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

Docket LA14004
Order LA17-01

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of Mlltonvale Park, dated June 26, 2014 and October 23, 2014.

BEFORE THE COMMISSION
on Thursday, the 16th day of March, 2017.

Douglas Clow, Vice-Chair
Michael Campbell, Commissioner
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of Mlltonvale Park, dated June 26, 2014 and October 23, 2014.

Contents

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Appearances & Witnesses

1. **For the Appellants**

   Matthew J.W. Bradley, Barrister & Solicitor

2. **For the Respondent Community of Miltonvale Park**

   Jonathan M. Coady, Barrister & Solicitor

3. **For the Island Regulatory and Appeals Commission**

   John W. Hennessey, Q.C., Barrister & Solicitor

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of MIltonvale Park, dated June 26, 2014 and October 23, 2014.

Reasons for Order

1. Introduction

[1] Phillip O'Halloran on behalf of himself and on behalf of Oscar O'Halloran (the **Appellants**) filed two appeals 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 Commission received a Notice of Appeal from the Appellants on July 16, 2014 (the **July appeal**). On November 13, 2014, the Appellants provided Commission staff with an email, which in substance initiated a second appeal (the **November appeal**). The Appellants were advised by Commission staff to file a Notice of Appeal and that document was received on November 19, 2014.

[2] Those appeals concerned decisions made by the Respondent *Community of Miltonvale Park (the **Respondent**) on* June 26, 2014 *and* October 23, 2014 respectively to deny applications for permits to place fill on parcel number 283085 located in the Community of Miltonvale Park.

[3] After hearing the evidence and the submissions of the parties, the Commission issued its Order together with Reasons for Order on June 16, 2015.

[4] In its Order, the Commission ordered that:

1. The appeals were allowed and the Respondent's June 26, 2014 and October 23, 2014 decisions were hereby quashed.

2. The Respondent was ordered to issue a development permit for the placement of fill to the Appellants, effective for the 2015 year.

[5] In its Reasons, the Commission stated as follows:

> *[63] Accordingly, the Commission allows both appeals, quashes the Respondent's June 26, 2014 and October 23, 2014 decisions pertaining to this matter and orders the Respondent to issue the Appellants a development permit for the placement of fill, effective for the 2015 year. In so doing, the Respondent may attach reasonable and relevant conditions to such permit or may require a development agreement setting out reasonable and relevant terms.* [underlining added]

[6] Pursuant to the Commission Order on July 17, 2015, the Respondent forwarded to the Appellants a draft form of Development Agreement.

[7] The parties were unable to reach agreement on the terms and conditions of a Development Agreement and, consequently, by letter dated August 12, 2016 from Matthew Bradley, solicitor for the Appellants, to the Commission, the Appellants requested implementation of Commission Order LA15-05 pursuant to section 28(11) of the *Planning Act* (PEI).

[8] Section 28(11) of the *Planning Act* (PEI) states:

> *Where the council or the Minister, as the case may be, fails to implement an order made under subsection (8), the Commission, on its own initiative or the initiative of an interested person, may act in the name of the council or the Minister to implement the order.*

[9] The Commission have received and reviewed correspondence and emails from counsel for the parties, and Commission staff as follows:

1. Letter from Matthew Bradley to the Commission dated August 12, 2016;

2. Letter from Jonathan Coady to Philip Rafuse dated August 16, 2016;

3. Email from Philip Rafuse to Matthew Bradley and Jonathan Coady dated September 8, 2016;

4. Email plus attachments from Jonathan Coady to Philip Rafuse and Matthew Bradley dated September 12, 2016;

5. Email plus attached statement of Mr. O'Halloran from Matthew Bradley to Jonathan Coady and Philip Rafuse dated September 20, 2016;

6. Email from Jonathan Coady to Philip Rafuse and Matthew Bradley dated September 23, 2016;

7. Email from Matthew Bradley to Philip Rafuse and Jonathan Coady dated September 23, 2016;

8. Copy of email from Sandy Foy to Phillip O'Halloran dated July 17, 2015 with enclosed proposed July 2015 Development Agreement.

[10] Each of the above items are deemed exhibits in this matter, numbered as above.

