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

Docket LA14004
Order LA15-05

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of Miltonvale Park, dated June 26, 2014 and October 23, 2014.

BEFORE THE COMMISSION
on Tuesday, the 16th day of June, 2015.

Doug Clow, Vice-Chair
Michael Campbell, 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 two appeals filed by Phillip O'Halloran concerning decisions of the Community of Miltonvale Park, dated June 26, 2014 and October 23, 2014.

Contents

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of Miltonvale Park, dated June 26, 2014 and October 23, 2014.

Appearances & Witnesses

1. For the Appellants

Phillip O'Halloran
Sean O'Halloran
Oscar O'Halloran

2. For the Respondent Community of Miltonvale Park

Sandy Foy
Hal Parker

Witness:

Orville Curtis

3. Members of the Public

Denise MacDonald-Vale
Judy MacDonald

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of Miltonvale Park, dated June 26, 2014 and October 23, 2014.

Reasons for Order

1. Introduction

[1] Phillip O'Halloran, on behalf of himself and on behalf of Oscar O'Halloran (the Appellants) has filed two appeals 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 Commission received a Notice of Appeal from the Appellants on July 16, 2014 (the July appeal). On November 13, 2014, the Appellants provided Commission staff with an email, which in substance initiated a second appeal (the November appeal). The Appellants was advised by Commission staff to file a Notice of Appeal and that document was received on November 19, 2014.

[2] These appeals concern decisions made by the Respondent Community of Miltonvale Park (the Respondent) on June 26, 2014 and October 23, 2014 respectively to deny applications for permits to place fill on parcel number 283085 located in the Community of Miltonvale Park.

[3] In an August 15, 2014 letter, the Respondent's Development Officer submitted in part that proceeding to a hearing based on the grounds of appeal set out in the July appeal would be an abuse of the appeal process. It was further submitted that the first appeal was frivolous and vexatious and the grounds were without merit. The Respondent requested that the July appeal be dismissed without a hearing.

[4] In a September 9, 2014 letter, the Appellants submitted that this appeal was not frivolous and the Respondent's request to dismiss the appeal was neither valid nor appropriate. The Appellants requested mediation. The Appellants further submitted that the Respondent did not agree to mediation the appeal should proceed to a hearing.

[5] In a September 10, 2014 email to both parties, Commission staff advised that the Commission decided to proceed to hear the appeal but the previously proposed hearing date would be postponed to allow a response from the Respondent on the Appellants' mediation request. On September 11, 2014, the Respondent informed Commission staff that the Respondent would not participate in mediation in this matter at this time.

[6] Following the filing of the November appeal, the Respondent filed a December 15, 2014 letter with the Commission raising further jurisdictional concerns. The Respondent submitted that they continue to be of the view that the appeals are frivolous and vexatious and the grounds for appeal are without merit to warrant a hearing. The Respondent submitted that with respect to the November appeal, the grounds for appeal, which added the fact that a Provincial environment permit had been granted, were also insufficient to warrant proceeding to a hearing as such permit does not replace or supersede the requirement for a development permit. The Respondent also noted that the Appellants failed to serve a copy of the Notice of Appeal on the Respondent within seven days as required by subsection 28(6) of the ***Planning Act***.

[7] The Commission decided to proceed to hear the appeals. The Respondent requested that the focus of the hearing be limited to the placing of fill on the property, noting that the Respondent's Council made decisions on two development permit applications.

[8] In a December 29, 2014 letter, the Appellants responded to the Respondent's December 15, 2014 letter and set out in some detail the Appellants' basis for both appeals.

[9] The Commission heard the consolidated appeals at a public hearing on January 19 and 20, 2015.

2. Discussion

Preliminary Matters

[10] The Respondent raised several preliminary matters orally at the hearing:

- That the focus of the hearing be limited to the placement of fill on the Appellants' property;
- That the Commission's jurisdiction is limited to the specific areas set out in section 28(1.1) of the ***Planning Act***;
- That the Commission has no jurisdiction over development agreements as a development agreement is a private contract between the parties;
- That the Appellants failed to serve a copy of the Notice of Appeal on the Respondent as required by subsection 28(6) of the ***Planning Act*** and that the second appeal should be dismissed on that basis.

[11] The Appellants replied to the jurisdictional issues, agreeing to keep the focus limited to the placing of fill, stating, "That's why we are here".

[12] The Commission orally determined that the scope of appeals would be limited to the applications for development permits to place fill on the Appellants' property.

[13] With respect to the issue of subsection 28(6) of the ***Planning Act***, the Commission orally referred to and quoted at some length from Commission Order LA99-06 *George R. Schurman* v. *Minister of Community Services and Attorney General*. In the present appeal, the Commission applied the test formulated by Chair Cheverie [as he then was] and determined that the failure of the Appellants to comply with the requirements of subsection 28(6) of the ***Planning Act*** did not prejudice or compromise the Respondent's position on this appeal.

