

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

**Docket LA10025
Order LA11-03**

IN THE MATTER of an appeal by
Caseley Farms Ltd. of a decision of the Town
of Kensington, dated November 8, 2010.

BEFORE THE COMMISSION
on Wednesday, the 9th day of March, 2011.

Maurice Rodgerson, Chair
John Broderick, Commissioner
Peter McCloskey, 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
Caseley Farms Ltd. of a decision of the Town
of Kensington, dated November 8, 2010.

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IN THE MATTER of an appeal by
Caseley Farms Ltd. of a decision of the Town
of Kensington, dated November 8, 2010.

Appearances & Witnesses

1. **For the Appellant Caseley Farms Ltd.**
Rendal Caseley

2. **For the Respondent Town of Kensington**
Geoff Baker
Gordon Coffin
Rowan Caseley

3. **Members of the Public**

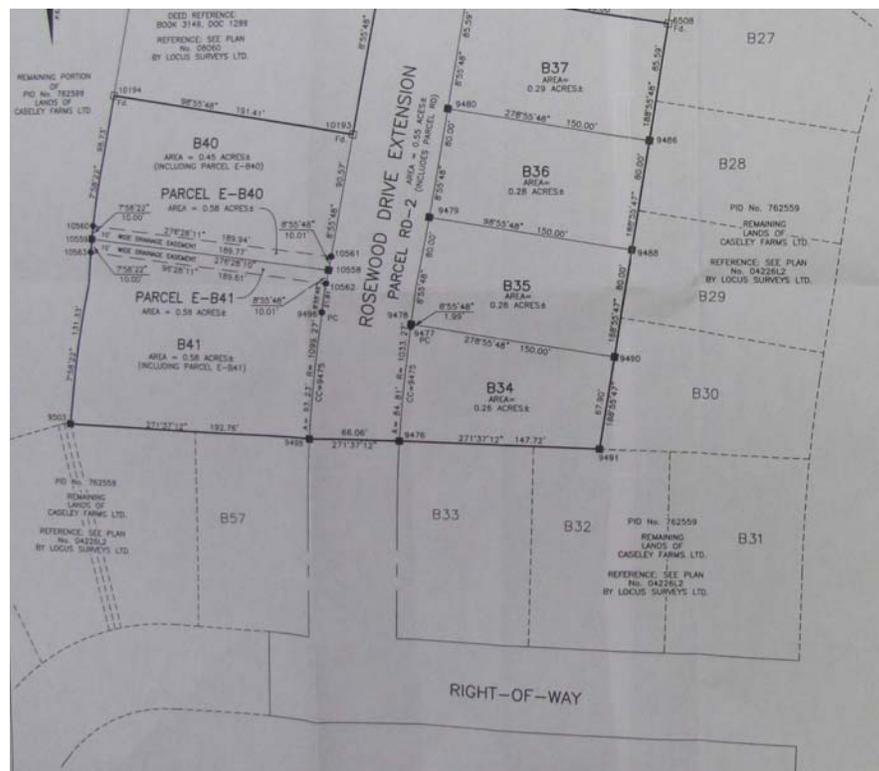
IN THE MATTER of an appeal by
Caseley Farms Ltd. of a decision of the Town
of Kensington, dated November 8, 2010.

Reasons for Order

1. Introduction

[1] The Appellant Caseley Farms Ltd. (Caseley Farms) 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*). Caseley Farms' Notice of Appeal was received on November 25, 2010.

[2] The appeal concerns a November 8, 2010 decision of the Respondent Town of Kensington (the Town) to deny a request by Caseley Farms to zone lots B34, B35, B36 and B40 to R2 (two-family residential zone) and also to deny a request by Caseley Farms to zone Lot R41 to R3 (multi-family residential zone). These lots are shown on plan number 09258A and form an extension to Rosewood Drive in Kensington as seen below.



[3] Following due public notice, the hearing was held on January 26, 2011.

2. Discussion

The Appellant's Position

[4] Caseley Farms' position may be summarized as follows.

- The Town had held a public meeting in October 2010 to obtain input from the public on the proposed zoning. Caseley Farms had a representative at the meeting. At the regular meeting of Council on November 8, 2010, the residents in attendance were invited to speak again. Had Caseley Farms known this was to take place, it would have sent a representative to that meeting as well.
- Caseley Farms submits that the Town voted to deny the requested zoning "to look popular to its citizens".
- Caseley Farms submits that the Mayor of Kensington had approached Rendal Caseley to encourage Caseley Farms to develop more lots in the Town.
- Caseley Farms submits that it needs the flexibility of lots which can be used for more than just single family residences.
- Caseley Farms submits that the Town abrogated its mandate to allow for the orderly development of the Town by following the wishes of a few adjoining land owners. The Town failed to be cognizant of its goals and aspirations as set forth in section 5.4 of the Town's Official Plan.
- Caseley Farms referred to the November 16, 2010 letter from the Town outlining the reasons for the Town's decision. That letter referred to restrictive covenants signed by each property owner on Rosewood Drive, said covenants requiring in part that the property owners would not develop anything other than a residential dwelling on their property. Caseley Farms pointed out that the Town, in its letter, "... deemed that your client [Caseley Farms] provided a commitment to the residents that Rosewood Drive is, and would always remain, a single family residential street unless otherwise agreed to by the residents". Caseley Farms submits that the Town misapprehended the nature and effect of a restrictive covenant. A restrictive covenant is a contract between the developer and the purchaser (including subsequent purchasers) of a parcel of land. It does not restrain the ability of the developer to change the intended uses of other lands owned by the developer. Restrictive covenants operate totally outside the zoning of the same property by the Town.

