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

Docket LA08015
Order LA09-02

IN THE MATTER of an appeal by Michael Reid of decisions of the Minister of Communities, Cultural Affairs and Labour, dated June 26, 2008.

BEFORE THE COMMISSION
on Monday, the 2nd day of February, 2009.

Maurice Rodgerson, Chair
David Holmes, Commissioner
Chester MacNeill, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by Michael Reid of decisions of the Minister of Communities, Cultural Affairs and Labour, dated June 26, 2008.

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Appearances & Witnesses

1. For the Appellant

Representatives:

Michael Reid
Jon Hutchinson

Witnesses:

Shirley Limbert
Cindy Newson
Sandy Nicholson

2. For the Respondent

Counsel:

Ryan MacDonald
Lynn Murray, Q.C.

Witnesses:

Garth Carragher
Glenda MacKinnon Peters

3. For the Developer

Steve Dickieson (on behalf of PEI Mudrooters Inc.)

4. Member of the Public

Ellen Reid

IN THE MATTER of an appeal by Michael Reid of decisions of the Minister of Communities, Cultural Affairs and Labour, dated June 26, 2008.

Reasons for Order

1. Introduction

[1] The Appellant Michael Reid (Mr. Reid) 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***). Mr. Reid's Notice of Appeal was received on July 16, 2008.

[2] This appeal concerns two June 26, 2008 decisions of the Respondent Minister of Communities, Cultural Affairs and Labour (the Minister) granting a change of use permit and also granting a development permit. These decisions were issued by the Minister as a result of an application by the Developer PEI Mudrooters Inc. (PEI Mudrooters) for a change of use for property number 206045 in Desable from a recreational motocross track / off road vehicle facility to a commercial motocross track / off road vehicle facility (the facility).

[3] The appeal was originally scheduled to be heard by the Commission on September 10, 2008. The parties requested and consented to several new tentative hearing dates and after due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on December 16, 2008.

2. Discussion

Mr. Reid's Position

[4] Mr. Reid's submissions may be briefly summarized as follows:

- Mr. Reid testified at the hearing that the facility creates considerable noise and vibration during practices and events. In fact, windows have been known to rattle as far away as 1000 metres from the facility. The sound dominates the countryside within a kilometer of the facility, although this can vary depending on wind direction. When the facility is in operation it is impossible to enjoy one's property if the wind is blowing the wrong way. In the past two years the noise level has "ramped up". The noise is more intense and more frequent.

- Ms. Limbert, a resident of the Desable area, testified at the hearing that she can hear the sounds of the facility 0.8 km from the track, even with her windows and doors shut in the summer. The sounds consist of the "revving" of engines and a voice over the loudspeaker system calling out names and numbers. It is loud enough that she has to raise her voice in conversation outside to be heard. Ms. Limbert is also concerned about soil runoff from the facility into a nearby stream.

- Ms. Newson, a resident and business owner in the Desable area, is concerned about contamination of the nearby creek. She also notes the presence of off-road vehicles being driven on the shoulder of the highway. She is also concerned that the noise of the practices and events at the facility is negatively affecting business at the motel she owns and operates.

- Ms. Nicholson lives approximately 1 km northwest of the facility. When the facility first opened, she thought the motocross bikes were racing in the next field. She notes that the sound carries very well and is affecting her family.

- Mr. Hutchinson testified that he lives about 600 metres from the facility. He notes that the facility was originally a local endeavor that held events two or three times per year. The noise has become worse and more frequent. The Developer never met with community members or dealt with their concerns. They did agree to meet with three residents but the residents and the Developer walked away from that meeting "agreeing to disagree".

- Mr. Reid and Mr. Hutchinson submit that the approval process for the facility was "done in reverse". Rather than get a permit first, the entranceway and building were constructed and a permit sought after the fact. The facility has become a commercial business, which runs from May to October, operating about twice a week: Wednesday and Sunday during the 2008 season. As well, unplanned use of the track occurs by various individuals who wish to take their dirt bike on the track. They also note that during rainfall soil from the bare earth within the facility runs downhill and into the nearby stream. They submit that the facility has a detrimental impact upon the environment and the people who live in the area.

[5] Mr. Reid requests that the Commission allow his appeal and quash the decisions of the Minister. Mr. Reid and Mr. Hutchinson also requested that the Commission recommend that the Provincial government enact noise level regulations.

Member of the Public

[6] Ms. Reid noted that the facility is literally "mucking up the environment". She submits that the environmental regulations need to be strictly enforced. She notes that the pitch of the sounds made by the dirt bikes does not fade into the background.

