

**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LR12023
Order LR12-27**

IN THE MATTER of an appeal under
Section 25 of the Rental of Residential
Property Act, by Andre Darville, against
Order LD12-220 dated August 21, 2012
issued by the Director of Residential Rental
Property

BEFORE THE COMMISSION
on Tuesday, the 30th day of October, 2012.

Allan Rankin, Commissioner
Leonard Gallant, Commissioner
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Susan D. Jefferson

Commission Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal under
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Property

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BACKGROUND

On September 12, 2012 the Commission received a Notice of Appeal dated the same date signed by a lessee, Andre Darville (the Appellant) requesting an appeal of Order LD12-220 dated August 21, 2012 issued by the Director of Residential Rental Property (the Director).

By way of background, on March 2, 2012 the Appellant filed with the Director a Form 6 – Application by Lessee to Set Aside Notice of Termination to which was attached a Form 4 – Notice of Termination by Lessor of Rental Agreement signed by a lessor, Clifford McQuaid (the Respondent) dated February 27, 2012.

The matter was heard by the Director on March 22, 2012 and in Order LD12-220 the Director ordered:

“IT IS THEREFORE ORDERED THAT

- 1. The lessee’s application to set aside the Notice of Termination is denied.*
- 2. The Notice of Termination dated February 27, 2012 to be effective on September 1, 2012 is valid.*
- 3. The rental agreement between the lessee and the lessor for the residential premises is hereby terminated as of midnight, September 1, 2012.”*

The appeal was heard by the Commission on September 27, 2012. The Appellant was present. The Respondent was also present and was accompanied by his legal representative, William Dow. Shayne Hogan (Mr. Hogan), a rental officer with the Office of the Director of Residential Rental Property, was called as a witness by the Appellant.

EVIDENCE

A brief summary of the Appellant's relevant evidence

The Appellant told the Commission that he is seeking two years notice in order to give him time to find a new place to live, stating that the Respondent had promised at a May 2011 meeting that he would give the tenants that much notice. The Appellant stated that the Town of Cornwall had accepted two years notice as well.

The Appellant stated that a previous owner of the Byways Mobile Home Park (Byways Park) had it rezoned with the intent of closing the Byways Park. The Appellant submitted that the Respondent always intended to close the Byways Park and re-develop it for another use.

The Appellant acknowledged that from March to August 2012 inclusive he and the other tenants were not charged any rent. He told the Commission that he taped a cheque for September's lot rent to his window, expecting the Respondent to come to his door to collect the cheque.

The Appellant stated that many of the tenants left the Byways Park because they were "scared out" by the Respondent.

The Appellant included in Exhibit E-44 a photograph of a truck parked near a mobile home with the word "WATERWORKS" clearly visible on the truck. He submitted in his written submissions (Exhibit E-44) that the greatly increased water bill is due to the water truck being filled "nightly since 2010-2012".

A brief summary of Mr. Hogan's evidence

Mr. Hogan told the Commission that he attended a May 3, 2011 meeting at the Cornwall Town Hall. He was at the meeting to provide the tenants and the Respondent with information concerning notice requirements under the ***Rental of Residential Property Act*** (the ***Act***).

At the meeting, tenants of the Byways Park asked the Respondent how much notice they would receive if they agreed to switch their heating to a system that did not use heating oil.

Mr. Hogan's recollection was that the Respondent replied that he would keep the Byways Park open for at least 2 years providing that it was financially viable, with it serving at least 15 mobile homes. The Respondent then indicated that he would put this in writing in a letter to each tenant.

Mr. Hogan stated that he had met with the Appellant two or three weeks after the May 3, 2011 meeting and no such letter from the Respondent had been received at that time.

A brief summary of the Respondent's evidence

The Respondent told the Commission that he purchased the Byways Park in 2009 with the intent of operating it for the foreseeable future and with no plans to shut it down and convert it to another use. The Respondent stated that he owns and operates the Evergreen mobile home park in Summerside (Evergreen Park). In 2009 there were 28 tenants in the Byways Park. Shortly after the Respondent purchased the Byways Park, one of the homes was lost due to fire, thus leaving 27 homes.

In the late fall of 2010, the Respondent was informed that an oil spill had occurred in the Byways Park. He was also advised that the spill had occurred two or three months earlier. The Respondent was ordered to clean up the spill. As a result of the oil spill and being required to pay the cost of the cleanup, the Respondent required his tenants in both mobile home parks to remove their oil tanks and switch to a type of home heating that did not require heating oil, such as propane or electric heat. All the tenants in the Evergreen Park complied and that park remains open and financially viable. Five or six of the tenants in the Byways Park put in new forms of home heating.

