



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

**Docket LA10005
Order LA10-06**

IN THE MATTER of an appeal by
Warren Doiron of a decision of the City of
Charlottetown, dated March 8, 2010.

BEFORE THE COMMISSION
on Wednesday, the 14th day of July, 2010.

Maurice Rodgerson, Chair
John Broderick, Commissioner
Anne Petley, 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
Warren Doiron of a decision of the City of
Charlottetown, dated March 8, 2010.

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IN THE MATTER of an appeal by
Warren Doiron of a decision of the City of
Charlottetown, dated March 8, 2010.

Appearances & Witnesses

1. For the Appellant Warren Doiron

Counsel:

Jonathan Coady

Witnesses:

**Phil Wood
Warren Doiron
Steve Burtram**

2. For the Respondent City of Charlottetown

Counsel:

Gordon MacKay, Q.C.

Witness:

Laurel Palmer-Thompson

3. Member of the Public

Dennis Williams

IN THE MATTER of an appeal by
Warren Doiron of a decision of the City of
Charlottetown, dated March 8, 2010.

Reasons for Order

1. Introduction

[1] The Appellant Warren Doiron (Mr. Doiron), on behalf of his company New Homes Plus Inc. (New Homes) 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. Doiron's Notice of Appeal was received on March 29, 2010.

[2] This appeal concerns a March 8, 2010 decision of the City of Charlottetown (the City) to reject an application by New Homes to amend the Future Land Use Map of the City's Official Plan as it pertains to property number 773051 (the subject property), situate at 136 Upton Road, from Low Density Residential to Medium Density Residential and to rezone portions of the subject property from Single-detached Residential (R-1S) to Low Density Residential (R-2) zone and Medium Density Residential (R-3) zone.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard on May 27, 2010 and June 9, 2010.

2. Submissions

New Homes' Position

[4] Counsel for New Homes presented oral submissions to the Commission. Highlights of these submissions appear below.

- City staff and the City's Planning Board recommended that New Homes' rezoning request be approved. Planning Board's recommendation was made after hearing from residents at a public meeting.
- In making its decision to reject the rezoning request, the City did not refer to its Official Plan and its Zoning and Development By-law (the Bylaw). Rather, the City's decision was solely based on the opposition of area residents. In the present matter, the decision of City Council was based on a natural political process not sound planning principles.
- The subject property was acquired in 2008 and is separate from the Sandlewood Park development.

- New Homes is willing to enter into a development agreement with the City.
- While the City has discretion to make a rezoning decision, such discretion is not unfettered or absolute. While City Council is not bound by its staff or Planning Board recommendation, it is required to follow the Planning Act, its Official Plan and its Bylaw.
- The proposed rezoning is endorsed by both planning professionals who testified before the Commission.

[5] New Homes requests that the Commission allow the appeal and rezone the property as recommended by the City's Planning Board.

The City's Position

[6] Counsel for the City presented oral submissions to the Commission. Highlights of these submissions appear below.

- The current zoning of the subject property has been in effect since 1995. Prior to amalgamation in 1995, the subject property was zoned R1 by the former community of West Royalty. In 2007 Mr. Doiron applied to rezone the subject property to a mix of commercial and residential. His application was denied. Thus, Mr. Doiron was well aware of the zoning of the subject property when his company purchased it in 2008.
- The present rezoning application may have been encouraged by City planning staff but it was not encouraged by City Council.
- City Council heard from the public and made the decision to keep the subject parcel zoned R-1S.
- While the evidence before the City Council, and before the Commission, is that the proposed rezoning of the subject property is consistent with sound planning principles, the current zoning is also consistent with sound planning principles. The subject property is designated for single family residential under the Future Land Use Map which forms a part of the City's Official Plan. Therefore, there is no conflict between the current zoning and the Official Plan. In this regard, the situation is very different from that faced in Order LA08-04 *L & A MacEachern Holdings Ltd. v. City of Charlottetown*.
- While the Official Plan encourages housing variety, it also encourages the preservation of existing neighbourhoods.

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

3. Findings

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

[9] Section 26, clauses (e.1) and (e.2) of the **Interpretation Act**, R.S.P.E.I. 1988, Cap. I-8 reads as follows:

26. In an enactment

...

(e.1) "may" is to be construed as permissive and empowering;

...