[11] By letter to counsel for the parties dated November 22, 2016, the Commission invited written submissions as to what each party considers "reasonable and relevant terms" to a permit or development agreement, including reasons why or why not. In addition, the Commission requested written submissions on whether the Commission could implement its Order dated June 16, 2015 in view of the fact that the Respondent had repealed its Bylaw 2013 and enacted a new Zoning and Subdivision Control Bylaw effective May 31, 2016.

[12] In the above letter to counsel the Commission advised that following receipt of submissions it would decide if a full hearing was necessary.

[13] In response to the above letter to counsel the Commission received written submissions from counsel for the parties on January 14, 2017. The Commission have decided that a full hearing is not necessary.

2. Discussion

The Appellants' Position

[14] As to what are reasonable and relevant terms to a permit or development agreement, the Appellants point to five conditions which the Respondent imposed on a fill permit for property of another applicant approved by the Community on September 25, 2014, those being as follows:

> *(i) The Applicant agreeing that only clean earthen fill shall be placed on the Property, such fill to conform with to the standards of the Department of Environment, Labour and Justice;*
>
> *(ii) The Applicant agreeing to control dust and dirt resulting from the placement of the fill that may affect neighbouring properties, including leveling [sic] the fill to the final grade and seeding it with see [sic] mix or mulch mix as appropriate;*
>
> *(iii) The Applicant agreeing that no trucks shall enter upon or leave the Property other than between the hours of 7:00 A.M. and 7:00 P.M.;*

(iv) The permit having an expiration date of one year from the date of issue, with the Development Officer having the power to renew the permit for an additional one year term; and

(v) Other conditions that may be required by either the Department of Environment, Labour & Justice or Department of Transportation & Infrastructure Renewal.

[15] The Appellants submit that these should serve as a precedent for what is reasonable and relevant and to add additional conditions would be arbitrary, unreasonable and unfair.

[16] The Appellants submit that, in the alternative, the following conditions, which are agreeable to the Appellants, would be reasonable, namely:

"We will seed out when work is complete in a specific area

We will comply with the conditions of Provincial Government Dept. of Environment Permit as issued for our property

We will operate our site under regular industry hours of 7am to 7pm Should we feel the site becomes too dusty to safely operate we will water the drive area and manage any dust issues that arise. This will be done at our discretion

Any site visit by community staff or agent shall be pre arranged with us by appointment only during regular operating hours"

[17] The Appellants also noted in their submission that an earlier Development Agreement signed in 2012 did not prove effective and resulted in the hearing before the Commission which led to the Order now under consideration.

[18] As to the issue regarding the repeal of the previous Zoning and Subdivision Control Bylaw 2013 and the enactment of a new Zoning and Subdivision Control Bylaw, the Appellants submit, in summary:

a) there is no material difference in the zoning or otherwise in regard to their application between the 2013 Bylaw and the 2016 Bylaw and requiring the Appellants, as the Respondent suggests, to submit a fresh application under the 2016 Bylaw is legally incorrect and simply an attempt by the Respondent Community to avoid its obligation to comply with the Commission's Order;

b) they rely on the principle enunciated in the Supreme Court of Canada decision of Ottawa (City) v. Boyd Builders Ltd [1965] SCR 408, to the effect that an owner may at common law do with their property as they see fit subject only to right of a municipality to rezone the property in accordance with the criteria set out in the Boyd Builders case;

c) the Appellants have a vested right to a development permit which pre-existed the 2016 Bylaw, relying on the principle as enunciated in the Supreme Court of Canada decision of Dikranian v. Quebec (Attorney General) [2005] SCC 73 and the Nova Scotia Provincial Court decision of R. v. Manship Holdings Ltd. [2006] NSPC 31;

(d) The 2016 Bylaw must be interpreted so as to comply with the provisions of the Planning Act (PEI), and in particular Section 28(10) which states:

> *The council or the Minister, as the case may be, fails to implement an order made under subsection (8), the Commission, on its own initiative or the initiative of an interested person, may act in the name of the council of the Minister to implement the order.*

and,

(e) in addition the refusal by the Respondent Community to implement the Order for the Community offends the principles of procedural fairness, the planning process set out in the Planning Act (PEI) and the Municipalities Act (PEI) and is disrespectful to the Commission's appellant authority.

