



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA08020
Order LA09-03**

IN THE MATTER of an appeal by
Harvey Livingstone Inc. of a decision of the
Community of Brackley, dated November 3,
2008.

BEFORE THE COMMISSION
on Monday, the 16th day of February, 2009.

Brian J. McKenna, Vice-Chair
David Holmes, Commissioner
Anne Petley, 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
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Community of Brackley, dated November 3,
2008.

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IN THE MATTER of an appeal by
Harvey Livingstone Inc. of a decision of the
Community of Brackley, dated November 3,
2008.

Appearances & Witnesses

1. For the Appellant

Harvey Livingstone
Barry MacDonald

2. For the Respondent

Lloyd MacNevin
Leo MacLeod

IN THE MATTER of an appeal by
Harvey Livingstone Inc. of a decision of the
Community of Brackley, dated November 3,
2008.

Reasons for Order

1. Introduction

[1] The Appellant Harvey Livingstone Inc. (Livingstone) has 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*). Livingstone's Notice of Appeal was received on November 12, 2008.

[2] This appeal concerns a November 3, 2008, decision of the Respondent Community of Brackley (the Community) to deny a request to amend the Community of Brackley 2006 Zoning and Subdivision Control Bylaw (the Bylaw) to allow Livingstone, under the business name of Island Auto Supply, to sell repairable and repaired vehicles by way of a used car dealer license.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on January 27, 2009.

2. Discussion

Livingstone's Position

[4] Livingstone's submissions may be briefly summarized as follows:

- Livingstone operates an automotive recycling business. The main portion of its business is the sale of repairable used cars. The *Automobile Junk Yards Act* and the Community's Bylaw do not accurately deal with the nature of this business.

- A few years ago, the Province of Prince Edward Island (the Province) imposed restrictions on when an auto salvage can register a vehicle “unplated” without having to pay sales tax. The Highway Safety Division has suggested that Livingstone obtain a used car dealer license to simplify the paperwork on the used cars and repairable used cars sold by Livingstone. A used car dealer license would allow Livingstone to register vehicles for sale in its business name “unplated” and tax exempt. The used car dealer license avoids the need to apply for a tax refund on every used or repairable used car sold. In order to obtain a used car dealer license from the Province, Livingstone requires the support of the Community. Livingstone believes that the Community has not provided its support on the basis that the present wording of the Bylaw does not permit the sale of used vehicles in either of its two zones.

[5] Livingstone requests that the Commission allow this appeal and order the Community to amend its Bylaw to allow the sale of repairable used vehicles and used vehicles in its auto salvage zone.

The Community’s Position

[6] The Community’s submissions may be briefly summarized as follows:

- The Community has had some requests for car dealer licenses and has denied these requests. There are, however, approximately three enterprises selling vehicles on a “grandfathered” basis and the Community feels this is enough.
- The Community believes that an amendment to its Bylaw to allow the sale of used vehicles in the auto salvage zone would create a “slippery slope” and “open the floodgates” for requests from automobile dealers to set up business in the Community.
- The Community has two zones: agriculture and auto salvage.
- The Community is of the view that there was no discussion about the sale of cars, and no intent to sell cars, when Livingstone first moved its auto salvage business to the Community. The Community believes that Livingstone is in breach of the Bylaw by selling used vehicles; however, the Community tolerates this breach.

[7] The Community requests that the Commission deny this appeal.

3. Findings

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

[9] A review of the Community’s Official Plan makes it clear that it is the general policy of the Community to limit commercial and industrial development to those developments that serve the agricultural community. The Community’s specific automobile salvage use policy and plan action are set out under section 4.3.3. *Industrial* in the Official Plan:

Automobile Salvage Use Policy

It shall be Council's policy that a limited area within the Community shall be set aside specifically for automobile salvage use.

Plan Action

The Community's Zoning and Subdivision Control Bylaws will make provision for the establishment of an Auto Salvage (AS) Zone within the Community. The Bylaws will also make provision for specific regulations governing automobile salvage operations within the Auto salvage (AS) Zone.

Emphasis added.

[10] The Commission notes the concerns expressed by the Community that amending the Bylaw to permit the sale of repairable used cars and used cars within the Auto Salvage (AS) zone might create an opportunity for new automobile dealers to seek to establish themselves in the Community. However, unless the land in question was already in the AS zone, a rezoning to AS would be required. Any such rezoning application would have to be considered by the Community according to the policies contained in the Official Plan. The Commission is of the view that these policies would provide protection to the Community against unwanted commercial or industrial development.

