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

Docket LA08022
Order LA09-07

IN THE MATTER of an appeal by Claus Brodersen of a decision of the Community of New Haven Riverdale, dated September 16, 2008.

BEFORE THE COMMISSION
on Friday, the 22nd day of May, 2009.

Maurice Rodgerson, Chair
John Broderick, Commissioner
Gordon McCarville, 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 Claus Brodersen of a decision of the Community of New Haven Riverdale, dated September 16, 2008.

Contents

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Appearances & Witnesses

1. For the Appellant Claus Brodersen

Counsel:

Barbara Stevenson, Q.C.

Witness:

Claus Brodersen

2. For the Respondent Community of New Haven Riverdale

Luis Bate
Sharon Slauenwhite
Dianne Dowling

3. For the Developer Deirdre MacKinnon

Deirdre MacKinnon

4. Member of the Public

Eric MacPhail

IN THE MATTER of an appeal by Claus Brodersen of a decision of the Community of New Haven Riverdale, dated September 16, 2008.

Reasons for Order

1. Introduction

[1] The Appellant Claus Brodersen (Mr. Brodersen) 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***). Mr. Brodersen's Notice of Appeal was received on November 14, 2008.

[2] This appeal concerns a September 16, 2008, decision of the Respondent Community of New Haven Riverdale (the Community) to permit a dog kennel to remain on the property of Colin and Deirdre McKinnon (Mrs. McKinnon), parcel number 600510 (the subject property), located in New Haven.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on April 2, 2009.

2. Discussion

Mr. Brodersen's Position

[4] Mr. Brodersen's submissions may be briefly summarized as follows:

- Counsel for Mr. Brodersen acknowledged that the appeal was filed beyond the twenty-one day appeal period set out in subsection 28(1) of the ***Planning Act***. Counsel submitted, however, that Mr. Brodersen was not aware of the Community's decision until he received, on October 28, 2008, a copy of the minutes from the Community's September 16, 2008 meeting.

- Counsel explained that Mr. Brodersen had previously raised the issue of Mrs. McKinnon's kennel with the Community. The Community had advised Mrs. McKinnon that she could not have the kennel and that she had twenty-one days to file an appeal. Mrs. McKinnon did not appeal that decision. Mrs. McKinnon then filed an application with the Community to move her new storage shed to the back of her property where her old kennel was located. The Community denied this application and Mrs. McKinnon filed an appeal with the Commission. The Community considered new information from Mrs. McKinnon and reversed its decision on September 16, 2008. Mrs. McKinnon then withdrew her appeal. Counsel submits that Mr. Bodersen was not made aware of the September 16, 2008 decision and thus believed that the earlier decisions by the Community continued to apply.

- Accordingly, Counsel submits that Mr. Brodersen filed his Notice of Appeal within twenty-one days of first becoming aware of the Community's September 16, 2008 decision.

- Counsel submits that, in reversing its earlier decision, the Community did not have an application before it. The Community did not seek public input; rather it only considered some new documents submitted by Mrs. McKinnon.

- Counsel submits that the evidence provided by Mr. Brodersen establishes the fact that there was no kennel operation on the subject property prior to Mrs. McKinnon acquiring the property in 1983. A kennel has not been a permitted use in the urban zone of the Community since the 1984 inception of its Zoning and Subdivision Control By-laws (the Bylaw). Further, prior to the 1984 Bylaw, the Community's Zoning and Subdivision Control Regulations (the Regulations), approved on July 17, 1980, were in effect. Under these regulations, kennels were not a permitted use in the urban (R1) zone.

- Counsel submits that Mrs. McKinnon's kennel operation does not pre-date the Regulations and therefore it cannot be considered a non-conforming use.

- Counsel requests that the appeal be allowed and that the Commission set aside the Community's September 16, 2008 decision.

The Community's Position

[5] The Community's submissions may be briefly summarized as follows:

- The Community does not take issue with the fact that Mr. Brodersen filed his Notice of Appeal beyond the twenty-one day appeal period. The Community submits that it has been caught in a disagreement between two neighbours. The Community requests that the Commission hear this appeal on its merits in order to resolve the issues raised by the appeal.

- The Community's decision of September 16, 2008 represented a reversal of an earlier decision made on May 20, 2008. The Community reversed its decision based on documents which suggested that a kennel operation existed prior to Mrs. McKinnon's purchase of the subject property in 1983.

- The Community made its September 16, 2008 decision in good faith, based on the evidence available to it at the time. The Community did not have the benefit of the evidence provided by Mr. Brodersen at the hearing before the Commission.