[5] Caseley Farms requests that the Commission overturn the Town's decision and grant the requested zoning.

The Respondent's Position

[6] The Town referred to its written brief found at Tab 1 of Exhibit R1. This brief referred to several portions of the Town's Official Plan. This brief may be summarized as follows.

- The Town followed all procedural requirements, including the mailing of notices and the placement of newspaper advertisements. Everyone present had a full opportunity to be heard.
- The Town submits that the action taken was as contemplated and required by the Official Plan.
- The Town decided to protect the character and appearance of an already established neighbourhood by not allowing its degradation through the installation of incompatible land uses. The Town acknowledges that the various residential land uses would not be considered conflicting; however, whether or not they are compatible is somewhat subjective in nature. The Town submits that this compatibility should be examined in terms of, among others, density and levels of activity including projected traffic generation. In the Town's view, the proposed uses as applied for are not compatible within this primarily single family residential subdivision.
- The Town submits there is a sufficient inventory of two-family and multi-family residential properties presently within the town.
- The Town submits that Rosewood Drive, having three multi-family properties at the top of the street, one two-family residential property and 20 single family residential properties, is and should remain primarily a single family residential area. It is felt that approving a development with a higher density than what currently exists on the street would contribute to the degradation of a higher end neighbourhood and would degrade the safety of the neighbourhood through a resultant increase in traffic generation.

[7] The Town requests that the Commission deny the appeal.

The Public's Position

[8] Three members of the public, all property owners on Rosewood Drive, gave sworn oral statements to the Commission. These persons all expressed their view that Rosewood Drive is essentially a single family street and this understanding was reinforced by the covenant that they were required to sign. They expressed concern about traffic, especially as there are no sidewalks on the street. One member of the public was especially concerned that the R3 designation could allow up to a 12 unit building.

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 allow the appeal in part. The reasons for the Commission's decision follow.

[10] A portion of section 5.4 of the Town's Official Plan reads as follows:

5.4 Residential

Housing demand in Kensington appears to be reasonably strong. Serviced residential lots, however, are in short supply. This is largely due to the lack of suitable land within the Town but it is also due to dramatically increasing servicing costs for residential development. The Town also lacks land which matches the demands of the marketplace, particularly for more innovative and affordable starter home formats such as duplexes and manufactured housing.

Council must not only designate additional land for residential development, it must also actively promote the Town as a residential location and an attractive investment opportunity for residential developers.

Efforts must also be focused on maintaining the quality of current residential neighbourhoods and promoting high residential development standards.

Objectives:

- To actively promote the Town as a residential location.*
- To encourage a broad range of cost-effective residential development opportunities in the Town.*
- To protect the character and appearance of established neighbourhoods.*
- To encourage residential development standards which stress safety, efficiency, aesthetic appeal, land use compatibility and fostering of a healthy lifestyle.*

Policies:

Policy PR-1: Zoning

It shall be the policy of Council to designate sufficient residential land to accommodate the projected and potential housing needs of the Town during the period of the Plan. Existing residential areas shall be protected from encroachment from conflicting land uses.

Plan Action:

- The Development Bylaw shall zone sufficient residential land to meet the projected needs of the Town.*
- Residential zoning shall be in conformance with the General Land Use Plan.*
- The Development Bylaw shall establish zones and development standards for Single Family, Two Family and Multiple Family forms of residential development.*
- Zoning shall be utilized to provide protection for*

existing residential neighbourhoods from encroachment by conflicting land uses and to direct and encourage future residential development.

[11] Section 5.4 of the Town's Official Plan acknowledges the dramatically increasing servicing costs for residential development, the need to match market demand, the need to facilitate an attractive investment opportunity for residential developers and the need to maintain the quality of current residential neighbourhoods. This section seeks to strike a balance between promoting new and innovative residential development while protecting the character of an existing neighbourhood.

[12] Rosewood Drive currently consists of three multi-family developments near the intersection with Garden Drive (Route 109), a single semi-detached (two-family) home on Lot A11 with the remainder of the lots consisting of single family homes. The Commission views Rosewood Drive as a multi-use residential street.