The Respondent's Position

[19] The Respondent submits firstly that it has not failed to implement Order LA15-05. The Community submits that the Order allowed for the signing of a Development Agreement and the Community took steps to do that by submitting a Development Agreement to the Appellants. The Community asserts that it is the refusal of the Appellants to sign a Development Agreement, coupled with its failure to act diligently in this matter, which is the source of the problem. The Community states the inability of the parties to agree to a contract is not a ground for the Commission to intervene.

[20] The Respondent submits secondly that the Commission Order LA15-05, which was dated June 16, 2015, referred to a development permit ". . . effective for the 2015 year" and it is now 2017. Accordingly, the Respondent submits that the Appellants must either apply for a permit under the Bylaw or seek prerogative relief from the Supreme Court of Prince Edward Island.

[21] On the issue of the repeal of the 2013 Bylaw and the enactment of a new Bylaw in 2016, the Respondent denies that the Appellants had a vested right to a development permit. Referring also to the Supreme Court of Canada decision in *Dikranian v. Quebec*, the Respondent cites the following extract:

> ***[A]n individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and***

> ***concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement.***
>
> *...*
>
> ***A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists.***
>
> *...*
>
> ***But there is more. The situation must also have materialized. When does a right become sufficiently concrete?*** *This will vary depending on the juridical situation in question.* ***Suffice it to say for now that****, just as the hopes or expectations of a person's heirs become rights the instant the person dies..., and just as a tor or delict instantaneously gives rise to the right to compensation ...,* ***rights and obligations resulting from a contract are usually created at the same time as the contract itself***. [emphasis added]

[22] The Appellants in this case, according to the Respondent did not have a concrete and crystallized right when, as here, the right was conditional on the signing of a development agreement. The Respondent cites additionally the Supreme Court of Canada decision of *R. v. Puskas* [1998] 1 SCR 1207 where it was stated ". . . a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled".

[23] The Respondent further submits that the Commission does not have authority to dictate the content of a Development Agreement, relying on the decision of the Prince Edward Island Court of Appeal in *Resort Municipality v. IRAC*, 2014 PECA 19. As well, the Respondent, citing the decision of the Prince Edward Island Court of Appeal in *Charlottetown (City) v. IRAC*, 2013 PECA 10, notes that municipalities with official plans and development bylaws have primary authority over the planning process, and the exercise of discretion by the Respondent to require a Development Agreement is part of that authority.

[24] Finally, on the issue of what are "reasonable and relevant conditions", the Respondent points out that the conditions contained in their proposed Development Agreement are substantially similar to the Development Agreement signed by the Appellants in 2012, and that it had made a number of accommodations on the subject of costs, dust control, hours of operation, surveyor certificates and notice before inspection. The Respondent states that it has acted reasonably, in good faith, and within the scope of its authority under the Bylaw.

3. Findings

The order sought to be implemented

[25] Section 28(1.1)(a)(i) of the *Planning Act* (PEI) provides for an appeal to the Commission from a decision of the council of a municipality made in respect to an application by any person for a building, development or occupancy permit. The order sought to be implemented arose out of such an appeal.

[26] Sections 28(8) and (9) of the *Planning Act* (PEI) read as follows:

> *(8) The Commission shall hear and decide appeals and shall issue an order giving effect to its disposition.*
> *(9) The Commission shall give reasons for its decision.*

[27] As can be seen, the statutorily prescribed mechanism for the Commission to give effect to its disposition is by the issuance of an Order. The Commission is required to give reasons for its decision, or its disposition, but it is the Order issued under Section 28(8) which constitutes the ultimate remedy available to a dissatisfied person who appeals to the Commission.

[28] This decision relates to a request by the Appellants to implement Order No. LA15-01 pursuant to section 28(11) of the *Planning Act* (PEI) which reads as follows:

> *(11) Where the council or the Minister, as the case may be, fails to implement an order made under subsection (8), the Commission, on its own initiative or the initiative of an interested person, may act in the name of the council of the Minister to implement the order.*

[29] The Commission believes that there is a clear legislative intention that the Order to be implemented under section 28(11) is the Order issued under section 28(8).

