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

Docket LA06014
Order LA07-05

IN THE MATTER of an appeal by Simon Compton of a decision of the Town of Stratford, dated October 25, 2006.

BEFORE THE COMMISSION
on Thursday, the 21st day of June, 2007.

Brian J. McKenna, Vice-Chair
Norman Gallant, Commissioner
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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Appearances & Witnesses

1. For the Appellant

Counsel:

Barbara Stevenson, Q.C.

Witnesses:

Simon Compton
Kent MacDonald

2. For the Respondent

Counsel:

Lindsay A. Wadden

Witness:

Kevin Reynolds

IN THE MATTER of an appeal by Simon Compton of a decision of the Town of Stratford, dated October 25, 2006.

Reasons for Order

1. Introduction

[1] This is an appeal filed on November 15, 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 Simon Compton (the Appellant).

[2] The Appellant is appealing an October 25, 2006 decision of the Town of Stratford (the Respondent) to deny a request to rezone a portion of parcel number 865550 (the subject property) near Creekside Drive from O1 (Recreation and Open Space Zone) to R1 (Single Family Residential Zone).

[3] On January 23, 2007 the parties held an alternative dispute resolution session and pre-hearing conference with Commission staff.

[4] After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on June 4, 2007.

2. Discussion

Appellant's Position

[5] Highlights of the Appellant's oral submissions are summarized below.

- The Appellant is a very credible developer who has been involved in several projects in Stratford since 1975. Kent MacDonald, who proposes to build a home on the subject property, is willing to work with the Respondent and enter into a development agreement. The home would be constructed and positioned so as to not interfere with the view enjoyed by neighbouring homes.

- The subject property is currently zoned O1 which would permit the construction of a building or buildings accessory to the use of the adjacent golf course. It is submitted that a rezoning of the subject property to R1 to allow the construction of a single family home would be the best use for this parcel.

- It is submitted that the second letter from the new owners of the "dream house" is a request for clarification and not a letter of opposition to the rezoning of the subject property.

- It is submitted that the Respondent's Council erred in making its decision to deny the rezoning of the subject property from O1 to R1. The Respondent treated the Appellant's application as a request to obtain a formal letter of denial in order that the Appellant could file an appeal with the Commission. There was confusion in the Respondent's final deliberations on October 25, 2006. A councillor misunderstood the permitted uses for a parcel of land within an O1 zone and stated in response to a question from another member of Council that the subject property was presently zoned "to not have anything constructed there". The Respondent then proceeded incorrectly using a false assumption. Had the Respondent conducted a proper analysis of the application, the result of Council's vote may have been different.

The Appellant requests that the Commission reverse the Respondent's decision and order that the subject property be rezoned to R1.

Respondent's Position

[6] Highlights of the Respondent's oral submissions are summarized below.

- The issue is not about a beautiful home which could be built on the subject property or the Appellant's fine reputation as a developer. Rather, the issue is whether the Respondent made a sound decision in accordance with its Revised Official Plan 2003 and zoning bylaw.

- The Appellant has argued that the Respondent confused an earlier informal application for rezoning with the formal application which is the subject of the present appeal. The Respondent's Planning and Heritage Committee recommended that no public meeting be called concerning the present application. However, the Respondent's Council made the decision to hold a public meeting to consider the application. The public meeting was held on October 3, 2006 and Planning and Heritage Committee on October 23, 2006 and Council on October 25, 2006 fully considered the formal application.

- The objections or agreement of residents in a neighbourhood is not the sole factor to be considered. Rather, the Respondent must also make its decisions on a rezoning application in full accordance with its bylaw and Revised Official Plan 2003.

- Rezoning the subject property from O1 to R1 would not maintain the integrity of the existing neighbourhood and would create a "dangerous precedent". The Respondent's decision to deny the application to rezone the subject parcel is in accordance with sound and consistent planning principles.

The Respondent requests that the Commission uphold Council's decision of October 25, 2006 to deny the Appellant's application for a rezoning of the subject parcel.

3. Findings

[7] After a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission to deny the appeal. The reasons for the Commission's decision follow.

[8] 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.*

[9] 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 the application will be approved or denied.

[10] The Commission finds that the above-cited principle, originally applied to decisions concerning building or development permits, and later applied 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 Bylaw in making a decision on the rezoning application; and

- Whether the Respondent's decision with respect to the proposed rezoning of the land has merit based on sound planning principles.

[11] With respect to procedure, the Commission notes that the Respondent appears to have followed the administrative procedures required for a rezoning application. A review of the Respondent's file reveals that notices were sent to nearby property owners, a public notice was published in a local newspaper, a public meeting was held and persons appearing before the Respondent were given an opportunity to be heard.

[12] While it does appear from the documents in evidence that the Respondent initially approached the matter as a formal reconsideration of an earlier decision, the intent displayed was not to prejudice the Appellant. On the contrary, the intent was to provide the Appellant with an opportunity to file an appeal, given that the appeal period for the earlier decision had expired.

