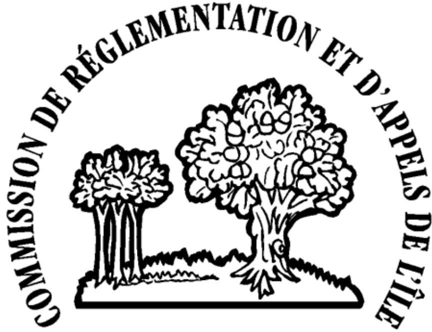

Docket LA13012
Order LA14-03

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated November 18, 2013.

BEFORE THE COMMISSION
on Tuesday, the 8th day of April, 2014.

John Broderick, Commissioner
Leonard Gallant, Commissioner
Jean Tingley, 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 Michael Wheeler of a decision of the Resort Municipality, dated November 18, 2013.

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Order

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated November 18, 2013.

Appearances & Witnesses

1. **For the Appellant Michael Wheeler**

   Michael Wheeler

2. **For the Respondent Resort Municipality**

   Counsel:

   Jonathan M. Coady

   Witness:

   Brenda MacDonald

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated November 18, 2013.

Reasons for Order

1. Introduction

[1] The Appellant Michael Wheeler (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 December 2, 2013.

[2] This appeal concerns a November 18, 2013 decision of the Respondent Resort Municipality of Stanley Bridge, Hope River, Bayview, Cavendish and North Rustico (the Respondent) to deny an application by the Appellant for a major variance for property number 232413 on the Route 13 flankage yard of the Old Wax Museum property located at Cavendish Corner.

[3] The appeal was heard on March 6, 2014.

2. Discussion

The Appellant's Submission

[4] The Appellant presented lengthy oral submissions to support his appeal and filed a written outline of his submissions (Exhibit A7) on his behalf and on behalf of his company, Wood Wheeler Inc. The conclusion of the Appellant's written outline is reproduced below:

> *Wood Wheeler Inc. believes that the authors of the Resort Municipality Zoning and Subdivision Control Bylaw anticipated that as societal demands change certain circumstances would present themselves where the strict compliance to the precise terms of a bylaw would not be in the public's best interests and contravene the purpose and intent of the Zoning and Subdivision Bylaws. This is evident in the Resort Municipality Official Plan that states:*
>
> > *"Council may grant variances to the provisions of the Development Bylaw where strict compliance to the precise terms of the Bylaw would represent an unreasonable or inappropriate burden on the applicant and where the general intent and purpose of the Bylaw and this plan is upheld."*

If the mechanism of a major variance is not available to simply allow an existing gravel walkway to be replaced with a wooden inclusive walkway that would re-establish dignity and equality for everyone, then under what circumstances would a major variance be granted?

In the matter of Wood Wheeler Inc. vs Cavendish Resort Municipality as: All legal test [sic] by the Resort Municipal Zoning and Subdivision Control Bylaw for approval of a major variance were satisfied;

The requested variance was the minimum required to overcome the unique characteristics of the property;

The Request for a major variance is in compliance with the purpose of a building setback;

People with physical disabilities and parents with small children will suffer undue hardship;

Not replacing the existing gravel walkway it [is] discrimination against individuals with respect to family status and physical disabilities and;

Failure of the Cavendish Resort Municipality to establish just cause for denying a major variance,

It is Wood wheeler Inc.'s opinion that the major variance application to relax the setback requirements for property #2324132 to permit the existing gravel walkway to be replaced with a wooden barrier free walkway be approved.

[5] The Appellant requests that the Commission quash the Respondent's November 18, 2013 decision to deny him a major variance and that the Commission order the Respondent to grant a major variance for a wooden barrier free walkway.

The Respondent's Submission

[6] Legal Counsel for the Respondent filed a written submission in addition to making a brief oral submission. Highlights of Counsel's written submission include the following:

- There is a development agreement between the parties. Schedule "B" of the development agreement requires the walkway on the western flank of the property to be a "paver stone walk". In effect and in addition to the variance request, the Appellant is requesting that the Respondent amend the development agreement to permit a "boardwalk deck" to be constructed in place of the paver stone walk. The Commission has no jurisdiction to amend the development agreement. An amendment of the development agreement would need to be negotiated between the parties; otherwise the proper forum for resolving a dispute as to the terms of the development agreement is the Supreme Court of Prince Edward Island.

- The Appellant is actually capable of meeting the requirements of the Bylaw as the Appellant could install a concrete sidewalk, strip of asphalt, paving stones, brick walkway, gravel or similar surfacing product. In the context of variances, it is generally required that there be no reasonable alternative available to the property owner. In the present matter the Appellant can meet the Bylaw; he has chosen not to meet those requirements.

- The Appellant has failed to demonstrate that the general intent of the Bylaw would be upheld. The Bylaw states that non-conforming structures shall not be increased and that yards are to be open and unobstructed by structures. The Appellant knew about the setback requirement. The proposed variance is inconsistent with the general intent of variances as a "limited relaxation" of provisions based on conditions peculiar to the parcel.

