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

Docket LA13010
Order LA13-09

IN THE MATTER of an appeal by Brian Chandler of a decision of the Community of Miltonvale Park, dated September 26, 2013.

BEFORE THE COMMISSION
on Wednesday, the 27th day of November, 2013.

Maurice Rodgerson, Chair
John Broderick, Acting Vice-Chair
Peter McCloskey, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of an appeal by Brian Chandler of a decision of the Community of Miltonvale Park, dated September 26, 2013.

Order

On October 14, 2013, the Appellant Brian Chandler (the Appellant) filed a Notice of Appeal form 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 appealed a September 26, 2013 decision of the Respondent Community of Miltonvale Park (the Respondent) to "amend the bylaws including an amendment to the definition of 'building'".

Commission staff contacted the parties on October 16, 2013 and scheduled a hearing for December 4, 2013.

On October 22, 2013, the Commission received a letter from the Respondent dated October 18, 2013. In that letter, the Respondent submitted that the Respondent's Community Council (Council) did not amend the Zoning and Subdivision Control (Development) Bylaw (the Bylaw). Rather, Council's decision was to approve a new Bylaw. This new Bylaw was submitted to the Minister of Finance, Energy and Municipal Affairs for approval and repeal of the previous 2009 Bylaw. The Respondent further submitted that while an amendment to an existing planning bylaw may be appealed under the ***Planning Act***, the creation of a new Bylaw does not appear to be appealable.

On October 30, 2013, the Commission received a letter from the Appellant in response to the Respondent's October 18, 2013 letter. The Appellant submitted that the PEI Planning Decisions website identified the Respondent's decision as a "Text Amendment to Bylaw". The Appellant also submitted that in the Respondent's minutes of its July 31, 2013 public meeting, Council proposed changes to the existing Bylaw. The Appellant submits that the Respondent's characterization of the amendments as a new Bylaw is to prevent community members from appealing Bylaw changes.

On November 20, 2013 the Commission received a written rebuttal submission from the Respondent. The Respondent noted that the PEI Decision's website only provides a municipality with five options for "application type". The Respondent selected the "Text Amendment to Bylaw" type and clarified that later in the entry by stating: "Repeal the Development Bylaw and approve one that: 1. Revises Subsection 4.23 Accessory Structures; 2. Removes signage; 3. Clarifies certain definitions; 4. Makes a number [of] administrative revisions; and 5. Corrects a number of typographical errors". The Respondent submitted that the new Bylaw has in excess of 350 differences from the old Bylaw. The Respondent also submits that the entire process of preparing and approving the new Bylaw was made in consultation with the staff at Municipal Affairs and followed the requirements set out in the ***Planning Act***.

The Commission's Decision

The Commission finds that it does not have the jurisdiction to hear this appeal for the reasons that follow.

In Order LA11-05, *Wanda Wood and Heather McBeath* v. *Community of Victoria* (*Wood and McBeath*), the Commission considered a very similar situation to the present appeal. In *Wood and McBeath*, the Appellants had submitted that:

> *We further contend that the proposed 2009 Official Plan and Zoning & Subdivision Control Bylaws is not a new/replacement for the existing 2002 Official Plan and Development Bylaw. Once again there is no documentation to show that Council requested or was given ministerial permission to revoke or replace the existing Plan and Development Bylaw.*
>
> *We, therefore, contend that the documents adopted on July 17 and 21 and sent to the Minister for approval are amendments to the 2002 Official Plan and Development Bylaw and that the Commission has the jurisdiction to hear this appeal concerning them.*

In *Wood and McBeath* the Commission stated:

> *[18] Within the sector of land use planning decisions, the Commission is a quasi-judicial tribunal granted the authority to hear certain kinds of municipal planning decisions. These decisions have always related to administrative decisions. For example, the decision to issue, or not to issue, a building permit is an administrative decision. Such a decision may be made by a municipal council, or by a person, such as a development officer, delegated by a municipal council to make such a decision. Administrative decisions quite commonly may be appealed to an appropriate administrative tribunal or to the courts. An administrative decision frequently relates to a specific application, such as an application for a building permit.*
>
> *[19] By contrast, a legislative decision is a decision to create, or amend, a law. While a tribunal or court may be called upon to interpret legislation, the validity of the legislation is usually beyond the reach of such tribunal or court. There are always exceptions, usually limited to issues of constitutionality and the Charter of Rights and Freedoms.*

[20] As a result, administrative decisions of a wide range of decision makers, including elected municipalities, may be appealed to tribunals or the courts while the legislative decisions of elected bodies are normally free from such a challenge.

…

[23] Under the Interpretation Act, a bylaw enacted in the execution of a power conferred by an Act, in this case the Planning Act, has the same authority as a regulation. The Commission finds that the creation of an official plan or a bylaw implementing such official plan, or the statutorily required review of such documents, is a legislative process which may not be appealed to the Commission.

[24] The Commission has had the benefit of applying the present wording of section 28 of the Planning Act for over one and one half years. Based on this experience, it is the view of the Commission that the amendments to the Planning Act enacted in 2006 and proclaimed in 2009 were to codify the body of administrative law resting on past Orders of the Commission, rather than to enhance or restrict the Commission's jurisdiction.

[25] While clause 28(1.1)(b) of the Planning Act allows an appeal of a decision to amend a bylaw, the Commission interprets this clause as pertaining to bylaw amendments made as an administrative, rather than a legislative, function of a municipality. Thus an amendment to a bylaw, for example an amendment to a zoning map, along with any necessary consequential amendments to an official plan, for example an amendment to the future land use map, both of which were required to allow a specific development project to go ahead, are viewed as administrative decisions which may be appealed to the Commission. By contrast, a comprehensive review of the official plan and the accompanying review of the implementing bylaw, not pertaining solely to any one specific application, constitute a legislative enactment made by the municipality.

[26] The Commission finds that the principles contained in Order LA00-01 Arthur Jennings et al continue to apply and thus a decision to enact a new official plan, or a new implementing bylaw, or a statutory review of either document is a legislative decision and the Commission has no jurisdiction to hear an appeal of such a decision. Accordingly, the Commission finds that it has no jurisdiction to hear the present appeal.

In the present appeal, the Commission finds that the Respondent did, in fact, approve the revocation of its previous 2009 Bylaw and the approval of a new Bylaw. The Respondent exercised a legislative function, in effect, the right to create its own law.

The Commission maintains the reasoning set out in *Wood and McBeath* reiterates that Bylaw amendments made to facilitate the approval or denial of an application are administrative in nature and are appealable, while a comprehensive review of a Bylaw or the approval of a new Bylaw, independent of an application, is a legislative function of a municipal council and are not subject to appeal.

For the above reasons, the Commission is without jurisdiction to hear this appeal.

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. The Commission does not have the jurisdiction to hear this appeal.

DATED at Charlottetown, Prince Edward Island, this **27th** day of **November**, **2013**.

BY THE COMMISSION:

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

(Sgd.) *John Broderick*
John Broderick, Acting Vice-Chair

(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.

IRAC141x-SFN(2009/11)