THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA05029
Order LA06-01

IN THE MATTER of an appeal by Elizabeth Trenholm and Ken Trenholm of a decision of the City of Summerside, dated November 21, 2005.

BEFORE THE COMMISSION
on Thursday, the 16th day of March, 2006.

Brian J. McKenna, Vice-Chair
Weston Rose, Commissioner
Norman Gallant, Commissioner

Order

Compared and Certified a True Copy

(sgd.) Philip J. Rafuse

Land and Appeals Officer
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by Elizabeth Trenholm and Ken Trenholm of a decision of the City of Summerside, dated November 21, 2005.

Contents

IN THE MATTER of an appeal by Elizabeth Trenholm and Ken Trenholm of a decision of the City of Summerside, dated November 21, 2005.

Appearances & Witnesses

1. **For the Appellants**

   Elizabeth Trenholm
   Ken Trenholm

2. **For the Respondent**

   Counsel:
   Krista J. MacKay

   Witnesses:
   Thayne Jenkins

IN THE MATTER of an appeal by Elizabeth Trenholm and Ken Trenholm of a decision of the City of Summerside, dated November 21, 2005.

Reasons for Order

1. Introduction

[1] This is an appeal filed on December 9, 2005 with the Island Regulatory and Appeals Commission (the Commission) under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8, (the ***Planning Act***) by Elizabeth Trenholm and Ken Trenholm (the Appellants). The Appellants are appealing a November 21, 2005 decision of the City of Summerside (the Respondent) to deny a request by the Appellants for an amendment to increase the maximum number of children permitted at their day care centre. Specifically, the amendment seeks to increase the maximum number of children from ten to fifteen children for the day care centre known as the Dreams Unlimited Childcare Centre located at 2 Darby Drive in Summerside.

[2] After due public notice, the Commission proceeded to hear the present appeal on February 1, 2006.

2. Discussion

Appellants' Position

[3] The Appellants' oral submissions presented at the hearing are summarized below.

- The Respondent's Council did not follow due process in its consideration of the Appellants' request for the amendment. The recommendation of the Respondent's Technical Services Committee should not have been given as much weight by Council as the Appellants were not invited to make a presentation and were thus not present at the October 27, 2005 committee meeting. An opponent of the daycare amendment was present and was allowed to speak to the matter. In addition, Council at its November 21, 2005 meeting failed to give significant weight to a petition which was overwhelmingly in support of the amendment.

- Council's decision appears to be premised on concerns over a commercial business entering a residential area. There is already a long established commercial business in the neighbourhood. However, small and medium sized daycare centres are allowed in a residential zone. The City of Summerside Zoning Bylaw SS-15 (the Bylaw) allows a medium sized daycare, defined as 8 to 15 children, in a single-family residential (R1) zone (the R1 zone), subject to a permit and also subject to Council's discretionary approval. No complaints were presented to Council about the current operation of the day care.

- The sole specific concern presented by opponents of the day care amendment related to a potential increase in traffic. The day care center's log-in, log-out book reveals an average of 4.4 additional vehicles arriving per day as a result of the center's existing operations. From 2002 to 2004, the traffic count increased from 384 to 472 vehicles per day. The daycare centre presently accounts for a very insignificant increase in traffic in the neighbourhood and the daycare amendment will result in only a very small further increase in traffic.

The Appellants submit that the Respondent's Council did not fairly exercise its discretion under section 15.4 of the Bylaw and therefore the Appellants request that the Commission quash the Respondent's decision and substitute a decision approving an amendment to increase the maximum number of children permitted at the Appellants' daycare centre from ten to fifteen children.

Respondent's Position

The Respondent's oral submissions presented at the hearing are summarized below.

- The Respondent contends that it followed the process set out in its Bylaw properly and that its decision to deny the daycare amendment was in accordance with sound planning principles. Accordingly, it is submitted that the Commission should give deference to the Respondent. The amendment involved a discretionary use and the Respondent properly exercised its discretion to deny the amendment. The arguments for and against the amendment were carefully considered by the Respondent. Ultimately, the amendment was defeated by a five to three vote of Council.

