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

Docket LA06010 and LA06011
Order LA07-01

IN THE MATTER of appeals by Valleybrook Pharmcare Ltd., Kerry Murphy and Claire Murphy of a decision of the Town of Montague, dated July 10, 2006.

BEFORE THE COMMISSION
on Tuesday, the 2nd day of January, 2007.

Brian J. McKenna, Vice-Chair
Kathy Kennedy, Commissioner

Order

Compared and Certified a True Copy

(sgd.) Philip J. Rafuse

Land and Appeals Officer
Land, Corporate and Appellate Services Division

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Contents

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Appearances & Witnesses

1. **For the Appellants Valleybrook Pharmcare Ltd. and Kerry Murphy**

   Counsel:

   John Hennessey, Q.C.

   Witnesses:

   Kerry Murphy
   Claire Murphy
   Phil Wood

2. **For the Appellant Claire Murphy**

   Claire Murphy

3. **For the Respondent Town of Montague**

   Counsel:

   Karen MacLeod

   Witness:

   Robin Campbell

4. **For the Developers Terry Walsh and Paul Jenkins**

   Counsel:

   Barry Burley

   Witnesses:

   Dr. David Hambly
   Terry Walsh

IN THE MATTER of appeals by Valleybrook Pharmcare Ltd., Kerry Murphy and Claire Murphy of a decision of the Town of Montague, dated July 10, 2006.

Reasons for Order

1. Introduction

[1] These are two consolidated appeals filed on July 28, 2006 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 Valleybrook Pharmcare Ltd. and Kerry Murphy (Docket LA06010) and Claire Murphy Docket (LA06011) (the Appellants) appealing a decision of the Town of Montague (the Respondent).

[2] On July 10, 2006, the Respondent's Council approved an application by Terry Walsh and Paul Jenkins (the Developers) for an expansion of the Kings County Medical Centre (the proposed expansion). Development permit M-06-35 was then issued by the Respondent's staff on July 12, 2006.

[3] After due public notice and suitable scheduling for the parties, the Commission heard this appeal on October 11 and October 23, 2006.

[4] Counsel for the Appellant Valleybrook Pharmcare Ltd. and Kerry Murphy requested an opportunity to file a written submission in response to the written submission filed at the hearing by Developers' Counsel. The Appellant's submission was received on November 6, 2006.

2. Discussion

Appellants' Position

[5] The Appellants submitted numerous documents, presented considerable testimony and extensive oral argument at the hearing. Highlights of the Appellants' oral submissions follow.

- The Respondent failed to follow its own bylaw and, accordingly, the development permit should be quashed.

- The proposed expansion is situated in an R-3 residential medium density zone. The application for the proposed expansion was referred to in a memo for Respondent's Council as a "commercial" development. The proposed expansion would contain a retail pharmacy, which is a commercial enterprise. Mr. Wood, the Appellants' expert witness, testified that a commercial or retail business would not be permitted in that zone.

- Mr. Wood testified that the R-3 permitted uses set out in the Respondent's Zoning Bylaw went well beyond the permitted uses for that zone set out in the Respondent's Official Plan. If a bylaw is inconsistent with the Official Plan, the inconsistent portion of the bylaw is invalid.

- The Respondent was concerned about the sale of sundry goods at the pharmacy, and thus attached a condition preventing the stocking or sale of items in the pharmacy "that are not medical in nature". As there is no common definition of "medical" items, this condition would be unenforceable.

- The application for the proposed expansion was signed by Terry Walsh, one of the Developers, and not the actual owner, Kings County Medical Centre. While this may seem like a small technical argument, it is vital that the permit be issued to the actual owner for enforcement purposes. In this case, the permit was issued to Terry Walsh and Paul Jenkins, neither of whom owns the property.

- The proposed expansion is inconsistent with the goals of the Official Plan to protect and enhance residential neighbourhoods and promote commercial development along Main Street. The establishment of a retail pharmacy within the R-3 zone would significantly increase traffic in a residential area.