[13] The Commission notes that the Town, through its Mayor, encouraged Caseley Farms to develop more lots as an extension to Rosewood Drive. This is appropriate and fully consistent with the Town's Official Plan.

[14] The Commission takes notice that residential preferences on Prince Edward Island are changing somewhat. In recent years, there has been increased demand for semi-detached (two-family) and multi-family developments, many of which are owner occupied. As noted in section 5.4, this provides for more affordable starter homes. It also provides attractive housing options for individuals and families who are downsizing. Many developers are taking pride in offering the same level of quality and amenities in these homes as would be found in single family homes. The days of 'sub-standard duplexes' being constructed are hopefully gone, thanks to building codes and market demand that insists on a quality product. Building lot developers, using restrictive covenants, and municipalities, using strict standards for development permits, also help to ensure that quality does not diminish with two-family and multi-family homes. All too often, residents cite concerns that the value of their property will be diminished if two-family homes are constructed in their neighbourhood. However, it has been the Commission's experience that these concerns, though offered most sincerely, are not supported by objective evidence.

[15] It is understandable that residents would be concerned about increased traffic flow through a neighbourhood as a result of multi-family homes placed near the end of the street. In the case of Rosewood Drive, the existing multi-family homes were placed at the beginning of the street close to the intersection with a major Town street. This makes good sense from a traffic perspective as the additional traffic volume is not lead through the entire street.

[16] The Commission finds that the Town made its decision in utmost good faith. The Town followed the notice requirements, held a public meeting, gave everyone an opportunity to be heard and considered its Official Plan before making its decision.

[17] The Commission notes that the residents who appeared as members of the public relied heavily on the fact that they were required to sign a restrictive covenant which, among other points, only permitted single family homes. While it is understandable that such a covenant would give residents the impression that the neighbourhood is single family, these covenants are a contract between the residents and the developer and, unlike a zoning bylaw, do not bind the Town.

[18] The Commission agrees with the Town's decision to deny zoning Lot B41 as R3 (multi-family residential) given that such zoning could allow, 'as of right', the construction of up to a twelve-unit building (and up to eighteen units by way of special permit). The Town correctly noted that contract zoning is not available to limit such development to the three or four units Caseley Farms have in mind. The Town further noted that it is looking into the possibility of adding additional residential zoning options as part of the Official Plan / Bylaw review process. Such additional options could allow for a multi-family zone with an upper limit of units more in keeping with Caseley Farms' intent for multi-family development.

[19] The Commission is of the view that Lot B41 should be zoned R2 (two-family residential).

[20] The Commission agrees with the Town's decision to deny zoning Lot B36 as R2 (two-family residential). Lot B36 is adjacent to the recently conveyed B37, zoned R1. Lot B37 is adjacent to the existing semi-detached home on lot A11. The owner of Lot B37 gave evidence as a member of the public and told the Commission that, at the time he purchased Lot B37 from Caseley Farms; he was not informed that an R2 zoning designation was sought for B36. Under these circumstances, the Commission views that it would be inappropriate to effectively 'sandwich' one R1 lot between two R2 lots.

[21] However, the Commission finds that the Town misapplied the rather delicate balance set out in section 5.4 of its Official Plan when it made the decision to deny the zoning of lots B-34, B-35, and B-40 to R2 (two-family residential zone). In effect, the Town placed too much weight on the need to protect the character and appearance of the neighbourhood and not enough weight on the need to address increasing servicing costs, the need to encourage housing diversity, and the need to provide an attractive investment opportunity for residential developers. The Commission is of the view that modern, well constructed semi-detached homes would not detract from the character or appearance of this attractive neighbourhood.

[22] Accordingly, the Commission allows the appeal in part and orders the following zoning for the lots contained in Rosewood Drive Extension:

- Lot B-36 to be zoned R1 (single family residential).
- Lot B-41 to be zoned R2 (two-family residential).
- Lots B-34, B-35 and B-40 to be zoned R2 (two-family residential).

4. Disposition

[23] An Order allowing the appeal in part follows.

IN THE MATTER of an appeal by
Caseley Farms Ltd. of a decision of the Town
of Kensington, dated November 8, 2010.

Order

WHEREAS the Appellant Caseley Farms Ltd. appealed a decision of the Town of Kensington, dated November 8, 2010;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on January 26, 2011 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 in part.
2. The lots contained in Rosewood Drive extension shall be zoned as follows:
 - Lot B-36 to be zoned R1 (single family residential).
 - Lot B-41 to be zoned R2 (two-family residential).
 - Lots B-34, B-35 and B-40 to be zoned R2 (two-family residential).

DATED at Charlottetown, Prince Edward Island, this 9th day of March, 2011.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*

Maurice Rodgerson, Chair

(Sgd.) *John Broderick*

John Broderick, Commissioner

(Sgd.) *Peter McCloskey*

Peter McCloskey, 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)