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

Docket LA12005
Order LA12-05

IN THE MATTER of an appeal by Bill Arsenault of a decision of the Community of Miltonvale Park, dated March 6, 2012.

BEFORE THE COMMISSION
on Friday, the 31st day of August, 2012.

Allan Rankin, Vice-Chair
John Broderick, Commissioner
Ferne MacPhail, 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 Bill Arsenault of a decision of the Community of Miltonvale Park, dated March 6, 2012.

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Bill Arsenault
Joshua Arsenault

2. For the Respondent Community of Miltonvale Park

Sandy Foy
Hal Parker
Phil Wood
Jay Carr

IN THE MATTER of an appeal by Bill Arsenault of a decision of the Community of Miltonvale Park, dated March 6, 2012.

Reasons for Order

1. Introduction

[1] The Appellant Bill Arsenault (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 14, 2012.

[2] This appeal concerns a March 6, 2012 decision of the Respondent Community of Miltonvale Park (the Respondent) to deny the Appellant's application to subdivide property number 940510 (the subject property).

[3] The appeal was heard on June 18, 2012.

2. Discussion

The Appellant's Position

[4] The Appellant's position may be briefly summarized as follows:

- The Appellant and his wife have an existing home on part of the subject property. They want to give their son and his wife a parcel of land [approximately half of the subject property] on which to build a home. The subject property has over 2 acres and the subdivision would provide for two parcels, each over 1 acre in size with one large enough for the existing home while the other parcel would be large enough for a new home. The Appellant applied to the Respondent for permission to subdivide, permission was denied and thus the Appellant has filed this appeal.

- The Appellant is of the view that the Respondent erred in its decision by misinterpreting its Development Bylaw (the Bylaw). Specifically, the Appellant believes that clause 19(5)(2) of the Respondent's Bylaw does not provide any indication of what may be done with a lot not in existence prior to 1994.

[5] The Appellant requests that the Commission allow his appeal and order a subdivision of the subject property.

The Respondent's Position

[6] The Respondent provided the Appellant with detailed reasons for its decision in a letter dated March 7, 2012. At the hearing, the Respondent spoke to the reasons for its decision, which may be summarized as follows:

- The subject property contains 2.88 acres of land. The Respondent believes that the subject property does not have enough frontage to be subdivided. Clause 11(4)(ii) of the Bylaw requires a minimum frontage of 150 feet. The subject property has a frontage of approximately 172.86 feet. Approving the Appellant's application would result in a frontage of approximately 148.86 feet as the required 24 foot wide access driveway retained by the remaining parcel would reduce the lot frontage of the proposed lot.

- The subject property is not an "existing parcel" which is specifically defined in clause 19(5)(2) of the Bylaw. An "existing parcel" means a parcel held in separate ownership on July 9, 1994. The subject property is a lot that was subdivided from an "existing parcel", specifically property number 281329, on August 23, 2004.

- The Respondent's Official Plan and Bylaw were prepared to meet the objectives of the Special Planning Area Regulations (subsection 63(3) of the Subdivision and Development Regulations made pursuant to the ***Planning Act***). This is a requirement of the Provincial government.

- Pursuant to subsection 7(2) of the ***Planning Act***, the Bylaw cannot be less stringent than the Provincial regulations.

- The Respondent's Bylaw allows the subdivision of up to five lots from each "existing parcel". However, Parcels created after July 9, 1994 are not given the right to be subdivided.

- The Respondent explained the logic of its interpretation: the Special Planning Area (SPA) regulations contained in section 63 of the Planning Act Subdivision and Development Regulations place a "cap" on the number of un-serviced lots in the Respondent community. If lots which were subdivided from an "existing parcel" are allowed to be further subdivided this cap would cease to exist and this would be contrary to the objectives of the SPA.

- The Respondent explained, through the testimony of Phil Wood, the Respondent's land use planner, that the SPA represents an additional "layer" added to the requirements of the Respondent's Bylaw and Official Plan. Mr. Wood explained that the SPA is imposed on the Respondent. The Respondent cannot question the legislative framework; logic is not the test, rather the Respondent is required to follow the SPA.

- Mr. Wood also explained that municipal bylaws speak in terms of permitted uses: if a use is not specifically listed it is not permitted.

- Mr. Wood spoke to the issue of “panhandle lots”, that it is best that the “handle” portion belong to the back lot to allow fully deeded access. Mr. Wood also spoke to general concerns over strip development.

- The Respondent noted in its March 7, 2012 letter that the proposed lot would not have sufficient width to accommodate the minimum circle diameter required by subsections 4(1) and (2) of the Province-Wide Minimum Development Standards Regulations made pursuant to the ***Planning Act***. However, at the hearing, the Respondent called Jay Carr of the Department of Environment, Labour and Justice and it was the evidence of Mr. Carr that, provided the minimum square footage requirements were met and provided the lot was characterized as a category I lot, a variance of the 150 foot circle requirement could be granted to the proposed 148 foot circle. If the lot was characterized as a category II lot the department will go down to a 150 foot circle as a matter of policy.

- However, Mr. Carr acknowledged that the Respondent would have the final say over the granting of any such variance.

[7] The Respondent summarized that while it would have possible discretion to approve a panhandle lot and it would have possible discretion to allow a minor variance of the minimum circle requirement, the Respondent is bound by the SPA and has no discretion to permit the subdivision of the subject property as it is not an “existing parcel” as that phrase is defined. Accordingly, the Respondent requests that the Commission deny the Appellant’s appeal.

3. Findings

[8] 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.

