

Eastern Newfoundland Regional Appeal Board

Appeal #	15-006-067-016
Appellant(s)	Paul Quigley
Respondent / Authority	Town of Torbay
Date of Hearing	December 7, 2021

Board Members

Chair	Cliff Johnston, MCIP
Member	Lisa Slaney
Member	Paul Boundridge, MCIP

Also in Attendance

Solicitor for the Appellant(s)	Darren O'Keefe
Representatives for the Appellant(s)	Robin Summers P.Eng., MAE Design
Representatives for the Authority	Stephen Penney, Solicitor, Town of Torbay Julia Schwarz, Director of Planning, Town of Torbay Dawn Chaplin, CAO Town of Torbay Witnesses: Trina Appleby, Councillor (formerly Deputy Mayor) Mary Thorne-Gosse (current Deputy Mayor)
Secretary to the Boards	Robert Cotter
Technical Advisor to the Boards	Elaine Mitchell, MCIP
Interested Parties	Michael Duffy, Solicitor for the Concern Citizens
Time start/end	9:00 am / 4:00 pm

The authority for appeals comes from section 42 of the *Urban and Rural Planning Act, 2000* (The Act).

Board's Role

The role of the Regional Appeal Board is to determine if the Town of Torbay (the Authority) acted in accordance with the Torbay Municipal Plan and Development Regulations when it made a decision to refuse an application for a development permit for a quarry at 454A Bauline Line on at a public meeting of Council on June 17, 2020.

Presentations During the Hearing

The following is a synopsis/summary of the verbal presentations made to the Board during the Appeal hearing. The Board also received and reviewed written submissions from the Technical Advisor, as well as representatives for the Appellant, the Authority and Interested Parties.

1.Planner's Presentation

On July 7, 2020, Mr. Paul Quigley (the Appellant) filed an appeal against a decision of the Town of Torbay (the Authority), made on June 17, 2020, to refuse a development application for a quarry located at 454A Bauline Line on the basis of the Approval in Principle for the development having expired. The letter outlining the Authority's decision was dated June 26, 2020.

There is a substantive history associated with this application. The Planner outlined this information in writing to the Board.

Chronology assembled from the material submitted by the Applicant, Appellant, and the Authority.

- June 19, 2017
The Authority granted conditional approval for a quarry at 454A Bauline Line.
- June 27, 2017
The Authority issued an approval in principle subject to conditions.
- June 28, 2017
Residents of Bauline Line filed a third party appeal.
- December 7, 2017
Appeal Hearing by the Eastern Newfoundland Regional Appeal Board
- March 23, 2018
Decision of the Supreme Court of Newfoundland and Labrador Trial Division
- April 3, 2018
Revised decision of the Eastern Newfoundland Regional Appeal Board
- May 17, 2018
Revised approval in principle letter issued by the Authority
- June 26, 2020
Letter of refusal issued by the Authority
- July 10, 2020
Appeal filed by Paul Quigley.

Grounds of Appeal

This appeal is based on the following section of the Act: Section 42. (1)(a) (an application to undertake a development).

42. (1) A person or an association of persons aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to

(a) an application to undertake a development;

(b) a revocation of an approval or a permit to undertake a development;

(c) the issuance of a stop work order; and

(d) a decision permitted under this or another Act to be appealed to the board.

The Appellant is appealing the decision of the Town of Torbay to refuse to issue a permit for a quarry at 454A Bauline Line even though an approval in principle was issued. The following grounds of appeal are raised by the solicitor for the Appellant:

1. The Authority erred when it determined that the Appellant failed to meet conditions set out in the approval in principle;
2. The Authority cannot override its previous decision on matters that are not outlined in the approval in principle;
3. The Authority has violated the Appellant's right to procedural fairness;
4. The Authority exhibited bias and some Councillors were in a conflict of interest; and
5. The Authority failed to properly apply its Municipal Plan and Development Regulations.

Legislation and Regulations

The applicable legislation with respect to this appeal is:

- Urban and Rural Planning Act, 2000
- Municipalities Act, 1999
- Torbay Municipal Plan and Development Regulations.

Land Use Planning

Section 12 of the Urban and Rural Planning Act, 2000 (the Act) states that a municipal plan and development regulations are binding upon the Authority and all persons carrying out development.

Application of plan

12. A plan and development regulations are binding upon

(a) municipalities and councils within the planning area governed by that plan or those regulations; and

(b) a person undertaking a development in the area governed by that plan or those regulations.

The Torbay Municipal Plan and Development Regulations came into legal effect on February 10, 2017.

According to the Torbay Municipal Plan and Development Regulations, the subject site is designated and zoned Rural. According to Municipal Plan policy 3.2.12, uses in the Rural designation may include aggregate extraction, proposed operations shall be evaluated in conjunction with the Department of Natural Resources (now the Department of Industry, Energy and Technology) and the Department of Environment and Conservation (now the Department of Environment, Climate Change and Municipalities) and that Council will ensure minimal impact.

3.2.12 Rural

Policy Statements:

- *Aggregate extraction may be permitted in the Rural area. Proposed operations shall be evaluated in conjunction with the Department of Natural Resources and the Department of Environment and Conservation.*
- *Council shall ensure that aggregate mining will have minimal impact upon adjoining land uses, particularly the visibility of gravel pits. Buffering and screening may be required to minimize dust and noise. Open pits shall be rehabilitated by the operator prior to abandonment.*

The Rural use zone table, found in schedule C, of the Torbay Development Regulations lists Mineral Workings as a discretionary use class. Condition 1 allows discretionary uses at the discretion of Council provided they are complementary to permitted use and support the development of permitted uses.