Mrs. McKinnon's Position

[6] Mrs. McKinnon's submissions may be briefly summarized as follows:

- Mrs. McKinnon states that she breeds purebred basset hounds and has done so since she and her husband moved to the subject property in 1983. She does not board, train or shelter dogs. She currently has seven dogs. There is no signage advertising that she breeds dogs. Her dogs are in a controlled environment: they do not roam free and she bags and removes waste.

- She notes that the Community does not have a dog bylaw. She also notes that "kennel" is not defined in the Bylaw. She notes that other people have dogs and doghouses in the urban zone of the Community.

- She states that the ***Dog Act*** does not apply as her dogs are not vicious and do not roam.

- She states that purebred dogs come under the jurisdiction of the Government of Canada's Department of Agriculture. The breeding of dogs is a type of agricultural operation and agriculture is a permitted use within the urban (R1) zone.

- Mrs. McKinnon requests that the appeal be denied.

Member of the Public

[7] Eric MacPhail testified that he was Chair of the New Haven Riverdale council when the 1980 regulations were approved. He states that both the subject property and Mr. Brodersen's property were located within the urban (R1) zone when the Regulations were approved. He briefly referred to the Regulations, noting that the rural (A1) zone included "animal kennels or stables" as a permitted use while the urban (R1) zone did not list kennels as a permitted use.

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] 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.*

[10] In the present appeal, Mr. Brodersen filed his Notice of Appeal on November 14, 2008. The Community's decision was made at a public meeting of council on September 16, 2008. As the appeal was filed beyond the twenty-one day appeal period set out in subsection 28(1) of the ***Planning Act***, the Commission must first review the law to determine whether it has the jurisdiction to hear Mr. Brodersen's appeal.

[11] In *Booth and Peak v. Island Regulatory and Appeals Commission* 2004 PESCAD 18 (October 4, 2004) Justice Webber reviewed various legal decisions with respect to the issue of when an appeal period begins to run. She then stated the following commencing at paragraph 20 of the Court's decision:

> *[20] All these cases express a concern about ensuring that a right of appeal is a real rather than an illusory right.*
>
> *[21] I find that Re Hache and Minister of Municipal Affairs (1969), 2 D.L.R. (3d) 186 (NBSCAD) applies in this province and the appeal period will begin to run when an appellant has received notice of the decision. This may be specific notice or general notice through posting or publication or by some other means. The bylaws of a community could establish the type of public notice that will be given upon the issuance of a building permit, e.g. publication in a newspaper or newsletter, posting in the community office. If the public can become aware of the decision by way of this public process then the process will likely satisfy the requirements of notice.*
>
> *[22] Where, as in this case there is no process of public notice set out in either the **Planning Act** or the bylaws of the community, then time can only begin to run when an appellant has actual notice of the decision. Just seeing the mobile home on the property would not be notice of the issuance of a building permit for that home. It might have been placed on the property without a permit.*
>
> *[23] Such notice of a decision is essential to give meaning to the appeal process. If this were not the case, the right to appeal would be illusory, rendering the statutory right of appeal meaningless. It would not be reasonable to interpret the statute in a way that renders a given right meaningless. The law does not specify the manner in which notice to the public must be given but does state that there must be some public notice of a decision–or specific notice to persons affected by the development -- before an appeal period can be said to run. That being said, an appellant could not abuse this right by deliberately delaying inquiry after he/she had been put on notice that a decision appears to have been made. In the present case, the mobile home was placed on the property and the appellants became aware of that fact on June 24, 2003. There was then some responsibility on them to inquire about whether or not a permit had been issued.*

[12] In the present appeal, Mr. Brodersen had honestly believed that the matter had been concluded in his favour. It was only upon receiving a copy of the minutes of the September 16, 2008 council meeting that it became clear that council had reconsidered its earlier decision. In addition, the Community does not take issue with the filing date of Mr. Brodersen's appeal. The Commission finds that Mr. Brodersen filed his Notice of Appeal within twenty-one days of receiving notice of the Community's September 16, 2008 decision. Accordingly, the Commission finds that it has jurisdiction to hear this appeal.

[13] 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.*

[14] Prior to making its September 16, 2008 decision, the Community had received from Mrs. McKinnon a copy of an Agreement of Purchase and Sale and a copy of a "Schedule "A"" legal description of the subject property. The Agreement of Purchase and Sale, apparently dated sometime in September 1983, concerns an offer by Colin and Deirdre McKinnon to purchase the subject property from Norman and Lorraine Osborne. Listed under "Conditions: Sale to Include:" is, among other items, "shed & kennels". The "Schedule A" legal description indicates that the Osbornes had acquired a portion of the subject property on November 25, 1977 and an adjacent second parcel from a different vendor on September 20, 1978.