- The Respondent in 2004 allowed the Appellants to have a day care centre in an R1 zone with a maximum of ten children. At that time a petition revealed that the nearby residents were against having a daycare centre with a capacity of fifteen children in their neighbourhood. A compromise was reached and the Respondent then approved the Appellants' day care centre with a maximum of ten children. The Appellants were given the option to reapply the following year to increase the capacity of the day care centre.

- While it is acknowledged that the Appellants' 2005 application for an amendment was ultimately supported by a petition revealing that many residents had changed their minds, with a majority of nearby residents now in favour of the increase from ten to fifteen children, two residents were still opposed to the increase. One of these residents lives beside the Appellants' property, the other resident is directly across the street from the Appellants' property. It is submitted that the Respondent gave significant weight to the concerns of the minority who were opposed to the amendment because they were most directly affected.

The Respondent requests that the Commission deny this appeal.

3. Findings

[4] After a careful review of the evidence, the information provided by the parties, and the applicable law, it is the decision of the Commission to allow the appeal for the reasons that follow.

[5] Section 15 of the Bylaw sets out the zoning uses under the R1 zone. Of particular importance to this appeal is section 15.4 which reads as follows:

> **Conditional Uses**
>
> 15.4 Subject to a permit:
>
> - Home occupation
> - Garden suite (also subject to Council discretionary approval)
> - Tourist home (also subject to Council discretionary approval)
> - Day care: medium (also subject to Council discretionary approval).
>
> [amended Oct. 2, 2001]

[6] Day care is defined under section 45 of the Bylaw as:

> **DAY CARE** includes: [amended Oct. 2, 2001]
>
> **Small Day Care** means a *home occupation* in a residential dwelling for care and supervision of 3-7 children for compensation, but shall not include overnight accommodation.
>
> **Medium Day Care** means the use of up to 50% of the floor area of a residential dwelling ***for care and supervision of 8-15 children for compensation***, but shall not include overnight accommodation.
>
> **Large Day Care means** a building used for the care and supervision of 8-50 children for compensation, but shall not include overnight accommodation and shall not be a public or private grade school.
>
> [emphasis added]

[7] Section 4.10 of the Bylaw deals with the procedures required for "discretionary use approval".

[8] Throughout the documentation on file with the Commission, it appears that the Respondent considered that the capacity range of eight to fifteen children, and the maximum capacity of ten children approved by the Respondent for the Appellants' 2004 application, would include children who resided in the residential dwelling who were cared for in the day care centre. Thus, in the present matter, the Appellants' two children who were being cared for in the day care centre would be counted under the Bylaw, reducing the number of paid spaces available at the Appellants' day care.

[9] However, given the wording, "*for care and supervision of 8-15 children for compensation"* the Commission rejects the notion that the Appellants' children who were also cared for in this day care would reduce the maximum capacity provided for under the Bylaw.

[10] The Respondent contends that it may consider and follow the wishes of a minority viewpoint expressed on a petition, particularly where those persons would be likely to be most affected by a decision. The Commission agrees with this view in general. The Respondent is not bound to make decisions on the basis of majority rule. However, in the present matter, the reasons expressed by the residents who were opposed to the 2005 amendment to increase the day care centre's capacity ought to be examined closely.

[11] From the evidence before the Commission, it appears that the only specific concern raised by residents against the day care centre's capacity increase was related to traffic. The Commission has had the benefit of the information contained in the Appellants' log-in, log-out book and is satisfied that the increase in traffic in the area surrounding the day care centre would be minimal. Further, it is worthy of note that the Respondent did not present a traffic study of the area to its Council, or indeed upon appeal, to the Commission.

[12] It appears that one of the main concerns of the Respondent involved the presence of a commercial enterprise in a residential neighbourhood. A day care centre is a commercial enterprise. However, a "medium day care" is allowed in an R1 neighbourhood, subject to Council's discretionary approval and subject to a conditional use permit. The Bylaw has already allowed for the possibility of a particular class of commercial enterprise in an R1 neighbourhood. In 2004 Council had approved a commercial enterprise in the neighborhood: the Appellants' "medium day care". In exercising its discretion whether or not to approve the 2005 amendment sought by the Appellants, it was incumbent on Council to consider the effect on the neighbourhood that the requested five additional day care "spaces" would cause.