[13] However, rather than merely "rubber stamping" an earlier decision, the Respondent appeared to have moved beyond a mere reconsideration and opted to hold a public meeting to seek more input from the public. At subsequent meetings of the Respondent's Planning and Heritage Committee and Council the present matter was discussed in considerable depth. While it appears that one member of council did not fully understand the permitted uses within the O1 zone, there is no evidence before the Commission that the Respondent failed to follow the rezoning procedures set out in its bylaw.

[14] The Commission notes the following portions of the Respondent's Revised Official Plan 2003:

> ***4.3 Residential***
>
> *…*
>
> - *To ensure that the character and appearance of existing neighbourhoods is maintained and enhanced.*
>
> *…*
>
> - *To create a "level playing field" across the Town in terms of lot and development standards.*

[15] While the present application for rezoning may not be an "infilling" in the strict sense of the term, the following policy from the Respondent's Revised Official Plan 2003 is helpful in considering the merits of rezoning adjacent land to extend an existing residential neighbourhood:

> ***Policy PR-5: Infilling***
>
> *Council shall ensure that "infilling" which occurs within existing developed residential neighbourhoods conforms to the established development character and streetscapes, even if the resulting standards exceed the minimum provisions of the Development Bylaw.*
>
> ***Plan Action:***
>
> - *The Development Bylaw shall require that residential "infilling" must conform to the development standards under which the subdivision was originally approved or be in general conformance with neighbouring developed lots.*

[16] The following comments concerning the Appellant's application were reported in the minutes of the October 3, 2006 regular monthly meeting of the Respondent's Planning and Heritage Committee:

> *…*
>
> *The Town Planner noted that we have to take a stance on this issue even without having a response back from the public. We can't always rely on the residents to give us the direction needed to make a decision.*
>
> *The Development Officer noted that when Creekside Drive was developed there was an opportunity for Mr. Compton to possibly develop*

> *a lot or maybe two lots. It may have involved redesigning the geometry somewhat of Creekside Drive. There could have been a way to take advantage of this parcel at the point in time. When Mr. Compton built the golf course he built his own residential subdivision and that if he had put another row of houses in front of the existing homes on Golfview Drive, there would be some irate people objecting to "after-the-fact" development in an area previously zoned for non-residential development.*
>
> *…*
>
> *The Town Planner also noted that there are statements throughout the Official Plan that consistently address that we are to protect the character* [of] *existing neighbourhoods. Does this application contravene that statement when we allow a home to be build* [sic] *in a back yard?*

[17] The following comments concerning the Appellant's application were reported in the minutes of the October 11, 2006 regular monthly meeting of the Respondent's Council:

> *…*
>
> *Councillor Dunphy asked on what basis can we deny it and Councillor McMillan replied that we have an existing neighbourhood and people who bought their homes there bought them on the understanding that this space was going to a* [sic] *remain a "recreational" site. Dale* [McKeigan, town planner] *added that if we look at it from a truly planning perspective, the official plan is inundated with a statement that says maintain the character of the existing neighbourhood. We have an existing neighbourhood in place and we have an activity behind it that is a recreational use. When we start creating pan handle lots to stick in behind existing buildings so those buildings are looking into someone else's backyard, I don't believe that is maintaining the character of existing neighbourhoods. I think we are stepping outside the bounds of good sound planning. We would also have to do an official plan amendment and a bylaw amendment. Dale stated that we stand on pretty strong ground if we decide to deny it.*

[18] In his testimony before the Commission, the Respondent's development officer stated that if a person purchasing a lot in front of the subject property had asked the Respondent's staff about the subject property, that person would have been informed that the property was for recreation and open space. In order to rezone a parcel, the rezoning has to be in the best interest of the established neighbourhood. The subject property is in the rear yard of two lots in an existing neighbourhood. The Revised Official Plan 2003 is clear that existing neighbourhoods are to be protected. As the subject property does not have enough frontage on a public road, it would be a "panhandle" lot resulting in a change in the streetscape.

[19] In his testimony, the Appellant told the Commission that the subject property is a redundant lot for the golf course. On the subject property a storage building, washroom, canteen etc. could be built for the golf course. However, the subject property is "too valuable a property for a storage building".

[20] Upon a review of all the evidence, the Commission finds that the Respondent did follow sound planning principles in considering the application

to rezone the subject parcel. While an attractive home carefully positioned on the subject parcel would, in all likelihood, create no material hardship or mischief for the existing neighbourhood, it would alter the character and appearance of the neighbourhood, contrary to the Respondent's Revised Official Plan 2003 and sound planning principles.

[21] As the Respondent followed the procedures set out in its bylaw and applied sound planning principles in considering the application for rezoning, the appeal is hereby denied.

4. Disposition

[22] An Order denying the appeal will therefore issue.

IN THE MATTER of an appeal by Simon Compton of a decision of the Town of Stratford, dated October 25, 2006.

Order

WHEREAS Simon Compton (the Appellant) has appealed a decision of the Town of Stratford (the Respondent), dated October 25, 2006;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on June 4, 2007 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 hereby denied.

DATED at Charlottetown, Prince Edward Island, this 21st day of June, 2007.

BY THE COMMISSION:

Brian J. McKenna, Vice-Chair

Norman Gallant, Commissioner

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)