



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

**Docket LA08003
Order LA09-04**

IN THE MATTER of a request for
review of Order LA08-04, issued by the
Commission on June 20, 2008.

BEFORE THE COMMISSION
on Thursday, the 5th day of March, 2009.

Maurice Rodgerson, Chair
John Broderick, 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 a request for
review of Order LA08-04, issued by the
Commission on June 20, 2008.

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IN THE MATTER of a request for review of Order LA08-04, issued by the Commission on June 20, 2008.

Appearances & Witnesses

1. For the Appellant L&A MacEachern Holdings Ltd.

Counsel:

J. Gordon MacKay, Q.C.

Witness:

Sharon King

2. For the Respondent City of Charlottetown

Counsel:

David W. Hooley, Q.C.

3. Members of the Public

Stephanie Hoganson

Rowena Stinson

Bonnie MacDonald

Clair Perry

David Morrison

Lana Baglole

IN THE MATTER of a request for review of Order LA08-04, issued by the Commission on June 20, 2008.

Reasons for Order

1. Introduction

[1] In Order LA08-04, issued by the Commission on June 20, 2008, the Commission allowed the appeal of the Appellant L & A MacEachern Holdings Ltd. (MacEachern) and ordered the Respondent City of Charlottetown (the City) to rezone parcel numbers 274480 and 274720, known as the Idle Wheels Trailer Court (the trailer court), to Medium Density Residential (R3), subject to a requirement that the owner of said parcels enter into a development agreement pursuant to section 4.60 of the City of Charlottetown Zoning and Development Bylaw.

[2] In Order LA08-09, issued by the Commission on December 18, 2008, the Commission found that it was appropriate to set this matter down for a supplementary public hearing. The hearing was held on January 26, 2009.

2. Discussion

Testimony of Members of the Public

[3] The Commission heard testimony from six members of the public. The following is a brief summary of their testimony.

[4] Stephanie Hoganson

- Ms. Hoganson is the owner/occupier of a single family home in the neighbourhood of the trailer court. She notes her neighbourhood is a quiet, family oriented neighbourhood.
- She is concerned that the three storey apartment buildings proposed for the trailer court site would interfere with her privacy. She is also concerned that the proposed buildings would reduce the amount and duration of sunlight on her property.
- She noted that the city's Official Plan speaks to the need to preserve existing neighbourhoods.

- Ms. Hoganson submits that the Commission should have shown deference to the decision of the City to deny the rezoning. She also noted that the City needs to update its Official Plan to protect the neighbourhood.

[5] Rowena Stinson

- Ms. Stinson lives in the greater neighbourhood of the trailer court. She notes that the development proposed for the trailer court is of an inappropriate scale. She expresses concerns with respect to traffic flow and light pollution. She is also concerned that the new apartments would be attractive to students given the close proximity of the location to the University of Prince Edward Island.
- She also spoke to the character of Parkdale as a community within the City. While noting that it is not a pretentious neighbourhood, she referred the Commission to notable homes, a national historic site and historic cemeteries in the area. She expressed concern that the proposed development of the trailer court would “open the gates” to more high density housing, thus irrevocably changing the character of the neighbourhood. She noted that a low rise type of development, such as the “Andrews of Stratford” concept would work well in the area.
- Ms. Stinson submitted that the Commission’s decision to overturn the City’s decision to deny the rezoning was “undemocratic”.

[6] Bonnie MacDonald

- Ms. MacDonald and her husband own a mobile home in the park. They hold a mortgage on that home. Their daughter, son-in-law and granddaughter live in that mobile home. She characterizes the neighbourhood as a single family and duplex neighbourhood with nearby heritage properties.
- She told the Commission that they cannot sell the mobile home because of the uncertain future of the trailer park. It would be difficult to move the mobile home. There is no other trailer park in the Charlottetown area that would accept the mobile home.
- She expresses concern about increased traffic associated with the proposed development of the trailer court. She notes that the twenty households of the current trailer court would be replaced with fifty households of the proposed apartment buildings. This would result in at least thirty extra cars using Harley Street.
- Ms. MacDonald submits that it seems odd that the Commission can “go against” the decision of City Council.

[7] Clair Perry

- Mr. Perry has lived adjacent to the trailer court for the past thirty years. He describes the trailer court as very quiet. He notes that the people who live in the trailer court are very good people.