[11] At the hearing, the Community informed the Commission of its opinion that the ongoing sale by Livingstone of repairable used cars and used cars is not permitted in its Bylaw. What greatly concerns the Commission is that the Community also stated that it is prepared to continue to tolerate this alleged breach of its Bylaw. Such an approach may be viewed as effectively "amending" the Bylaw without undertaking the requirements and safeguards of the amendment process. The Commission believes that tolerating a breach of the Bylaw is far more likely to create a "slippery slope" leading to unwanted development in the Community than approving a lawful and careful amendment to the Bylaw in order to somewhat expand and clarify the permitted uses in the AS zone.

[12] Livingstone is in the automobile salvage business. While the popular notion of an auto salvage may be the stripping of vehicles for useful parts, Mr. Livingstone and Mr. MacDonald testified at the hearing that this is only part of the business of a modern automobile salvage business. The Commission heard testimony to the effect that a major aspect of the business of a modern auto salvage operation involves the contracted purchase of late model damaged vehicles from insurance companies and resale of these vehicles as repairable used cars. In fact, Livingstone annually sells some 100 to 150 of these repairable cars to body shops and others with the skill to restore these vehicles to safe, roadworthy condition. In addition, Mr. Livingstone and Mr. MacDonald testified that Livingstone sends a few repairable automobiles out to be restored to roadworthy condition and then these automobiles return to be sold as repaired used cars. Unfortunately, the existing wording used in section 6 of the Community's Bylaw, which deals with the AS zone, does not reflect these realities of the modern automobile recycling operation. Indeed, the current wording of the Bylaw suggests to the Commission the kind of business operations traditionally associated with an automobile junk yard, that is to say, the storage of derelict vehicles to be stripped for parts.

[13] With respect to the sale of “repairable used cars”, the Commission hereby orders the Community to amend, in consultation with its planner or other professional deemed necessary, the wording of the AS zone provisions of the Bylaw to provide clarity and specifically include the sale of “repairable” salvage automobiles. Mindful that a definition may be necessary, the Commission understands that “repairable” salvage automobiles are not broken up for parts; rather, they are sold intact as “a piece” of salvage.

[14] With respect to the sale of “repaired” used cars, the Commission orders the Community to amend, in consultation with its planner or other professional deemed necessary, the wording of the AS zone provisions of the Bylaw to permit the sale of “repaired” used cars as an ancillary operation to the business of an automobile salvage operation. The wording could make such sale of repaired used cars a discretionary use requiring a permit if the Community was concerned that such an ancillary operation might escalate in size or intensity. The permit could, for example, establish conditions such as the number of repaired used cars that could be offered for sale at any one time.

[15] With the Community’s Bylaw thus amended to reflect the modern reality of an automobile salvage operation, Livingstone would then be required to operate in full compliance with the Bylaw. The Bylaw would not be undermined by a failure to enforce the requirements set out in the AS zone. The policies of the Community’s Official Plan would stand firm protecting the Community against unwanted industrial and commercial development. With a revised Bylaw in place, the Community ought to be able to lend its support to Livingstone’s application for a used car dealer license from the Province.

4. Disposition

[16] An Order allowing this appeal follows.

IN THE MATTER of an appeal by
Harvey Livingstone Inc. of a decision of the
Community of Brackley, dated November 3,
2008.

Order

WHEREAS Harvey Livingstone Inc. has appealed a decision of the Community of Brackley, dated November 3, 2008;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on January 27, 2009 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 Community of Brackley is hereby ordered to amend, in consultation with its planner or other professional deemed necessary, the wording of the Auto Salvage (AS) zone provisions contained in its 2006 Zoning and Subdivision Control Bylaw to provide clarity and specifically permit the sale of repairable salvage automobiles.
3. The Community of Brackley is hereby ordered to amend, in consultation with its planner or other professional deemed necessary, the wording of the Auto Salvage (AS) zone provisions contained in its 2006 Zoning and Subdivision Control Bylaw to permit the sale of repaired used cars as an ancillary operation to the business of an automobile salvage operation.

DATED at Charlottetown, Prince Edward Island, this 16th day of February, 2009.

BY THE COMMISSION:

(Sgd.) Brian J. McKenna

Brian J. McKenna, Vice-Chair

(Sgd.) David Holmes

David Holmes, Commissioner

(Sgd.) Anne Petley

Anne Petley, 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)