[14] Accordingly, the Commission orally determined near the commencement of the hearing that it had the jurisdiction to hear both of the present appeals.

The Appellants' Position

[15] The Appellants submits that his family have been making efforts to improve their property. He views the Respondent as making unreasonable demands. He stated that his family have not entered this parcel for almost a year. He noted that his family have been filling the low portions of the property for many years to enhance the property for future opportunities. He noted that dust is a fact of life and stated that different people may have widely varying tolerance to dust. He noted that other fill sites have no gates and no efforts at dust control. He expressed concern that the Respondent is not fair or consistent in applying their bylaw. He submitted that any infractions with respect to the placement of fill on his family's property are minor in nature and the Respondent has been nitpicking and petty in its response. He stated that his family wish to make reasonable improvements to improve their land and request a permit in order to do so.

[16] At the hearing, the Appellants offered to purchase a water truck to combat dust issues, install signs warning against tailgate slamming and encourage trucking firms to use rubber blocks.

[17] The Appellants requests that the Commission allow the appeals and order the Respondent to issue a permit for the placement of fill on the Appellants' property.

The Respondent's Position

[18] Sandy Foy told the Commission that he has been the Development Officer for the Respondent since April 2010. At that time, the Respondent recently had received approval for its new Official Plan and development bylaw. Since that time, the Respondent has received complaints from a half-dozen people. The Respondent has issued permits to the Appellants in the recent past. A development agreement was signed in April 2012 in attempts to deal with concerns of nearby residents. A permit was issued in 2012. A new permit was issued in 2013 with the development agreement continuing in force on a one-year extension. The 2013 permit was suspended in September of that year as the Respondent was of the opinion that the development agreement had been contravened. In 2014, the Respondent received two applications, denied both and the present appeals were filed by the Appellants.

[19] Mr. Foy noted Exhibit R5, which contains a list of 19 alleged contraventions of conditions of the development agreement and related permits.

[20] The Respondent called Orville Curtis as a witness. Mr. Curtis lives across the road from the Appellants' property. He testified that the prevailing winds blow dust from the Appellants' property onto his own property. He stated that he has experienced dust and noise from the Appellants' property for 20 to 25 years. Mr. Curtis testified that the dust aggravates his health. He stated he has seen a water truck on the site once. He stated that any dry day dust is present. He described the noise as a "crash-bang", "three or four slams per truck" and on some days as many as "75 to 80 trucks". He stated that the dust gets on the clothesline, windowsills and vinyl siding of his home.

[21] The Respondent requested that the Commission deny the appeals thus confirming the Respondent's decisions not to issue development permits for the placement of fill on the Appellants' property.

Members of the Public

[22] Denise MacDonald-Vale testified that she lives next door to the Appellants' property. She told the Commission that she had contacted the Respondent in 2011 over concerns over the kind of materials that were being placed on the Appellants' property. She also has concerns over water drainage onto her property. She noted concern over dust and noise issues since 2011.

[23] Judy MacDonald testified that she resided in the Community of Miltonvale Park from 1954 to 1982. She currently passes by the property several times per week. She expressed concerns over dust and noise, including the sound of banging truck tailgates. She stated that construction inconvenience is usually short-lived; however, the placing of fill on the Appellants' property has been ongoing for years.

3. Findings

[24] After a careful review of the evidence, the written and oral submissions of the parties, and the applicable law, it is the decision of the Commission to allow these appeals. The reasons for the Commission's decision follow.

[25] Subsection 28(1.1) sets out the kinds of municipal decisions that may be appealed to the Commission:

> *28.(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality*
>
> *(a) that is made in respect of an application by the person, or any other person, under a bylaw for*
>
> *(i) a building, development or occupancy permit,*
> *(ii) a preliminary approval of a subdivision,*
> *(iii) a final approval of a subdivision; or*
>
> *(b) to adopt an amendment to a bylaw, including*
>
> *(i) an amendment to a zoning map established in a bylaw, or*
> *(ii) an amendment to the text of a bylaw,*
>
> *may appeal the decision to the Commission by filing with the Commission a notice of appeal.*

[26] Section 2.36 of the Community of Miltonvale Park Zoning & Subdivision Control (Development) Bylaw 2013 (the Bylaw) defines "Development" and section 2.38 defines "Development Permit". These sections read as follows:

> *2.36 "Development" – the carrying out of any construction operation, including excavation, in preparation for building, on, over or under land, or the making of any material change in the use, or the intensity of use of any land, buildings, or premises and includes the placing of structures on, over or under land.*
> …
>
> *2.38 "Development Permit" – the formal and written authorization for a person to carry out any development.*

[27] Section 4.1 of the Bylaw requires a "permit" for various land related activities:

> *4.1 DEVELOPMENT APPROVAL*
>
> *1. No person shall:*
>
> *a) change the use of a parcel of land or a structure;*
> *b) commence any "development";*
> *c) construct, place or replace any structure, building or deck;*
> *d) make structural alterations to any structure;*
> *e) make any water or sewer connection;*
> *f) make any underground installation such as a fuel tank, a foundation wall, or the like;*
> *g) move or demolish any structure;*
> *h) establish or operate an excavation pit;*
> *i) construct a highway;*
> *j) place, or dump any fill or other material;*
> *k) subdivide or consolidate a parcel or parcels of land; or*
> *l) construct a fence over four (4) feet (1.2 m) high*
>
> *without first applying for, and receiving a permit from Council.*

Emphasis added by the Commission.

