



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

**Docket LA19010
Order LA20-01**

IN THE MATTER of an appeal by Donald
Turner and Susan Turner of a June 19, 2019
decision of the Rural Municipality of Brackley.

BEFORE THE COMMISSION
on Thursday, the 11th day of June, 2020.

**J. Scott MacKenzie, Q.C., Chair
M. Douglas Clow, Vice-Chair
Erin T. Mitchell, Commissioner**

CERTIFIED A TRUE COPY

Collette Vessey,
Executive Assistant
Island Regulatory & Appeals Commission

Order

IN THE MATTER of an appeal by Donald
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decision of the Rural Municipality of Brackley.

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IN THE MATTER of an appeal by Donald
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decision of the Rural Municipality of Brackley.

Appearances & Witnesses

1. For the Appellants Donald and Susan Turner:

Donald Turner
Susan Turner

Witness:

Harvey Livingston

2. For the Respondent Rural Municipality of Brackley:

Derek French, Development Officer

Witness:

Barbara Jenkins

IN THE MATTER of an appeal by Donald Turner and Susan Turner of a June 19, 2019 decision of the Rural Municipality of Brackley.

Reasons for Order

Overview

1. This is an appeal by Appellants Donald Turner and Susan Turner (the “Turners”) of a June 19, 2019 decision of the Rural Municipality of Brackley (“Brackley”) to deny an application to rezone a property from an existing A1 Agricultural zone (“A1”) to M1 Industrial Zone (“M1”). The Appellants, the Turners, argue that the Community of Brackley Official Plan 2014 (“Official Plan”) specifically provides that the area in which their property is located was to be zoned M1, but was instead zoned A1 when the Community of Brackley Zoning and Subdivision Control (Development) Bylaw 2014 was enacted.

Decision

2. The Commission finds that Brackley erred in interpreting its Official Plan in denying application for a rezoning. The Commission, quashes the decision of Brackley and orders that the property, being Provincial Parcel No. 640011, located at 467 Brackley Point Road, Brackley, Prince Edward Island, (the “Property”), be rezoned from A1 Agricultural to M1 Industrial zone.

Facts

3. The Turners’ appeal is pursuant to section 28(1.1) of the Planning Act, R.S.P.E.I. 1988, Cap. P-8 (“the Planning Act”).
4. On April 23, 2019 the Turners applied for the rezoning of the Property. Brackley processed the application and scheduled a public meeting to consider the application. The evidence before the Commission is that Brackley followed the notification and advertising procedures required by the Community of Brackley Zoning and Subdivision Control (Development) Bylaw (2014) (“the Bylaw”). The public meeting was held on May 22, 2019. Brackley denied the Turner’s application at a June 19, 2019 meeting of council.
5. The Commission received the Turner’s Notice of Appeal on July 10, 2019. The Record was received on August 19, 2019. On September 24, 2019 the Commission offered hearing dates to the parties.

6. The appeal was heard on January 7, 2020, the first available date that was acceptable to the parties.

Discussion

The Turners' Position

7. The Turners position is that the Community of Brackley Official Plan 2014 ("the Official Plan") specifically identifies certain lands that shall be zoned M1. The Turners state that the Property is located within these specifically identified lands.
8. Harvey Livingston ("Mr. Livingston") testified on behalf of the Turners. Mr. Livingston owns the land to the south of the Property and operates an auto salvage on his land. He testified that he originally purchased the Property to prevent a residence from being built too close to his auto salvage. Mr. Livingston testified that he later sold the Property to the Turners. Mr. Livingston believes that the Property was sold to the Turners in 2014 prior to the public meeting for the Official Plan review. Mr. Livingston testified that when the Official Plan was being reviewed, he spoke with the land use planner, Phil Wood, who prepared the Official Plan. Mr. Livingston testified that it was his understanding that the Property was to be included in the lands to be zoned M1.

Brackley's Position

9. Derek French ("Mr. French") is Brackley's development officer. Mr. French submitted that section 5.4 of the Official Plan, which pertains to industrial uses, should be read with the whole section in mind. He submitted that an industrial use on the Property could lead to a land use conflict with the adjacent residential properties. He referred to the objectives and policies contained under section 5.4 of the Official Plan which refer to the potential for land use conflicts. He noted that 23 residents attended the public meeting expressing concern about this proposed rezoning. He noted that a petition opposing the rezoning was signed by 35 residents.
10. Mr. French submitted that the existing A1 zoning of the Property was consistent with sound planning principles as it would continue to provide a buffer between the auto salvage and the existing residential properties.
11. Mr. French also expressed concerns about storm-water, noting that a large roof and parking lot associated with an industrial building would add to existing storm-water issues.
12. Barbara Jenkins ("Ms. Jenkins") testified on behalf of Brackley. Ms. Jenkins has lived adjacent to the Property for 56. She testified that storm-water issues began in 2014 after the Turners added fill and installed a culvert on the Property. Ms. Jenkins testified that prior to 2014 the back area of her lot would be dry by May each year. She testified that following the addition of fill and a culvert, her back lot now is dry by July each year.