1. Discretionary Use Classes

The discretionary use classes listed in this table may be permitted at the discretion of Council provided that they are complementary to permitted uses and will not inhibit or prejudice the existence or development of permitted uses.

Condition 6 outlines the conditions for mineral workings.

6. Mineral Working Council may permit mineral working subject to the following conditions:

(a) Effective tree screens shall be maintained around the periphery of any mineral working. Where trees are not present to create an effective screen, Council may require the installation of a landscaped embankment or fence.

- (b) Topsoil removed for mineral working shall be retained for restoration of the site.
- (c) No mineral working shall be conducted which causes danger or nuisance to the public.
- (d) No mineral working shall be permitted within the view of a designated scenic road.
- (e) Proposed mineral working operations will be evaluated carefully by Council in conjunction with the Department of Natural Resources.
- (f) No mineral working shall unacceptably reduce the quality of water in a watercourse or waterbody. Any access road which crosses a watercourse shall have a bridge or culvert according to the regulations of the Department of Environment and Conservation.
- (g) No mineral working shall result in the excavation of land below the level of the water table nor cause the ponding of water. However, settling ponds may be permitted with the approval of the Department of Environment and Conservation. (h) No mineral working shall be carried out in a manner which causes the erosion of adjacent land.
- (i) The mineral working shall be kept clean of refuse, abandoned vehicles and equipment, and derelict buildings.
- (j) Upon completion of mineral working, and when there is no intention to re-open such operations, all buildings and machinery shall be removed from the site and the site restored so as not to constitute a danger to the public or present an unsightly appearance.

As a discretionary use, the Authority must advertise the application, consider any objections or representations received and evaluate the development with respect to the Municipal Plan and Development Regulations and public interest.

33. Notice of Application (Refer to Minister's Development Regulations, Section 13 and 15)

The Council may, and when a variance is necessary under Regulation 11 and the Council wishes to consider whether to authorize such a variance, when a change in nonconforming use is to be considered under Regulation 49, or when the development proposed is listed as a discretionary use in Schedule C of the Regulations shall, at the expense of the applicant, give notice of an application for a permit or for approval in principle, by public advertisement in a newspaper circulating in the area or by any other means deemed necessary, and under Regulation 12 and the Council shall give written notice of the proposed variance from development standards to all persons whose land is in the immediate vicinity of the land that is the subject of the variance, and allow a minimum period of 7 days for response.

90. Discretionary Uses

Subject to these Regulations, the uses that fall within the Discretionary Use Classes set out in the appropriate Use Zone Table in Schedule C may be permitted in that Use Zone if the Council is satisfied that the development would not be contrary to the general intent and purpose of these Regulations, the Municipal Plan, or any further scheme or plan or regulation pursuant thereto, and to the public interest, and if the Council has given notice of the application in accordance with

Regulation 33 and has considered any objections or representations which may have been received on the matter.

From the information presented at the December 7, 2017 appeal hearing, Council advertised the proposed development, received and considered submissions and passed a motion to issue an approval in principle. The approval in principle was issued by the Authority on June 27, 2017, modified by the Eastern Regional Appeal Board in its decision of December 6, 2017, and re-issued by the Authority on May 17, 2018. In order to issue the approval in principle letter, the Authority had determined that the application for a quarry at 454A Bauline Line conformed to the Torbay Municipal Plan and Development Regulations.

Section 20 of the Torbay Development Regulations contains provisions with respect to an approval in principle. Subsection (2) states that the Authority may issue an approval in principle if it determines that the application conforms to the municipal plan and development regulations. Subsection 4 specifies that no development shall be carried out under an approval in principle.

20. Approval in Principle

(1) An application for Approval in Principle shall include;

a) a description of the proposed development,

b) a description of the limits of the land to be used with the proposed development, and may include a survey description of the subject lands,

c) submission of detailed plans,

d) any additional information that may be required by the Council.

(2) The Council may issue an Approval in Principle if it determines the application conforms to the Municipal Plan and these Regulations.

(3) An Approval in Principle shall be valid for a period of 1 year, and may be extended 1 year (must be requested by applicant), up to a total maximum period of 2 years.

(4) No development shall be carried out under an Approval in Principle.

(5) Council may revoke an Approval in Principle if it determines the applicant has changed the proposed development in a way that significantly alters the original intent of the applications.

Issuance of an approval in principle occurs when the Authority has considered an application and determined that it conforms to the municipal plan and development regulations.

The May 17, 2018 approval in principle does not specify a time limit that the approval in principle is valid. Section 20 (3) of the Torbay Development Regulations specifies a maximum period of 2 years.

According to subsection 20 (4) of the Torbay Development Regulations, no development can proceed under an approval in principle. In order to proceed with development, a development permit is required. Condition 13 of the approval in principle states that no construction can proceed until all items have been addressed and agreed to.

According to Regulation 21 of the Torbay Development Regulations, issuance of a permit gives permission for the development to proceed.

21. Development Permit

(1) A written Permit to Develop, including a temporary Permit to Develop, issued by the Council shall be permission to develop. This permission shall not relieve the applicant from full responsibility of obtaining all other approvals, prior to the commencement of development, and complying with the requirements of all other regulations and statutes during development.

