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

Docket LA12006
Order LA12-03

IN THE MATTER **of an appeal by Barbara Duncan-Biage of a decision of the Community of New Haven-Riverdale, dated March 20, 2012.**

BEFORE THE COMMISSION
on Friday, the 13th day of July, 2012.

John Broderick, Commissioner
Michael Campbell, Commissioner
Ferne MacPhail, Commissioner

Order

IN THE MATTER of an appeal by Barbara Duncan-Biage of a decision of the Community of New Haven-Riverdale, dated March 20, 2012.

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Appearances & Witnesses

1. For the Appellant

Barbara Duncan-Biage

2. For the Respondent

Luis Bate, Councillor
Dianne Dowling, Administrator

Witness:

Philip Wood, Planner

3. Member of the Public

Morley Foy

IN THE MATTER of an appeal by Barbara Duncan-Biage of a decision of the Community of New Haven-Riverdale, dated March 20, 2012.

Reasons for Order

1. Introduction

[1] The Appellant Barbara Duncan-Biage (the Appellant) 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). The Appellant's Notice of Appeal was received on March 26, 2012.

[2] This appeal concerns a March 20, 2012 decision of the Respondent Community of New Haven-Riverdale (the Respondent) to deny the Appellant's application to subdivide property number 611228 (the subject property).

[3] The appeal was heard on May 9, 2012.

2. Discussion

The Appellant's Submissions

[4] The Appellant told the Commission that when she bought the subject property she understood that she was buying two lots totaling over two acres. She is aware that only one acre is necessary to build a home on. She wishes to subdivide the subject property into two lots, live in her existing home on the front lot and move a house onto the back lot for her daughter. She acknowledges that there is some additional "paperwork" that needs to be done. She notes that she now has confirmation from the Province that the original 1979 house lot was lawfully subdivided as no approval stamp was required for the "first lot off". However, it appears necessary to have the Province retroactively issue subdivision approval for the back lot as that lot had been purchased by her predecessors in title in 1989 with a warranty deed but no evidence that a stamped approved plan was ever issued for that lot.

[5] In November 2011 the Appellant requested from the Respondent a right-of-way access across the front property as, at that time, she believed she owned two approved lots. She then learned that the process would be more complicated and she requested a copy of the Respondent's Official Plan, Bylaw and application forms for subdivision and a building permit. At first she received "approval in principle" to subdivide. However, three days later she was informed that the back lot was not a legal lot as it had been appended. She was told to subdivide the lot into two equal sized lots and then both parcels should meet the current one acre standard. She proposed a private driveway leading to the back lot. She requested that the Respondent make a decision as fast as possible as the deadline was fast approaching for the house she wished to purchase and move to the back lot. On December 28, 2011 she received a letter which she believed to be a decision as it stated that she had a right of appeal. She appealed that decision to the Commission but later withdrew that appeal as the Respondent later submitted that the letter was not a decision but a request for further information. By February 2012 the status of the 1979 house lot was clarified and it became clear that lot had been lawfully subdivided as a "first lot off".

[6] The Appellant then proposed to subdivide the back lot using her existing driveway. She was initially advised that this would sever the front lot but she maintains that a right-of-way does not of itself sever a property. Her current proposal involves expanding her current driveway to allow access to the back lot. At the March 20, 2012 meeting of the Respondent's Council, she was advised that her most recent application was denied, with reasons to follow, and that she had the right to appeal to the Commission. The offer to purchase the house [to be moved] was extended several times during this process but the final extension expired on February 29, 2012. She then filed the current appeal.

[7] The Appellant stated that she was originally advised that the subdivision would be approved provided that she could establish that the 1979 and 1989 lots were legally subdivided. She has now established that the 1979 lot was lawfully subdivided and the process to confirm the legality of the 1989 lot is currently ongoing. In her view the Respondent is now denying subdivision approval based on planning considerations which were not raised when she had initially applied in 2011.

[8] With respect to the planning issues raised by the Respondent in its March 26, 2012 decision letter, the Appellant filed with the Commission on April 24, 2012 a detailed four page document setting out her position. This response, titled "Response to Conflicts with the Official Plan …", as well as several other documents filed by the Appellant at the same time, forms Exhibit A2. In brief, the Appellant's position, as expressed in her oral submissions, includes:

- Her needs as a property owner are being overlooked;
- The Respondent's argument that granting the subdivision would create a precedent is overstating the matter as the development of a 'back lot' could only occur with three lots in this area of the Respondent community;
- The concerns about water and sewer are not compelling as each lot would meet the Respondent's one acre requirement;

- The Bylaw does not state a maximum width for a driveway and thus she should be able to have one, wide driveway serving both properties;
- With respect to "detrimental effect" on neighbouring properties, only two letters of opposition were received, one of which is from Mr. Foy who spoke at the appeal hearing. Mr. Foy's lot is actually a rear lot similar to what the Appellant is now proposing;
- Mr. Foy's privacy concerns will not be a concern as trees will be maintained;
- Sharing one wide driveway would be safer than two separate driveways;

[9] The Appellant requests that the Commission allow her appeal, quash the Respondent's March 20, 2012 decision [as reflected in the March 26, 2012 decision letter] and substitute a decision allowing a subdivision of the subject property.

