PRINCE EDWARD ISLAND
Regulatory & Appeals Commission
Commission de réglementation et d'appels
ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: **April 12, 2023**
Docket: LA20-012
Type: **Planning Act Appeal**

INDEXED AS: Carol-Ann McLaine and William McLaine v. Rural Municipality of Miltonvale Park, 2023 PEIRAC 1 (CanLII)

Order No: LA23-01

BETWEEN:

Carol-Ann McLaine and William McLaine

Appellants

AND:

Rural Municipality of Miltonvale Park

Respondent

AND:

Jade Stephens and Zach Stephens

Developers

ORDER

Panel Members:

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

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Philip J. Rafuse,
Appeals Administrator
Prince Edward Island Regulatory and
Appeals Commission

Contents

Appearances

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For the Respondent, Rural Municipality of Miltonvale Park

Counsel:

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For the Developers, Jade Stephens and Zach Stephens.

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1. INTRODUCTION

1. This case asks whether the Rural Municipality of Miltonvale Park properly approved a development permit in an agricultural zone for a ground-mounted solar array under the municipality's Zoning and Subdivision Control (Development) Bylaw.

2. The Appellants, Carol-Ann McLaine and William McLaine, live at 985 Loyalist Rd.[1] The Developers, Jade and Zach Stephens, live next door.[2]

3. In the summer of 2020, the Developers began construction of a ground-mounted solar array which is connected to their residence. The Developers were initially advised by the Municipality that they did not require a development permit;[3] the Municipality later corrected that instruction, and the Developers submitted a development permit application for the solar array to the Municipality on June 30, 2020, but no permit was issued at that time.[4]

4. On July 15, 2020, after further discussion with the Municipality, the Developers submitted a revised application for a development permit to construct the solar array.[5] The Municipality issued a development permit the same day, and it is the issuance of this permit that the Appellants have appealed.[6]

5. The Appellants object to the placement of the solar array. They are not opposed to alternative energy sources, but they contend the array is not permitted under the existing bylaws. They are also concerned that the size and placement of the solar array – approximately 20 feet from the Appellants' property boundary – dominates their viewscape and impedes their use and enjoyment of their property.

2. PROCEDURAL NOTE

6. The parties agreed that this matter could be adjudicated by way of written submissions, pursuant to Rule 41 of the Commission's Rules of Practice and Procedure. The Commission determined that an oral hearing was not required in order to adjudicate the matter. The Appellants, the Developers, and the Municipality all filed written submissions for the Commission's consideration.

7. The Municipality also filed with the Commission its record in this matter. The Record totaled 286 pages, and includes, but is not limited to, the Developer's application, email correspondence between the Developers and the Municipality, as well as between the Municipality and a land use planner regarding the application, and miscellaneous correspondence between the Municipality and the Appellants and other residents.

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[1] Written Submissions of the Appellants, at para 4.
[2] Record from the Rural Municipality of Miltonvale Park, pg. 1 [Record].
[3] Record, pg. 105.
[4] Record, pg. 81.
[5] Record, pg. 1.
[6] Record, pg. 6.

3. DISPOSITION

8. After a review of the evidence and submissions of the parties, the appeal is dismissed. The Commission finds that the development permit for the solar array was issued in accordance with the Bylaw.

4. ISSUE

9. The primary issue to be decided in this appeal is whether the issuance of the permit for the solar array is permitted under the Municipality's Zoning and Subdivision Control Bylaw (the "Bylaw"). More specifically, the Commission must determine whether the Municipality properly applied the Bylaw when determining that the solar array constitutes a "private utility structure" under the Bylaw, which is a permitted use in any zone under the Bylaw.

10. The Appellants filed a Notice of Appeal containing ten (10) enumerated grounds;[7] the written submissions filed on their behalf focusses almost entirely on Ground #7, with little or no reference to the balance.[8] The Commission will, therefore, only address the grounds that were advanced by the Appellants in their written submissions.

