



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

**Docket LA08013
Order LA08-06**

IN THE MATTER of an appeal by
Sharon Ogawa of a decision of the
Community of Lower Montague, dated June
4, 2008.

BEFORE THE COMMISSION
on Thursday, the 25th day of September,
2008.

Brian J. McKenna, Vice-Chair
John Broderick, Commissioner
David Holmes, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by
Sharon Ogawa of a decision of the
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4, 2008.

Contents

<i>Contents</i> _____	<i>ii</i>
<i>Appearances & Witnesses</i> _____	<i>iii</i>
<i>Reasons for Order</i> _____	<i>1</i>
1. Introduction _____	1
2. Discussion _____	1
3. Findings _____	3
4. Disposition _____	5
<i>Order</i>	

IN THE MATTER of an appeal by
Sharon Ogawa of a decision of the
Community of Lower Montague, dated June
4, 2008.

Appearances & Witnesses

1. For the Appellant Sharon Ogawa

Representative: David Hume

Witness: Sharon Ogawa

2. For the Respondent Community of Lower Montague

Counsel: Shannon Farrell

Witness: Elizabeth Nicholson

IN THE MATTER of an appeal by
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4, 2008.

Reasons for Order

1. Introduction

[1] The Appellant Sharon Ogawa (Ms. Ogawa) filed an appeal 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*). Ms. Ogawa's Notice of Appeal was received on June 12, 2008.

[2] The present appeal concerns a reconsideration decision of the Respondent Community of Lower Montague (the Community), dated June 4, 2008, to deny an application for a building permit for property number 253336 on the St. Andrew's Point Road in Lower Montague (the subject property).

[3] In Order LA08-03 dated May 30, 2008, the Commission considered an appeal by Ms. Ogawa against a March 5, 2008 decision of the Community to deny an application for a building permit for the subject property. In Order LA08-03, the Commission required the Community to reconsider Ms. Ogawa's application for a building permit on the subject parcel. The Commission also required the Community to provide full reasons for its decision and specifically refer to any documents or letters relied on.

[4] After due public notice and suitable scheduling for the parties, the present appeal was heard by the Commission at a public hearing on August 12, 2008.

2. Discussion

Ms. Ogawa's Position

[5] Ms. Ogawa reiterated her position previously summarized in Order LA08-03:

- Ms. Ogawa consulted with provincial government staff on the matters of environmental approval and the highway right of way. She understood that there would be no problem so long as any new building constructed on the subject property did not encroach any further on the highway right of way and was not built any closer to the

bank (watercourse) than the existing building which was to be removed. On the strength of this understanding, she purchased the subject property.

- In January 2008, Ms. Ogawa applied for a building permit. The January meeting of the Community's Council was cancelled due to a snowstorm. At the February meeting, Ms. Ogawa understood that the Respondent denied her application. She then filed her first appeal, docket LA08002. She then learned that no decision had actually been made because there was no quorum of the Community's Council. At the March 2008 meeting of the Community's Council, there was a quorum and her application for a building permit was denied. She then filed her second appeal, docket LA08004.
- Ms. Ogawa stated that she does not know why her application was denied. She is, however, aware of a letter, dated October 16, 2007, from the Manager of Provincial Lands, Department of Transportation and Public Works, to the Community's Administrator. Ms. Ogawa's representative suspects that the Community's decision to deny the building permit application was based on the October 16, 2007 letter.

[6] The following is a summary of additional points made by Ms. Ogawa in the course of the present appeal:

- On the original January 8, 2008 building permit application, the width given for the proposed building was 20 feet "or less". Ms. Ogawa noted that she was going by her memory at the time as it would have been difficult to measure the existing building because of the amount of snow on the subject property. The actual size of the existing building is 32 feet long, 20 feet wide at the ell, and 16 feet wide not including the ell. The proposed replacement building would be 32 feet long, 16 feet wide with no ell and would be placed on the same footprint as the old building.
- The March 31, 2008 drawing of the subject property site (Exhibit R6) was provided to the Department of Environment, Energy and Forestry by Ms. Ogawa. In this drawing, the proposed building is shown as being situated two feet closer to the water and two feet farther from the highway right-of-way. A copy of the drawing was sent to the Community. Staff of the Department of Environment, Energy and Forestry did not approve of this proposal.

[7] Ms. Ogawa requests that the Commission allow the appeal, overturn the Community's June 4, 2008 decision and order the Community to issue a building permit to her allowing the demolition of the existing building and its replacement with a new building not larger than 32 feet long by 16 feet wide to be situated on the same footprint of the old building on the subject property.

The Community's Position

[8] Highlights of the oral submission presented by the Community's Counsel include the following:

- On June 4, 2008, the Community reconsidered Ms. Ogawa's application for a building permit as ordered by the Commission. The Community ultimately denied her application because a building permit would not conform to the Community's 2006 Zoning and Subdivision Control Bylaws (the Bylaw). The Community considered the possibility of a variance; however, the subject property, at 0.22 of an acre, is a seriously undersized lot and a ten percent variance would not be enough to lawfully permit a new dwelling to be constructed.
- The March 31, 2008 drawing (Exhibit R6) submitted by Ms. Ogawa gave a strong impression to the Community that Ms. Ogawa was seeking to construct a larger building on the property, as the drawing suggested that an additional two feet of building width was being sought. The proposal illustrated by this drawing also had the effect of narrowing the distance between the building and the high water mark of the Montague River.
- Ms. Ogawa seeks to replace the existing dwelling with a new building built off site. The Community submits that "reconstruction", as referred to in section 5.5 of the Bylaw, does not contemplate tearing down an existing building and replacing with a new building.
- Section 5.19 of the Bylaw prevents erecting "any building or structure in the Community a) within the distance, specified by Provincial regulation, of the mean high water mark of any river, stream or watercourse located within or bordering on the legal boundaries of the Community; or b) within the distance, specified by Provincial regulation, of any embankment, excluding highway embankments, the slope of which is greater than 30 degrees from horizontal." The Community submits that subsection 39(5) of the *Planning Act* Subdivision and Development Regulations (the Regulations) establishes this distance at 75 feet. The Community further submits that the April 4, 2002 survey of the subject property, a copy of which was filed as Exhibit R7 and also as tab 10 of Exhibit R5, demonstrates that the present building does not meet the distance requirements set out in subsection 39(5) of the Regulations. The Community therefore submits that a new building is not permitted on the subject property.
- The Community submits that it followed proper procedures and followed sound planning principles when it made the decision to deny Ms. Ogawa's application for a building permit.