The Minister's Position

[7] The Minister's submissions may be briefly summarized as follows:

- The role of the Commission is not to set public policy or craft regulations. Rather, the Commission is responsible on appeal to determine if the regulations have been followed with respect to the Minister's decision.

- The fact that the facility initially operated without permits is outside the scope of this appeal.

- With respect to the documents submitted by Desable River Enhancement & Activity Management Inc. (DREAM), the Minister notes that there was no testimony from the author of the documents and thus no opportunity to cross examine his statements and conclusions. Accordingly, the Minister submits that the Commission should give these documents reduced evidentiary weight.

- The Minister submits that the noise associated with the facility does not meet the test of "detrimental impact" set out in the ***Planning Act*** Subdivision and Development Regulations. It is submitted that detrimental impact refers to matters of public health and safety.

- It is noted that the Developer moved the entranceway to comply with site distance requirements. There is no sewage disposal system and no public health issues with respect to the facility's canteen.

- It is submitted that the Minister of Environment, Energy and Forestry prepared a memorandum setting out environmental conditions and these conditions were incorporated into condition number 3 set out in the conditions attached to the Minister's [Communities, Cultural Affairs and Labour] Development Permit.

- Noise level tests were required and these were performed. While there are no noise level regulations in the Province, the tests were evaluated with respect to relevant Ontario noise level regulations.

- While there may be other concerns outside of the ***Planning Act*** and its various regulations, these concerns would need to be raised in an appropriate forum.

[8] The Minister requests that the Commission deny the appeal.

The Developer's Position

[9] The Developer's submissions may be briefly summarized as follows:

- Prior to 2007, there were six to eight events held yearly at the facility. In 2007 there were only five events. In 2008 there were only four events. Practices were also cut back. For 2009, only 3 events are planned and one weekly practice.

- The Developers love their property and are also concerned about the environment. The Developers believe they have met and indeed exceeded the environmental requirements.

- The Developers note that they have made it mandatory for participants at their facility to use a new device called the "db Dawg" universal 4-stroke silencer insert. It is hoped that this device will make practices and events less noisy.

[10] The Developers request that the Commission deny the appeal.

3. Findings

[11] 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. The reasons for the Commission's decision follow.

[12] Subsection 28(1) of the ***Planning Act*** reads as follows:

> *28. (1) Subject to subsections (2), (3) and (4), any person who is dissatisfied by a decision of a council or the Minister in respect of the administration of regulations or bylaws made pursuant to the powers conferred by this **Act** may, within twenty-one days of the decision appeal to the Commission.*

[13] Within the context of a ***Planning Act*** appeal, subsection 28(1) limits the Commission's jurisdiction on appeal to decisions made with respect to the following: the ***Planning Act***, ***Planning Act*** regulations, municipal official plans and municipal bylaws made pursuant to the official plans.

[14] In an appeal such as the present one, the sole focus of ministerial decision making is the Department of Communities, Cultural Affairs and Labour. Often environmental concerns are brought into the realm of the Commission's scrutiny because environmental requirements are incorporated into conditions attached to a development permit. Environmental protection and land use development often go hand in hand. While it appears that follow up and enforcement from an environmental perspective may not have been vigilant, the Commission does not have the jurisdiction, in this appeal, to determine whether or not the facility is in breach of the conditions set out in the June 4, 2008 memorandum of the Minister of Environment, Energy and Forestry, or, for that matter, the ***Environmental Protection Act*** or its regulations.

[15] In the present appeal, there are two key issues within the Commission's jurisdiction. First, did the Minister [Communities, Cultural Affairs and Labour] follow the general requirements set forth in the ***Planning Act*** and its regulations, most notably the Subdivision and Development Regulations? Second, do the change of use and development permits issued by the Minister give rise to a detrimental impact as defined in the Subdivision and Development Regulations?

[16] With respect to the first question, the Commission cannot find any evidence that the Minister failed to follow the ***Planning Act*** or its regulations in general.

[17] With respect to the second question, a brief review of "detrimental impact" is in order. Clause 1(f.3) of the ***Planning Act*** Subdivision and Development Regulations defines detrimental impact as:

> *(f.3) "detrimental impact" means 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) real property value;*
>
> *(ii) competition with existing businesses;*
>
> *(iii) viewscapes; or*
>
> *(iv) development approved pursuant to subsection 9(1) of the Environmental Protection Act;*
>
> Emphasis added.

