



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

**Docket LA08003
Order LA08-04**

IN THE MATTER of an appeal by L & A
MacEachern Holdings Ltd. of a decision of
the City of Charlottetown, dated February 11,
2008.

BEFORE THE COMMISSION
on Friday, the 20th day of June, 2008.

Maurice Rodgerson, Chair
John Broderick, Commissioner
Anne Petley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Land and Appeals Officer
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by L & A
MacEachern Holdings Ltd. of a decision of
the City of Charlottetown, dated February 11,
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IN THE MATTER of an appeal by L & A
MacEachern Holdings Ltd. of a decision of
the City of Charlottetown, dated February 11,
2008.

Appearances & Witnesses

1. For the Appellant L & A MacEachern Holdings Ltd.

Counsel:

J. Gordon MacKay, Q.C.

Witnesses:

**Ken MacEachern
William Chandler
Phil Wood**

2. For the Respondent City of Charlottetown

Counsel:

David W. Hooley, Q.C.

Witness:

Don Poole

IN THE MATTER of an appeal by L & A MacEachern Holdings Ltd. of a decision of the City of Charlottetown, dated February 11, 2008.

Reasons for Order

1. Introduction

[1] On March 3, 2008 the Appellant L & A MacEachern Holdings Ltd. (the Company) filed a Notice of 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*). The Company appeals a decision of the Respondent City of Charlottetown (the City) dated February 11, 2008.

[2] The Company sought a rezoning of its property on 3-9 Harley Street, parcel numbers 274480 and 274720 (the subject property) from Manufactured Housing (MH) zone to Medium Density Residential (R3) zone, subject to a development agreement. This rezoning request was rejected by the City at a regular monthly meeting of the City's council on February 11, 2008.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on May 20, 2008.

2. Discussion

The Company's Position

[4] The Company's oral submissions may be briefly summarized as follows:

- The Company submits that the subject property is identified as Medium Density Residential, not Mini Home Residential, on the Future Land Use Map, which forms Schedule "A" to the Charlottetown Official Plan, dated July 1999.

- The Company submits that the present Manufactured Housing (MH) zoning of the subject property, as indicated on Appendix “H” City of Charlottetown Zoning Map July 1999 to the City’s Zoning and Development Bylaw (the Bylaw), is inconsistent with the future land use identified on Schedule “A” of the Official Plan. Section 15 of the **Planning Act** requires the Bylaw to conform to the Official Plan and, in the event of any conflict or inconsistency, the Official Plan prevails.
- The Company submits that the evidence of both Mr. Poole and Mr. Wood supports a finding that a rezoning of the subject property to Medium Density Residential (R3) would be consistent with sound planning principles.
- The Company submits that it agrees to an increased setback of 30 feet and the installation of a privacy fence and similar measures to address the concerns of an adjacent property owner. These measures can be incorporated into a development agreement between the Company and the City.
- The Company submits that the subject property presently has significant problems with its sewer system. The subject property would require extensive upgrades to its sewer system in order to continue to be used as a mobile home park.

[5] The Company requests that the Commission allow the appeal and rezone the subject property to Medium Density Residential (R3).

The City’s Position

[6] The City’s oral submissions may be briefly summarized as follows:

- While the City’s Planning staff had recommended that the subject property be rezoned to Medium Density Residential (R3), some deference should be shown for the City’s decision. The City’s councillors are elected officials who are, and ought to be, responsive to the concerns expressed by the residents of the neighbourhood and of the City as a whole. While the subject property and its immediate neighbourhood appear to be in transition, deference should be given to the City’s councillors to control the pace of any such transition.
- The Official Plan does speak of the need to preserve existing low density residential neighbourhoods. At present, there are 19 residential units, in the form of mobile homes, on the subject property. The Company proposes to build two apartment buildings containing a total of 50 units. This represents a significant increase in the density of the neighbourhood.

[7] At the hearing, the City took the position that the subject property was identified as Mini Home Residential on the Future Land Use Map, which forms Schedule “A” to the Official Plan. The City explained that there was some confusion between “Mini Home Residential” and “Medium Density Residential” as the colours chosen for these two designations were rather similar. As the Company took the position that the subject property was identified as Medium Density Residential on the Future Land Use Map, the City’s legal counsel undertook to file additional maps to clarify the status of the subject property with respect to its identification on the Future Land Use Map.

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

[9] On May 26, 2008, the City provided the Commission with additional maps and a very helpful explanatory letter from Mr. Poole which concludes that the subject property is in fact identified as Medium Density Residential on the Future Land Use Map.