(2) The Council may attach conditions to a Permit to Develop to ensure compliance with the Municipal Plan and these Regulations, and the permit holder shall be responsible for full compliance with the permit conditions.

(3) A Permit to Develop is valid for a period of 1 year and may be extended twice up to a total maximum period of 3 years.

(4) The issuance of a Permit to Develop shall not prevent the Council from requiring the correction of errors, or ordering the cessation, removal of, or remedial work on any development being carried out that is in violation of the Municipal Plan and these Regulations.

(5) The Council may revoke a Permit to Develop for failure by the developer to comply with the Municipal Plan and these Regulations, or any condition attached to the Permit to Develop, or where it was issued in error or was issued on the basis of incorrect information.

(6) No person shall change the application for which a Permit to Develop has been issued unless the change has been approved by a resolution of the Council, and written approval has been issued.

(7) A copy of the Permit to Develop, and the plans and specifications, shall be kept on the site until completion of the development.

The Authority has the right to attach conditions to the development permit to ensure that the development proceeds in compliance with the Torbay Municipal Plan and Development Regulations.

In the letter of refusal from the Authority, dated June 26, 2020, one of the reasons given for Council's decision was that quarry development in areas with slopes steeper than 15 percent is contrary to the Municipal Plan. An objective of the Municipal Plan is to discourage development in areas with steep slopes. Municipal Plan policy 3.2.9 which states that areas with slopes in excess of 15 percent are designated Conservation.

2.7 Environment

Objectives:

- *To discourage development in areas with slopes greater than 15 percent, recognizing that development in such areas can result in environmental damage and higher costs for servicing and maintenance.*

3.2.9 Conservation

Policy Statements:

- *Extensive areas of land having slopes in excess of 15 percent are designated Conservation. Development is not considered feasible on such slopes because of excessive runoff and erosion and high costs to install and maintain services, and risk to public safety.*

There does not appear to be any conditions in the Development Regulations which deal with slopes in excess of 15 percent.

Procedural Compliance

The solicitor for the Appellant alleges that then Deputy Mayor Appleby owns private property adjacent to the subject site and failed to declare a conflict of interest under section 207 of the Municipalities Act and remove herself from any considerations with respect to this matter. As the Authority's submission did not include minutes from the Planning and Development Committee or the public Council meetings where this matter was discussed, it cannot be determined whether that then Deputy Mayor Appleby had an interest distinct from an interest held in common with other citizens, declared a conflict of interest or participated in the decision making process.

Section 207 of the Municipalities Act states that a councillor shall not vote on or speak to a matter where a councillor or a relative has a monetary interest in the matter. Under subsection (4) that interest must be distinct from an interest held in common with other citizens.

Conflict of interest

207. (1) A councillor shall not vote on or speak to a matter before the council or a committee of the council where

(a) the councillor has a monetary interest in the matter distinct from an interest arising from his or her functions as a councillor;

(b) the councillor has a monetary interest directly or indirectly in the matter;

(c) a relative of the councillor has a monetary interest in the matter; or

(d) the councillor is an officer, employee or agent of an incorporated or unincorporated company, or other association of persons, that has a monetary interest in the matter...

(4) In order for an interest to be considered as one falling within the prohibition set out in subsection (1) it shall be an interest distinct from an interest held in common with the other citizens or classes of citizens of the municipality.

Section 208 of the Municipalities Act requires that the Councillor state their interest and leave the meeting while the matter is being discussed.

Disclosure

208. (1) Where a councillor has an interest described in subsection 207(1), the councillor shall

(a) state that he or she has that interest; and

(b) state the nature of the interest at the beginning of discussion on the matter in which he or she has that interest,

and that statement respecting his or her interest shall be recorded in the minutes of the council, or a committee of the council, where that statement was made at a committee meeting...

(3) Where a councillor declares a conflict of interest under subsection (1) he or she shall immediately leave the meeting while the matter on which he or she has a conflict of interest is being discussed.

Section 209 of the Municipalities Act allows Council to decide the matter after the councillor has made a disclosure.

Decision of council

209. (1) Where a councillor is in doubt as to whether or not he or she has a monetary interest that is a conflict of interest under section 207, he or she shall make a disclosure and the council may decide the question by majority vote and its decision on the matter is final.

(2) A councillor whose possible conflict of interest is being voted on is not entitled to vote.

Appellant's Presentation

Mr. O'Keefe, the solicitor for the Appellant, made all verbal representations on behalf of the Appellant, Paul Quigley. Mr. Quigley did not speak at the Hearing.

Mr. O'Keefe highlighted a number of points from his written submission to the Board. Included in his verbal comments were the following:

- The "Concerned Citizens" group represented by Michael Duffy should not have its submissions considered on this Appeal. The public consultation process mandated by s. 90 of the Development Regulations was completed prior to the initial Approval in Principle. The Board reviewed evidence on the adequacy of

that process in 2017 and found that it was reasonable. The Appellant is aware that the "Concerned Citizens" continue to have concerns about the Proposed Quarry, however, the Regulations dictate when and how third parties can involve themselves in the development process and that time has passed. There is no ongoing right to be heard unless the decision affects that person's rights directly, as those rights exist on the date of the decision being appealed from.