[9] The Community requests that the Commission deny the appeal. In the alternative, if the Commission allows the appeal, the Community requests that the Commission spell out clear parameters in any decision made to issue a building permit for the subject property.

3. Findings

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

[11] Section 5.5 of the Community's Bylaw reads as follows:

5.5 *Where a building has been erected on or before the effective date of these Bylaws on a lot having less than the minimum frontage or area, or having less than the minimum setback, side yard or rear yard requirement, the building may be enlarged, reconstructed, repaired or renovated provided that:*

- a) the enlargement, reconstruction, repair or renovation does not further reduce the front, side, flankage or rear yard which does not conform to the requirement of these Bylaws.; and*
- b) all other applicable provisions of these Bylaws are satisfied.*

Emphasis added.

[12] Subsections 5.17 (1) and 93) of the Bylaw read as follows:

5.17 (1) Subject to the provisions of these Bylaws, a building or structure, or use of land, buildings or structures lawfully in existence on the effective date of these Bylaws shall be permitted to continue.

5.17 (3) No structural alterations that would increase the exterior dimensions, except as required by statute or bylaw, shall be made to a building or structure while a non-conforming use thereof is continued.

Emphasis added.

[13] The Commission notes that Ms. Ogawa seeks to “reconstruct” a dwelling on the subject property. From her application and from the evidence provided before the Commission, it appears that her intention is to tear down the existing dwelling and replace it with a new building constructed off site. This new building would then be placed on the existing, or smaller, footprint currently utilized by the existing building. The net effect is that there would be no further encroachment on the highway right of way. In fact, by removing the ell, the encroachment on the highway right of way would be reduced. Further, the new building would not be placed any closer to the Montague River than the existing building.

[14] The term “reconstruct” is neither defined in the Bylaw nor in the Regulations. Black’s Law Dictionary, 6th edition, defines reconstruct as:

Reconstruct. *To construct again, to rebuild, either in fact or idea, or to remodel. To form again or anew as in the imagination or to restore again as an entity the thing which was lost or destroyed.*

[15] The above cited definition could be interpreted to allow Ms. Ogawa’s dwelling to be torn down and constructed again or anew.

[16] However, the meaning of the word “reconstruct”, as referred to in section 5.5 of the Bylaw and as considered above, cannot be viewed in isolation. Other relevant sections of the Bylaw may set boundaries to the meaning to be given to the term “reconstruct”.

[17] In the present appeal, the subject property borders the Montague River and as such the provisions of section 5.19 of the Bylaw are applicable. Section 5.19 reads as follows:

5.19 Notwithstanding anything contained in these Bylaws, no person shall erect any building or structure in the Community

- a) *within the distance, specified by Provincial regulation, of the mean high watermark of any river, stream or watercourse located within or bordering on the legal boundaries of the Community; or*
b) *within the distance, specified by Provincial regulation, of any embankment, excluding highway embankments, the slope of which is greater than 30 degrees from horizontal.*

Emphasis added.

[18] Subsection 39(5) of the Regulations reads as follows:

39(5) The nearest exterior portion of a building or structure shall be located no closer than

- (a) 75 feet (22.9 metres), or 60 times the annual rate of erosion, whichever is greater, to a beach, measured from the top of the bank;*
(b) 100 feet (30.5 metres) to a migrating primary or secondary sand dune, measured from the inland boundary of the dune;
(c) 75 feet (22.9 metres) to the inland boundary of a wetland or watercourse.

[19] Upon a review of a copy of the April 4, 2002 survey filed as Exhibit R7 and also contained at Tab 10 of Exhibit R5, the Commission finds the portion of the existing building nearest the Montague River appears to be significantly less than 75 feet from the high watermark. While Ms. Ogawa may reconstruct the existing building pursuant to section 5.5 of the Bylaw, the meaning of the term “reconstruct” must be in conformity with the requirements of the rest of the Bylaw. In the present appeal, section 5.19 is particularly germane to an understanding of how broadly the term “reconstruct” may be interpreted. Given the facts before the Commission, a building cannot be erected on the subject parcel. However, the existing building may be lawfully “enlarged, reconstructed, repaired or renovated” in accordance with the remainder of the Bylaw.

[20] For the reasons stated above, this appeal is hereby denied.

4. Disposition

[21] An Order denying this appeal follows.

IN THE MATTER of an appeal by
Sharon Ogawa of a decision of the
Community of Lower Montague, dated June
4, 2008.

Order

WHEREAS the Appellant Sharon Ogawa has appealed a decision of the Community of Lower Montague, dated June 4, 2008;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on August 12, 2008 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 hereby denied.

DATED at Charlottetown, Prince Edward Island, this 25th day of September, 2008.

BY THE COMMISSION:

Brian J. McKenna

Brian J. McKenna, Vice-Chair

John Broderick

John Broderick, Commissioner

David Holmes

David Holmes, 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.

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