[15] In the September 16, 2008 minutes of the Community's regular monthly council meeting, it is noted:

> BUSINESS ARISING FROM MINUTES
>
> 1. *MacKinnon's [sic] Kennel issue – Circulated information received from Mrs. MacKinnon concerning documentation of history of kennel operations back to 1977. It was noted that this is legal proof that the kennel operation pre-existed the 1980 plan. Discussed the implications of this information and it was noted that while the new building cannot be considered an ongoing use, the old kennel building can be traced back to before the bylaw was implemented therefore considered an on-going use. Thus, the MacKinnon's can continue to utilize the old building at the rear of the property as a kennel and they also would be allowed to maintain and up-grade this building provided it maintains the historical footprint. It was noted that this would have no impact on the request to move the new building to replace the older one, since the newer building has a larger footprint then the older one. Therefore, would not impact the appeal currently before IRAC. The administrator is to forward a letter to the MacKinnon's clarifying Council's position. Motion to approve this action (M) Stephen Gould (S) Luis Bate, Motion carried.*

[16] The Commission finds that the Community made its decision in good faith, based on the evidence presented at the time.

[17] In the present appeal, the Commission received considerable evidence provided by Mr. Brodersen which had not been available to the Community's council when it made its decision of September 16, 2008. Most notably, this evidence includes the March 26, 2009 Statutory Declaration of M. Lorraine Osborne who, with her husband Norman Osborne, owned the subject property from November 1977 to October 13, 1983. The pith and substance of this sworn document is that the "kennel" on the subject property prior to October 13, 1983 was a doghouse not larger than three feet by four feet in size. In addition, the Statutory Declaration notes that Mr. Osborne was originally from England where the term "kennel" is used to describe a building that Canadians would often describe as a doghouse.

[18] In addition, Mr. Brodersen also provided a letter from William R. Gaudet, dated December 10, 2008. The body of Mr. Gaudet's letter reads:

> *As requested and for your information please be advised that I shortly after the McKinnon's move to their present location on the West River Road in New haven helped them relocate their dog kennel from their former property in Milton to their new location.*
>
> *I should further note that to the best of my recollection there was at that time no other accessory buildings on that property.*

[19] "Kennel" is not defined in the Community's Official Plan, Bylaw, the ***Planning Act*** or the various regulations under the ***Planning Act***.

[20] "Kennel" is defined in *Webster's Encyclopedic Dictionary of the English Language Canadian Edition* as:

> ***kennel*** *(kén'l)1. n. (pl.) a place where dogs are kept, bred, trained etc. ll (Br.) a doghouse*

[21] The Commission has attempted to review official plans and zoning and development bylaws for various communities across Prince Edward Island in an effort to provide some perspective on this matter. It appears that only the City of Charlottetown currently defines "kennel" within a zoning and development bylaw.

[22] Based on the new evidence presented at the hearing, the Commission finds that while the Osbornes did have a doghouse, there was no "kennel" as such prior to the McKinnons purchasing the subject property. Accordingly, having a kennel on the subject property is not permitted as a non-conforming use, or as often expressed in popular language; a kennel is not permitted on the subject property by way of a "grandfather" clause.

[23] Accordingly, the Commission allows the appeal and based on new evidence presented at the hearing, quashes the Community's September 16, 2008 decision on the McKinnon's kennel matter.

[24] The Commission wishes to point out that the Community has the full authority to amend its Bylaw and as such, the Commission strongly recommends the Community define the term "kennel" in order to best meet the interests of the Community. Accordingly, the Commission hereby refers the matter back to the Community to amend its Bylaw to define the word "kennel" for the purposes of its Bylaw.

[25] The Commission is mindful that the Community and, through the appeal process, the Commission, has been put in the difficult position of dealing with what ultimately amounts to a dispute between two neighbours. That being said, the residents of a community have the right to expect a community to enforce its bylaws, and residents also have the right to appeal decisions of a community made with respect to the administration of regulations or bylaws made pursuant to the powers conferred to that community by the ***Planning Act***.

4. Disposition

[26] An Order allowing the appeal will therefore be issued.

IN THE MATTER of an appeal by Claus Brodersen of a decision of the Community of New Haven Riverdale, dated September 16, 2008.

Order

WHEREAS the Appellant Claus Brodersen has appealed a decision of the Respondent Community of New Haven Riverdale, dated September 16, 2008;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on April 2, 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 Respondent's September 16, 2008 decision pertaining to the subject matter of this appeal is hereby quashed.**

3. **The Commission hereby refers the matter back to the Community to amend its Zoning and Subdivision Control Bylaw to define the word "kennel" for the purposes of its Bylaw.**

DATED at Charlottetown, Prince Edward Island, this 22nd day of May, 2009.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*
Maurice Rodgerson, Chair

(Sgd.) *John Broderick*
John Broderick, Commissioner

(Sgd.) *Gordon McCarville*
Gordon McCarville, 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 Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal 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)