5. AUTHORITY AND GUIDELINE

11. An appeal of a municipal decision to issue a development permit[9] turns on whether the decision to issue such a permit complies with the requirements of that municipality's bylaw. The Bylaw was created by the Municipality in its legislative capacity and approved by the Minister responsible for the *Planning Act*, currently the Minister of Agriculture and Land.[10] In this case, the Commission's role is to review how the Municipality applied its Bylaw to the application filed by the Developers.

12. The Commission has the legal authority to substitute its decision for one made by a municipality. However, the Commission does not lightly interfere with these types of decisions. Over time, the Commission has developed a guideline for exercising its appellate authority under the *Planning Act*. The guideline involves two main considerations:

- Whether the municipality followed the proper procedure as required by its bylaw, the Planning Act and the law in general, including the duty of procedural fairness; and

- Whether the decision made by the municipality has merit based on sound planning principles in the field of land use planning and as enumerated in the Official Plan and Bylaw.[11]

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[7] Notice of Appeal, August 4, 2020.
[8] Written Submissions of the Appellants, pg. 4.
[9] In this case, the appeal is pursuant to section 28(1.1)(a)(i) of the *Planning Act*.
[10] Rural Municipality of Miltonvale Park, Zoning and Subdivision Control (Development) Bylaw (2019), pg. 2 [Bylaw].
[11] See, for example, Order No. LA17-02, *APM Construction Services Inc.* v *Community of Brackley*, at para 21.

13. In the present appeal, the Commission must consider the first part of this test and determine whether the Municipality correctly applied the Bylaw in interpreting the phrase "private utility structure" when considering and approving the permit for the solar array.

14. When reviewing an application for a development permit, it is incumbent on a municipality to ensure that a proposed development complies with and meets the requirements of its bylaw.[12] The Commission has previously found that a breach of the first step of the guideline includes where a municipality incorrectly interpreted its official plan and bylaw.[13]

15. The Appellant has not raised an issue with respect to sound planning principles; therefore, the Commission finds it is not necessary to conduct an analysis on the second part of the test.

16. Finally, the Appellants have advanced an argument that even if the solar array is a private utility, it would be impossible for the Developers to comply with the condition on the permit. The Commission has previously held that it does not have the authority to hear and determine matters of enforcement. Enforcement is a matter that falls within the discretion of the permit-issuing authority, in this case the Municipality.[14] Therefore, the Commission will not address this argument of the Appellants.

6. ANALYSIS

17. The Developers applied to the Municipality for a permit to construct a "Structure – Private utility (photovoltaic solar array)."[15] The permit issued by the Municipality allowed the Developers "to erect a 1,084-square foot Private Utility Structure (Photovoltaic Solar Array) on Parcel No. 658559 and 856922 located at 999 Loyalist Road," subject to the following condition:[16]

> That the private utility shall produce, transmit, distribute, and furnish electric energy, either directly or indirectly, only to its owner and not to or for the public.

18. Section 3.1.1.iii of the Bylaw states that no person shall construct or place a structure without applying for and receiving a development permit.[17]

19. Section 1.4.2 grants the Municipality's Development Officer with the authority to approve or deny development permits in accordance with the Bylaw.[18] This particular application is not one that requires Council's approval.[19]

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[12] Order No. LA17-06, *Donna Stringer v. Minister of Communities, Land and Environment*, at para 57.
[13] Order No. LA17-02, *APM Construction Services Inc.* v *Community of Brackley,* at para 45.
[14] Order No. LA22-03, *Brian R. MacKay v. Minister of Agriculture and Land,* at para 12 (citing from Orders LA14-05 and LA13-02).
[15] Record, page 1.
[16] Record, page 6.
[17] Bylaw, s. 3.1.1.iii.
[18] Bylaw, s. 1.4.2.
[19] See, for example, Bylaw ss. 3.15, 3.16, 4.4.5, 4.7.3.

20. The Bylaw prescribes certain uses which are permitted in all zones, and section 4.24.2 states that "public and private utilities and utility-related buildings or structures" may be located in any zone, and that no zone standards shall apply.[20]

21. On a review of the Record, the evidence seems to clearly demonstrate that the Development Officer followed the proper process, considered the Bylaw, and sought advice from a planner.[21]

22. From that perspective, the Commission finds that the Municipality followed the proper procedure as required by its Bylaw, the *Planning Act* and the law in general, including the duty of procedural fairness, when it reviewed the Developers' application.