- He is opposed to the concept of the proposed three storey apartment complex. He is also concerned about light pollution from the parking lot for the proposed apartment buildings. He is concerned about the buildings blocking sunlight from his home. He notes there are no three storey buildings in the neighbourhood and believes that two storey buildings on the trailer court site would be more appropriate.
- He is concerned about the eighteen families who currently live in the trailer court. He wonders where they will be able to go.
- He expressed concern about increasing commercialization in the area of the neighbourhood.
- Mr. Perry acknowledged under cross-examination from MacEachern's legal counsel that three trailers encroach on his property and he currently receives compensation for this.

[8] David Morrison

- Mr. Morrison noted that he had attended the recent meeting of the Harley Street area residents. He notes that Harley Street is a narrow street and is not much wider than a lane. He notes that across the street from the trailer court is a property advertised for condominiums. He is concerned about development pressures and pointed to an example of a condominium development in the downtown area that is only partially sold after several years on the market. He questions the necessity of focusing more development on an "overused" street.
- He expressed concern for the residents of the trailer court who will lose their homes.
- Mr. Morrison also expressed concern that the Commission overturned the decision of City Council.

[9] Lana Baglole

- Ms. Baglole is a resident of the trailer court. She purchased her mobile home approximately six years ago. Ms. Baglole is also spokesperson for the group 'Harley Street and Surrounding Residents', a group formed in response to the Commission's decision in Order LA08-04.
- She submits that the City's Future Land Use Map represents a vision, a template, a model or a pattern for future development. On occasion, the pattern gets changed. There is some leeway to allow input. City Council is elected to serve the residents of the City. City Council heard the concerns of the residents and voted unanimously to deny the rezoning of the trailer court.
- She notes that under the City's current zoning map, the neighbourhood surrounding the trailer court is composed of R1 and R2 zones representing single family and duplex homes. It is only on the outskirts of the neighbourhood that R3 zones may be found.

- She referred to several provisions of the City's Official Plan which promote existing residential neighbourhoods, and express the desire to maintain the distinct character of Charlottetown's neighbourhoods. New development should be harmonious and physically related to the surroundings. She notes that the City's Official Plan promotes moderately higher densities in new neighbourhoods and in the downtown core.
- She notes that the proposed apartment development would contain three times as many parking spaces as the existing trailer court, thus increasing the traffic burden on Harley Street.
- Ms. Baglole submits that the owners of mobile homes in the trailer park, unlike tenants in an apartment building, are owners of property and the rezoning of the trailer court seriously reduce the value of this property. Some residents of the trailer court have inquired as to the availability of sites in other mobile home parks. They have been informed that there are no available sites for these homes.
- Ms. Baglole read into the record letters from Roy and Lynn MacArthur of Harley Street, Edward and Phyllis Doucette of the trailer court and John Flemming of the trailer court.

MacEachern's Submissions

[10] The Commission heard one witness called by MacEachern. A summary of Sharon King's testimony follows.

- Ms. King is the previous owner of the trailer court. She notes that her late husband had owned the trailer court for fifteen to twenty years prior to his passing in 2002. She sold the trailer court to MacEachern in the spring of 2003. Since that time, she has served as the "land lady" collecting site rent cheques and communicating with the tenants of the trailer court.
- She noted that it had been the intention of her late husband to eventually re-develop the trailer court as a seniors apartment complex. It was his intention that the tenants of the trailer court would "transition" into tenants in the apartment complex.
- She noted that, following the purchase of the trailer court, MacEachern did not express its intentions as to future re-development of the property. However, when tenants of the trailer court asked her what MacEachern's intentions were, Ms. King reminded them of her late husband's intentions. When asked by a tenant whether it would be advisable to upgrade the tenant's mobile home, she expressed her view that she wouldn't advise taking out a mortgage to upgrade the mobile home as the trailer court was owned by a businessman and future re-development was very possible.
- Ms. King noted that, as a result of the closure of the Experimental Farm road, Harley Street has enjoyed a significant reduction in traffic.

[11] Legal counsel for MacEachern submits that, in a request for a review of a Commission decision, the onus is on the person seeking review to establish a prima facie [at first sight] case as to either an error of the Commission or changed circumstances. Counsel submitted that the Commission did not err in its decision contained in Order LA08-04 and that there were no changed circumstances. Counsel referred to the reasoning set out by the Commission in Order LA08-04. He noted that the Commission had the benefit of an expert witness at the original hearing. He observed that the City's planning staff and Planning Board supported the application by MacEachern to rezone the trailer court. Counsel also noted that the City limited the choices for residents of the trailer court by not allowing new mobile home parks.