The Respondent told the Commission that at the time of the May 2011 meeting he did not foresee that so many tenants would move their home out of the Byways Park. However, 12 mobile homes were removed and the Town of Cornwall informed him that no other mobile homes could be moved in as the Byways Park was operating as a non-conforming use. Further, the water bill for the Byways Park doubled even though it now contained fewer homes. The Respondent believed that the water pipes were failing. In February 2012 the Respondent considered the Byways Park to be no longer financially viable and as a result, he informed the tenants that he was closing it and giving six months' notice. At that time there were 15 mobile homes left in the Byways Park.

The Respondent referred to Exhibit E-45 and submitted that said exhibit established that the Town of Cornwall would not allow any mobile homes to be moved into the Byways Park. By contrast, mobile homes may be replaced in the Evergreen Park and it remains an attractive and viable mobile home park.

The Respondent stated that the Appellant is the only tenant remaining who has not agreed to move from the Byways Park.

DECISION

The Commission denies this appeal for the reasons that follow.

Subsections 15(1) and 15(2) of the **Act** read as follows:

15. (1) Where the lessor in good faith seeks to

(a) have possession of the premises for occupation by himself, his spouse, children or parents, or the parents of his spouse;

(b) convert the premises to a use other than residential use;

(c) renovate the premises where the nature of the renovations are advised to the lessee and are such that the renovations cannot be

carried out while the lessee occupies the premises;

(d) demolish the premises,

the lessor may serve the lessee with a notice of termination to be effective not less than two months after it is served.

...

(2) Notwithstanding subsection (1), where a lessor serves a notice of termination under this section respecting a mobile home site, other than where the lessee is renting a mobile home and the mobile home site under a single rental agreement, the period of notice shall not be less than six months.

The evidence before the Commission is that the number of mobile homes in the Byways Park rapidly dropped from 27 to 15 in the months following the 2010 oil spill. The Respondent, as owner of the land, bore the financial burden of an environmental cleanup order issued by the Minister of the Department of Environment, Energy & Forestry [as said Department was then known] on February 11, 2011.

For some reason, water consumption also greatly increased within the Byways Park at the same time.

According to the evidence before the Commission, the Byways Park is zoned within the Town of Cornwall as a Multiple Family Residential Zone (R3), it was operating as a non-conforming use and, as stated in a September 26, 2012 email from the Town's Chief Administrative Officer (CAO) to the Respondent's legal counsel (Exhibit E-45), the Town "would not issue permits for the placement of mobile homes on the existing vacant lots" in the Byways Park.

However, it is possible that the Town of Cornwall did have a different policy in the past with respect to the continued operation of the Byways Park as a non-conforming use. In a February 21, 2005 letter (Exhibit E-37) the Town of Cornwall's then planner stated her opinion as to the continued operation of the Byways Park. The first three paragraphs of the letter set out the background concerning the matter. The fourth and fifth paragraphs may be subject to different interpretations, however, they tend to suggest to the Commission that while adding additional mobile homes would be an intensification of use and not permitted, replacement of mobile homes was permissible as the "existing number of units are permitted to continue".

During the hearing, the Commission referred the parties to Exhibit E-37 noted above and invited comment. Counsel for the Respondent expressed his opinion that he did not interpret Exhibit E-37 to permit a replacement of mobile homes.

As Exhibit E-37 may be interpreted in different ways, the Commission believes it appropriate, in the interest of transparency, to reproduce this letter in its entirety below.

Σ-37

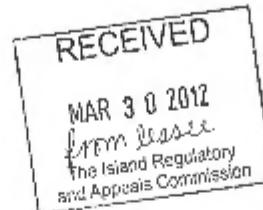


TOWN OF CORNWALL

29 Cornwall Road
P.O. Box 430
Cornwall,
Prince Edward Island
COA 1H0

February 21, 2005

Andre J. Darville
PO Box 1032
Cornwall, P.E.I.
COA 1H0



Dear Mr. Darville:

This letter is in response to your letter dated February 7, 2005. The By-Ways Trailer Park was formerly zoned RM1, which permits Mobile Home Parks. It was re-zoned in 2004 to R3, which permits Multiple Family Residential Uses.

Under the Zoning and Development Bylaw of the Town of Cornwall, a building or use of land lawfully in existence on the date of approval of the bylaw may continue to exist. By-ways Trailer Park is now considered a legally non conforming use, under section 4.25 of the Zoning Bylaw.

The property comprising By-Ways trailer park is one parcel, with one property identification number. The park is used as a mobile home park. It may continue to exist as such. The zoning covers the entire parcel. The Town of Cornwall does not administer or oversee leasing agreements within the parcel of land.

The parcel of land may continue to be used to support mobile homes, until the property owner makes application to change the use and to develop the property differently. 4.25 (6) states, "Any change of tenants or occupants of any premises or building shall not itself be deemed to affect the use of the premises or building for the purposes of this bylaw." 4.25(8) states, "No intensification of use... shall be made while a non-conforming use... is being continued."

Please note that if additional mobile homes were added to the parcel of land, that would constitute an intensification of use, which is not permitted. However, the existing number of units are permitted to continue. If you have any questions, please contact me at the number below.