23. However, in the context of this appeal, the question that remains is: is the solar array a "private utility-related structure" per s. 4.24.2 of the Bylaw? In other words, did the Municipality correctly interpret and apply the Bylaw in permitting the installation of this solar array?

A. Is the solar array a "private utility structure" as referenced in the Bylaw?

24. The Commission finds that it is, for the reasons that follow.

25. It is not disputed that the Municipality's Bylaw does not explicitly define "private utilities" or "private utility structure", nor are there provisions that relate specifically to solar arrays. The arguments before the Commission focussed on the interpretation of section 4.24.2 and whether the solar array constitutes a "private utility structure," a permitted use in all zones.

26. Counsel for the Appellants and the Municipality provided extensive submissions on the proper interpretation of the phrase "private utility", both citing the same leading authorities on the principles of statutory interpretation.

27. The Appellants submit that the term "private utility" does not and should not apply to the solar array. They further submit that the term "private utility" "is not used in ordinary parlance and has no standard meaning". They argue that as the term "private utility" is not explicitly defined in the Bylaw, it must be interpreted within in the overall context of the Bylaw, and doing so does not support a finding that the solar array constitutes a "private utility structure."

28. The Municipality counters that the permit was properly issued, and that the overall context of the Bylaw supports a finding that the solar array is a private utility structure, and therefore a permitted use on the Developers' property.

29. In *Vavilov*, the Supreme Court of Canada noted as follows: [22]

> *[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must*

[20] Bylaw, s. 4.24.2.
[21] Record, pgs. 17, 95, 105-106, 120-122, 143, 184-185.
[22] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 120-121.

> *be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.*
>
> *[121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue.*

30. Based on this guidance, the Commission will consider whether the text, context, and purpose of the Bylaw supports an interpretation that the solar array is a "private utility structure."

The Text

31. Section 4.24.2 of the Bylaw reads as follows:[23]

> Public and private utilities and utility-related buildings or structures may be located in any zone and no zone standards shall apply.

32. The solar array is a "structure" as defined in Appendix 2, section 114 of the Bylaw[24] – i.e., it is a "construction" that is "fixed to, supported by or sunk into land."

33. "Utility" is not a defined term in the bylaw. However, Appendix 2 of the Bylaw provides that, except for those defined therein, all words "shall carry their ordinary meaning".[25] A land use planner consulted by the Municipality, opined that the ordinary meaning of utility "is as we would all interpret it to be – which includes the provision of electrical service".[26]

34. In this case, the Commission takes general notice of this, and finds that, in its ordinary meaning, a "utility" is commonly accepted as including a system or service that produces, transmits, distributes, and/or furnishes electric energy. Further, the Commission accepts the submission of the Municipality that the words "utility" or "utilities" are used in the Bylaw in ways that support an interpretation that captures a number of systems or services.

35. Further, the development permit explicitly states that the "private utility shall produce, transmit, distribute, and furnish electric energy, either directly or indirectly, only to its owner and not to or for the public."[27] This demonstrates that the Municipality accepted and understood the term "utility", as included in the

[23] Bylaw, s. 4.24.2.
[24] Bylaw, Appendix 2, s. 114.
[25] Bylaw, Appendix 2, preamble.
[26] Record, pg. 143.
[27] Record, pg. 6.

Bylaw, to include a system or service that produces, transmits, distributes and furnishes electricity.

36. Finally, the Commission accepts the Municipality's submission that the appropriate reading of section 4.24.2 supports a distinction between "public utilities" – i.e., utilities that serve the public; and "private utilities" – i.e. utilities that serve their owner(s).[28]

37. Even though the term "private utilities" does not appear elsewhere in the Bylaw, the ordinary meaning of the term is clear when read in the overall context of section 4.24.2. It means a utility that serves its owner, as opposed to the public.

The Context

38. The Commission finds that the Appellant's attempt to parse the term "private utility" runs contrary to the modern principle of statutory interpretation articulated in the text by Ruth Sullivan,[29] and adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*[30]:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

39. The Appellants submit that because the Bylaw regulates renewable energy systems such as wind turbines, but makes no mention of solar arrays, this means there is at most, no authority for the Municipality to permit such uses, and at least, there exists a gap in the Bylaw that cannot be fixed by through an expansive interpretation without leading to absurdity.