[12] Counsel for MacEachern noted that MacEachern was not insensitive for the need to provide residents of the trailer court with notice. He noted that the ***Rental of Residential Tenancies Act*** requires a trailer park operator to provide a minimum of six months period of notice for a notice of termination to residents of a trailer park. He submitted that MacEachern is prepared to offer more than the statutory notice as part of the provisions of a Development Agreement.

The City's Submissions

[13] Legal counsel for the City noted that, while the City's Planning Board supported MacEachern's rezoning application, the Chair of Planning Board did not. In fact, Council unanimously rejected Planning Board's recommendation to rezone the trailer court. Counsel noted the letters filed with the Commission by Councillors MacDonald and Devine which accompanied the City's request for reconsideration. Counsel referred to various portions of the Official Plan supporting the preservation of existing low density neighbourhoods.

[14] Counsel for the City submitted that the Future Land Use Map is a concept plan which is not as specific as a Zoning Map. Counsel acknowledged there is very little land in the City currently zoned for mobile homes and mini-homes.

3. Findings

[15] After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission to deny the requests for reconsideration filed by the City and the Harley Street and Surrounding Residents group (the residents) referred to in Order LA08-09. Accordingly, the Commission confirms the decision contained in Order LA08-04. The reasons for the Commission's decision follow.

[16] Section 12 of the ***Island Regulatory and Appeals Commission Act*** (the ***IRAC 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. 1991,c.18,s.12.

[17] In Order LA97-11, *In the Matter of a Request for Review of Commission Order LA97-08 by Keir Clark and Marion Clark* (Order LA97-11 Clark), the Commission set out in some detail the test to be met on an application for a review or reconsideration of Commission decision:

*The Commission and its predecessor, the Prince Edward Island Public Utilities Commission, have considered in the past the minimum criteria an Applicant must meet before the Commission will exercise its absolute discretion in the matter of reviewing its decisions under s. 12 of the **Island Regulatory & Appeals Commission Act**, and the identical predecessor to s. 12, s. 16 of the **Public Utilities Commission Act**. This test has been interpreted consistently by the Commission in its past decisions.*

As noted in previous decisions, the onus rests upon the Applicant to show that a prima facie case exists which will entitle the Applicant to the review. A prima facie case will be shown only where the function of review should be exercised to correct an error of the Commission or to meet changed circumstances.

Changed circumstances may encompass either a situation which has developed after the decision or where new evidence emerges which was not known or not available at the time the original evidence was adduced. Changed circumstances will dictate a review only if they are material.

Finally, the power to review is discretionary and will be exercised sparingly.

*This test was first laid out by the Public Utilities Commission in Case No. E209-06 and Order No. E90-8, May 2, 1990, *In the Matter of the **Public Utilities Commission Act and the Electric Power and Telephone Act***. The Commission also relies upon another previous decision, *In the Matter of a Request for Reconsideration of Commission Order LA95-16 by Fida Enterprises Limited*, May 29, 1996, which followed the earlier comments of the Public Utilities Commission.*

[18] The test for review or reconsideration noted above is a strict test. It is a discretionary process to be used sparingly. It is not intended to be a substitute for the right to appeal, set out in section 13 of the **IRAC Act** which reads:

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.

(3) The Commission shall be deemed to be a party to the appeal.

(4) No costs shall be payable by any party to an appeal under this section unless the Appeal Division, in its discretion, for special reasons, so orders. 1991,c.18,s.13.

[19] The Commission notes that the submissions of the City, and some members of the public, with respect to the various portions of the Official Plan dealing with the preservation of existing neighbourhoods, and the role of the Future Land Use Map, could have been fully addressed by the City at the original hearing. This information was known and available to the City at the time of the original decision. Accordingly, these submissions do not meet the definition of changed circumstances as set out in Order LA97-11 *Clark*. In a similar vein, the position of City staff, Planning Board and Council were very apparent on the record at the original hearing.