[13] The Respondent's "compromise" decision in 2004 to permit the day care centre, subject to a maximum of ten children, noted that the Appellants could request in the following year an amendment to increase the capacity of their day care centre. The 2004 decision also appeared to be heavily influenced by a petition provided to the Respondent. In the Commission's view, this left the Appellants with the impression that their application for an amendment to increase the capacity of their day care would be looked upon favourably after one year of operation if the neighbours changed their opinions in favour of the centre. Indeed, the suggestion was made at the October 27, 2005 Technical Services/Planning Board meeting that at least one member would have been more supportive if a petition in favour of the amendment had been presented by the Appellants. However, by the time Council made its decision to deny the amendment on November 21, 2005, Council had the benefit of a neighbourhood petition of support for the increase in capacity from 10 to 15 children.

[14] The Commission finds that the Respondent did not fairly exercise its discretion to approve or deny the Appellants' 2005 application. In effect, the Respondent's criteria on this discretionary matter were a moving target. A petition appeared to be important in 2004. It also appeared to be important to Technical Services/Planning Board in October 2005. However, when a petition in support was later provided, this new found support demonstrated by the Appellants' neighbours appeared to have received little weight in Council's November 21, 2005 deliberations. While it is certainly reasonable to consider the views of the minority, this should have focused on the impact of the requested increase in capacity. The only tangible issue which appears to have been raised by neighbours opposed to the amendment concerned an increase in traffic. However, this does not appear to have been Council's reason for denying the day care amendment application.

[15] Discretion should not be unfettered. The principles of natural justice and fairness cannot be ignored. The Respondent is bound by these principles as is the Commission. The Commission has taken considerable time to review the minutes of the various meetings of the Respondent's Technical Services/Planning Board and Council in 2004 and 2005. While the Commission is of the view that the Respondent acted in a fair manner in 2004, the Commission finds that the minutes of the meetings held in 2005 strongly indicate that the Respondent acted in an unfair manner towards the Appellant's amendment application. This is not to say that the Respondent went so far as to act in bad faith. However, the Commission is of the opinion that the Respondent exercised its discretion in an unfair manner.

[16] The Commission may, in some circumstances, remit a matter under appeal back to the Respondent with instructions for its reconsideration. However, the Commission will, in this case, substitute its own decision for that of the Respondent's Council. It is well established that the Commission hears appeals *de novo* and may substitute its decision for that of the decision maker of first instance. The Commission is of the view, in this matter, that the Appellants might not receive a fair hearing from the Respondent.

[17] Accordingly, the Commission hereby quashes the Respondent's November 21, 2005 decision which is the subject of this appeal. The Commission orders that the Appellants application to increase the number of spaces in their day care centre from ten to fifteen children be approved. The Appellants will be required to obtain a conditional use permit from the Respondent. Such a permit shall not be refused unreasonably.

4. Disposition

[18] An Order quashing the Respondent's decision and substituting a decision approving an amendment to increase the maximum number of children from ten to fifteen children for the Appellants' day care centre, located at 2 Darby Drive in Summerside, will issue.

IN THE MATTER of an appeal by Elizabeth Trenholm and Ken Trenholm of a decision of the City of Summerside, dated November 21, 2005.

Order

WHEREAS the Appellants Elizabeth Trenholm and Ken Trenholm appealed a decision of the City of Summerside, dated November 21, 2005 to deny a request for an amendment to increase the maximum number of children from ten to fifteen children for the Appellants' daycare centre;

AND WHEREAS/UPON the Commission heard the appeal at public hearings conducted in Charlottetown on February 1, 2006 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. **The appeal is allowed.**

2. **The Respondent's decision of November 21, 2005 to deny the Appellants' request for an amendment is hereby quashed.**

3. **The Commission hereby orders that the Appellants' request for an amendment to increase the maximum number of children from ten to fifteen children for the Appellants' daycare centre be approved.**

4. **The Appellants shall be required to apply for a conditional use permit from the Respondent.**

5. **The Respondent shall not unreasonably refuse the Appellants a conditional use permit.**

DATED at Charlottetown, Prince Edward Island, this 16th day of March, 2006.

BY THE COMMISSION:

Brian J. McKenna, Vice-Chair

Weston Rose, Commissioner

Norman Gallant, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.*

IRAC141A(99/2)