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

Docket LA09021
Order LA10-09

IN THE MATTER of an appeal by Gordon MacCallum of a decision of the Minister of Communities, Cultural Affairs and Labour, dated December 2, 2009.

BEFORE THE COMMISSION
on Friday, the 8th day of October, 2010.

Maurice Rodgerson, Chair
Michael Campbell, 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 Gordon MacCallum of a decision of the Minister of Communities, Cultural Affairs and Labour, dated December 2, 2009.

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Appearances & Witnesses

1. For the Appellant Gordon MacCallum

Counsel:

Catherine Parkman

Witnesses:

Gordon MacCallum
David Hume

2. For the Respondent

Counsel:

Robert MacNevin

Witness:

Jay Carr

IN THE MATTER of an appeal by Gordon MacCallum of a decision of the Minister of Communities, Cultural Affairs and Labour, dated December 2, 2009.

Reasons for Order

1. Introduction

[1] The Appellant Gordon MacCallum (Mr. MacCallum) 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. MacCallum's Notice of Appeal was received on December 16, 2009.

[2] This appeal concerns the December 2, 2009 decision of the Respondent Minister of Communities, Cultural Affairs and Labour, now the Minister of Finance and Municipal Affairs, (the Minister), to deny an application by Mr. MacCallum for a site suitability assessment of Lot #89, parcel number 731307, located in Brackley Beach.

[3] In his Notice of Appeal, Mr. MacCallum requested that the hearing be scheduled no sooner than April 1, 2010. The Commission then scheduled the hearing of the appeal for April 6, 2010. In March 2010, Counsel for the Minister requested that the hearing be postponed in order to further investigate the matter and present options for a resolution of the matter. Counsel for Mr. MacCallum consented to this adjournment.

[4] In June 2010, Counsel for both parties requested that the Commission establish a new hearing date. After further consultation with Counsel for both parties, the Commission re-scheduled the hearing for August 11, 2010 and the appeal was heard on that date.

2. Discussion

Mr. MacCallum's Position

[5] The submissions presented on behalf of Mr. MacCallum may be briefly summarized as follows:

- Lot #89 was identified in the 1988 subdivision plan which received approval in principle that year. In 2003, Lot #89 was formally approved. It is submitted that Lot #89 complied with all regulations in 2003 and this was confirmed through the testimony of David Hume, who signed the approval of the plan in 2003.

- It is submitted that Lot #89 is “grandfathered” and new regulations cannot be applied “backwards” to deny a building permit in the absence of specific retroactive wording.

- It is submitted that the old definition of “wetland” was based on the land being submerged or periodically submerged. The current definition of wetland includes the presence of water tolerant vegetation. It is submitted that all the Department of Environment, Energy and Forestry can rely on is the presence of water tolerant vegetation and there is no evidence that the land is submerged, or periodically submerged. It is submitted that if the land was in fact wetland, it would have been identified as such on the survey plan.

- Mr. MacCallum visited the site the evening before the hearing. He walked from pin to pin on Lot #89. The land was dry. He has never known this lot to be submerged.

[6] Mr. MacCallum submits that the appeal should be allowed and that he be found entitled to a building permit for Lot #89.

The Minister’s Position

[7] The submissions presented on behalf of the Minister may be briefly summarized as follows:

- Jay Carr, Environmental Assessment Officer, visited the site and consulted with Randy Dibblee, wildlife biologist. Mr. Carr concluded that the majority of Lot #89 today is a salt marsh.

- Environmental regulations change over time to protect the environment. Such protection is in the public interest.

- It is possible to reconfigure 5 existing undeveloped lots of Mr. MacCallum’s subdivision into 3 new lots which would meet current regulations. This would represent a sensible, fair and environmentally responsible solution.

[8] The Minister submits that the appeal be denied and the Minister’s decision be upheld.

3. Findings

[9] 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 this appeal. The reasons for the Commission's decision follow.

[10] Clause 1(x) of the *Planning Act Subdivision and Development Regulations* (the Development Regulations) reads as follows:

> *1.(x) "wetland" means a wetland as defined in the Environmental Protection Act Watercourse and Wetland Protection Regulations;*

[11] Clause 1(gg) of the *Environmental Protection Act Watercourse and Wetland Protection Regulations* (the Wetland Regulations) reads as follows:

1. *(gg) "wetland"*

> *(i) an area which contains hydric soil, aquatic or water-tolerant vegetation, and may or may not contain water, and includes any water therein and everything up to and including the wetland boundary, and*
>
> *(ii) without limiting the generality of the foregoing, includes any area identified in the Prince Edward Island Wetland Inventory as open water, deep marsh, shallow marsh, salt marsh, seasonally flooded flats, brackish marsh, a shrub swamp, a wooded swamp, a bog or a meadow;*

[12] Jay Carr, Environmental Assessment Officer, testified that he visited Lot #89 on September 24, 2009 to perform a site suitability assessment. He noted "significant" wetlands, identifiable by the presence of water tolerant vegetation. As Mr. Carr is not an expert in wetland vegetation, he returned to the site one week later with Randy Dibblee, a wildlife biologist with the Department. Mr. Dibblee confirmed the presence of water tolerant vegetation. Mr. Carr noted in his testimony before the Commission that the land was not spongy, but there was a definite change in the vegetation. Mr. Carr stated that he walked the line with a GPS unit, and then drew the line on an orthophoto back at his office. He noted that the presence of wetlands and the application of the 15 metre buffer reduces Lot #89 to 2,000 square feet. A category 1 lot requires 25,000 square feet and a category 2 lot requires 35,000 square feet for development.