[9] The Respondent is bound by the law. That is to say, the Respondent cannot make a decision contrary to the ***Planning Act***, its Official Plan or its Bylaw. The Commission, on appeal, is bound by the very same laws.

[10] In the present appeal, the Respondent contends that it is also bound by the objectives of the SPA.

[11] Subsection 63(10) of the Planning Act Subdivision and Development Regulations reads as follows:

> 63(10) A municipality with an official plan may, as an alternative to amending its official plan and bylaws to conform with subsections (2) to (9), otherwise amend its official plan and bylaws where the amendments comply with subsection 7(2) of the Act and
>
> (a) are consistent with the objectives set out in subsection (3);
>
> (b) satisfy the minimum requirements applicable to official plans pursuant to section 7 of the Act;

> (c) revoked by EC421/09;
>
> (d) with the exception of the community of Miscouche, limit the number of lots in a subdivision for residential use to no more than five lots per existing parcel of land, unless
>
> > (i) central water service, central sewerage service or both of them, by a municipal water utility, municipal sewerage utility, or both of them is available, and
> >
> > (ii) an irrevocable agreement has been signed between the developer and the municipal water utility, municipal sewerage utility, or both of them, to provide central water service, central sewerage service or both of them, to all lots prior to the conveyance of any lot from the approved subdivision; and
>
> (e) require the municipality to report to the Minister, on or before April 30 of each year, the number of lots approved and development permits issued in the previous fiscal year, by type of intended use. (EC693/00; 702/04; 116/05; 212/05; 364/07; 380/07; 166/08; 421/09)

[12] Subsection 63(3) of the Planning Act Subdivision and Development Regulations sets out the objectives for development within the SPA:

> 63(3) The specific objectives for development within the Stratford Region Special Planning Area, the Charlottetown Region Special Planning Area, the Cornwall Region Special Planning Area, and the Summerside Region Special Planning Area are
>
> > (a) to minimize the extent to which unserviced residential, commercial and industrial development may occur;
> >
> > (b) to sustain the rural community by limiting future urban or suburban residential development and non-resource commercial and industrial development in order to minimize the loss of primary industry lands to non-resource land uses; and
> >
> > (c) to minimize the potential for conflicts between resource uses and urban residential, commercial and industrial uses.

[13] Clauses 19.5 (1) and (2) of the Respondent's Bylaw read as follows:

> **19.5 SPECIAL REQUIREMENTS – AGRICULTURAL (A1) ZONE**
> (1) Within an Agricultural (A1) Zone, no Person shall be permitted to subdivide from any existing Parcel of land more than five (5) Lots.
> (2) For the purposes of this Section "existing Parcel" shall mean a Parcel of land which was held in separate ownership as of July 9, 1994.

[14] Subsection 7(2) of the ***Planning Act*** reads as follows:

> 7(2) Where regulations have been made pursuant to clause (1)(c) or section 8.1, the council of a municipality with an official plan or bylaws made under this Act shall, within one hundred and twenty days of the date of publication of the regulations in the Gazette, make such amendments to its official plan or bylaws as are necessary to ensure that any requirements imposed thereby are not less stringent than those imposed by the comparable provision of the regulations.

[15] The Commission notes the following from Mr. Wood's February 6, 2012 letter to Sandy Foy, the Respondent's Development Officer:

> *Essentially the Planning Act Special Planning Area Regulations were put in place to prevent, or at least minimize, the urbanization of these rural areas. Special emphasis is placed on limiting "unserviced" residential development. The Regulations grant a five (5) lot subdivision allowance to those parcels that were in existence as of July 9, 1994. Parcels created subsequent to July 9, 1994 are not given the right to be subdivided.*
>
> *The logic of this interpretation is clear. The Regulations intend to place a "cap" of the number of unserviced lots. If more lots are allowed to be further subdivided this cap would cease to exist. The inability to further subdivide "newly" created lots has been in place since the Special Planning Area Regulations were put in place.*

[16] Mr. Wood is a knowledgeable land use planner who has frequently testified before the Commission. The Commission agrees with Mr. Wood that municipal development bylaws are premised on permissible uses. That is to say development or land use bylaws list the kinds of development that are permissible in a given zone and uses not listed are not permitted.

[17] The Commission finds that the Respondent has interpreted its Bylaw, specifically clauses 19.5(1) and (2), to be not less stringent than the requirements of the SPA regulations set out in section 63 of the Planning Act Subdivision and Development Regulations. The Bylaw adopts the same definition of "existing parcel" as set out in the SPA and is a reasonable and prudent approach to ensure that the Respondent is within the requirements of subsection 63(10) of the Planning Act Subdivision and Development Regulations.

[18] The Commission finds that the Respondent followed its Bylaw, the Planning Act and the SPA in making its decision to deny subdivision approval to the Appellant. While the Commission is sympathetic to the Appellant's desire to help facilitate a home for his son and daughter-in-law, the Respondent must follow its Bylaw and the Regulations of the Province of Prince Edward Island.

[19] For the above reasons, the appeal is denied.

4. Disposition

[20] An Order denying the appeal follows.

IN THE MATTER of an appeal by Bill Arsenault of a decision of the Community of Miltonvale Park, dated March 6, 2012.

Order

WHEREAS the Appellant Bill Arsenault appealed a decision of the Community of Miltonvale Park, dated March 6, 2012;

AND WHEREAS the Commission heard the appeal at a public hearing conducted in Charlottetown on June 18, 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 31st day of August, 2012.

BY THE COMMISSION:

(Sgd.) *Allan Rankin*
Allan Rankin, Vice-Chair

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

(Sgd.) *Ferne MacPhail*
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)