and the Development Regulations impose various requirements on the Authority with respect to the evaluation of proposed subdivisions.

Policy 3.1.1.2 of the Municipal Plan requires the Authority to undertake a “comprehensive evaluation” of all “proposed subdivision developments.” This evaluation must include “an outline of how the proposed subdivision will integrate with existing development and roads and services on adjacent lands and provide for future access to undeveloped lands in the area.” It must also “ensure compatibility between the subdivision and surrounding land uses, both existing and future” (per Policy 3.1.1.2). In my view, the references to “adjacent lands” and “undeveloped lands” in this Policy would include the back part of the subject property that is not part of the Appellant’s subdivision application.

Further, pursuant to Policy 3.2.1.10, the Authority is only permitted to consider subdivision proposals if they meet the various requirements set out therein, including phasing schemes, provisions for lotting,

provisions for 10% recreation lands (open space), adherence to development standards for grades, storm drainage, etc.

Likewise, section 81 of the Development Regulations outlines the requirements for infrastructure development in a proposed subdivision.

All of these requirements must also be considered in light of the broad mandate set out in the Municipal Plan requiring the Authority “to encourage future growth in a manner that ensures land use compatibility and orderly development” (section 2.1).

Consideration and evaluation of these various requirements by the Authority is mandatory.

Similarly, the Municipal Plan and Development Regulations prohibit the Authority from issuing a permit for development of a subdivision in certain circumstances.

Section 9 of the Development Regulations prohibits the issuance of a permit where “in the opinion of the Authority, it is premature by reason of the site lacking adequate road access, ... drainage, ...” etc.

Section 73 of the Development Regulations prohibits the issuance of a permit for a subdivision development “when, in the opinion of the Authority, the development of a subdivision does not contribute to the orderly growth of the municipality and does not demonstrate sound design principles.” In this regard, the section requires the Authority to consider various factors including “the topography of the site and its drainage.”

The Authority indicated during the hearing that it was provided with very little information as part of the Appellant’s application. While the Appellant has provided information from time to time in respect of its proposed subdivision to the Authority in the past, the fact remains that the application itself was accompanied with little in the way of information speaking to the various requirements stipulated in the Development Regulations. I sympathize with the Appellant’s frustration in dealing with the Authority during the course of the past decade. As the Authority conceded, its record-keeping in the past has been inadequate and there has been significant administrative turn-over. However, I am required to focus solely on the application brought before the Authority and which was refused on August 24, 2023.

The Authority refused the Appellant’s application on the basis it did not include a “complete design submission” for the total land area. The Authority indicated during the hearing that it wished to obtain further information from the Appellant respecting lot layout for the full property, sloping/grading and how it affects things like stormwater management, road layout, open space considerations and a groundwater assessment. I cannot say that seeking this information is unreasonable, particularly in light of the broad discretion granted to the Authority to determine the scope of the information it requires to make its determination.

While I appreciate Mr. Bickford’s comment that he has never before been requested by a municipality to provide a full development plan for a backlot, it is clear from the evidence that it was, at one point, the Appellant’s intention to develop the entire property as a subdivision. In light of this, the Appellant’s current unknown intentions respecting the backlot and the lack of information provided with the Appellant’s application, I cannot say the basis upon which the Authority refused the application was unreasonable. This is especially the case in light of the Authority’s broad mandate in the Municipal Plan to ensure orderly development of the area and the fact that the Authority is required by its

Development Regulations to consider drainage, topography, etc. in considering whether to issue a permit.

Lastly, no evidence was presented at the hearing that shows the Authority acted in error or beyond its authority in its decision to refuse the Appellant's application. There was no evidence that procedural requirements were not followed in the course of the Application review process. Further, no evidence was provided indicating the Authority acted in a biased manner or otherwise contrary to principles of natural justice. I also find there was no dispute between the parties as to the basic facts in issue and, as such, the decision of the Authority was not based on any material factual error.

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 develop an 11-lot subdivision on Deans Road 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 5th day of July, 2024.



Christopher Forbes

Adjudicator

Urban and Rural Planning Act, 2000