The Respondent's Submissions

[10] Luis Bate submitted on behalf of the Respondent that the Respondent's Council was placed under a lot of pressure because the Appellant had an offer to purchase a house which had to be moved. Mr. Bate stated that the Appellant had been provided with various forms but had not submitted an application. The Appellant had two property numbers at the time so the Respondent gave preliminary approval on that basis. Later it was found that the Province had issued the second property number in error and that number was rescinded. The process had to be restarted and this time the Appellant submitted an application that was almost complete. The proposed driveway was shown to be in the centre of the proposed front lot, and while this would not legally create three parcels it would functionally do so. The Respondent's March 26, 2012 decision letter determined that the Bylaw would not permit the Respondent to grant the Appellant's proposed subdivision.

[11] Philip Wood testified that the front lot is an approved lot. However, the Respondent cannot find any evidence that the back lot was lawfully subdivided. The Respondent has no retroactive authority to grant subdivision approval. However, the Province does have such power should it see fit to exercise it. Further, Mr. Wood stated that the special planning area regulations [set out in section 63 of the Planning Act Subdivision and Development Regulations] serve as an overlay to the Respondent's Bylaw and Official Plan and in fact take priority over those documents. In brief, the special planning area regulations impose a "buffer" zone around large municipalities to direct development into these urban areas and restrict development within the buffer area. The special planning area regulations do permit limited subdivision of "existing" lots – defined as a lot in existence on July 9, 1994. If the 'back lot' can be found to be an existing lot, then the Appellant needs to meet the requirements of the Bylaw. However, if this back lot does not qualify as an existing lot, then there is a problem which prevents further subdivision.

[12] Mr. Wood referred to his March 12, 2012 letter contained in Tab N of Exhibit R2. He told the Commission that even if there had been no public opposition to the Appellant's application, the Respondent could still have denied the Appellant's subdivision application. Mr. Wood stated that a granting of this subdivision would set a precedent which would encourage other landowners to subdivide their own back lots. He noted that many property owners had obtained back lots in order to obtain additional privacy and promote sustainability of their septic systems. Permitting development of back lots or rear yards may result in a loss of privacy for adjacent neighbours. The development of the back lot portion of the subject property would result in a significant impact on Mr. Foy's home.

[13] Morley Foy was present at the hearing as a member of the public and requested an opportunity to be heard. Mr. Foy testified that he and his family live in a home immediately adjacent to the subject property. They purchased this lot because of the privacy it offered and they appreciated the existing character of the neighbourhood. Mr. Foy expressed concern that his family would lose privacy if the rear portion of the subject property were developed.

3. Findings

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

[15] The decision made by the Respondent on March 20, 2012 [the reasons for which were expressed in the March 26, 2012 letter from the Respondent's Administrator] is independent of the need for the Appellant to establish that the so called back lot, conveyed by deed in 1989, was lawfully subdivided at the time or to, in the alternative, obtain a retroactive decision by the Province to the same effect. The Commission's decision on appeal addresses the Respondent's decision made with respect to its Official Plan and Bylaw and thus is also independent of this requirement to establish that the parcel deeded in 1989 was done with subdivision approval, either contemporarily or retroactively.

[16] Appeals under the ***Planning Act*** 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.*

[17] 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. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the decision maker did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the ***Planning Act***, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[18] However, a consideration as to whether or not a decision maker followed "the proper procedures" ought not to be viewed narrowly to include only ascertaining that the required notices were issued and other preliminary steps taken. Rather, "proper procedure" applies to the entire decision making process, from receipt of an application to the rendering of a decision. The decision maker must always follow the applicable law.

[19] The Commission examined a two-part test which serves as a guideline in determining appeals under the ***Planning Act***:

- Whether the municipal authority, in this case the Respondent, followed the proper process and procedure as required in its Bylaw, in the ***Planning Act*** and in the law in general, including the principles of natural justice and fairness, in making a decision on an application to subdivide the subject property; and

- Whether the Respondent's decision with respect to the proposed subdivision has merit based on sound planning principles within the field of land use and municipal planning and as enumerated in the Official Plan.

[20] Upon reviewing the entire record before the Commission, the Commission finds that the Respondent followed the process and procedure set out in the Bylaw, the ***Planning Act*** and the law in general. While the process may have seemed slow to the Appellant, the Commission is of the view that any delay was not the fault of the Respondent. Rather, the Respondent was challenged by erroneous information, that is to say a property number issued by the Province in error, and missing information, which it tried to assist the Appellant in obtaining. Most importantly, the Respondent was fair to the Appellant and fair to those persons, such as Mr. Foy, who had concerns about the Appellant’s application.