[18] Subsection 3(2) of the ***Planning Act*** Subdivision and Development Regulations reads as follows:

> *3(2) No development permit shall be issued where a proposed building, structure, or its alteration, repair, location, or use or change of use would*
>
> *(a) not conform to these regulations or any other regulations made pursuant to the Act;*
>
> *(b) precipitate premature development or unnecessary public expenditure;*
>
> *(c) in the opinion of the Minister, place pressure on a municipality or the province to provide services;*
>
> *(d) have a detrimental impact; or*
>
> *(e) result in a fire hazard to the occupants or to neighbouring buildings or structures.*
>
> Emphasis added.

[19] In the present appeal, the decisions under appeal consist of a decision to grant a change of use permit and a decision to grant a development permit for a canteen. In order to "trigger" the detrimental impact analysis, there needs to be "*a proposed building, structure, or its alteration, repair, location, or use or change of use".* The Commission notes that the only development permit issued was for the canteen.

[20] While it may be argued that the canteen in and of itself would have no detrimental impact on Mr. Reid or other residents in the Desable area, it is noteworthy that the development permit for the canteen includes conditions which apply not just to the operation of the canteen, but to the facility as a whole. The Commission also notes the mandatory nature of section 9 of the ***Interpretation Act***:

> 9. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[21] Section 2 of the ***Planning Act*** reads:

> ***2.*** *The objects of this Act are*
>
> *(a) to provide for efficient planning at the provincial and municipal level;*
>
> *(b) to encourage the orderly and efficient development of public services;*
>
> *(c) to protect the unique environment of the province;*
>
> *(d) to provide effective means for resolving conflicts respecting land use;*
>
> *(e) to provide the opportunity for public participation in the planning process. 1988,c.4,s.2.*

[22] Accordingly, the Commission finds that as the canteen is an integral part of the facility and the permit for the canteen represents the sole development permit issued for the facility, the requirements of subsection 3(2) are applicable in the present appeal and therefore it is appropriate, within the objects of the ***Planning Act***, to determine whether the facility will have a detrimental impact.

[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.

[26] For the above reasons, the Commission finds that the Minister followed the requirements of the ***Planning Act*** and its regulations and the impact of the facility on adjacent land use does not constitute a detrimental impact, as that term is defined in the regulations. Accordingly, the appeal is denied.

[27] The Commission is, however, concerned that further enforcement and follow up of the environmental conditions incorporated into the Minister's decisions may be required. The Commission notes that the sound level readings taken on July 19, 2008 were performed by a person who had not received training in the use of a sound level meter. The Commission is also concerned that it appears that the Developer has not, to date, taken steps to prevent unauthorized use of the facility.

[28] The Commission is also concerned that the Province of Prince Edward Island lacks noise level regulations applicable to land use. While the Commission was informed at the hearing that the other Atlantic Provinces also lack noise level regulations applicable to land use, the Commission takes official notice of the fact that Prince Edward Island has the highest population density of any province or territory in Canada. Greater population density has the potential to foster greater conflict over widely varying land uses as there is less opportunity to provide optimal separation distances between incompatible land uses. The importance of tourism to the Province's economy is yet another compelling reason for the Province to take a leadership role and enact noise level regulations applicable to land use. New technologies, such as wind energy, may raise concerns over sound levels and their impact on adjacent land uses. Outdoor musical concerts may also raise concerns over sound levels on adjacent properties. Such regulations, and the trained people and properly calibrated equipment to accurately measure the degree and level of noise and sound, may provide ministerial and municipal decision makers, the Commission and the Courts with an opportunity to make an objective determination, and thus provide helpful guidance, as to whether or not a proposed land use is reasonable with respect to the impact of noise and sound on existing surrounding land uses. In addition, the provision of such regulations may encourage the consideration of various noise abatement measures which would assist in permitting different land uses to peacefully co-exist in the same area.

[29] Accordingly, in the interests of fostering the management and resolution of land use conflicts related to noise and sound, the Commission wishes to encourage public policy makers to fully consider the implementation of noise and sound level regulations applicable to land use.

4. Disposition

[30] An Order denying this appeal follows.

IN THE MATTER of an appeal by Michael Reid of decisions of the Minister of Communities, Cultural Affairs and Labour, dated June 26, 2008.

Order

WHEREAS Michael Reid has appealed two related decisions of the Minister of Communities, Cultural Affairs and Labour, dated June 26, 2008;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on December 16, 2008 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 appeal is hereby denied.

DATED at Charlottetown, Prince Edward Island, this 2nd day of February, 2009.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*
Maurice Rodgerson, Chair

(Sgd.) *David Holmes*
David Holmes, Commissioner

(Sgd.) *Chester MacNeill*
Chester MacNeill, 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 Appeal Division of the Supreme Court upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.*

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