- The Respondent's Planning Board and Council provided reasons which reflected sound planning principles.

[7] The Respondent requests that the Commission deny the 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 allow this appeal and require the Respondent to grant the Appellant a variance to allow a wooden walkway, 10 feet wide, to be utilized instead of a gravel, concrete or paver-stone walkway. However, the Commission wishes to point out that an amendment of the development agreement may be required as well as a building permit. The Commission wishes to make it clear that the variance is for a wooden walkway and not a wooden deck and that the Respondent is fully entitled to set conditions and requirements in an amended development agreement, the building permit, or both, to ensure that the wooden walkway is solely a walkway and not a deck and to prevent any obstructions, including benches, chairs, tables etc. on such walkway.

[9] Section 2.77 of the Respondent's Bylaw reads as follows:

> *2.77 "Structure" – means any construction including a building fixed to, supported by or sunk into land or water, but excludes concrete and asphalt paving or similar surfacing and fencing and includes a swimming pool.*
>
> Emphasis added by the Commission.

[10] The Commission finds that a wooden walkway would be considered a structure. In making this finding the Commission agrees with the Respondent that "concrete and asphalt paving or similar surfacing" creates a class of walkway different from a wooden boardwalk and therefore a wooden boardwalk is considered a structure under the Respondent's Bylaw. The Commission also takes notice that the Appellant had applied for a variance, thus suggesting that the Appellant had acknowledged that his proposed walkway would be considered as a structure.

[11] As a structure, setback requirements apply. Various correspondence in the Respondent's file (Exhibit R1) identified the yard in question to be a flankage yard with a minimum setback of 25 feet. Due to the irregular boundary of the Appellant's property, the actual setback would vary between 18 and 3 feet if a 10 foot wooden walkway is constructed. Accordingly, a minor variance, limited to 10%, would not be sufficient. The Respondent's Bylaw sets out the following requirements for a variance of more than 10% in subsection 15.1(2) of the Bylaw:

> *15.1(2) Council may approve a permit with a variance of more than 10% from the requirements of this Bylaw, provided that in the opinion of Council the general intent of the Bylaw continues to be upheld, neighbouring properties will not be significantly or permanently injured, and the applicant for the permit has been able to document a compelling reason why the requirements of the Bylaw cannot be precisely met after:*
>
> *a) receiving a written application signed by the applicant;*
> *b) receiving a fee sufficient to cover the estimated cost of the advertising and mailed notices required under this section, the amount of such fee to be determined by Council;*
> *c) requesting and considering the recommendation of Planning Board;*
> *d) providing written notice, by ordinary mail, documenting the pertinent details of the application to all affected property owners within 120 m (approximately 400 feet) of the boundaries of the subject lot;*
> *e) holding a public meeting, notice of which shall be placed at least seven clear days prior to the meeting in a newspaper circulating in the area, indicating in general terms, the nature of the variance application and the date, time and place of the Council meeting at which it will be considered.*
>
> Emphasis added by the Commission.

[12] The portions of text underlined above set out the "test" to be applied. There is no indication that neighbouring properties will be significantly or permanently injured. However, Counsel for the Respondent submits that granting a variance would violate the general intent of the Bylaw, and that the Appellant is capable of meeting the Bylaw requirements by using alternate methods to create a walkway. The Appellant has placed great emphasis on the need to provide a walkway that is both cost effective and suitable for those with disabilities and young children.

[13] Technically, a wooden boardwalk is considered a "structure" under the Respondent's Bylaw. That said, the Commission is of the view that a wooden boardwalk, free of obstructions, would allow the flankage yard to remain open and unobstructed. In addition, the Respondent's Official Plan speaks to accessibility and pedestrian needs, see for example goals 3.3.2 and 3.3.4. The Appellant's development is a non-conforming use and expansion of such use is not permitted under the Bylaw. While the Commission is of the opinion that a wooden deck would expand the use by allowing for additional seating space, a simple unobstructed walkway in itself would not expand the Old Wax Museum development.

[14] Currently, the Appellant is using a gravel pathway which is in compliance with the Bylaw, although use of a gravel pathway was not specified in the development agreement. However, the Appellant submits, and the Commission agrees, that such loose surfacing is inappropriate for wheelchairs, strollers and other such devices to assist in personal mobility.

[15] The Appellant has filed two documents, Queen's University Accessibility Guidelines (Exhibit A5) and Education for Quality Accessibility (Canada) Ramps and Walkways Accessibility Guidelines (Exhibit A6). Exhibit A5 specifically notes that brushed concrete is the preferred surface. Exhibit A5 identifies exposed earth, coarse gravel, sand and bark chips as unsuitable. Exhibit A5 gives a maximum joint tolerance of 6 mm for brick pavers, concrete slabs or tiles. Exhibit A6 cautions to avoid the use of surfaces constructed of small paving units such as paving stones or cobble stones which may move independently and cause unevenness.

[16] The Appellant also filed a quote from Larry Stewart of First Last Construction for the cost of installing a concrete walkway (Exhibit A3). According to Exhibit A3, a 10 foot by 120 foot concrete walkway would cost $14,400 plus HST and a wood walkway "… would be half the price and just as good".

