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

Docket LA15005
Order LA16-02

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated May 25, 2015.

BEFORE THE COMMISSION
on Tuesday, the 12th day of July, 2016.

J. Scott MacKenzie, Q.C., Chair
M. Douglas Clow, Vice-Chair

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 May 25, 2015.

Contents

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated May 25, 2015.

Written submissions filed by:

1. **For the Appellant Michael Wheeler**

   Michael Wheeler, representing himself

2. **For the Respondent Resort Municipality**

   Jonathan M. Coady, Counsel for the Respondent

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated May 25, 2015.

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 and accompanying written submissions were received on June 12, 2015.

(2) This appeal concerns a May 25, 2015 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 special development permit for an accessory structure consisting of a 132 foot by 10 foot wooden walkway on property number 232413 located at civic address 8572 Cavendish Road in Cavendish.

(3) On July 13, 2015, Jonathan M. Coady, legal counsel for the Respondent, ("Counsel for the Respondent") filed a Record on behalf of the Respondent. Counsel for the Respondent also filed a Reply to the Notice of Appeal.

(4) On January 25, 2016, the Commission advised the parties by email from the Commission's Appeals Administrator that the Commission was of the view that an oral hearing would not be necessary as the facts do not appear to be in dispute and credibility does not appear to be an issue. The parties were given an opportunity to file additional submissions or documents.

(5) The Appellant filed a document entitled Grounds for Appeal (Supplement), dated February 15, 2016, which was received by the Commission on February 16, 2016.

(6) On February 19, 2016, Counsel for the Respondent filed a response to the Appellant's February 15, 2016 document.

(7) On March 1, 2016, the Appellant filed a rebuttal to the February 19, 2016 document filed by Counsel for the Respondent.

(8) On March 30, 2016, the Commission's Appeals Administrator advised the parties by email that the Commission had determined that an oral hearing will not be held and the Commission would therefore make a decision based on the documentation on file.

2. Discussion

Appellant's Submissions

(9) The Appellant filed extensive written submissions to support his appeal. In his original Notice of Appeal, the Appellant set out the following grounds for appeal:

1. *The Resort Municipality in their decision considered irrelevant facts and did not consider relevant facts.*
2. *The Resort Municipality failed to make a decision based on the application's merits and the law.*
3. *The Resort Municipality in their decision erred in the interpretation of the Planning Bylaws.*
4. *The Resort Municipality exceeded its jurisdiction.*

(10) In the Appellant's February 15, 2016 Grounds for Appeal (Supplement), the Appellant expanded upon ground number 4 of his Notice of Appeal, adding "Wooden walkways do not require a development permit." The Appellant then made reference to wording used in the City of Charlottetown Zoning and Development Bylaw. The Appellant also added an additional ground for appeal:

5. With respect to Mr. Michael Wheeler's application for an accessory structure and the Resort Municipality's decision process, there exists a reasonable apprehension of bias.

(11) The Appellant then outlined his rationale in support of his additional ground for appeal alleging a reasonable apprehension of bias. He further discusses this additional ground for appeal in his March 1, 2016 email submission.

(12) In his Notice of Appeal, the Appellant requests that the Commission quash the Respondent's May 25, 2015 decision and decide his application based on its merits and the applicable law.

Respondent's Submissions

(13) In his Reply to the Notice of Appeal, Counsel for the Respondent filed extensive written submissions in an effort to support the Respondent's position that there is no merit to the Appellant's appeal. Counsel for the Respondent referred frequently to the decision of the Prince Edward Island Court of Appeal in *Resort Municipality* v. *Island Regulatory and Appeals Commission*, 2014 PECA 19.

(14) In his February 19, 2016 submission, Counsel for the Respondent stated in part:

- First, the applicable bylaws are those in force in the Resort Municipality – not the City of Charlottetown. As directed by the Planning Act, each municipality has its own official plan and bylaws. The applicable rules are those in place in the Resort Municipality.
- Second, the wrong legal test has been cited by Mr. Wheeler. The closed mind test – not the reasonable apprehension of bias test – applies to municipal councillors. …

(15) Counsel for the Respondent also submitted that the Respondent's Council Chair did not vote (as Chair, he only votes to break a tie) with respect to the Respondent's May 25, 2016 decision and furthermore he was not present at the May 20, 2015 meeting of the Respondent's Planning Board when the application was considered and denial was recommended.

(16) Counsel for the Appellant states in his February 19, 2016 submission that the Respondent is entitled to deference from the Commission and he requests that the appeal be dismissed.

3. Findings

(17) After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission to deny this appeal for the reasons that follow.

(18) 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. 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 will proceed to review the evidence before it to determine whether or not the application should succeed.

(19) The Commission finds that the above-cited principle is applicable to the facts of this case. A two-part test is invoked:

- Whether the Respondent, followed the proper procedures as required in its Bylaw in making a decision on the application for a special development permit; and
- Whether the Respondent's decision with respect to the application for a development permit has merit based on sound planning principles.

(20) Section 4.28 of the Respondent's Zoning & Subdivision Control (Development) Bylaw (the "Bylaw") reads as follows:

> *4.28 ACCESSORY STRUCTURES*
>
> *Accessory uses, buildings and structures shall be permitted on any lot but shall not:*
>
> *(1) be used for human habitation;*
> *(2) be located within the front yard or flanking side yard of a lot;*
> *(3) be built closer than five (5.0') feet (1.5 m) from any lot line;*
> *(4) except in a resort zone, commercial zone or on a farm property exceed 12' (3.6 sq. m.)*
> *(5) except in a resort zone, commercial zone or on a farm property exceed three hundred (300) sq. ft. (27 sq. m.) in total floor area;*
> *(6) be considered an accessory building if attached to the main building;*
> *(7) be considered an accessory building if located completely underground;*
> *(8) except in a resort zone, commercial zone or on a farm property be limited to two (2) per property (including a detached garage).*

Satellite dishes greater than 2 feet in diameter shall not be erected in any zone in the Municipality unless a special permit has been issued by Council.