- Council claims that the Appellant failed to provide a complete permit application containing all information required by the revised Approval in Principle prior to the expiry date. The Appellant disagrees and states that the Approval conditions were fulfilled by the required date through material compliance.
- The Appellant states that, while certain material items were submitted on or near the expiry date, this was largely due to the Town's late direction, inadequate processes, and a general lack of coordination throughout the process.
- The Appellant was able to submit all substantive items prior to the expiry of the Approval in Principle on May 19, 2020 and understood that the conditions were met as of that date. The Town did request minor clarification or revision on certain items but did not indicate that the original submissions failed to satisfy the Approval requirements. There was also no expectation that the revisions be completed by the deadline and in some cases this would have been impossible.
- The Appellant states that the foregoing demonstrates that the Town accepted that the package was complete, and then moved on to any necessary follow up or corrections as would be the normal operating protocol. There will always be ongoing questions or clarification on a planning file as it progresses, this would be expected even after the issuance of the permit.
- The Appellant's completed Application package was reviewed by the Planning and Development Committee on June 10, 2020. The Committee thoroughly reviewed the Application and concluded "that all 14 conditions of the May 17, 2018 Approval in Principle have been met", such that issuance of a conditional permit should follow. This memo was provided to Council in advance of the vote. At that vote, Council refused to follow the Committee's recommendation and substituted its own finding as to whether the conditions had been met as of the relevant date. The Appellant states that the Application would not have gone to a vote at all if it had expired on May 19th, 2020 nor would Council have engaged in a debate on the issues raised in the second and third grounds of the rejection letter.

- The Appellant states that Council erred in rejecting the Committee's assessment and recommendation to approve the Application and in substituting its own view with respect to the Appellant's compliance with the Approval prior to the expiry. The Appellant further states that Council's refusal to issue the permit based on mere technicalities which were outside of the Appellant's control (and had been rectified by the date of the meeting) was arbitrary and made in bad faith.
- Council states that, prior to rejecting the Application, they "assessed all of the relevant factors as set out in the Development Regulations and Torbay Municipal Plan 2015-2025, including the appearance and effect that the proposal may have on the surrounding residential and natural areas". The Appellant states that it was inappropriate for the Council to consider any such criteria in making their decision. These issues were considered by the prior Council per s. 33 of the Development Regulations before the 2017 Approval in Principle was issued. The prior Council's use of its discretion in doing so was reviewed by the Board during the previous Appeal and confirmed to be appropriate. Council had no authority to revisit these criteria at the June 2020 meeting.
- The Appellant did not make any material changes to the Proposed Quarry after the issuance of the revised Approval, nor did Council allege this was the case. The Appellant therefore submits that Council improperly exceeded its jurisdiction in considering matters outside of compliance with the Approval conditions and erred in relying on these considerations as a basis to reject the Application.
- Council's final reason for refusing the Application was that "greater than 15% sloping" had been detected in some areas of the Proposed Quarry based on the engineering drawings submitted. According to Council, "a quarry development in areas with slopes steeper than 15% is contrary to the Municipal Plan". The Appellant states that Council's reasoning on this point is invalid and reflects a misinterpretation of the Municipal Plan. The 15% restriction applies only to areas designated "Conservation" under s. 3.2.9 of the Municipal Plan; the Property is zoned "Rural". These two zonings are mutually exclusive.
- "Rural" zoning under the Municipal Plan specifically contemplates development, including "mineral workings" such as a quarry (s. 3.2.12). "Conservation areas" are described in the Municipal Plan as the undeveloped

lands around Torbay with “extensive areas of land having slopes in excess of 15 percent”, due to excessive runoff and erosion, associated safety risks and high costs to install and maintain services (s. 3.2.9). According to the Land Use Plan, the Conservation designation only applies to the open undeveloped lands around Torbay Bight, the shorelines of ponds and wetlands, and the banks of streams. If Property were zoned “Conservation”, the Appellant would not have been granted an Approval in Principle by Council in the first place, nor would the Province have issued a quarry permit.

- The Appellant’s position reflects the Planning and Development Committee’s view as recorded June 10, 2020. The Committee repeatedly referred to the Proposed Quarry as being zoned “Rural” and governed by the rules and regulations applicable to that designation. The Committee stated expressly, with respect to the issue of slope requirements: “DPD noted that there are no slope requirements. That is only a requirement in the Conservation Zone, this property is in Rural Zone”. As the 15% restriction does not apply to the Rural Zone, Council erred in rejecting the Application on this basis.
- The Appellant states that then Deputy Mayor Trina Appleby was in a conflict of interest and improperly participated in the discussion and voting on the Application. Conflict of interest in this circumstance is governed by s. 207 of the Municipalities Act, SNL 1999 M-24.
- The then Deputy Mayor Appleby voted for the Approval in Principle in 2017. During the intervening period, she moved to a home on Bauline Line located several hundred meters from the Proposed Quarry and has publicly expressed concern about the impact of the Proposed Quarry on her property value since that time. In fact, then Deputy Mayor identified her financial interest at the June 17, 2020 Council meeting. As reflected in the Minutes, “Deputy Mayor advised she feels the application will have an impact on the value of her home”. The Appellant submits that the then Deputy Mayor was clearly in conflict on this basis. The fact that she identified it and allowed Council to vote on it is irrelevant. Council has no authority to waive a legal conflict of interest where one exists.
- The Appellant submits that the then Deputy Mayor Appleby should have recused herself from discussing or voting on the matter under Appeal. The then Deputy Mayor’s participation in the discussion and the decision-making process on the Application, including at an in camera meeting, contravened s. 207(1) and irrevocably tainted the process.