- The application did not contain a sketch or plan showing the information required by section 3.4.1 of the Zoning Bylaw. Further, an exterior view showing the elevations of all four sides as required by section 3.4.2 of the Zoning Bylaw was not provided. The application does not make it clear whether there was sufficient parking for this development. However, it is clear that the parking spaces are not of the size and dimensions required by section 7.15.2 of the Zoning Bylaw.

[6] The Appellants submit that the Respondent failed to follow its own Zoning Bylaw and that the Respondent's decision to approve the Developer's application was contrary to the Respondent's Official Plan. Accordingly, the Appellants request that the Commission quash the development permit for the proposed expansion.

Respondent's Position

[7] The Respondent provided numerous documents, testimony and considerable oral argument at the hearing. Highlights of the Respondent's oral submissions follow.

- Under subsection 28(1) of the ***Planning Act***, it is the administration of a bylaw which may be appealed. It is submitted that the legality of a bylaw is not within the scope of an appeal before the Commission.

- While the application was not actually signed by the owner of the property, it was hand delivered by Dr. Hambly, a principal of the Kings County Medical Centre. This action made it clear to the Respondent's staff that the actual owner consented to, and approved of, the application. Furthermore, the second page of the application indicates that the signature may be of the owner or the authorized agent. It is submitted that Mr. Walsh was authorized to sign as the owner's agent.

- A floorplan and plot plan were provided with the application showing the shape and the dimensions of the proposed expansion. The location of the boundaries can be determined using common sense. An exterior view filed with an application mainly impacts on the cosmetics of a proposed development and the absence of such a view would not affect the merits of the application.

- It is submitted that the proposed expansion is a permitted use as a "medical or paramedical clinic".

- Two conditions were provided on the development permit. These conditions were inserted for clarification only. The first condition that the project conforms to the requirements of the Fire Marshall, would apply whether or not it was expressed in a condition. The second condition, that items not of a medical nature be stocked or sold, also did not have to be stated as a condition because the Zoning Bylaw only permitted a "medical or paramedical clinic".

- The surrounding neighbourhood represents a mix of uses including a medical clinic, a hospital, a seniors development, an ambulance facility and a residence separated by a row of trees. None of these property owners objected to the proposed expansion. Concerns regarding traffic were not supported by any studies.

- The proposed expansion has merit in accordance with sound planning principles. A pharmacy would be located within a medical clinic adjacent to a hospital and seniors apartments. The Official Plan makes it clear that the Respondent is "open for business". The Respondent is concerned about the health of its residents and wishes to attract, and retain, physicians.

[8] The Respondent submits that it properly administered its Zoning Bylaw in deciding to issue the development permit. Accordingly, these appeals should be denied.

Developers' Position

[9] The Developers provided considerable documentation, testimony as well as very extensive oral and written submissions at the hearing. Highlights of the Developers' submissions include the following:

- The Respondent was clearly and lawfully acting within its powers when it issued the development permit for an expanded medical facility and when it permitted the inclusion of a pharmacy within that expanded facility. If the condition regulating the type of products the pharmacy can stock and sell is *ultra vires* the lawful powers of the Respondent's Council, then the proper remedy is to severe the condition. An *ultra vires* condition is not a ground to overturn the otherwise fully lawful act of the Respondent's Council in issuing the permit.

- The Appellants' contention that the Respondent's decision is contrary to the Official Plan's goals, objectives and policies, calls for interpretation of the Official Plan to determine the purpose served by the stated goals, objectives and policies. The Developers maintain that the guiding principle for such an interpretation is found in the Official Plan's Mission Statement; namely, that "the Town is open for business." In other words, the Mission Statement calls for an expansive or liberal interpretation of the Official Plan, not a restrictive one. With a liberal reading, the Developers submit, the correct conclusion is that the Respondent acted in accordance with the Official Plan's goal and policies.

- The Developers submit it is implausible that the authors of the Official Plan intended to render illegal the permitted use of the Respondent's only medical centre; a medical facility that served the community for more than twenty-five years. Accordingly, the Developers maintain the correct statutory interpretation is that the authors of the Official Plan only intended to illustrate the type of residential uses permitted in the R-3 zone. There is no direct collision between the R-3 Zoning Bylaw and the Residential Policy, rather that the latter is merely silent on other uses. To read the Residential Policy otherwise would force one to conclude that the purpose behind the Official Plan, by not illustrating other uses, is to outlaw a permitted use that existed for twenty-five years.