[28] Section 4.15(8) of the Bylaw reads:

> *4.15 DEVELOPMENT RESTRICTIONS*
> *Council shall not issue a development permit for a development if, in the opinion of the Council:*
> *…*
> *(8) the proposed development would be detrimental to the convenience, health, or safety of residents in the vicinity or the general public;*

[29] Section 4.32(i) of the Bylaw reads:

> *4.32 DENYING PERMITS*
>
> *(i) No development permit shall be issued if the proposed development could create a hazard to the general public or any resident of the municipality or could injure or damage neighbouring property or other property in the municipality, such as injury or damage to*

> *include but not be limited to water, drainage or other water run-off damage.*

[30] 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.*

[31] 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.

[32] 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.

[33] The Commission considered 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 decisions on what are essentially development permit applications; and
>
> •Whether the Respondent's decisions with respect to the applications for development permits for the placement of fill have merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.

[34] In *Charlottetown (City)* v. *Island Reg. & Appeals Com*. 2013 PECA 10, Chief Justice Jenkins of the Court of Appeal stated:

> *[32] I would endorse the Commission's two-step approach that it employs as a guideline when determining appeals under the* ***Planning Act****. Once the Commission confirms that a planning appeal is within its jurisdiction to decide, its initial review of the decision appealed from is for procedural error. Because such applications are essentially for rezoning or bylaw amendment, in which Council's decisions affect rights, such an error may render the decision under review subject to being declared invalid.*

[35] In both the Respondent's June 30, 2014 and October 28, 2014 decision letters, the Respondent cited subsections 4.15(8) and 4.32(i) as the basis for their decision. This position was maintained at the hearing by the Respondent's representative.

[36] In order to determine whether proper process and procedure was followed, a brief review of case law relating to the issuance of municipal permits is helpful.

[37] In *Re East Royalty; Affleck* v. *East Royalty, Village Commissioners of* [1983] P.E.I.J. No. 62, Justice MacDonald of the Supreme Court of Prince Edward Island (Appeals Division) noted:

> *5 The case law in this area has been stated many times and it is that any by-law, regulation or statute that is restrictive on the common law rights of a person or the liberty with which he may exercise those rights are to be strictly construed. If the rights of a person are to be effected it must be done in the clearest legislative language and if the right is to be restricted by a municipal government, the authority to do so must be found in the legislative language.*

[38] In *Ottawa (City)* v. *Boyd Builders Ltd.* [1965] S.C.R. 408 Justice Spence of the Supreme Court of Canada stated:

> *An owner has a prima facie right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, e.g., nuisance, etc. This prima facie right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch.*

[39] In Order LA11-01, *Biovectra Inc*. v. *City of Charlottetown*, the Commission stated at paragraph 61:

> *[61] The caselaw is clear. At common law, a property owner may do with his land what he wishes, subject to the rights of surrounding property owners, for example, the law of nuisance. However, these rights may be restricted by statute, regulation or bylaw. Such restrictions must be expressed clearly and with solid legislative authority. To the extent that discretion is permitted by the statute, regulation or bylaw the wording must be clear and the criteria objective. Arbitrary discretion is to be avoided.*

[40] The applicability of subsection 4.32(i) of the Bylaw very much appears to be based on concerns noted in the Respondent's Planning Board minutes of October 16, 2014. Subsection 4.32(i) speaks of a "hazard to the general public" or "could injure or damage neighbouring property or other property in the municipality" and non-limiting examples of injury or damage are listed as "water, drainage or other water run-off damage". While some anecdotal evidence of water concerns was mentioned by one of the members of the public, such evidence was understandably subjective and concerns such as water in a basement could be attributable to other factors. To apply subsection 4.32(i) convincingly, objective evidence would need to demonstrate that the proposed development could cause a "hazard" to the general public or "injury" or "damage" to neighbouring or other property. While the concerns noted in the Planning Board minutes of October 16, 2014 are numerous, objective evidence to support these concerns is not presently before the Commission.

[41] Subsection 4.15(8) of the Bylaw is also relied on by the Respondent. Section 4.15(8) is mandatory in nature and gives discretion to the Respondent's Council. The wording specified is "the proposed development would be detrimental to the convenience, health, or safety of residents in the vicinity or the general public;".