[30] In this case, the Order issued by the Commission reads as follows:

> *WHEREAS Philip O'Halloran has appealed two decisions of the Community of Miltonvale Park;*
>
> *AND WHEREAS the Commission heard the appeals at public hearings conducted in Charlottetown on January 19 and 20, 2015 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 appeals are allowed and the Respondent's June 26, 2014 and October 23, 2014 decisions are herby quashed.*

2. *The Respondent is ordered to issue a development permit for the placement of fill to the Appellants, effective for the 2015 year.*

DATED at Charlottetown, Prince Edward Island, this 16th day of June, 2015.

BY THE COMMISSION . . .

[31] As can be seen, the Order of the Commission was that the Respondent ". . . issue a development permit . . .". The evidence is clear that the Respondent has not issued a development permit to the Appellants. The question for the Commission is whether it should, in the circumstances of this case, exercise its authority under s. 28(11).

[32] In deciding this question the Commission is mindful of the objects (or objectives) of the *Planning Act* (PEI) which are as follows:

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.* [emphasis added]

What were the Appellants initially seeking from the Respondent?

[33] The Appellants applied to the Respondent for a development permit pursuant to section 4.1.1 of the Community Zoning and Subdivision Control (Development) Bylaw 2013 (the 2013 Bylaw) which reads, in part:

SECTION #4 – GENERAL PROVISIONS FOR ALL ZONES

1.1 DEVELOPMENT APPROVAL

1. No person shall: . . .

(j) place, or dump any fill or other material. . .

without first applying for, and receiving a permit from Council.

[34] Under section 4.5 of the 2013 Bylaw, the Community could require an applicant to submit a site plan showing such things as shape and dimensions of the lot to be used, the location, height and dimensions of any building or structure proposed to be erected or already erected on the lot, the location and dimensions of parking spaces, loading space, driveways and landscaped areas, the proposed use for the lot and its buildings or structures and any other information which the development officer deems necessary to determine if the proposed development complies with the Bylaw. In this instance no site plan was requested.

[35] When issuing a development permit, the Respondent could impose conditions and could require a development agreement in accordance with sections 4.6 and 4.7 of the 2013 Bylaw which read as follows:

> *4.6 CONDITIONS ON PERMITS*
>
> *Council or its agent shall have the authority to impose conditions on a permit subject to such conditions being directly related to or consistent with bylaws of the Community or the Official Plan.*
>
> *4.7 DEVELOPMENT AGREEMENT*
>
> *Council may require any applicant to enter into a Development Agreement. This Agreement shall be a contract binding on both parties, containing all conditions which were attached to the development permit. Failure to comply with a Development Agreement shall constitute an offense under this Bylaw.*
>
> *A Development Agreement may address but shall not be limited to the following matters:*
>
> *i) site design;*
> *ii) the design and construction cost of sidewalks, pathways and other pedestrian access matters;*
> *iii) landscaping and screening;*
> *iv) vehicular accesses and exits;*
> *v) signage;*
> *vi) lighting;*
> *vii) architectural harmony;*
> *viii) methods of waste disposal;*
> *ix) fencing; and*
> *x) any other matters that Council deems necessary to ensure the health, safety, and convenience of Community residents and the travelling public.*

[36] It was with those provisions in mind that in its reasons for order LA15-05 the Commission stated the following:

> *[63] Accordingly, the Commission allows both appeals, quashes the Respondents June 26, 2014 and October 23, 2014 decisions pertaining to this matter and orders the Respondent to issue the Appellants a development permit for the placement of fill, effective for the 2015 year. In so doing, the Respondent may attach reasonable and relevant conditions to such permit or may require a development agreement setting out reasonable and relevant terms.* [underlining added]

[37] As such, ". . . reasonable and relevant terms . . ." should be ". . . directly related to or consistent with Bylaws of the Community or the Official Plan."

[38] As stated in section 4.7 of the 2013 Bylaw, a development agreement should contain all conditions which were attached to the development permit issued under section 4.6.

[39] In this case, the Respondent did not issue a development permit with conditions, but proceeded to propose a development agreement first. It is the view of the Commission that this approach was a reversal of the sequence of events as contemplated by sections 4.6 and 4.7. It is the view of the Commission that the Respondent ought first to have issued the permit subject to conditions relevant or consistent with Bylaws of the Community or its Official Plan. The Respondent could also have required that the Appellants enter into a development agreement as a condition of the development permit, with such development agreement containing the conditions attached to the development permit.