- The Appellant is aware that Mayor Scott also resides near the Proposed Quarry and recused himself from the June 10, 2020, Planning and Development Committee meeting due to possible conflict. Unlike the then Deputy Mayor, the Mayor has never demonstrated a biased view or closed mind toward the Application and expressed before Council that he did not feel that his property value would be impacted.
- The Appellant states that he had a right to procedural fairness. The importance of a decision to the individuals affected constitutes a significant factor affecting the content of the duty of procedural fairness. The Appellant submits that, given the amount of time and money invested into the Application to date and the financial consequences of a vote to reject it, a high duty of procedural fairness should be applied in this situation.
- Both Council and the Appellant were aware that fulfilling the conditions outlined in the Approval would involve significant expense on his part. The Appellant had a legitimate expectation that the Application would be processed in good faith, appropriately and impartially considered by Council and approved as a matter of course if he met the conditions. This expectation arises from the Municipal Plan and Regulations and was reinforced by the Town's words and conduct throughout the two-year period following the issuance of the revised Approval in Principle.
- Representatives of the Town continued to reiterate that the Application was complete, and approval anticipated, during the weeks leading up to the Council meetings on June 15 and 17, 2020. The Appellant was specifically informed within that time that the minor outstanding items required by the Approval could be submitted 'ideally by June 8th' for consideration. The Appellant then learned the Planning and Development Committee had met on June 10, 2020, found the conditions to be satisfied and recommended issuance of the permit. This unofficial notice that the Application contained no disqualifying deficiency and would be approved further reinforced the Appellant's legitimate expectations.
- The Appellant states that his right to procedural fairness was violated and his legitimate expectations were not met. Instead, Council allowed a biased decision-maker to discuss and vote on the Application and then relied on arbitrary, extraneous, and improper considerations to justify rejecting it despite the Planning and Development Committee's contrary findings and

recommendation to approve. Having been denied the benefit of a fair process and result on the Application, the Appellant is now seeking the relief identified below.

- The Appellant submits that Council's arbitrary and unfair decision on the Application must be overturned. The Appellant asks that the Board substitute Council's decision with an order that the Application be approved and a permit issued, subject to the conditions recommended in the Planning and Development Committee memo dated June 10, 2020.
- In the alternative, the Appellant asks that the Board order the Application be remitted back to Council for a vote by non-conflicted members on the narrow issue of whether the conditions in the Approval in Principle have been met.
- The solicitor for the Appellant undertook cross examination of the following Town representatives regarding their understanding of and their respective actions/decisions, in the Town's processing of the application.
 - 1) Julia Schwarz, MCIP, CSLA – Director of Planning and Development
Under cross examination by Mr. O'Keefe, Ms. Schwarz outlined her credentials as a professional planner.
 - 2) Deputy Mayor Mary Thorne-Gosse
Under cross examination by Mr. O'Keefe, Deputy Mayor Mary Thorne-Gosse advised that she was confident in advice being presented to the Town Council by Ms. Schwarz with respect that the application for the quarry could be given Final Approval by Council.
 - 3) Councillor Trina Appleby
Under cross examination by Mr. O'Keefe, Councillor Appleby indicated that she moved to her present address on Bauline Line in 2013.

** Both Ms. Schwarz and Ms. Appleby had submitted affidavits prior to the Appeal Hearing which were provided to and reviewed by members of the Appeal Board.

Authority's Presentation

Mr. Penney, the solicitor for the Authority, made all verbal representations on behalf of the Authority, The Town of Torbay.

Mr. Penney highlighted a number of points from his written submission to the Board. Included in his verbal comments were the following:

- This appeal concerns a discretionary decision of the Town Council of the Town of Torbay (the “Town” or “Council”) to reject a discretionary use application.
- On June 9, 2020, the Appellant submitted a completed permit application to construct a quarry, which was a discretionary use in the Town’s Rural Zone.
- The Appellant had previously applied for and received an Approval in Principle for the same project. This Approval in Principle expired on May 17, 2020, several weeks before the permit application had been submitted. It was noted by Mr. Penney that the Authority agreed that the Approval in Principle actually expired on May 19, 2020 given that May 17, 2020 was a Sunday and May 18, 2020 was a Statutory Holiday.
- Council considered all of the relevant and mandatory factors set out by the Town’s Development Regulations and Municipal Plan, and exercised its discretion to reject the application.
- Council’s exercise of discretion was thorough and thoughtful. The Appellant’s disagreement with that exercise of discretion does not mean that Council’s decision should be overturned. The appeal is meritless and must be dismissed.
- This matter involves a proposed quarry. It does not appear to be disputed that the proposed quarry is located in a “Rural Zone” pursuant to the Town’s Development Regulations.
- It also does not appear to be disputed that the Development Regulations provide that “Mineral Working” is a discretionary use within this zone.
- The proposed development has a complicated history. The Appellant originally applied for Approval in Principle on February 10, 2016, which was granted with 13 conditions (the “CAP”). The conditions required, among other things:
 - (a) Compliance with the Town’s Mineral Working Conditions;
 - (b) Approval by the Department of Natural Resources (“DNR”);
 - (c) An access easement by the Department of Transportation and Works (“DTW”);

(d) Provision of a Storm Water Management Plan for the quarry that achieves net zero run off, to be approved by the Town's consulting engineer; and,

(e) Review and written approval of all plans by the Town's consulting engineer.