[42] In the evidence before the Commission, a common theme based on past experience is concerns over dust, noise, unauthorized access and hours of operation. While it is understandable that a decision maker would consider past experience as an aid to predicting the future and therefore helpful in setting conditions to a development permit, it is also essential that a decision maker maintain an open mind to consider a new application as a fresh application.

[43] An analysis of the Respondent's process and procedure is therefore appropriate to examine how the Respondent considered its Bylaw and exercised its discretion.

[44] The following are the minutes of the Respondent's Council pertaining to the June 26 and October 23, 2014 decisions with respect to the Appellants' applications:

> *Minutes - Community of Miltonvale Park Page 4 and 5 of 8 Approved on September 25, 2014* ***June 26, 2014***
>
> *iv. Planning Board*
>
> *a. Development Applications and Permits*
>
> *Motion 2014:75– Moved by Councillor George Piercey, seconded by Councillor Gail Ling that due to detrimental effects to nearby landowners, and enforcement issues with previous permits, Council deny application MP-0914 to place fill on parcel 283085. Motion carried.*
> *…*
>
> *Minutes - Community of Miltonvale Park Page 4 of 7 Approved on November 27, 2014* ***October 23, 2014***
>
> *iv. Planning Board*
>
> *a. Development Applications and Permits*

Motion 2014:100 – Moved by Councillor George Piercey, seconded by Councillor Walter Carver that, as recommended by Planning Board, Council deny application MP-0934 – O'Halloran fill application PID 0283085. Motion carried.

There was concern noted that the drainage patterns on an adjacent property may have been altered, and if approval were to be considered in the future, an engineered drainage plan may be required.

[45] Neither of the above minutes provides much detail, however both have adopted the recommendation of Planning Board.

[46] The June 17, 2014 minutes of Planning Board note the following:

3. **Application #MP-0914—Oscar O'Halloran (Phillip O'Halloran)**

The Applicant has applied to resume placing fill on the property (parcel 283085) on those parts of "Part A" and "Part B" west (to the left) of the light blue line on the submitted map (on file) from the edge of what has already been filled to the boundary of the wetland/buffer -over a five-year period.

The Department of Environment, Labour & Justice does not object to the proposal.

The site is low and slopes to the west and has no buildings on this part of the parcel. A farm is located to the south, residential land to the east and north and vacant land is to the west.

Council granted the initial permit (Permit No. 2010-11) to the Applicant to place fill and inert material on parcel 283085 on June 30, 2010. The Applicant failed to comply with some of the condition of the permit. Permit No. 2011-11 was issued on April 24, 2012 after the Applicant applied to continue filling adjacent to first area. Council entered into a 12 month Development Agreement with the Developer and Owner (with an option to renew for an additional 12 months), to improve compliance. On October 3, 2012, a third permit (Permit No. 2012-45) was issued to place inert material for driveway stabilization. On June 27, 2013, Council issued Permit No. 2013-28 to extend permission for the activity in Permit No. 2011-11 until April 24, 2014. Council suspended this permit on September 26, 2013 when the Developer failed to meet the conditions of the Development Agreement.

Between April 2012 and October 2013, more than fifteen contraventions or alleged contraventions occurred. Phillip O'Halloran felt they were minor in nature and did not warrant suspending Permit No. 2013-08.

Betty Pryor arrived at 6:25 p.m.

Several other contraventions have occurred since, including not filing a certification that the grade of the filled land met the requirements by the deadline; not leveling part of the filled area and seeding it in the time frame required; and placing fill on the property (approximately 15 loads, which still remain) without a permit. Nearby land owners have lost their ability to use and enjoy their properties to the fullest extent; therefore, are impacted detrimentally. There are photos of significant dust; noise and dumping of fill has occurred outside the permitted hours, and a number of complaints have been received from nearby residents.

Subsections 4.15(8) and 4.32(i) of the Bylaw state:

4.15 Council shall not issue a development permit for a development if, in the opinion of the Council ...(8) the proposed development would be detrimental to the convenience, health, or safety of residents in the vicinity or the general public; and

4.32(i) No development permit shall be issued if the proposed development could create a hazard to the general public or any resident of the municipality or could injure or damage neighbouring property or other property in the municipality, such as injury or damage to include but not be limited to water, drainage or other water run-off damage.

Staff recommends denial.

Moved by Sheila MacKinnon, seconded by Sheila Curtis, **that due to detrimental effects to nearby landowners, and enforcement issues with previous permits, Planning board recommend Council deny MP-0914 to place fill on parcel 283085.** Motion carried.