3. Findings

[10] After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission to allow this appeal. The reasons for the Commission's decision follow.

[11] Appeals under the **Act** generally take the form of a hearing *de novo* before the Commission. In an often cited decision which provides considerable guidance to the Commission, *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act* (Stated Case), [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:

it becomes apparent that the Legislature contemplated and intended that appeals under the Planning Act would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.

[12] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. Such discretion should be exercised carefully. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the decision maker did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the **Act**, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[13] The Commission finds that the above-cited principle, originally applied to decisions concerning building or development permits, and later applied to applications for variances and applications for rezoning, is applicable to the facts of this case. A two-part test is invoked:

- Whether the municipal authority, in this case the City, followed the proper procedures as required in its Bylaw in making a decision on the rezoning application; and
- Whether the City's decision with respect to the proposed rezoning of the land has merit based on sound planning principles.

[14] The Company did not raise any concerns over the City's administrative procedures utilized for this rezoning application. The Commission finds that the City did follow all the procedures required in its Bylaw.

[15] The Commission is satisfied that the subject property was identified as Medium Density Residential on the City's Future Land Use Map, forming Schedule A" to the City's 1999 Official Plan. The City has noted that there were no formal amendments to this document which pertain to the subject property. Accordingly, the Commission finds that the subject property is presently identified as Medium Density Residential on the City's Future Land Use Map.

[16] The Commission notes that the City's Future Land Use Map is an integral part of the Official Plan. The City's Official Plan was prepared in consultation with residents of the City to provide guidance and direction for the future development of the City.

[17] In the present appeal, the Company applied to rezone the subject property to Medium Density Residential (R3). Such a rezoning, if approved, would be consistent with the subject parcel's existing identification on the City's Future Land Use Map.

[18] Counsel for the Company submits that the current zoning is inconsistent with the subject property's future land use identified on Schedule "A" of the Official Plan. Counsel referred to section 15 of the **Planning Act** and submits that the subject property should be rezoned to resolve the inconsistency. Section 15 reads as follows:

15. (1) Following the approval of an official plan by the Minister

(a) the plan becomes the official plan for the area;

(b) a copy of the official plan as approved by the Minister shall be published in the Gazette;

(c) the Minister shall deposit a copy of the official plan, certified by the chairman as a true copy, in the office of the Registrar of Deeds for the county to which the plan relates; and

(d) the council shall, as soon as is practicable, cause bylaws to be made to implement the official plan.

(2) The bylaws or regulations made under clause (1)(d) shall conform with the official plan and in the event of any conflict or inconsistency, the official plan prevails. 1988,c.4,s.15; 1991,c.1,s.1; 1991,c.18,s.22; 1994,c.46,s.4 {eff.} Sept. 1/94; 1995,c.29,s.6 {eff.} Oct. 14/95.

[19] While there is insufficient evidence and argument at the present time to persuade the Commission that an automatic rezoning should follow in these circumstances, the Commission finds that the subject property's identification as Medium Density Residential on the City's Future Land Use Map is highly persuasive. The Commission finds that the City's council should have placed more weight on the fact that the subject property was already identified as Medium Density Residential under the Official Plan's Future Land Use Map.

[20] Accordingly, the Commission will briefly review the evidence on file to determine whether there were sufficient factors to reject the rezoning application notwithstanding the fact that the subject property was identified as Medium Density Residential on the City's Future Land Use Map.

[21] In the February 4, 2008 report prepared for Planning Board by City staff, it was recommended that the rezoning be approved, subject to the Company entering into a Development Agreement per section 4.60 of the City's Bylaw.

[22] In the minutes of the February 4, 2008 meeting of the City's Planning Board, it was noted that 39 letters were sent out to residents and four letters in opposition to the rezoning were received. It was noted that the staff recommendation was to require a Development Agreement. It was observed that the proposed sideyard setback to the closest home is 30 feet, well above the minimum of 10 feet required. The minutes go on to read:

Board members debated the project, but felt the Official Plan already designates this area for medium density housing, and we should be trying to encourage sustainable densities in the City of Charlottetown. The Board generally felt that this project should enhance the neighbourhood in the future compared to the existing trailer park. The Board agreed to recommend approval of this rezoning request with the signing of a Development Agreement.