Notwithstanding the above provisions, Council may issue a special development permit for an accessory structure located within the front yard or flanking side yard of a lot, where Council is satisfied the structure will be architecturally compatible with adjacent structures and no permanent injury would be caused to adjoining properties, subject to such conditions as Council may impose.

(21) The minutes from the May 25, 2015 meeting of the Respondent's Council pertaining to the matter under appeal read as follows:

Michael Wheeler: (Cavendish Road)
An application was received to have a special development permit for an accessory structure, namely a wooden walkway of 132' X 10', in the flankage yard of the property. This property is located in the C1 Zone. It was moved by Councillor Richard, seconded by Councillor Hryckiw that the development application be denied under the Zoning and Subdivision Control (Development) bylaw for the following reasons:

1) Section 4.17 sets out the general requirements for development permits and they continue to be applicable unless inconsistent with s. 4.28 of the Bylaw;
2) Section 4.17(1) of the Bylaw states that a proposed development must "conform to this Bylaw or any other bylaw, regulation, or law in force in the Municipality;"
3) a non-conforming use is being made of this property and the new accessory structure does not appear to comply with s. 4.48(3) of the Bylaw;
4) the developer also does not appear to be in compliance with s. 4.37 of the Bylaw;
5) Section 4.21 of the Bylaw only speaks of an exception for "accessory building" and otherwise insists upon open and unobstructed yards;
6) Section 4.28 of the Bylaw sets out exceptional requirements for a special development permit;
(a) based on the input received by council regarding this walkway in prior seasons, it does not appear that the proposed development would cause permanent injury to any adjoining properties;

Monthly Council Meeting
May 25, 2015
Page Five

(b) it appears that wood is only one of many products that would be compatible architecturally, such as the paving stones identified in the development agreement for the walkway in this yard or other non-structural products identified in the Bylaw, such as asphalt or concrete;
7) the exception in s. 4.28 of the Bylaw for a special development permit is discretionary and allows for an accessory structure to be developed in a front or flankage yard; however, it does not specifically state that an accessory structure can be built closer than five (5.0) feet (1.5 m) from any lot line and the proposed wooden walkway would violate that setback requirement because part of it is three (3.0) feet from the lot line;
8) the developer knew from the very beginning of this project the setback required to develop the property and what was allowed to be built on the flankage yard;
9) the developer signed a development agreement stating that he would use paved patio stones for the walkway in the flankage yard;
10) the effect of granting the application would be to grant a variance to the setback requirement without proceeding through the public consultation process that is associated with a variance request; and
11) the effect of granting the application would be to amend the terms of the development agreement with the developer, which dealt explicitly with the flankage yard and insisted on a non-structural walkway, and remove this contractual obligation from the developer.
All in favor 3, 1 non-voting, 2 absent. Motion Carried.

(22) The notwithstanding clause contained in section 4.28 of the Bylaw is central to the Appellant's current application and the Respondent's present decision. The Bylaw as a whole does not permit an accessory structure in the front or flanking side yard of a property and thus the Appellant does not have a right to place an accessory structure on the flankage yard of the subject property. The notwithstanding clause is a discretionary clause which may allow the issuance for a special permit for an accessory structure in the front yard or flanking side yard. While the discretionary clause, if exercised, would be of benefit to the Appellant, a decision by the Respondent to decline to exercise the discretionary clause does not deprive the Appellant of his right to develop the subject property in accordance with the Bylaw.

(23) The minutes of the May 25, 2015 meeting of the Respondent's Council show that the Respondent's Council considered the matter but declined to exercise their discretion based on concerns about the application being in breach of other portions of the Bylaw and being contrary to the terms of the development agreement between the parties.

(24) Upon a careful review of the record, the Commission has not found any procedural error in the Respondent's decision, nor any substantive error in the Respondent's interpretation and application of its Bylaw. The Commission finds that the Respondent followed its Bylaw, considered relevant factors, did not exceed its jurisdiction and thus acted fairly toward the Appellant.

(25) The Commission further finds that the Respondent's decision to deny the Appellant's application for a special development permit, on the basis of upholding other provisions within the Bylaw and also upholding a duly executed development agreement between the parties, is both consistent with sound planning principles and consistent with the law.

(26) While the Appellant attempted to persuade the Commission that the Respondent's Council Chair acted in a manner consistent with a reasonable apprehension of bias, the Commission finds that this allegation has not been substantiated by the Appellant and thus rejects such argument. The record before the Commission demonstrates that the Respondent's Chair was not present at the May 20, 2015 meeting of the Respondent's Planning Board and did not vote at the May 25, 2015 meeting of Council. Further, the Commission finds that the minutes of both meetings reflect that Respondent's Council retained an open mind towards the Appellant's application.

(27) For the above reasons, the Commission denies this appeal.

4. Disposition

(28) An Order denying this appeal follows.

IN THE MATTER of an appeal by Michael Wheeler of a decision of the Resort Municipality, dated May 25, 2015.

Order

WHEREAS the Appellant Michael Wheeler appealed a May 25, 2015 decision of the Respondent Resort Municipality;

AND WHEREAS the Commission considered the appeal based on the written record and the written submissions filed by 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 appeal is hereby denied.

DATED at Charlottetown, Prince Edward Island, this 12th day of July, 2016.

BY THE COMMISSION:

(sgd.) *J. Scott MacKenzie*
J. Scott MacKenzie, Q.C., Chair

(sgd.) *M. Douglas Clow*
M. Douglas Clow, Vice-Chair

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)