[40] Proceeding with a requirement for a development agreement without first issuing and imposing conditions on the development permit placed the Appellants in an untenable position. While the Appellants might have had a right to appeal to this Commission if they disagreed with the conditions placed on a development permit, it is doubtful that the Appellants could appeal the inability of the parties to enter into a development agreement. The position taken by the Respondent effectively renders the Order of the Commission of no practical force or effect and, by extension, would negate the ability of the Appellants to take advantage of section 28(11). Such an interpretation of the *Planning Act* (PEI) and the 2013 Bylaw would be inconsistent with the objects of the *Planning Act* (PEI), in particular the objectives of efficiency in planning and development and effectiveness for resolving conflicts respecting land use.

Can the Commission implement the Order given the repeal and enactment of the Zoning and Subdivision Control Bylaw?

[41] The Commission agrees with both counsel that this issue involves a consideration of the principle against interference with vested rights. In this case, both parties have referred the Commission to the Supreme Court of Canada in *Dikranian v. Quebec (Procureur general)* [2005] SCR 530. In that case, the principal is described as follows:

> *4.2.2. Statement of Principle*

> *32 The principle against interference with vested rights has long been accepted in Canadian law. It is one of the many intentions attributed to Parliament and the provincial legislatures. As E.A. Driedger states in Construction of Statutes (2nd ed. 1983), at p. 183, these presumptions*
>
> > *. . .were designed as protection against interference by the state with the liberty or property of the subject. Hence, it was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject.*
>
> *This has already been accepted by Duff J. in Upper Canada College v. Smith (1920), 61 S.C.R. 413 (S.C.C.), at p. 471:*
>
> > *. . . speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time. (see also Steele-Smith v. Acme (Village) School District (1932), [1933] S.C.R. 47 (S.C.C.), at p. 51; R. Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed. 2002), at pp. 569-70.)*
>
> *33 The leading case on this presumption is Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, [1933] S.C.R. 629 (S.C.C.), at p. 638, where this Court stated the principle in the following terms:*
>
> > *A legislative enactment is not to be read as prejudicially affecting rights, or "an existing status" (Main v. Stark [(1890), 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.*
>
> *34 The principle has since been codified in interpretation statutes. The Interpretation Act is no exception:*
>
> > *12. The repeal of an act or of regulations made under its authority shall not affect rights acquired . . . and the acquired rights may be exercised . . . notwithstanding such repeal.*

[42] It is worth noting here that the *Interpretation Act* (PEI) contains a provision somewhat similar to Quebec. The *Interpretation* Act (PEI) is a guide for courts and others when looking to interpret or apply legislation in Prince Edward Island and it applies to a Bylaw as well as statutes. Section 32 of the *Interpretation Act* (PEI) reads as follows:

> *32. Where an enactment is repealed in whole or in part, whether or not another enactment is substituted for it, the repeal does not*
>
> *(a) revive an enactment or thing not in force or existing immediately before the time when the real takes effect;*
>
> *(b) affect the previous operation of the enactment so repealed or anything done or suffered thereunder;*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;*
>
> *(d) subject to clause 33(1)(d), affect any offence committed against or a contravention of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed; or*
>
> *(e) subject to clause 33(10)(b), affect any investigation, proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,*
>
> *and subject to subsection 33(1), an investigation, proceeding or remedy as described in clause (e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.* [underlining added]

[43] As can be seen, the *Interpretation Act* (PEI) refers to a ". . . right, privilege . . . acquired, accrued, accruing or incurred under the enactment so repealed.".

[44] While not disagreeing with the description of the principle of vested rights, the Respondent argues that that Appellants do not have a "vested right" to a development permit as the issuance of the development permit is conditional upon the community imposing conditions upon the development or requiring the Appellants to sign a development agreement. The Respondent in its submission quotes the following from *Dikranian v. Quebec (Procureur general)*:

> *[A]n individual must meet two criteria to have a vested right: (a) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statue's commencement.*
>
> *...*
>
> *A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists.*
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> *...*
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> *But there is more. The situation must also have materialized. When does a right become sufficiently concrete? This will vary depending on the juridical situation in question. Suffice it to say for now that, just as the hopes or expectations of a person's heirs*

> *become rights the instant the person dies..., and just as a tort or delict instantaneously gives rise to the right to compensation ..., rights and obligations resulting from a contract are usually created at the same time as the contract itself.* [underlining added]

[45] The Respondent also relies on the decision of the Supreme Court of Canada in *R. v. Puskas* [1998] 1 S.C.R. 1207 which, interestingly, discusses section 43 of the *Interpretation Act* (Canada) which is almost identical to section 32 of the *Interpretation Act* (PEI) quoted above.