[13] Mr. MacCallum testified that Lot #89 has never been submerged. He also noted that he has not received any complaints of salt water well intrusion from lot owners in other parts of the subdivision.

[14] Clause 3(4)(c) of the Wetland Regulations reads as follows:

> *3.(4) No person shall, without a license or a Buffer Zone Activity Permit, and other than in accordance with the conditions thereof, engage in or cause or permit the engaging in any of the following activities within 15 metres of a watercourse boundary or a wetland boundary:*
> *…*
>
> *(c) construct or place, repair or replace, demolish or remove, buildings or structures or obstructions of any kind, including but not limited to bridges, culverts, breakwaters, dams, wharves, docks, slipways, decks, or flood or erosion protection works;*

[15] Clause 5(a) of the Development Regulations reads as follows:

> ***5.*** *No approval shall be given pursuant to these regulations until the following permits or approvals have been obtained as appropriate:*
>
> *(a) where an environmental assessment or an environmental impact statement is required under the Environmental Protection Act, approval has been given pursuant to that Act;*

[16] In ***Gallant v. Prince Edward Island (Island Regulatory & Appeals Commission)*** (1997), 155 Nfld. & P.E.I.R. 218 (P.E.I. A.D.) the Prince Edward Island Supreme Court Appeal Division considered the issue of whether a building permit could be issued for a lot in an approved subdivision when the proposed access did not comply with the minimum sight distance requirements. Chief Justice Carruthers considered the legislation, evidence and the submissions of the parties and then stated:

> *15 The appellant relies on Regulation 50(c)(i) and submits the Commission erred in denying him a building permit as the lot in question is an existing parcel of land which is deemed to have an access driveway. This submission raises the issue whether subdivision approval carries with it a vested right to a building permit.*
>
> *16 This issue was dealt with by Chief Justice MacDonald of the Prince Edward Island Supreme Court Trial Division in Eric D. McLaine Construction Ltd. v. Southport (Community) (1990), 85 Nfld. & P.E.I.R. 168 (P.E.I. T.D.) where he followed the decision of the Supreme Court of Canada in Gauthier v. Quebec (Commission de protection du territoire agricole), [1989] 1 S.C.R. 859 (S.C.C.). He held that approval of a subdivision plan for single family dwellings constitutes a use but such use only pertains to the use of being allowed to erect single family dwellings if all other requirements are met.*
>
> *17 The subdivision plan now before the Court was approved for single family dwelling use but such approval does not entitle a lot owner to receive a building permit without conforming to certain requirements. A building permit authorizing the construction of a single family dwelling on a lot in an approved subdivision is not the same thing as the approval for the subdivision itself.*

[17] Based on the evidence of Mr. Carr, the Commission finds that a majority of Lot #89 is composed of wetland as defined by the Wetland Regulations and as incorporated into the Development Regulations. The Commission also finds that the application of a 15 metre buffer to the wetland boundary would reduce the portion of Lot #89 available for development to approximately 2,000 square feet.

[18] In Order LA06-10, *Marion Bernard* v. *Minister of Community and Cultural Affairs*, the Commission noted at paragraph 19:

> *[19] The Commission follows the reasoning of then Chief Justice Carruthers in **Gallant v. Prince Edward Island (Island Regulatory & Appeals Commission)** and finds that the subject parcel and the adjacent parcel may only be developed if "all other requirements are met". In the present appeal, the evidence indicates that the requirements of the **Environmental Protection Act** have not been met.*

[19] The Commission finds that subdivision approval does not grant a vested right to a building permit. While Lot #89 is a lot in an approved subdivision, the Commission finds that this "approved lot" may only be used to construct a dwelling if all other requirements are met. As there is no vested right to a building or development permit, the requirements to be met are the requirements which are in effect at the time of an application for a development or building permit. The Commission finds that Lot #89, as presently configured, does not meet the environmental requirements to allow the construction of a dwelling.

[20] As part of his Notice of Appeal, Mr. MacCallum requested the following relief:

> *RELIEF:*
>
> *(A) Leave the approved lots as is.*
> *(B) Pay me for the listed price of the lots that are now being called wet land.*
>
> *# 89, 90, 91 and 92 = 4x $149,000.00 = $596,000.00*

[21] In Order LA09-09, *James A. Campbell* v. *Community of Eastern Kings*, the Commission noted that it does not have the jurisdiction to award compensation. Nothing has changed since Order LA09-09 to give the Commission the power to award compensation.

[22] For the above reasons, the appeal is hereby denied.

4. Disposition

[23] An Order denying this appeal follows.

IN THE MATTER of an appeal by Gordon MacCallum of a decision of the Minister of Communities, Cultural Affairs and Labour, dated December 2, 2009.

Order

WHEREAS the Appellant Gordon MacCallum has appealed a decision of the Respondent Minister of Communities, Cultural Affairs and Labour, dated December 2, 2009;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on August 11, 2010 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 8th day of October, 2010.

BY THE COMMISSION:

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

(Sgd.) *Michael Campbell*
Michael Campbell, Commissioner

(Sgd.) *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 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 rules of court respecting appeals apply with the necessary changes.*

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)