[21] The Respondent’s decision letter, dated March 26, 2012 and found at Tab S of Exhibit R2, contains a detailed series of reasons for the Respondent’s decision to deny the Appellant’s application to subdivide the subject property. When a municipal decision maker provides detailed reasons for its decision, such reasons are beneficial for all concerned parties and allow an appellate body, be it the Court or the Commission, to know the basis for the decision.

[22] The Commission has heard evidence from Mr. Wood, a knowledgeable and respected land use planner, and finds that the various points set in the Respondent’s decision letter are rooted in the Official Plan and in the Bylaw. The Commission finds that the Respondent’s decision is consistent with sound planning principles, and most importantly, the specific principles the Respondent has chosen to adopt in its Official Plan and implement in its Bylaw.

[23] However, the Commission is also of the view that there is much merit in the Appellant's application. The Appellant's April 24, 2012 "Response" provides an insightful perspective on the Respondent's decision. Just because the Respondent's decision is consistent with sound planning principles does not mean that the Appellant's proposal is contrary to sound planning. The Commission is of the view that there is enough leeway in the Respondent's Official Plan to lend support to an approval of the Appellant's application had the Respondent seen fit to do so. The Respondent effectively chose to strongly emphasize the rural character of the community, avoid placing pressure on itself to develop municipal services by maintaining a very low development density and place considerable weight on the "detrimental" effect on neighbouring properties.

[24] Where a municipal decision maker follows the law and its own process carefully, and bases its decision on identified principles contained in its Official Plan and sound planning in general, the majority of the Commission is inclined to defer to the decision of a municipal government. In the present situation, the Respondent's decision was a decision made by its elected Council. The Respondent's Council followed the process without error and specifically considered the application with a view to its compliance with identified sections of the Official Plan and Bylaw. Neither the Appellant nor the Commission was left guessing: it was abundantly clear what the Respondent's concerns were as its decision was carefully reasoned and thoughtfully referenced to the specific Official Plan and Bylaw provisions. The Respondent had to make a difficult decision in applying the facts of the application to the requirements of the Official Plan and the Bylaw.

[25] Accordingly, the majority of the Commission defers to the decision of the Respondent and the appeal is hereby denied.

[26] CAMPBELL, COMMISSIONER (Dissenting): I dissent from the findings of the majority's Decision and Order and would allow the appeal for the reasons that follow.

[27] I agree with most of the findings of the majority of the Commission. However, it is my view that an Official Plan and a land use Bylaw lawfully infringe on the pre-existing common-law rights of a land-owner. Where an application is clearly contrary to the requirements of the Official Plan or the Bylaw, the application should of course be denied. However, where the relevant policies of the Official Plan may reasonably be interpreted for or against a landowner's application, I am of the view that the Commission should defer to the landowner/applicant, in this case the Appellant, rather than the municipality. This is particularly germane in this case where the Appellant purchased in 1995 what was described at the time, as two separate parcels, with the intention of providing for the future building requirements of her three children, should they have a desire to establish a home on that property.

[28] With regard to section 16.6 of the Bylaw and the detrimental effect on neighbouring properties, I am of the view that in the present case the Appellant's application was permissible from a planning point of view and Mr. Foy's privacy concerns could be addressed by maintaining the existing treed buffer on Mr. Foy's own land. Furthermore, the Respondent's Council could, if seen as absolutely necessary, insist that a narrow border of existing trees be prevented from being cut to provide a buffer between the Appellant and the adjacent neighbour.

[29] It should be pointed out that the establishment of panhandle lots in the area has indeed been established with the neighbour Mr. Foy being one landowner and a second such situation appearing to exist further to the east. In my opinion the precedent has already been established and in the Respondent's March 26, 2012 letter it is stated "A number of adjacent lots to this property have added parcels to the rear of their properties … thus creating an established development pattern".

[30] Therefore, based on the fact that quiet enjoyment of the neighbour can be accomplished by buffering and the fact that similar layouts and locations of lots exist in the area, I would have allowed the appeal, subject of course to the requirements of the special planning area regulations being met.

4. Disposition

[31] An Order denying the appeal follows.

IN THE MATTER of an appeal by Barbara Duncan-Biage of a decision of the Community of New Haven-Riverdale, dated March 20, 2012.

Order

WHEREAS the Appellant Barbara Duncan-Biage appealed a decision of the Community of New Haven-Riverdale, dated March 20, 2012;

AND WHEREAS the Commission heard the appeal at a public hearing conducted in Charlottetown on May 9, 2012 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 hereby denied.

DATED at Charlottetown, Prince Edward Island, this 13th day of July, 2012.

BY THE COMMISSION:

John Broderick, Commissioner

Michael Campbell, Commissioner
(Dissenting)

Ferne MacPhail, 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)