[20] The Commission notes that the issue of traffic in the Harley Street area was considered in some detail at the original hearing. Accordingly, the evidence and submissions with respect to traffic provided at the present hearing do not meet the definition of changed circumstances noted in Order LA97-11 *Clark*.

[21] At the original hearing the Commission heard testimony from Ken MacEachern on the condition of the trailer court's sewer system and the Commission noted in Order LA08-04:

[27] The timing for a rezoning appears to be appropriate at the present time as the subject property is currently experiencing problems with its sewer system and sewer upgrades would be necessary for it to remain in use as a mobile home park. Such an upgrade would greatly disrupt the existing mobile home park as testimony before the Commission indicates some lines run under existing mobile homes, thus requiring those homes to be moved to permit the work to be completed.

[22] No evidence was presented at the present hearing to support a contention that the above finding, was, with the benefit of hindsight and better evidence, made in error.

[23] At the present hearing, there was considerable comment to the effect that the Commission should have shown more deference to the decision of City Council, as Council is an elected body representing the residents of the City. City Council is a democratically elected body entrusted with making decisions, often with the benefit of considerable input from its residents and other stakeholders. Public meetings, letters, petitions and the like are all highly appropriate within this context.

[24] However, the Commission is not an elected body entrusted with representing the residents of a municipality. The Commission is a quasi-judicial administrative tribunal empowered by several statutes to perform various administrative, regulatory and appellate functions. In its appellate functions, it is the role of the Commission to consider the decisions of various municipal and ministerial decision makers to ensure that they have complied with the acts, regulations, official plans or bylaws which provide the legal foundation for the decision of the ministerial or municipal decision maker.

[25] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. Such discretion should be exercised carefully. While it is important to show some deference to the original decision maker's decision, the Commission must ensure that the decision maker followed sound planning principles and the law.

[26] In Order LA08-04 the Commission observed at paragraph 25:

[25] While the Commission tends to defer to the actions of the elected Council on such matters, that is not an absolute, and in this instance the Commission is presented with significant expert testimony contrary to the Council's decision. The Official Plan permits the rezoning of the subject property, the City's planning staff and Planning Board recommended approval of the rezoning, and the Company's expert witness is of the opinion that the project proposed for the subject property represents sound planning. The Commission recognizes Council is not bound to follow staff or Planning Board advice, however, the Commission cannot satisfy itself that sufficient reasons have been offered to reject that advice in this case.

[27] In a frequently cited decision, *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., for the Appeal Division of the Supreme Court of Prince Edward Island, states on 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.

[28] As part of the reconsideration process, the Commission received written submissions and heard from members of the public who expressed concern over the difficulties (and cost) of moving older mobile homes and the lack of mobile home parks willing to accept such homes. In effect, these submissions are asking the Commission to temper or modify its decision given the impact of the rezoning on residents of the trailer court. In other words, the Commission is being asked to consider the principles of equity to temper its decision.

[29] Equity is defined in part in Black's Law Dictionary, as:

Equity. Justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation.

[30] In *Jeriel Enterprises Ltd. v. The Minister of National Revenue*, Appeal No. AP-93-087, March 8, 1994, the Canadian International Trade Tribunal noted:

As was explained at the hearing, the Tribunal is a body created by statute whose jurisdiction is limited to that expressly granted to it or which might be implied therefrom. The Tribunal has consistently held that it does not have equitable jurisdiction which could allow it, under certain circumstances, to deviate from the law in order to mitigate its impact.

[31] In *John Campeau v. President of the Canadian Border Services Agency*, Appeal No. AP-2005-024, March 2, 2006, the Canadian International Trade Tribunal stated at paragraph 21 of its decision:

21. *The Tribunal's jurisdiction is statutory. The Tribunal has no equitable jurisdiction to grant relief simply in the interest of fairness or relieving hardship.*

[32] While the Commission sympathizes with the situation faced by the residents of the trailer court, neither the Commission's enabling statute, the ***Island Regulatory and Appeals Commission Act***, nor the ***Planning Act***, provides the Commission with a grant of equitable jurisdiction.

[33] The Commission does note, however, that there may be an opportunity for both the City and MacEachern to negotiate some means to soften the impact of the rezoning as part of the development agreement.