The October 16, 2014 minutes of Planning Board note the following:

> *4. Application #MP-0934-Oscar O'Halloran (Phillip O'Halloran)- The applicant has filed to continue filling the area of the property 0283085 from the edge of what has already been filled to the boundary of the wetland/buffer as delineated in the plan submitted, in an application that is virtually identical to application #MP-0914 (currently under appeal). Comments were received from Jay Carr with the province's Environment Department, who had no issues with the application. Dale Thompson, with a different division within Environment, notes a 15 metre buffer zone would be required adjacent to all watercourses and wetlands, and a provincial permit would be required. Transportation and Infrastructure Renewal repeated comments from 07/01/2011 noting that the traffic division had no issues, but the finished grade should be no higher than the centerline of the road, and be graded no more than 10% away from the ROW. Mr. Thompson noted other environmental approvals may be required and the area should not be infilled in such a way to substantially alter the natural surface water drainage patterns. There have been several permits issued for fill on the property in recent years and a development agreement; however, there were more than fifteen contraventions between April 2012 and October 2013; and several since, including not filing certification of the grade, not levelling or seeding, and placing fill without a permit. Nearby landowners have also complained to Council.*

> *Concern was noted that the fill placed on the property may have altered the flow of drainage as there is a swale on the nearby property that did flow across the property. Land online was consulted and concerns remain regarding the water flow.*
>
> *The bylaw states (subsection 4.15.8) Council shall not issue a development permit for a development if, in the opinion of the Council: … the proposed development would be detrimental to the convenience, health, or safety of residents in the vicinity or the general public; and 4.31(i) [sic] No development permit shall be issued if the proposed development could create a hazard to the general public or any resident of the municipality or could injure or damage neighbouring property or other property in the municipality, such as injury or damage to include but not be limited to water, drainage or other water run-off damage.*
>
> *No significant changes were noted in this application from the previous one which was denied and appealed, although the property has been issued a provincial permit, which notes that municipal permits be obtained if required. The provincial permit is issued using different criteria from the community, as the impacts on neighbouring properties would not be a consideration. The province would also not have experienced the same issues with non-compliance as the municipality has.*
>
> *Moved by Betty Pryor and seconded by Sheila MacKinnon that Planning Board recommend to Council that application MP-0934 be denied. Motion carried.*

[47] The Respondent's Council accepted the recommendations of its Planning Board for both applications.

[48] While "detrimental" is not defined in the Respondent's Bylaw, section 2.35 of the Respondent's Bylaw defines "detrimental impact":

> *2.35 "Detrimental Impact" – any loss or harm suffered in person or property in matters related to public health, public safety, protection of the natural environment and surrounding land uses, but does not include potential effects of new subdivisions, buildings or developments with regard to*
>
> *(i) property value;*
> *(ii) competition with existing businesses;*
> *(iii) landscapes; or*
> *(iv) development approved pursuant to subsection 9 (1) of the Environmental Protection Act.*

[49] The above cited definition appears to mirror the definition of detrimental impact contained in clause 1.(f.3) of the Planning Act Subdivision and Development Regulations.

[50] *Black's Law Dictionary, 9th edition*, defines "detriment":

> *Detriment.(15c) 1. Any loss or harm suffered by a person or property.*

[51] In Order LA09-02 *Michael Reid* v. *Minister of Communities, Cultural Affairs and Labour*, the Commission considered the matter of detrimental impact, albeit from the perspective of areas of the Province without an Official Plan and Land Use / Development Bylaw.

> *[23] In Order LA00-04 George R. Schurman et al v. Minister of Community Services and Attorney General, February 18, 2000, the Commission considered the issue of detrimental impact in substantial depth and concluded:*
>
> > *When the Commission considers the objects of the **Act** as defined in Section 2 of the **Act** and the definition of detrimental impact within the scope of the Regulations, the Commission is of the opinion that clause 15(1)(c) requires the Respondent to consider potential impacts on neighboring properties when determining whether a permit should be granted. It seems clear from the wording of this clause and the supporting definition that the Lieutenant Governor in Council, in drafting the clause, contemplated that the Respondent would have to give consideration to whether a building structure, its alteration, its repair, its location, its use or its change of use would have a detrimental impact on among other things – surrounding land uses.*
> >
> > *In reaching this conclusion, the Commission understands that in the end, any anticipated impact on surrounding land uses must be reasonably assessed by the issuing authority, with the degree or level of any anticipated interference or disturbance to surrounding land uses determining whether clause 15(1)(c) becomes operative. The "degree" and "level" aspect of the assessment is, therefore, key as the Commission does not believe the intention of this clause is that no impact on the surrounding land uses will be permitted. Such an interpretation would be counter to basic land use planning principles which acknowledge that all development has some impact on neighboring properties.*
> >
> > *The Commission believes that the disturbance and inconvenience experienced by the Appellants in this case is very real and cannot be discounted – and we have sympathy for how this has impacted their lifestyle. However, when considering these impacts, the Commission must also be cognizant of the mix of existing land uses in the immediate area and the level of existing commercial activity on the Developer's property prior to the most recent additions. The Commission also must consider the fact that the involved area does not have a land use plan and associated zoning and development bylaws and, as a result, is subject to less restriction and control on development under the provisions of the Regulations (e.g. – mixed land uses being able to locate on adjacent properties).*