[23] In the verbatim minutes of the City's Council meeting of February 11, 2008, Councillors Devine and MacDonald state:

Councillor Devine: Thank you, Your Worship. I will not be supporting this recommendation for approval from Planning Board. I don't think that two large apartment buildings in that area of Parkdale would reflect the existing scale of that neighbourhood although it is zoned R-3. Most of the dwellings are single-family homes or they are duplexes and I just don't think the zoning reflects what is actually there. Although I am not opposed to development in that area, I think we need a plan and we need a better plan that reflects more of the existing homes around the neighbourhood.

Councillor MacDonald: Thank you, Your Worship. Thank you Councillor Devine. I, too, will not be supporting this resolution. I have received, over the last number of weeks, three or four communications from residents in that area. Like Councillor Devine, I don't think it's a question so much as not being in support of development in that particular area but it's a question of having more time and trying to come up with some projects that might better fit into the neighbourhood. We have a unique situation here in that we have is a small community within a community when we talk about that mobile home park. We have 18 residents who have lived there for a long time. It's going to be very difficult for those resident, in a short period of time, to be able to relocate and move their homes to some other mobile home park within the City. Most of the feedback that I've been getting from residents is that they understand that this is an area of the City that at some stage will likely be developed

but at this time they think the proposal that was submitted at the public meeting the other night is just not congruent with the area. It's something that will create more of a problem than it will solve. We have the situation with the Allen Street/Mt. Edward Rd intersection that we have to worry about and we have the whole question of the infrastructure in that particular area that just doesn't support some kind of development of that magnitude. I'm not supporting that resolution this evening. Thank you.

[24] The verbatim minutes note that the resolution to approve the proposed rezoning of the subject property was defeated 7-0.

[25] While the Commission tends to defer to the actions of the elected Council on such matters, that is not an absolute, and in this instance the Commission is presented with significant expert testimony contrary to the Council's decision. The Official Plan permits the rezoning of the subject property, the City's planning staff and Planning Board recommended approval of the rezoning, and the Company's expert witness is of the opinion that the project proposed for the subject property represents sound planning. The Commission recognizes Council is not bound to follow staff or Planning Board advice, however, the Commission cannot satisfy itself that sufficient reasons have been offered to reject that advice in this case.

[26] The Commission finds that the evidence, in general, is supportive of a rezoning of the subject property. While the two Councillors do raise valid concerns, these concerns would have been more persuasive if the requested rezoning also required an amendment to the Official Plan by way of a change in the identification of the subject property on the City's Future Land Use Map. However, this was not the case. The rezoning applied for by the Company was already contemplated some nine years ago by the City's Official Plan.

[27] The timing for a rezoning appears to be appropriate at the present time as the subject property is currently experiencing problems with its sewer system and sewer upgrades would be necessary for it to remain in use as a mobile home park. Such an upgrade would greatly disrupt the existing mobile home park as testimony before the Commission indicates some lines run under existing mobile homes, thus requiring those homes to be moved to permit the work to be completed.

[28] The testimony of Phil Wood, an expert witness in urban planning, satisfies the Commission that a rezoning of the subject property to Medium Density Residential (R3) is consistent with sound planning principles.

[29] The testimony of Mr. Poole satisfies the Commission that the development proposed for the subject property will not result in a significant increase in traffic flow and the development provides more parking than the minimum required under the Bylaw.

[30] The Commission hereby allows the appeal and orders the City to rezone the subject property to Medium Density Residential (R3), subject to a requirement that the owner of parcel numbers 274480 and 274720 enter into a

development agreement pursuant to section 4.60 of the City of Charlottetown Zoning and Development Bylaw.

4. Disposition

[31] An Order allowing the appeal and requiring the rezoning of parcel numbers 274480 and 274720 to Medium Density Residential (R3), subject to a development agreement, will therefore be issued.

IN THE MATTER of an appeal by L & A MacEachern Holdings Ltd. of a decision of the City of Charlottetown, dated February 11, 2008.

Order

WHEREAS the Appellant L & A MacEachern Holdings Ltd. has appealed a decision of the Respondent City of Charlottetown, dated February 11, 2008;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on May 20, 2008 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Planning Act*

IT IS ORDERED THAT

1. The appeal is allowed.
2. The Respondent City of Charlottetown rezone parcel numbers 274480 and 274720 to Medium Density Residential (R3), subject to a requirement that the owner of said parcels enter into a development agreement pursuant to section 4.60 of the City of Charlottetown Zoning and Development Bylaw.

DATED at Charlottetown, Prince Edward Island, this 20th day of June, 2008.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*

Maurice Rodgerson, Chair

(Sgd.) *John Broderick*

John Broderick, Commissioner

(Sgd.) *Anne Petley*

Anne Petley, 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.

IRAC141AA(2006/10)