[34] The issue of the displacement of older mobile home owners is not unique to the present matter. The Commission takes official notice that mobile home parks are sometimes redeveloped for other land uses. If the City, concerned citizens and, for that matter, other municipalities in the Province, are concerned about providing locations for displaced mobile home owners and their homes, they may wish to consider changes to municipal official plans and zoning bylaws to allow for the development of new mobile home parks, including parks which would welcome safe, well maintained older mobile homes. In addition, municipal policy makers and developers might wish to consider innovative mobile home park concepts, such as mobile home park cooperatives where stability and pride of ownership would be interwoven into the development.

[35] The Commission heard considerable discussion at the present hearing as to the role of the Future Land Use Map. The essence of these comments is that the Future Land Use Map is a general concept plan which is not as specific as the Zoning Map. While that may be true, the Future Land Use Map is a key component of the Official Plan and a document which cannot simply be brushed aside no matter how well intentioned the desired result may be. Section 1.4 of the Official Plan describes the role of the Future Land Use Map:

1.4 The Future Land-Use Map

*The policies and implementation measures contained in the **CHARLOTTETOWN PLAN** are supported by the Future Land-Use Map, which is a concept plan providing a general interpretation of various future land-use activities within the City. Figure 1 in this document, may be used for reference purposes only within this published plan. A larger scale version of the Future Land-use Map, separately prepared as Schedule A, shall be considered a constituent part of this plan. It applies to all properties within the boundaries of the City of Charlottetown and shall be the definitive source for general interpretation of land use classifications.*

Emphasis added.

[36] The Commission notes that the City's Official Plan was initially approved on August 25, 1999. Pursuant to the December 10, 2005 Royal Gazette, the then Minister of Community and Cultural Affairs [as that department was then known] gave "his approval to the confirmation of the City of Charlottetown Official Plan and Zoning and Development Bylaw for the, [sic] effective December 1, 2005". It is noteworthy that the Official Plan, with its Future Land Use Map, was reviewed relatively recently and the City was apparently satisfied with the Medium Density Residential designation of the trailer court under the Official Plan's Future Land Use Map. While it is understandable that the City's position may change over time, the Official Plan, and its Future Land Use Map, should then be amended to reflect any such changes.

[37] The Commission has also heard the concerns of residents in the neighbourhood of the trailer court who are opposed to the size and scale of the apartment complex proposed for the trailer court. While sketches of proposed buildings were provided by MacEachern to the City as part of the rezoning application, the Commission wishes to remind the residents that the rezoning process is a separate one from the development permit process. Approval of a rezoning application does not bind the City or a developer to a particular building design or size. The specifics of the building are properly addressed at the development permit and development agreement stages. The provisions of the Official Plan will, no doubt, be reviewed and considered prior to the issuance of any development permit and the City's decision with respect to the development permit issue may be appealed to the Commission by "any person who is dissatisfied" with such decision.

[38] For the above reasons, the Commission finds that there is no prima facie case entitling the City and the residents to a review of Order LA08-04. Accordingly, the requests for reconsideration filed by the City and the residents are hereby denied and the Commission confirms the decision set forth in Order LA08-04 rezoning parcel numbers 274480 and 274720 to Medium Density Residential (R3), subject to a requirement that the owner of said parcels enter into a development agreement pursuant to section 4.60 of the City of Charlottetown Zoning and Development Bylaw.

4. Disposition

[39] An Order denying the requests for reconsideration and confirming the decision set out in Order LA08-04 will be issued.

IN THE MATTER of a request for review of Order LA08-04, issued by the Commission on June 20, 2008.

Order

WHEREAS the City of Charlottetown (the City) and a group of residents known as the Harley Street and Surrounding Residents group (the residents) filed requests for review of Commission Order LA08-04;

AND WHEREAS in Order LA08-09, the Commission determined that it was appropriate to hold a supplementary public hearing;

AND WHEREAS the Commission heard from the parties to the appeal and members of the public at a supplementary public hearing conducted in Charlottetown on January 26, 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 requests for review of Order LA08-04 are hereby denied.
2. The Commission hereby confirms the decision set forth in Order LA08-04 rezoning parcel numbers 274480 and 274720 to Medium Density Residential (R3), subject to a requirement that the owner of said parcels enter into a development agreement pursuant to section 4.60 of the City's Zoning and Development Bylaw.

DATED at Charlottetown, Prince Edward Island, this 5th day of March, 2009.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*

Maurice Rodgerson, Chair

(Sgd.) *John Broderick*

John Broderick, 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.

IRAC141A(99/2)