- The Developers submit that the alleged procedural errors, where there is any basis in fact for them, are relatively minor and may be easily remedied. The Developers contend that any such errors are merely of a technical nature and not of sufficient weight to overturn the Respondent's decision to issue the development permit.

- In summary, the Developers argue that because the operation of a pharmacy is not specifically mentioned in the Respondent's Zoning Bylaw, the matter is a question of interpretation. The Developers maintain that the Respondent properly interpreted its Zoning Bylaw and concluded that the application was an appropriate and compatible development proposal for an R-3 zone. The proposed renovation and expansion of the Kings County Medical Centre did not conflict with existing uses. Indeed the expansion presents an enhancement of the medical services that were already in place and is an added convenience for patients attending the medical centre. This application clearly has merit.

[10] The Developers submit that the Respondent properly followed its Zoning Bylaw when it approved the issuance of a building permit for the proposed expansion of the Kings County Medical Centre. Accordingly, these appeals should be denied.

3. Findings

[11] 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 and quash the Respondent's decision to issue a development permit for the proposed expansion for the reasons that follow.

Scope of Appellate Review

[12] Appeals under the ***Planning Act*** generally take the form of a hearing *de novo* before the Commission. In an often cited decision which provides considerable guidance to the Commission, *In the matter of Section 14(1) of the* ***Island Regulatory and Appeals Commission Act*** (Stated Case), [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:

> *it becomes apparent that the Legislature contemplated and intended that appeals under the Planning Act would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.*

[13] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the person or body appealed from. Such discretion should be exercised carefully. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the person or body appealed from did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the ***Planning Act***, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[14] The Commission finds that the above-cited principle, originally applied to decisions concerning building or development permits, and later also extended to applications for variances and applications for rezoning, is applicable to the facts of this case. A two-part test is invoked:

- Whether the municipal authority, in this case the Respondent, followed the proper procedures as required in its Zoning Bylaw in making a decision to issue the development permit for the proposed expansion; and

- Whether the proposed development permit has merit based on sound planning principles.

[15] Subsection 28(1) of the ***Planning Act*** reads as follows:

> *28. (1) Subject to subsections (2), (3) and (4), any person who is dissatisfied by a decision of a council or the Minister* ***in respect of the administration of regulations or bylaws*** *made pursuant to the powers conferred by this Act may, within twenty-one days of the decision appeal to the Commission.* [emphasis added]

[16] In the present appeal, the Appellants contend that some of the permitted uses in the R-3 zone of the Respondent's Zoning Bylaw run contrary to permitted R-3 zone uses contained within the Respondent's Official Plan. The Respondent submits that the legality of a bylaw is not within the scope of an appeal before the Commission. The Developers maintain that the correct interpretation to be given is that the authors of the Official Plan only intended to illustrate the type of residential uses permitted in the R3 zone.

[17] A careful reading of subsection 28(1) cited previously makes it quite clear that the scope of an appeal under the ***Planning Act*** is, in this case, the Respondent's decision in respect of the administration of its Zoning Bylaw. The legality of its Zoning Bylaw itself is not under the appellate microscope. Rather, it is the administration of that bylaw which is the subject of an appeal.

[18] However, the administration of a bylaw cannot exist in a vacuum. The bylaw must be administered mindful of the law, including the ***Planning Act***, the Respondent's Official Plan, other statutes which may be applicable and the fundamental principles of fairness and natural justice.

[19] Subsection 15(2) of the ***Planning Act*** reads as follows:

> *15(2) The bylaws or regulations made under clause (1)(d) shall conform with the official plan and in the event of any conflict or inconsistency, the official plan prevails. 1988,c.4,s.15; 1991,c.1,s.1; 1991,c.18,s.22; 1994,c.46,s.4* {eff.} *Sept. 1/94; 1995,c.29,s.6 {eff.} Oct. 14/95.*

[20] Given subsection 15(2) of the ***Planning Act***, the Commission finds that a municipality must administer its bylaws in harmony with its Official Plan.