> *The Commission therefore concludes that, while the Appellants' use of their land has been negatively impacted, the development covered by the permits being appealed does not unreasonably impact on the surrounding land uses given the circumstances existing in this area. As a result, the Commission finds that there is not detrimental impact to surrounding land uses within the context of its meaning and application within the Regulations.*

> *[24] The Commission notes that while the section numbers have changed over the years, the relevant wording of subsection 15(1) referred to in Schurman et al is essentially the same as the present wording of subsection 3(2).*

> *[25] In the present appeal, the Commission finds that the evidence demonstrates that the noise associated with the facility has a very real negative impact on Mr. Reid and the other residents who testified at the hearing. The Desable area does not have an official plan and land use bylaw with zoning and development requirements. As there is no official plan and development bylaw, there are fewer restrictions on development in Desable. Based on the evidence provided at the hearing, the Commission finds that the impact of the noise of the facility falls short of the degree and level associated with detrimental impact as defined in the regulations.*

[52] In this current appeal, the Commission notes that the Respondent has an Official Plan and its Bylaw. While the Respondent's Bylaw does provide somewhat more restrictions in general with respect to development than the development requirements set out in the Planning Act Subdivision and Development Regulations and while the Respondent's Bylaw does contain nine zones, the Respondent's Bylaw has not set out any specific terms and conditions pertaining to development permits for the placement of fill. In addition, the placement of fill does not appear to be restricted with respect to particular zones. Although the Bylaw requires a permit for the placement or dumping of fill or other material, there are no specific provisions to establish what is necessary for an applicant to obtain such a permit. This would tend to suggest that a development permit for the placement of fill would be forthcoming, so long as an application has been made. Sections 4.15 and 4.32 of the Bylaw contain many provisions, including 4.15(8) and 4.32(i) that then attempt to restrict development on a discretionary basis.

[53] The evidence before the Commission in the present appeal suggests that noise and dust do have an effect on neighbouring properties. However, this evidence fall shorts of that necessary to establish detrimental impact.

[54] In *Resort Municipality* v. *Island Reg. & Appeals Com. & Ano*. 2014 PECA 19, the Court of Appeal addressed the issue of deference to a municipal decision maker:

> *[20] As the Commission has previously stated in many cases, deference is earned when a decision maker follows the process set out by the law. While as a matter of law it is open to the Commission to substitute its decision for that of the Municipality, it cannot do so merely because it disagrees with the end result.*

[55] In *Mackenzie* v. *Toronto* (1915) 7 O.W.N. 820 at page 821, Middleton J. stated:

> *When the plans and specifications of the proposed building conform to the building by-law, the duty of the civic official is to issue the permit.*

[56] In *Doman Industries Ltd.* v. *North Cowichan (District)*, [1980] B.C.J. No. 96, 116 D.L.R. (3d) 358, Bouck J. noted at paragraph 40:

> *40 An owner of land is entitled to know what qualifications he must comply with in order to obtain a development permit. These should be in the development permit division of the zoning by-law.*

[57] In *Dominion Stores Ltd.* v. *Borough of Etobicoke et al.* 1982 CarswellOnt 665, 135 D.L.R. (3d) 301, Galligan J noted at paragraph 2:

> *2 The applicant wishes to build and operate a large supermarket on the site. The proposed use is in all respects in compliance with the zoning by-laws of the municipality. The applicant applied for a building permit and it is admitted that it has complied in all respects with the requirements therefore. Accordingly it is prima facie entitled to a building permit: Ottawa v. Boyd Bldrs. Ltd., [1965] S.C.R. 408, 50 D.L.R. (2d) 704.*

[58] The Respondent considered both applications thoroughly , responding to concerns raised by residents and mindful about alleged violations of past permit conditions and a previous development agreement. The common law is clear, however; *prima facie* [at first sight] an applicant is entitled to a development permit if the application meets the requirements of the Bylaw.

[59] The Bylaw gives the Respondent's Council the discretion to deny a permit under the Bylaw, according to the test of "….detrimental to the convenience, health, or safety of residents in the vicinity or the general public" in subsection 4.15(8) or "…a hazard to the general public or any resident of the municipality or could injure or damage neighbouring property or other property in the municipality…" in subsection 4.32(i).