40. The Commission does not agree with this analysis.

41. As noted by the Ontario Court of Appeal in *Southside Construction Management Limited* v *Ingersoll (Town)*[31]:

> *There is no requirement that every term in a zoning by-law be precisely defined. Where words are not defined, they can be interpreted in accordance with their grammatical and ordinary meaning and the context in which they are used.*

42. The Appellants argue that though the Municipality's Official Plan expresses support for renewable energy generation[32] and alternate energy systems,[33] the Bylaw only explicitly contemplates wind energy systems.[34] Further, the Appellants point out that wind energy systems are not defined as "utilities", and yet are heavily

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[28] Written Submissions of the Municipality, paras 22-23.
[29] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis: 2014) [Sullivan].
[30] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27.
[31] *Southside Construction Management Limited* v *Ingersoll (Town),* 2019 ONCA 459, para 20.
[32] Rural Municipality of Miltonvale Park - Official Plan (2016) – Amended July 2019, s. 9 [Official Plan].
[33] Official Plan, Policy, section 9.3.
[34] Bylaw, section 4.32.

regulated in the Bylaw. Therefore, they posit that a privately-owned wind energy system could never be "private utility", and the conflicting treatment of wind energy systems and private utilities is evidence of an "intolerable inconsistency" in the Bylaw which cannot be remedied.

43. The Commission does not find this argument persuasive.

44. The Commission acknowledges that wind energy systems are not expressly classified as "utilities" under the Bylaw. However, if it were the intent of the Bylaws to only permit wind energy systems to support the objectives and policies of the Official Plan, there would be no reason for section 4.24 to be included at all. The Commission finds that the Municipality's position is more persuasive, that wind energy systems are specifically contemplated because of their nature and size, but not to the exclusion of other "public and private utilities and utility-related buildings or structures".

The Purpose

45. Bylaws are intended to give practical effect to the provisions of a municipality's official plan.[35] This Bylaw is no different.[36]

46. Bylaws are passed, and can be revised and amended, by the council of a municipality in accordance with the *Planning Act*. Section 19 of the *Act* prescribes the procedures to be followed by a municipal council in making a bylaw.[37]

47. The Commission finds that section 4.24 of the Bylaw gives effect to the provisions of the Official Plan relating to renewable and alternate energy systems. The section does not provide a significant amount of guidance on its application, but this does not, in the Commission's opinion, render the section meaningless. Council of the Municipality included section 4.24 in the Bylaw, and it has support from the Official Plan. That said, Council may wish, in future, to provide additional clarity relating to the rules to govern existing and emerging renewable and alternate energy technologies.

48. Further, as noted above, the Official Plan supports "renewable energy generation"[38] and "alternate energy systems".[39] While the Official Plan specifically refers to regulating around wind, this is not to the exclusion of other alternate energy systems. The Commission finds that it is reasonable that the Municipality would interpret the word "utility" in section 4.24 in such a way to give effect to the policy of Council to support the use of alternate energy systems in the community.

7. ORDER

49. For these reasons, the appeal is dismissed.

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[35] *Planning Act*, RSPEI 1988, P-8, s. 16.
[36] Bylaw, s. 1.6.
[37] *Planning Act*, RSPEI 1988, P-8, s. 19.
[38] Official Plan, Objective, s. 9.
[39] Official Plan, Policy, s. 9.3.

50. The Commission finds that the Municipality followed the proper procedure as required by its Bylaw and Official Plan, the *Planning Act* and the law in general when it reviewed the Developers' application. Further, and in particular, the Commission finds that the solar array is a "private utility-related structure" per s. 4.24.2 of the Bylaw and that the Municipality correctly interpreted and applied the Bylaw in permitting the installation of this solar array on the Developers' property in the A1 zone.

DATED at Charlottetown, Prince Edward Island**, Wednesday, April 12, 2023**

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, K.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.

NOTE: In accordance with IRAC'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.