- A third party appealed the CAP. In response, the Eastern Newfoundland Regional Appeal Board ("the Board") upheld the CAP but ordered the Town to add an additional condition requiring a complete site plan relative to buffer and slope restrictions contained in the Municipal Plan.
- After a Consent Order from the Supreme Court requiring the Board to clarify its Order, this resulted in a revised CAP issued on May 17, 2018.
- The Appellant did not appeal any of the CAP conditions or the Board's initial decision.
- Section 20(3) of the Town's Development Regulations provides that an approval in principle "shall be valid for a period of 1 year, and may be extended 1 year (must be requested by applicant), up to a total maximum period of 2 years.
- As set out in the Affidavit of Julia Schwarz, it appears that the Appellant was very slow in preparing the engineering work required to meet the CAP conditions. The first draft of engineering drawings was submitted to the Town on September 27, 2019, by the Appellant's engineers, Mae Design Ltd. ("Mae"), with a response from the Town's engineers on November 22, 2019. It took several months for the Appellant to prepare the next draft of engineering drawings, which were provided to Ms. Schwarz on April 13, 2020, approximately a month before the Approval in Principle was to expire. The Appellant's design did not include an illustration of buffer and slope restrictions, as required by the amended CAP.
- On April 27, 2020, Ms. Schwarz wrote to the Appellant and Mae advising that that revisions and further detail on site plan and run off calculations were required by the Town's engineer. Ms. Schwarz also reminded the Appellant that a timely response was required due to the upcoming expiry of the CAP. Ms. Schwarz also reminded the Appellant of the slope and buffer condition.
- The CAP also required the Appellant to obtain approval from the DNR. The Appellant received approval from the Mineral Lands Division of DNR on May 19, 2020, two days after the CAP expired. Further, the Appellant only received

approval from the Water Resources Management Division in fulfillment of his DNR quarry permit on June 8, 2020, three weeks after the CAP expired.

- The Town's consulting engineer approved the Appellant's final application package the day after it was complete, on June 9, 2020. This was after the CAP expired.
- On January 7, 2019, the Appellant wrote to then Councillor Mary Thorne-Gosse re-requesting an extension of any time limitation associated with the CAP. It does not appear that the Town responded to this request. On April 28, 2020, the Appellant wrote to Ms. Schwarz, again requesting a one year extension. No one replied to this correspondence.
- As of the expiry of the CAP on May 17, 2020, the Appellant had not:
 - (a) submitted an access easement from DNR;
 - (b) been approved by DNR;
 - (c) been approved by Water Resources Management Division;
 - (d) finalized the actual application, and in particular had not submitted revised drawings and culvert calculations required by the Town's consulting engineers; and,
 - (e) Had not received final written approval from the Town's consulting engineers.
- Only one of these conditions, approval by DNR, had been satisfied by May 19, 2020, which is when the Appellant argues the CAP expired.
- The Appellant submits that Council was bound to issue a permit if the Appellant complied with the CAP conditions.
- Apart from the expiry of the CAP, the Appellant's submission contradicts the wording of the Development Regulations and the common law. In the context of discretionary uses, the Development Regulations describe two types of applications: (1) permits to develop, and (2) for approvals in principle.
- At s. 10, the Development Regulations indicate that Council must exercise its discretion in considering both types:

“In considering an application for a permit or for approval in principle to carry out development, the Council 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 Council 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”.

In other words, even if the ultimate approval in principle has been issued, Council is not permitted to “rubber stamp” application for a permit. Council must consider the factors set out in s. 10 and comply with its statutory duty to exercise its discretion. The requirements for an approval in principle are set out in s. 20 of the Development Regulations. Section 20 does not change the plain wording of s.10, or otherwise indicate that Council’s discretion in considering a permit application should be limited when an approval in principle has been issued.

- The wording of the Town’s Development Regulations accords with the general state of municipal law.
- The Town’s Development Regulations specifically reference approvals in principle as a distinct concept from a permit, and must be assessed accordingly. The CAP had expired, no extension was given, and no extension could have been given.
- The Town’s Development Regulations provide that an approval in principle expires in a year, but can be extended by one more year at the request of the applicant. The Town submits that the CAP expired on May 19, 2020, after a maximum of two years following its issuance.
- As of May 19, 2020, the Appellant had not:
 - (a) Submitted an access easement from DNR;
 - (b) Been approved by Water Resources Management Division;
 - (c) Finalized the actual application, and in particular had not submitted revised drawings and culvert calculations required by the Town’s consulting engineers; and,
 - (d) Had not received final written approval from the Town’s consulting

engineers.

- At no point did anyone represent to the Appellant that the CAP would be extended. Ms. Schwartz's June 4, 2020 email to the Appellant, sent after the CAP expired, was merely to advise when he would need to have his materials to her if he wanted Council to review them by June 15, 2020, when Council was scheduled to meet. As Ms. Schwarz's affidavit makes clear, the Appellant was required to make numerous and important changes to the CAP long after its expiry. The CAP conditions do not indicate that final sign off of the Town's engineering consultant or compliance with its conditions could be ignored, waived, or met in part. Nor was the Town even able to waive the expiry of the CAP, had the Town intended to do so. There is no power in the Development Regulations or relevant legislation for Council to extend or waive deadlines on the basis of "fairness and natural justice." As a creature of statute, the Town only has the power to do those things it is empowered to do by its enabling legislation and regulations.
- The Appellant submits that the principles of fairness and natural justice support granting a "modest extension" to the CAP deadline. The Appellant submits that any delay is due to the Town's "inadequate management" of the application, particularly in relation to the net zero run off requirement.
- The Board has no jurisdiction to extend a statutory deadline, particularly a statutory deadline that the Town is bound to follow.
- Also contrary to the Appellant's submission, the Town has no duty to "manage" the affairs of developers. It was up to the Appellant to ensure that he was in a position to meet the conditions of the CAP before the expiry of the deadline.
- The Town Councillors were principally concerned with the question of whether the CAP had expired before a completed application had been submitted, not whether the CAP conditions had been met. Council fairly exercised its discretion to reject the permit application.
- In assessing the permit application, Council was required to take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulations pursuant thereto, 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.