[60] In *MacArthur*, Justice Cheverie considered section 4.73 of the then City of Charlottetown Zoning and Development Bylaw:

> *4.73 OBNOXIOUS, HAZARDOUS OR UNHARMONIOUS DEVELOPMENT*
>
> *Any Development that would, in the opinion of Council, be inferior to the general standard of appearance prevailing or intended to prevail in the area, create a nuisance, a hazard or be obnoxious to the public or Significantly or permanently injure neighbouring properties by reason of architectural disharmony; traffic generation; noise or vibration; emission of gas, fumes, dust, oil or objectionable odour; or unsightly storage of goods, wares, merchandise, salvage, refuse matter, waste or other materials Shall be refused.*
>
> *…*
>
> *Discussion*

[19] Notwithstanding the various directions with respect to interpretation of municipal bylaws to give effect to their intent, this case centres on the statement of principle contained in the Verdun case and reiterated in the Greenbaum case by the Supreme Court of Canada that a bylaw, which exceeds a municipality's jurisdiction ever so slightly, will be declared ultra vires. The answer to the question of whether or not s. 4.73 of the bylaw is ultra vires is contained in the Verdun case. While there are factual differences between that case and the case at bar, the law, as articulated in Verdun remains accurate and applicable.

[20] The offensive bylaw in the Verdun case indicates that once the building inspector inspected the land, building, or premises, and was satisfied that the requirements of the bylaw were met "he shall transmit a certificate to this effect to the City Council, which may, at its discretion, grant or deny the permission applied for" (p. 4 Quicklaw version). The key phrase is "at its discretion". The parallel with the case at bar is the phrase contained in s. 4.73 "in the opinion of Council". While the offensive bylaw in Verdun contains no language descriptive of the discretion in Council, s. 4.73 includes just the opposite - a series of subjective and objective criteria with little or no explanation as to their meaning. In fairness, the City argues that "obnoxious use" is defined in s. 3.131 of the bylaw as follows:

> *3.131 "Obnoxious Use" means a Use which from its nature or operation creates a nuisance or is offensive by the creation of noise or vibration, or by reason of the emission of gas, fumes, dust, oil, or objectionable odour, or by reason of the unsightly storage of goods, wares, merchandise, salvage, refuse matter, waste, or other materials.*

The City also argues that the word "nuisance", as used in the definition of obnoxious use, is subject to the ordinary standard dictionary definition and includes anything injurious or obnoxious to the community, or to the individual as a member of it, for which some legal remedy may be found. The City cites other definitions of nuisance to make its case, but the fact is the City did not point to any of these specific reasons in deciding to deny MacArthur's building permit.

[21] The Supreme Court of Canada in Verdun had the following to say concerning the bylaw in that case (p. 7 Quicklaw version):

> *The mere reading of section 76 is sufficient to conclude that in enacting it, the City did nothing in effect but to leave ultimately to the exclusive discretion of the members of the Council of the City, for the time being in office, what it was authorized by the provincial Legislature, under section 426, to actually regulate by by-law. Thus, section 76 effectively transforms an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution a right which, untrammelled in the absence of any by-law, could only, in a proper one, be regulated. This is not what section 426 authorizes.*

[22] Exactly the same conclusion may be reached when one examines s. 4.73 of the present bylaw. Although it contains a medley of events, circumstances, or things which "in the opinion of Council" constitute reasons for refusing any development, it is, in effect, a menu without detail. It leaves to the exclusive discretion of the members of City Council of the day the ultimate authority to deny any development which, in its opinion, falls into any of the myriad of things contained in s. 4.73. For example, the development might be inferior to the general standard of appearance prevailing or intended to prevail in the area. What does that mean? Where are the objective criteria for that statement? Likewise, the development might significantly, or permanently, injure neighbouring properties by reason of architectural disharmony. What does that mean? And what are the criteria by which it is judged? When the bylaw refers to such things as traffic generation, or noise, or vibration, then presumably there are some objective criteria for that. However, with respect to traffic generation, the only real evidence gathered by the City is contained in a report from the Manager of Public Works (tab 15 of the record) and the Deputy Chief of Police (tab 17 of the record). In each case their responses do not reflect any serious concerns. One could pluck out other examples within this section of the bylaw, but the point is, much of the criteria are very subjective in nature, and those which are not stand alone without description. In my view, this section "Effectively transforms an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution a right which...could only...be regulated.". One must keep in mind that MacArthur's proposal met the as of right provisions in the bylaw for a project like a 23 unit apartment building.

[23] In the Verdun case, Fauteux J. went on to cite, with approval, the following:

> *The comments of Sir Melbourne Tait, then A.C.J., in Corporation du Village de Ste-Agathe v. Reid [Q.R. 10 R. de J. 334.], quoted by Gagné J.A., and approved by McDougall and Bertrand JJ.A., are to the point. At page 337, the learned jurist, speaking for the Court of Review, said:*
>
> > *A by-law is passed after certain formalities, and while in force is general in its application; it is published and is known to the ratepayers of the municipality, whereas a resolution may be passed without such publicity. Moreover, the composition of the council changes from time to time, the conditions might be changed from meeting to meeting, and the council would then have it in its power to permit one person to erect a saw-mill propelled by steam, upon certain conditions, and in a certain locality, and refuse the same rights to others.*

This goes to the very heart of the issue. What might be inferior to the general standard of appearance prevailing, or intended to prevail in the area as referred to in s. 4.73, may have a certain meaning to the members of one Council of the City and not enjoy the same meaning to another Council of the City, or, indeed, by any particular combination of members of one Council when meeting together to decide an issue. Likewise, the same may be said of what is meant by architectural disharmony, or the unsightly storage of goods, wares, merchandise, salvage, refuse matter, waste or other materials as set out in s. 4.73 - the meaning and interpretation of these words may have a different meaning to different Councils or different combinations of persons within a given Council, and this may result in discrimination from one project to the next.