[46] The *Puskas* case dealt with the question of when a right of appeal to the Supreme Court of Canada was ". . . acquired, accrued, [or] accruing . . .". At the time when the accused were charged, the *Criminal Code of Canada* provided for an appeal "as of right" to the Supreme Court of Canada. Subsequently, but before the Ontario Court of Appeal had ruled on their appeals to it, the *Criminal Code of Canada* was changed to require that leave of the Court was required for an appeal to the Supreme Court of Canada. The accused did not obtain leave, and argued that their right of appeals ". . . acquired, accrued [or] accruing . . " at the time they were charged. The Supreme Court of Canada disagreed, and ruled instead that the right of appeal was not ". . . acquired, accrued [or] accruing . . ." until the Ontario Court of Appeal had ruled on their appeals. This case illustrates that, as was stated in the *Dikranian v. Quebec (Procureur general)* case, that whether a right is "vested" or ". . . acquired, accrued [or] accruing . . ." will vary depending on the juridical situation in question.

[47] The Order sought to be implemented required the Respondent to issue a development permit. Section 4.7 of the 2013 Bylaw allowed the Respondent to impose conditions directly related to or consistent with bylaws of the Community or the Official Plan or, as stated by the Commission in its Reasons for Order, reasonable and relevant terms. That Order did not require a development agreement, although that was permissible both by the 2013 Bylaw of the Community and by the Reasons of the Commission. However, the Order itself clearly gave the Appellants a right to a development permit which was not provided.

[48] Taking into account the jurisprudence discussed above and in consideration of the particular circumstances of this case, it is the view of the Commission that the Appellants have a vested right to a development permit subject to such conditions as the Respondent decides to impose, subject to such conditions being directly related to or consistent with Bylaws of the Community or its Official Plan.

[49] Accordingly, the Commission is prepared to implement its Order LA15-05 by requiring the Respondent to issue a development permit to the Appellants subject to the imposition of conditions by the Respondent which are directly related to or consistent with the Bylaws of the Community or its Official Plan. The Respondent may require that such conditions, or terms, be included in a development agreement signed by the parties containing the conditions which were attached to the development permit.

Can the Commission issue an Order now given that the initial Order referred to the 2015 year?

[50] Commission Order LA15-05 referred to the 2015 year as that was the year in which it was issued, and the effect of that Order would extend into 2016.

[51] It is the view of the Commission that the request by the Appellants under consideration is, in effect, a continuation of the appeal process which began in 2014. The calendar year is not, in the Commission's view, material to the nature of the permit sought. What is material is that the Appellants be entitled to place fill on property which they own.

[52] Again, to accept the position taken by the Respondent would effectively neuter the appeal rights of the Appellants as provided under the *Planning Act* (PEI).

[53] In this regard, the Commission also refers again to section 32 of the *Interpretation Act* (PEI) as follows:

> *32. Where an enactment is repealed in whole or in part, whether or not another enactment is substituted for it, the repeal does not*
>
> *(a) revive an enactment or thing not in force or existing immediately before the time when the real takes effect;*
>
> *(b) affect the previous operation of the enactment so repealed or anything done or suffered thereunder;*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;*
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> *(d) subject to clause 33(1)(d), affect any offence committed against or a contravention of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed; or*
>
> *(e) subject to clause 33(10)(b), affect any investigation, proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,*
>
> *and subject to subsection 33(1), an investigation, proceeding or remedy as described in clause (e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.* [underlining added]

Reasonable and Relevant Conditions

[54] The Commission received submissions from the parties as to what would be "reasonable and relevant conditions" to impose on a development permit. Counsel for the Respondent submits that the Commission cannot dictate the contents of a development agreement, pointing out that the planning is within the sole purview of the Community. The Appellant cites a number of authorities for this preposition, including *Charlottetown (City) v. IRAC,* 2013 PECA 10 and *Resort Municipality v. IRAC*, 2014 PECA.