The record before the Board reflects that the various Councillors considered these factors and issues in voting on the application, including the nature of the area, the

considerations set out in the Municipal Plan, the desirability of quarries in the area in question, and concerns of sloping in the area.

- The Appellant's asserts that Council's assessment of the relevant factors is not founded in evidence and was not "credible." However, the Appellant's disagreement with Council's exercise of discretion is irrelevant to this appeal. Council's exercise of discretion cannot be second-guessed or substituted.
- In this case, the Council minutes, rejection letter, and Affidavit of then Deputy Mayor Appleby all indicate that Council thoroughly considered the relevant factors and exercised their discretion fairly.
- The Appellant's submissions allege that the Town's conduct was arbitrary and unreasonable, including in:
 - (a) Its "inadequate management" of the application;
 - (b) Failing to recognize the effect of the COVID-19 pandemic on the proponent's ability to submit the completed application;
 - (c) Failing to ensure that all Councillors had the ability to participate in the meeting;
 - (d) Failing to "inform" all Councillors that all conditions had been met;
 - (e) Unreasonably relying on certain submissions as to certain technical matters they were unable to speak to;
 - (f) Failing to identify any technical defect in the application; and,
 - (g) Failing to consult with Julia Schwarz and Brian Winter (former Director of Planning and Development with the Town of Torbay).

Most of these grounds of appeal do not have anything to do with procedural fairness. Rather, they are challenges to Council's decision on its merits. In particular, any conclusion as to compliance with the CAP conditions, the "technical matters," and the soundness of the advice of the Town's planning staff, are all matters on the merits of the application engaging Council's discretion. Any duty of procedural fairness owed by Council to the Appellant does not require Council to make any particular decision, but rather engages how Council makes its decisions.

- The Appellant's submissions also mistake the decision making structure of Council. It is Council, and not the Town's planning staff, that has the statutory duty to exercise its discretion to issue or not issue development permits. While Council have to consider the relevant factors and evidence, Council cannot fetter its discretion by handing over responsibility for its decisions to its staff.
- The main issue raised in by the Appellant in relation to procedural fairness is the alleged representations made by Town staff that the application would be accepted after the deadline. As set out above and in the Affidavit of Julia Schwarz, no representations were ever made to the Appellant that his application for a permit would be accepted outside of the statutory deadline. Nor can procedural fairness grant the appellant new substantive rights – a municipal council cannot gain the statutory power to extend a statutory deadline because someone advised the proponent it would be extended.
- The Appellant alleges that Councillors, particularly the then Deputy Mayor, were biased against the application. The proponent uses the language of s. 209 of the Municipalities Act, 1999 in asserting that the then Deputy Mayor had a monetary interest in the application given the proximity of her property.

Where a councillor is alleged to have prejudged an issue, the Board must use the "closed mind" test. This test takes into account the fact that municipal councillors have diverse interests and may have been elected to Council based on a particular agenda. The test requires that the councillor's mind not be closed, and that the councillor is "capable of being persuaded."

The more stringent "reasonable apprehension of bias" test applies where a Councillor has a pecuniary interest in a matter. The Supreme Court of Canada has indicated the statutory conflict of interest provisions set out in the Municipalities Act "typically provide a definition of the kind of interest which will give rise to a conflict of interest."

- In this province, that requires a Councillor to have an "appreciable" monetary interest in the matter. In the specific context of bias, other courts have indicated that the pecuniary interest at stake must be "substantial."

In any event, in this case there is no evidence of any pecuniary interest, of any kind, that the then Deputy Mayor or other Councillors had in the proposed development. The Affidavit of then Deputy Mayor Appleby indicates that she approached the matter with an open mind and made a sober decision based on the evidence before her. Further, prior to Council's consideration of the application, then Deputy Mayor Appleby had put the question of a potential conflict of interest to Council under s. 209 of the Municipalities Act, 1999.

In considering the matter, Council voted then Deputy Mayor Appleby was not in a conflict. Section 209 indicates that Council's vote on the matter is final. Therefore, because Council had decided that she was not in conflict, then Deputy Mayor Appleby was legally required to vote on the application pursuant to section 212(2) of the Municipalities Act. The Town submits that there can be no reasonable apprehension of bias arising from a Councillor obeying her statutory duty to vote on the motion.

- Council's exercise of discretion was thorough and unbiased. The appeal is meritless and must be dismissed.
- Under the provisions of Section 209 (1) of the Municipalities Act, the issue of whether a Councillor is in a conflict of interest, is a matter for the appropriate Municipal Council to decide. The Eastern Newfoundland Regional Appeal Board has no role or authority to deal with matters of conflict of interest.

Interested Parties

Mr. Duffy, solicitor for the Bauline Line Concerned Citizens Group spoke to the Appeal. Mr. Duffy also indicated that he was a member of this group and lives in the area of the proposed quarry.