[17] While the Appellant could fully comply with the Bylaw and meet mobility guidelines through the use of a brushed concrete surface, the evidence suggests that a concrete surface would cost the Appellant an additional $7,200 plus tax. Whether a brushed concrete surface would be included in that cost is unknown. Not mentioned is the cost to maintain a concrete walkway in Prince Edward Island. The Commission takes notice that concrete walkways are susceptible to frost damage and repair may be costly and, at worst case, require complete replacement. By contrast, wood is easily repositioned or repaired and simply makes more sense when a walkway will not be used and maintained during the winter months. The question for the Commission to consider is whether the additional costs associated with a concrete walkway would be a "compelling" reason which would justify the granting of this variance.

[18] The Commission finds that in this case the Appellant is seeking to provide a walkway to enhance the safety and mobility of patrons of the various retailers in his development and of the general public. The walkway connects two parking lots and connects these parking lots with as many as 8 retail establishments within the Old Wax Museum development. A safe, pleasant and inviting walkway encourages safety by keeping patrons and the public on a well-defined pathway – especially important given the very close proximity of the development to a busy highway. While providing such safety and mobility may have some effect on the profitability of the Appellant's development, the Commission believes any such effect would be indirect and rather minimal. In such a perspective, an additional $8200 outlay [including tax], plus the potential for more costly annual maintenance, seems to be a compelling reason to waive a requirement to precisely meet the Bylaw's setback provisions.

[19] The Commission also takes notice that much of the limited flankage yard setback is due to a land conveyance to the Province in the 1990s. This land conveyance was necessary to improve highway safety at the Cavendish Corner. This is a unique feature of the Appellant's parcel which would mitigate in favour of granting a variance. The very fact that the Respondent has never granted a variance in excess of 10% should not, by itself, discourage the granting of such variance.

[20] The extensive documentation before the Commission uses the terms walkway, boardwalk and deck. The width of the "walkway" sought by the Appellant is 10 feet, which in the Commission's view is somewhat wider than the typical walkway. The Appellant explained the need for a walkway wide enough to allow two wheelchairs to pass each other and also explained the need for sufficient width for a mobility scooter to turn around. Exhibit A5 speaks to a minimum clear width of 1500 mm [1.5 metres or approximately 5 feet] with a preferred width of 2000 mm [2 metres or approximately 6 foot 7 inches]. Exhibit A6 speaks to a minimum width of 1.5 metres and a preferred width of 1.6 metres. While it could be viewed that a 10 foot walkway would be tantamount to a narrow deck, the Commission is of the view that use as a deck can be prevented, should the Respondent wish to do so, through conditions in the building permit, or through the terms of an amended development agreement, or both. Further, there is much to be said to encourage walkways to be wider than the minimum, especially given the increased popularity of mobility scooters.

[21] From the perspective of aesthetics and community planning, the Commission is of the view that a boardwalk type walkway would be preferable in appearance to concrete, as the Resort Municipality has an extensive boardwalk system and boardwalk style walkways are quite common in the Cavendish area. Simply put, a boardwalk type walkway would be in keeping with the visual character of Cavendish.

[22] The Respondent expressed concerns that granting a variance would set a precedent. The Commission notes that each variance application must be considered on its own unique facts, just as each appeal ultimately rests on its own facts. In the present matter, there are many unique circumstances.

[23] Accordingly, the Commission allows the appeal and requires the Respondent to grant a variance to the Appellant which would allow for a wooden walkway of 10 feet in width to replace the current gravel walkway. While an amendment to the development agreement may be required and the Commission has no jurisdiction over the development agreement per se, decisions of a municipal council, and the substitution of such decisions on appeal, should not be dictated to or constrained solely on the basis of existing wording in a development agreement. Any concerns that such a wide walkway could be also used as a deck may be addressed in conditions attached to the building permit and in an amended development agreement.

4. Disposition

[24] An Order allowing the appeal and requiring the Respondent to grant a variance for a wooden walkway of 10 feet in width, subject to conditions which may be set by the Respondent in the building permit and amended development agreement.

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated November 18, 2013.

Order

WHEREAS the Appellant Michael Wheeler (the Appellant) on December 2, 2013 appealed a decision of the Respondent Resort Municipality of Stanley Bridge, Hope River, Bayview, Cavendish and North Rustico (the Respondent), said decision dated November 18, 2013;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on March 6, 2014 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.**

2. **The Respondent shall grant the Appellant a variance to allow for a wooden boardwalk style walkway of 10 feet in width.**

3. **A building or development permit will be required before the Appellant commences construction. The Respondent shall have the right to impose such reasonable conditions as are deemed necessary, including any conditions restricting the use of the walkway and preventing its use as a deck.**

DATED at Charlottetown, Prince Edward Island, this 8th day of April, 2014.

BY THE COMMISSION:

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

(Sgd.) *Leonard Gallant*
Leonard Gallant, Commissioner

(Sgd.) *Jean Tingley*
Jean Tingley, 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)