Analysis of the Respondent's Official Plan and Bylaw

[21] Policy 2.5 of the Respondent's Official Plan reads as follows:

> Policy 2.5
>
> Council shall establish in the Land Use By-law a "Residential Medium Density (R-3)" Zone that permits the following uses:
>
> - all those uses permitted in the R-1 and R-2 zones
> - multiple unit dwellings;
> - row houses;
> - double duplex dwellings;
> - triplexes;
> - converted dwellings of three or more units;
> - boarding or rooming houses to a maximum of six rooms;
> - flower shops, provided they are located along a main thoroughfare, specifically Queen's Road, Main Street or Wood Islands Road;
> - bed and breakfast establishments to a maximum of six rooms.

[22] Section 12.1 of the Zoning Bylaw reads as follows:

> **12.1 Permitted Uses**

> 12.1.1 The following uses shall be permitted in the Residential Medium Density Zone (R-3):
>
> (i) triplex dwellings;
> (ii) townhouse/rowhouse dwellings;
> (iii) multiple unit dwellings;
> (iv) converted dwellings or expansions to existing converted dwellings
> (v) boarding houses with a maximum of six rooms to rent;
> (vi) bed and breakfasts with a maximum of six rooms to rent;
> (viii) [sic] senior citizen housing;
> (ix) nursing homes and homes for the aged
> (x) doctor's office and medical, or para-medical, clinic;
> (xi) dentist's office and dental, or para-dental, clinic;
> (xii) optometrist office;
> (xiii) lawyer's office or para-legal office;
> (xiv) accountants and bookkeeping office;
> (xv) insurance and financial planners office;
> (xvi) veterinarian's office and small animal hospital;
> (xvii) similar professional office or service;
> (xviii) funeral home;
> (xix) parking lot;
> (xx) flower shops, provided they are located on a main thoroughfare, specifically Main Street, Queen's Road and Woods Islands Road;
> (viii) [sic] any use permitted in the R-2 Zone subject to the R-2 Zone requirements.

[23] A plain reading of the quoted sections above suggest that the permitted R-3 uses in the Zoning Bylaw go well beyond the more limited, mostly residential, permitted R-3 provisions of the Official Plan. The Developers invite the Commission to read Policy 2.5 as only setting out examples of residential uses, and being merely silent on other non-residential uses.

[24] There are two flaws with the Developers' argument. First, while Policy 2.5 mostly lists residential uses, it does also include flower shops, a non-residential use. Second, and more importantly, the Commission must search the rest of the Official Plan to attempt to glean the drafter's true intent.

[25] Under section 4.4 Commercial Development a) Discussion, located near the bottom of page 26 of the Official Plan, it is stated:

> *There are a number of professional offices in Montague located outside the Commercial Business District including a medical doctor's office, ambulance service, and accounting offices. Council intends to allow these existing professional offices to continue at their present location and list them as Commercial – Other if located along an arterial road or as permitted non-conforming use if not on an arterial road.*

[26] Policy 4.2 of the Official Plan then reads:

> Policy 4.2
>
> Council shall permit within the Commercial Business District Zones, (C-1 and C-2) the following and similar types of uses:

…

- Businesses and Professional Offices;

…

- Medical Clinics and other professional offices;

…

[27] Under Policy 4.7 of the Official Plan it states in part:

> Council shall permit within the Commercial – Other (C-3) zone the following and similar types of uses:
>
> General:
>
> - Business and professional offices, including doctor's office, medical clinic, paramedical office, dentist's office, bookkeeping office, insurance office, financial planner's office, and veterinarian's office and small animal hospital;
>
> …

Commission's Findings

[28] Based on a review of the Official Plan, the Commission finds that it was the intent of the Respondent that doctor's offices, medical clinics and similar businesses should exist in commercial zones. However, it was also the intent of the Official Plan that doctor's offices, medical clinics and similar businesses, which were not in a commercial zone and were not on an arterial road, might continue to operate as non-conforming uses.