- The residents feel that the proposed development would infringe on their right of peaceful enjoyment of their properties, their property values and the safety of area residents.
- Potential conflicts could arise for nearby residential and recreational properties.
- Mr. Duffy stated that buffers are required for the proposed quarry to mitigate land use conflicts as per the Town's Development Regulations and applicable provincial legislation. Buffers are required to be within the property lines of the subject property. The plans submitted for the proposed quarry, do not appear to show that the quarry operation and the required buffers can all be accommodated within the site boundaries.
- The issue of slope protection as set out in the Town's Municipal Plan should be considered by the Town as a type of "overlay" planning designation applicable to all lands in the Town regardless of the actual zoning of a property which is the subject of a development application such as the proposed quarry.
- Council has discretionary authority to approve or reject the quarry application. Council used its discretionary authority appropriately in rejecting the application.

Board's Analysis of Section 209 of the Municipalities Act as it applies to this Appeal:

Section 209

(1) Where a councillor is in doubt as to whether or not he or she has a monetary interest that is a conflict of interest under section 207, he or she shall make a disclosure and the council may decide the question by majority vote and its decision on the matter is final. (Emphasis added by Appeal Board)

(2) A councillor whose possible conflict of interest is being voted on is not entitled to vote.

The Appeal Board has reviewed the June 17, 2020 minutes of the Regular Public Meeting of the Torbay Town Council. The Board notes that the then Deputy Mayor advised Council that she had become better aware of the proposed quarry's location respecting her residence; and she noted to Council that the activities of the proposed quarry could potentially affect the value of her property and her enjoyment of it, such as blasting, heavy truck traffic, and loss of a scenic view. She stated "I feel very strongly against the quarry, there's no question, I'd love to vote on that..." She requested Council to decide if she was in a conflict of interest position for the vote on the proposed quarry.

Council after discussion, Council agreed to hold a vote to determine whether the Mayor (who also advised Council at this same Council Meeting that he lives on Bauline Line and supported the application) and the then Deputy Mayor were in a conflict of interest position. According to the minutes of the Council Meeting, the Mayor and the then Deputy Mayor left the Council Chambers before the vote was taken.

Four Councillors remained for the vote on the question of conflict of interest. The Minutes indicate there was a tie vote; two Councillors voting that the Mayor and the former Deputy Mayor were in conflict and two Councillors voting that they were not. The Minutes further indicated that Councillors that voted viewed the motion regarding the conflict of interested for the proposed quarry as having failed due to the tie vote and thereby the Mayor and former Deputy Mayor were not in a conflict of interest and were entitled/required to vote on the proposed quarry.

Board's Decision

In arriving at its decision, the Board reviewed the submissions and comments given by parties present at the hearing along with the technical information and written submissions. The Board is bound by *Section 42* of the *Urban and Rural Planning Act, 2000* and therefore must make a decision that complies with the applicable legislation, policy and regulations.

In particular, *Section 42 (10)* of the *Urban and Rural Planning Act, 2000* specifies that the Board may only confirm, reserve or vary the decision under appeal.

42. (10) In determining an appeal, a board may confirm, reverse or vary the decision appealed from and may impose those conditions that the board considers appropriate in the circumstances and may direct the council, regional authority or authorized administrator to carry out its decision or make the necessary order to have its decision implemented.

The Board notes that Council agreed to hold a vote on the issue of potential conflict of interest for the Mayor and former Deputy Mayor as is authorized under *Section 209 (1)* of the *Municipalities Act*. The Board has determined that the tie vote is not in compliance of *Section 209 (1)* of the *Municipalities Act* which requires a majority vote of Council. The Board has also determined that the vote on the conflict of interest matter was flawed and must be referred back to Council for another vote which fulfills the requirements of *Section 209 (1)* of the *Municipalities Act*.

Further as a result of the Council's flawed voting process on the conflict of interest matter, the Board has determined that Council's subsequent decision of June 17, 2020 to deny Final Approval of the quarry application is null and void.

The Board has agreed to refrain from ruling on other matters pertaining to the appeal until the Council vote on the conflict of interest matter has been undertaken by Council as per the requirements of the *Municipalities Act* and; subsequent decision made by Council on the Appellant's request for Final Approval of the quarry application.

Board's Order

Based on the information presented, the Board orders that the decision by the Town of Torbay on June 17, 2020 to deny Final Approval to Paul Quigley to establish and operate a quarry operation at 45A Bauline Line, Torbay, be reversed.

In reversing the decision, the Board orders that the Town Council of Torbay hold another vote on the question of conflict of interest for Mayor Scott and Councillor Appleby regarding the quarry application and this voting process must satisfy the requirements of Section 209 (1) of the Municipalities Act. Following a proper voting process on the conflict of interest matter, Council shall then hold another vote on the Appellant's request for Final Approval on his application.

The Authority and the Appellant(s) are bound by the decision of this Regional Appeal Board.

According to section 46 of the Urban and Rural Planning Act, 2000, the decision of this Regional Appeal Board 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 Appellant have received the Board's decision.

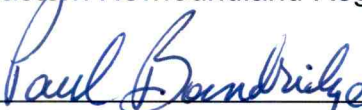
DATED at St. John's, Newfoundland and Labrador, this 10th of December, 2021.



Cliff Johnston, MCIP, Chair,
Eastern Newfoundland Regional Appeal Board



Lisa Slaney, Member
Eastern Newfoundland Regional Appeal Board



Paul Boudridge, MCIP, Member
Eastern Newfoundland Regional Appeal Board