Analysis

13. In Prince Edward Island, an official plan is adopted under statute and binding on a municipal council.¹ A council is responsible for administering the official plan within the municipality.² Bylaws implementing the official plan must be consistent with the official plan.³
14. The Turners rely on the following paragraph contained within section 5.4 of the Official Plan:

The vacant lands on the west side of the Brackley Point Road to the south of the Royalty Junction shall also be zoned as “Industrial” but pursuant to the provisions of the Charlottetown Region Special Planning Area Regulations industrial developments will be limited to a maximum of one acre unless full central services are supplied. Industries which use major amounts of domestic water shall be discouraged. [Emphasis added]
15. The Commission takes note of the unusual language used in Sec. 5.4 of the Official Plan. The language is very specific and not of a type that is usually found in well drafted official plans. The Official Plan for Brackley, except for this specific language, is very much a carbon copy of other official plans that were enacted by other communities in the Province of Prince Edward Island. The unusual aspect of the language used in Sec. 5.4 is that it does not provide broad language of general direction, rather it is very specific and mandates that vacant lands, which include the property, shall be zoned as “Industrial”. Although no evidence was led as to how this particular section was added to an otherwise generic official plan, it leaves no doubt that the vacant lands on the west side of Brackley Point Road, of which this property comprises a portion, are to be zoned as “Industrial”.
16. The evidence before the Commission establishes that the Property is currently vacant and was vacant when the Official Plan came into effect in 2014.
17. Brackley relies on other provisions within the Official Plan, most notably provisions addressing conflict of land use and the following “Plan Action” set out in Policy PM-1: Zoning, contained within section 5.4:
 - *The Zoning and Subdivision Control Bylaw shall also designate a major portion of the vacant lands on the west side of Brackley Point Road to the south of Royalty Junction as Industrial (M1). [Emphasis added]*
18. The “Plan Action” cited above introduces the qualification, restriction or limitation in the words “major portion” which is not present in the main body of section 5.4.
19. The Commission takes notice of the comments of Mr. Justice Spence of the Supreme Court of Canada in *Ottawa (City) v. Boyd Builders Ltd.* [1965] S.C.R. 408 Justice Spence of the Supreme Court of Canada stated:

¹ Planning Act RSPEI 1988 Cap P-8, s. 14(1)

² Planning Act, s. 9(1)

³ Planning Act, s. 15(2)

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.

20. The Commission also finds that the comments of Mr. Justice MacDonald of the Supreme Court of Prince Edward Island (Appeals Division) in *Re East Royalty; Affleck v. East Royalty, Village Commissioners of* [1983] P.E.I.J. No. 62, instructive, wherein he stated:

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.

21. The Planning Act also makes it clear that an official plan prevails over bylaws or regulations in the event there is any conflict or inconsistency between the two.⁴
22. The Commission finds that section 5.4 of the Official Plan is clear; the Property was to be zoned as M1 Industrial. No other conclusion can be reached and general language of a qualifying nature set out subsequently in the Official Plan does not derogate from that clear, concise, direct statement.
23. The Commission finds that there is a conflict between the Official Plan and the Bylaws. The property should have been zoned M1 Industrial but was zoned A1 Agricultural contrary to the specific provisions of the Official Plan. In these circumstances and in accordance with the provisions of the Planning Act the provisions of the Official Plan prevail over the provisions of the Bylaw.
24. The Commission finds that the Turners' application for a rezoning of the Property is supported by the Official Plan, the Official Plan overrides the Bylaw. The Commission, therefore, orders that the Property be rezoned to M1 Industrial.

⁴ Planning Act, s. 15. (2) *The bylaws or regulations made under clause (1)(d) shall conform with the official plan and in the event of any conflict or inconsistency, the official plan prevails.*

[emphasis added]

25. The Commission has taken note of much discussion concerning storm-water run-off issues allegedly caused by the Turners' placing fill and a culvert on the Property. There was much evidence that was laid before the Commission with respect to this action and these issues are quite rightly of significant concern to the neighboring landowner. The Commission notes, however, that storm-water management and drainage and other such matters of concern are well within the jurisdiction of the Municipality of Brackley to deal with respecting the infilling and other actions taken by the Turners. They are also matters that are within the jurisdiction of Brackley to deal with, if and when a development permit is sought for any further development on the property.

Conclusion

26. The Appeal is allowed and the decision of Brackley is hereby quashed.
27. The Property is hereby rezoned to M1 Industrial. Brackley is ordered to amend its Zoning and Subdivision Bylaw to show that the Property has been rezoned from the existing A1 Agricultural to M1 Industrial zone.

IN THE MATTER of an appeal by Donald Turner and Susan Turner of a June 19, 2019 decision of the Rural Municipality of Brackley.

Order

WHEREAS the Appellants Donald Turner and Susan Turner have appealed a June 19, 2010 decision of the Respondent Rural Municipality of Brackley to deny their application to rezone PID#640011 from the existing (A1) Agricultural Zone to a desired zoning of (M1) Industrial Zone;

AND WHEREAS/UPON the Commission heard the appeal at public hearings conducted in Charlottetown on January 7, 2020 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, the Respondent's decision of June 19, 2020 pertaining to the rezoning of PID#640011 is hereby quashed, and the Appellants' application to rezone their property to M1 Industrial is approved.

DATED at Charlottetown, Prince Edward Island, this 11th day of June, 2020.

BY THE COMMISSION:

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

J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

M. Douglas Clow, Vice-Chair

(sgd) Erin T. Mitchell

Erin T. Mitchell, 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)