[55] While the Commission does not disagree with those authorities, it is nevertheless of the view that what is involved here is not planning as such, but rather the exercise of the Commission's appellate authority to supervise decisions of a council of a municipality pursuant to the *Planning Act* (PEI). That appellate authority includes the power to implement an order made by it where a council of a municipality has failed to do so.

[56] In considering the nature and extent of its authority under section 28(11) of the *Planning Act* (PEI), the Commission are reminded of its general powers and authorities prescribed by the provisions of the *Island Regulatory and Appeals Commission Act* (PEI), and in particular section 6(1)(a) thereof which reads:

> *6.(1) The Commission has*
>
> *(a) all the jurisdiction and powers conferred or vested in it by this Act or any other enactment, and all other implied or incidental powers necessary to perform its functions;*

[57] As well, the Commission are reminded of the provisions of sections 9 and 24(2) of the *Interpretation Act* (PEI) which reads:

> *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.*
>
> *24.(1) . . .*
>
> *(2) Where in an enactment power is given to a person to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person to do or enforce the doing of the act or thing.*

[58] Taking the foregoing statutory provisions together with the objects of the *Planning Act* (PEI) together, the Commission is of the view that it does have the ". . . implied and incidental power . . ." to enforce its Order by determining what are reasonable and relevant terms to impose on the development permit sought by the Appellant. Not doing so would do little to resolve the impasse which, as can be seen, is over precisely what those terms should be.

[59] The Commission have considered the submissions of counsel for the parties and find that the five conditions imposed by the Respondent in respect to the applicant previously referred to in paragraph 14 are reasonable and relevant, those being as follows:

> *(i) The Applicant agreeing that only clean earthen fill shall be placed on the Property, such fill to conform to the standards of the Department of Environment, Labour and Justice;*
> *(ii) The Applicant agreeing to control dust and dirt resulting from the placement of the fill that may affect neighbouring*

properties, including leveling the fill to the final grade and seeding it with see [sic] mix or mulch mix, as appropriate;

(iii) The Applicant agreeing that no trucks shall enter upon or leave the Property other than between the hours of 7:00 A.M. and 8:00 P.M.;

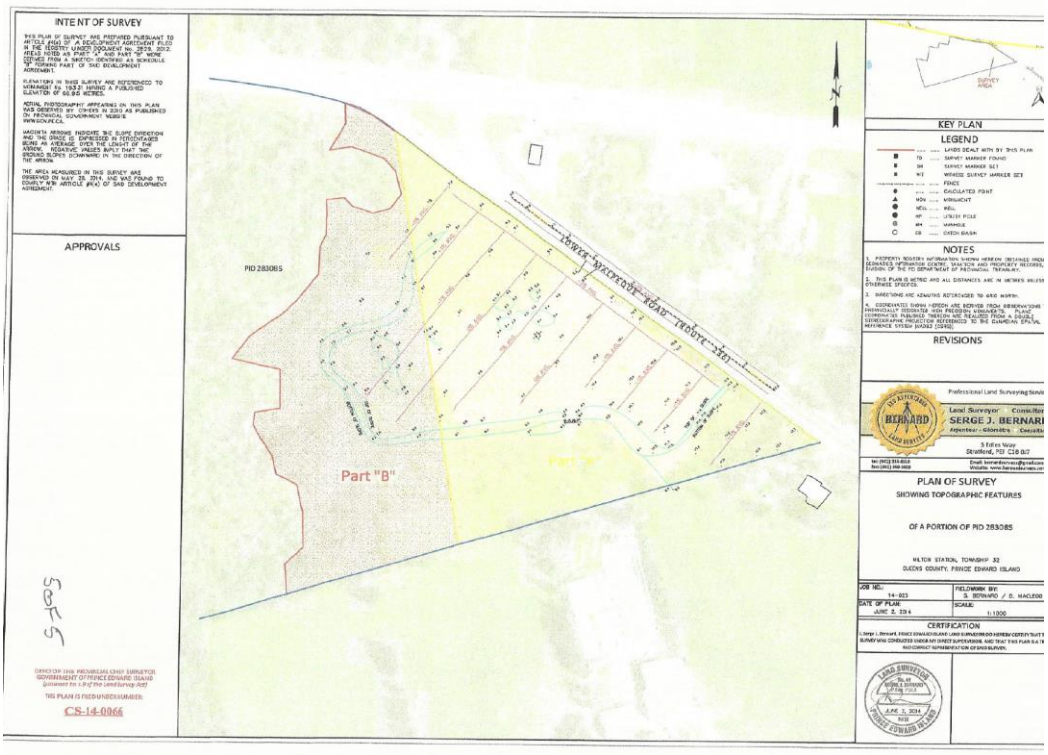
(iv) The permit having an expiration date of one year from the date4 of issue, with the Development Officer having the power to renew the permit for an additional one year term; and