Yours sincerely,

Janice Harper
Planning and Development Officer

Ph. (902) 566-2354
Fax. (902) 566-5228
e-mail: town.cornwall@pei.aibn.com

Even assuming that Exhibit E-37 establishes that the Town of Cornwall would have permitted replacement of mobile homes in the Byways Park in 2005, it is the Town's current policy which is germane to the present appeal and that policy is clearly reflected in the recent email from the Town's CAO (Exhibit E-45).

Based on the evidence on the civil standard of a balance of probabilities, the Commission finds that the Respondent terminated the rental agreement with the Appellant in order to close the Byways Park and such termination was motivated by factors outside of the control of the Respondent. The Commission finds that a closure of a mobile home park would fall under either clause 15(1)(b) or 15(1)(d) of the **Act** cited above.

In determining whether the Respondent acted in good faith in seeking to "convert" or "demolish" the Byways Park, the Commission is mindful that the decision appears motivated by financial reasons rather than an attempt to retaliate against one or more tenants. The Director provided a thoughtful and insightful analysis into a consideration of the concept of "good faith" within a notice of termination context and the Commission agrees and adopts this analysis. The number of homes and thus tenants declined sharply and the existing zoning prohibits replacing those homes and tenants, thus dramatically altering the revenues generated by the Byways Park. On the civil standard of the balance of probabilities, the Commission finds that the Respondent acted in good faith in deciding to close the Byways Park.

The remaining question is whether the Respondent agreed to give tenants more than required notice provided for under subsection 15(2) of the **Act**.

The evidence is quite clear that the Respondent made a commitment to give more notice, but there is disagreement as to whether or not this commitment was conditional on continued economic viability. The commitment was never reduced to writing, thus creating confusion as to the real nature of the commitment. The Appellant claims that the Respondent made an unqualified promise of two years notice while the Respondent states that his commitment was specifically premised on economic viability.

In the absence of a written commitment, the testimony of an objective third party can be very useful to assist a trier of fact in determining what was actually promised.

The Appellant chose to call Mr. Hogan as a witness. As noted earlier, Mr. Hogan is a rental officer who was present at the May 3, 2011 meeting to provide the parties with information about the **Act** and its requirements. Mr. Hogan testified that the Respondent stated that he would provide two years notice provided that the Byways Park was financially viable with at least 15 homes in it.

The evidence before the Commission is that there were 15 mobile homes in the Byways Park when the Respondent issued a notice to the tenants to the effect that it would be closed in six months and that the rental agreement would be terminated. The Byways Park had recently lost 12 homes with apparently no opportunity to bring other homes in, due to its zoning and status as a non-conforming use. A significant water bill increase had also occurred, which might be a result of a failing water system. Current expenses thus were higher, due to the increased water bill, the possibility of expenditures to repair or replace the Byways Park's water system were ever present and the number of mobile homes could not be increased. At a lot rent of \$133.00 per month and only 15 mobile home lots rented, the gross revenue would be \$1995.00 per month, for a yearly gross revenue of \$23,940.00. Out of this amount, the Respondent would have to pay property taxes, water and sewer rates, maintenance expenses, office and administrative expenses.

The Commission therefore finds it reasonable that with only 15 mobile homes, and no opportunity to restore the original number of mobile homes, the Byways Park would no longer be financially viable.

The Commission finds that while the Respondent did promise to give tenants two years notice before any closure of the Byways Park, that promise was explicitly premised on financial viability. Following the promise, the number of homes declined while the water bill increased. The evidence supports a finding that the Byways Park ceased to be viable by early 2012 and the Respondent may be released from his May 2011 oral promise and thus he was only bound to give the statutory six months' notice set out in the **Act**.

For these reasons, the appeal is denied.

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Rental of Residential Property Act*

IT IS ORDERED THAT

1. The appeal is denied.
2. Director's Order LD12-220 is confirmed in its entirety.

DATED at Charlottetown, Prince Edward Island, this **30th** day of **October**, **2012**.

BY THE COMMISSION:

(sgd. Allan Rankin)

Allan Rankin, Commissioner

(sgd. Leonard Gallant)

Leonard Gallant, Commissioner

(sgd. Jean Tingley)

Jean Tingley, Commissioner

NOTICE

Sections 26.(2), 26.(3), 26.(4) and 26.(5) of the ***Rental of Residential Property Act*** provide as follows:

26.(2) A lessor or lessee may, within fifteen days of the decision of the Commission, appeal to the court on a question of law only.

(3) The rules of court governing appeals apply to an appeal under subsection (2).

(4) Where the Commission has confirmed, reversed or varied an order of the Director and no appeal has been taken within the time specified in subsection (2), the lessor or lessee may file the order in the court.

(5) Where an order is filed pursuant to subsection (4), it may be enforced as if it were an order of the court.

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.

IRAC141y-SFN(2009/11)