[29] Accordingly, the Commission finds that there is an inconsistency between a portion of the Respondent's Official Plan and a portion of its Zoning Bylaw. The Official Plan permits a doctor's office or medical clinic in commercial zones, but allows existing facilities in other zones as a non-conforming use. The Zoning Bylaw allows a doctor's office or medical clinic as a permitted use in an R-3 zone. Pursuant to subsection 15(2) of the ***Planning Act***, the requirements of the Official Plan will prevail to the extent of the inconsistency.

[30] The Commission finds that the existing Kings County Medical Centre, currently zoned R-3, is a non-conforming use as there is no evidence before the Commission that it is located along an arterial road.

[31] Section 7.13 of the Respondent's Zoning Bylaw considers what may, and may not, be permitted with a non-conforming structure or use. A portion of section 7.13.4 is particularly germane to this appeal:

> 7.13.4 Where there is a nonconforming use in a structure, the structure may not be
>
> (i) expanded or altered so as to increase the volume of the structure capable of being occupied;
>
> …

[32] The Commission finds that as a non-conforming use, the Kings County Medical Centre may continue to exist in its present form, with renovations or alterations as permitted under section 7.13 of the Respondent's Zoning Bylaw. However, the current zoning of the medical centre prevents the proposed expansion.

Concluding Remarks

[33] The evidence before the Commission suggests that the concept of a renovated and expanded medical clinic, complete with a small pharmacy, has considerable merit. The Commission appreciates that the Respondent would consider enhanced office facilities for existing and new physicians, as well as the convenience of the public, to be laudable goals.

[34] Although the concept has merit, the decision to approve the development permit was fatally flawed. There is a serious inconsistency between the Official Plan and the Zoning Bylaw. In the area of that inconsistency, the Official Plan shall prevail. The proposed expansion of the Kings County Medical Centre is not permitted given its current zoning. Accordingly, the Commission hereby quashes the development permit issued by the Respondent for the proposed expansion.

[35] However, the Developer is free to re-apply so that the Respondent can carefully consider the matter and make a fresh decision. No doubt, the Respondent may wish to obtain professional advice.

[36] Had the Kings County Medical Centre already been in a commercial zone, or had a rezoning application been made to rezone the parcel of land required for the proposed expansion, it is likely that the outcome of the present appeal would have been very different.

[37] With respect to the other arguments raised by the Appellant, it is not necessary for the Commission to address them as the Commission has ordered that the development permit be quashed. However, even though some of the alleged procedural errors may be of a mere technical nature, the Respondent and the Developers should strive to avoid such errors in the event the Developers submit a new application.

[38] For the reasons stated throughout, the Commission hereby quashes the July 10, 2006 decision of the Respondent to issue a development permit to the Developers and the actual building permit M-06-35, dated July 12, 2006, is also accordingly quashed.

4. Disposition

[39] An order allowing the appeal and quashing the Respondent's July 10, 2006 decision to issue a building permit to the Developer, and quashing building permit M-06-35 issued on July 12, 2006, will therefore issue.

IN THE MATTER of appeals by Valleybrook Pharmcare Ltd., Kerry Murphy and Claire Murphy of a decision of the Town of Montague, dated July 10, 2006.

Order

WHEREAS Valleybrook Pharmcare Ltd. and Kerry Murphy (LA06010) and Claire Murphy (LA06011) (the Appellants) have appealed a decision of the Town of Montague (the Respondent), dated July 10, 2006;

AND WHEREAS the Commission heard these appeals at public hearings conducted in Charlottetown on October 11, 2006 and October 23, 2006 after due public notice and suitable scheduling for the parties;

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 July 10, 2006 decision to issue a Development Permit to Terry Walsh and Paul Jenkins (the Developers) is hereby quashed.**
3. **Development Permit M-06-35, issued July 12, 2006, is also hereby quashed.**

DATED at Charlottetown, Prince Edward Island, this 2nd day of January, 2007.

BY THE COMMISSION:

Brian J. McKenna, Vice-Chair

Kathy Kennedy, 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.*

IRAC141AA(2006/10)