[24] Fauteux J. concludes in Verdun (at p. 8 of the Quicklaw version):

> *The permission to erect and conditions would thus be subject to the mere whim of the persons who might form the council of any particular meeting ... It (the by-law) opens the door to discrimination and arbitrary, unjust and oppressive interference in particular cases. It is not really a by-law at all,...*

In my view, s. 4.73 is not really a bylaw at all, but, rather, it is a declaration that City Council, in its opinion, shall deny any development by referring to any of the list of items set out in s. 4.73, most of which there has been no attempt at all to define objectively. Therefore, a person such as MacArthur, who follows the rules prescribed by the City for a building permit, is faced with a denial of his application because the City has invoked the arbitrary language contained in s. 4.73. It appears from the record that the City was responding to concerns raised by residents in the area to the entire project when those residents became aware of the application for variation. While one can never argue with the responsibility of elected officials to respond in a meaningful way to the concerns of its citizens, the balance between certainty and arbitrariness must be protected.

[25] No doubt the City spent a great deal of time developing its zoning and development bylaw. There would have been a great deal of discussion and public consultation before that bylaw was adopted. The bylaw provides for certain activities and developments in different areas of the City. This, no doubt, is an attempt to keep like things together and also to provide opportunity for further development within the City. The property in question is property where a 23 unit apartment building is, on its face, allowed. MacArthur presented his application to the development officers with the City and proceeded with their blessing. However, once general objections were raised in the neighbourhood, the City decided to deny the application, first according to s. 4.60 of the bylaws and then it rescinded that decision and replaced it with a decision to refuse the application based on s. 4.73. The certainty for any proposed developer which is evident from a review of the appropriate zoning and development bylaw is, therefore, at the whim of the invocation of a bylaw such as s. 4.73. The line has been crossed; this should not happen. That is why a bylaw such as s. 4.73 is ultra vires and I so find.

> *[26] Since I have found that s. 4.73 of the bylaw is ultra vires, I need not consider the alternative argument advanced by MacArthur that the City failed to follow its own bylaw procedure. Accordingly, pursuant to para. 3(3)(e) of the Judicial Review Act, MacArthur's application for a building permit is referred back to the City for further consideration. The application should be considered as one which has been interrupted and not an application which must be started afresh.*

[61] Although subsection 4.32(i) does not use words that immediately speak of discretion, the use of such a provision, in the absence of truly objective evidence, would be arbitrary.

[62] The Commission finds that subsections 4.15(8) and 4.32(i) would only apply to a development permit application if truly objective evidence was before the Respondent. In the present appeals, the Commission determines that there is insufficient objective evidence to warrant a denial of a development permit for the placement of fill pursuant to subsections 4.15(8) and 4.32(i).

[63] Accordingly, the Commission allows both appeals, quashes the Respondent's June 26, 2014 and October 23, 2014 decisions pertaining to this matter and orders the Respondent to issue the Appellants a development permit for the placement of fill, effective for the 2015 year. In so doing, the Respondent may attach reasonable and relevant conditions to such permit or may require a development agreement setting out reasonable and relevant terms.

[64] As the Commission has determined that the Respondent has not met the first part of the Commission's two-part test, it is unnecessary to determine whether the Respondent's decisions were in accordance with sound planning principles.

[65] The Respondent has demonstrated a desire to carefully regulate the placement of fill within the Respondent community. However, an applicant for a development permit is entitled to a development permit so long as the Bylaw requirements have been met.

4. Disposition

[66] An Order allowing both appeals follows.

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of Miltonvale Park, dated June 26, 2014 and October 23, 2014.

Order

WHEREAS Philip O'Halloran has appealed two decisions of the Community of Miltonvale Park;

AND WHEREAS the Commission heard the appeals at public hearings conducted in Charlottetown on January 19 and 20, 2015 after due public notice and suitable scheduling for the parties;

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 appeals are allowed and the Respondent's June 26, 2014 and October 23, 2014 decisions are hereby quashed.**

2. **The Respondent is ordered to issue a development permit for the placement of fill to the Appellants, effective for the 2015 year.**

DATED at Charlottetown, Prince Edward Island, this 16th day of June, 2015.

BY THE COMMISSION:

(Sgd.) *Doug Clow*
Doug Clow, Vice-Chair

(Sgd.) *Michael Campbell*
Michael Campbell, 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)