(v) Other conditions that may be required by either the Department of Environment, Labour & Justice or Department of Transportation & Infrastructure Renewal.

[60] These appear to the Commission to be ". . . directly related to or consistent with the Bylaws of the Community or the Official Plan", and appear intended in part ". . . to ensure the health, safety and convenience of Community residents and the travelling public" as provided in Bylaw 4.7(x).

[61] As well, the Commission finds that the following additional terms acceptable to the Appellant would be reasonable and relevant, those being as follows:

- Fill to be placed on the property as delineated Part B on map below:



- No waste demolition materials will be placed
- Seed out when work is complete in a specific area, taking into account time of year and potential for future traffic over the seeded area

- If the site becomes too dusty to safely operate Applicant will water the drive area and manage any dust issues that arise, to be done at their reasonable discretion
- Any site visit by community staff or agent shall be pre arranged with Appellant by appointment only during regulator operating hours

[62] While recognizing that the Respondent has made some concessions regarding various matters, including costs, the Commission advises that in its view some articles of the proposed Development Agreement are not reasonable nor relevant.

[63] The first is Article #2 dealing with costs. This provision is far too broad and could extend to costs of further proceedings before this Commission or proceedings in Court to enforce the agreement, seemingly without regard to the ultimate outcome. There are no costs awarded to any party appearing before this Commission, and appeals from our decisions to the Court of Appeal do not attract costs except for special reasons. This article is inconsistent with those considerations, and is inconsistent with what the Commission views as an overriding policy expressed by statute that costs sanctions should rarely be imposed in planning matters, including appeals.

[64] The second is Article #5 which establishes the Respondent as the sole arbiter of whether the Development Agreement has been complied with. The Development Bylaw sections 19.2 and 19.3 contain enforcement mechanisms which are available to the Respondent if it considers that there has been any violation of the Development Bylaw, including a Development Agreement. Those enforcement mechanisms require that the determination of any alleged violations should be in the hands of a third party, i.e. a court, and that is as it should be.

[65] The third is Article #6 respecting a security deposit which appears to be tied to Article #2 respecting costs.

4. Disposition

[66] An Order will follow implementing Commission Order LA15-05 by the Commission directing the Respondent to forthwith issue to the Appellant a development permit subject to the terms described above as reasonable and relevant, such development permit to be for a period of one year commending May 1, 2017.

IN THE MATTER of two appeals filed by Phillip O'Halloran concerning decisions of the Community of MIltonvale Park, dated June 26, 2014 and October 23, 2014.

Order

WHEREAS the Appellant Phillip O'Halloran has requested implementation of Commission Order LA15-05 pursuant to subsection 28(11) of the ***Planning Act***;

AND WHEREAS the Commission reviewed documentation filed by counsel for both parties;

AND WHEREAS the Commission invited and received written submissions from counsel for both parties with respect to this matter;

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 application by the Appellant Phillip O'Halloran for the implementation of Order LA15-05 is hereby allowed.**

2. **The Respondent Community of Miltonvale Park shall forthwith issue a development permit to the Appellant Phillip O'Halloran, pursuant to the terms described within the Reasons for Order and subject to the terms and conditions found by the Commission to be reasonable and relevant within said Reasons.**

3. **The aforementioned development permit shall be in effect for a period of one year commencing May 1, 2017.**

DATED at Charlottetown, Prince Edward Island, this 16th day of March, 2017.

BY THE COMMISSION:

(Sgd.) *Douglas Clow*
Douglas Clow, Vice-Chair

(Sgd.) *Michael Campbell*
Michael Campbell, Commissioner

(Sgd.) *Jean Tingley*
Jean Tingley, 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)