(e.2) "shall" is to be construed as imperative;

[10] Subsection 28(1.1) of the **Planning Act** reads as follows:

(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality

(a) that is made in respect of an application by the person, or any other person, under a bylaw for

(i) a building, development or occupancy permit,

(ii) a preliminary approval of a subdivision,

(iii) a final approval of a subdivision; or

(b) to adopt an amendment to a bylaw, including

(i) an amendment to a zoning map established in a bylaw, or

(ii) an amendment to the text of a bylaw,

may appeal the decision to the Commission by filing with the Commission a notice of appeal.

[11] The appeal provisions of the **Planning Act** are clear. So long as the requirements of subsection 28(1.1) subsections 28(1.2), (1.3) and (1.4) [the bylaw must have been made under the authority of the **Planning Act**, the Notice of Appeal must have been filed within 21 days after the decision being appealed and, where the appeal is of a bylaw amendment, the 21 day appeal period commences on the date of a Council's final reading of the bylaw amendment] are met, an appellant is permitted and empowered to file an appeal; that is to say, an appellant has a statutory right to file an appeal.

[12] Once an appellant's statutory right to file an appeal has crystallized, the Commission is obligated by law to proceed with the appeal. The Commission shall determine the hearing procedure, shall hear and decide the appeal, shall give reasons for its decision and the municipal decision maker or Minister shall implement the Commission's order. These requirements are set out in subsections 28(7), (8), (9) and (10) of the **Planning Act** and read as follows:

(7) *Subject to adherence to the rules of natural justice, the Commission shall determine its own procedure.*

(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.*

(10) *The council or the Minister, as the case may be, shall implement an order made by the Commission.*

[13] In the present appeal, all parties agree that the appeal is properly before the Commission.

[14] 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.*

[15] 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.

[16] 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.

[17] In the present appeal, there is no indication that the City made a procedural error.

[18] The Commission has had the benefit of the planning expertise of Laurel Palmer-Thompson, who is a development officer for the City and Phil Wood, who the Commission has accepted as an expert witness in the field of urban planning. Both planning professionals agree: the proposed rezoning is consistent with sound planning principles.

[19] The minutes of the City's Council, especially the verbatim minutes of the March 8, 2010 regular meeting of Council, appear to acknowledge that the proposed rezoning "... makes perfectly good sense ... from a planning point of view..." and "If you read the notes from Planning staff in the report from planning Board, it is very sound planning principles that they are advocating here..."

[20] Based on the evidence, the Commission finds that the proposed rezoning is consistent with sound planning principles.

[21] However, the key question is whether the City's decision to deny the proposed rezoning has merit based on sound planning principles.

[22] A review of the Official Plan reveals that there are objectives and policies which could be characterized both in support of the proposed rezoning and in support of retaining the status quo.

[23] For example, here are some of the objectives and policies under section 3.2 Sustaining Charlottetown's Neighbourhoods:

Defining Our Direction

*Our **goal** is to maintain the distinct character of Charlottetown's neighbourhoods, to enhance the special qualities of each, and to help them adjust to the challenges of economic and social transformation.*

1. *Our **objective** is to preserve the built form and density of Charlottetown's existing neighbourhoods, and to ensure that new development is harmonious with its surroundings.*

- *Our **policy** shall be to ensure that the footprint, height, massing, and setbacks of new residential, commercial, and institutional development in existing neighbourhoods is physically related to its surroundings.*
- *Our **policy** shall be to establish an appropriate relationship between the height and density of all new development in mixed-use residential areas of existing neighbourhoods.*

2. *Our **objective** is to allow moderately higher densities and alternative forms of development in any new residential subdivisions which may be established, provided that this development is well planned overall, and harmonious with existing residential neighbourhoods.*

- *Our **policy** shall be to permit moderately higher densities in new neighbourhoods and to permit in-laws suites in residential land use designations and to make provision for higher density residential projects in the Downtown Growth*

*Area which is located in the Downtown Core Area and to permit multiple unit developments in suburban areas provided that it is development at a density which will not unduly adversely affect existing low density housing. **Amended May 25, 2005***

- *Our **policy** shall be to allow a mix of residential, commercial, institutional, and recreational uses in new subdivisions which are established, provided that there is a comprehensive site plan which ensures that development is well-related to both its internal and external environments.*

[24] As an additional example, here are some of the objectives and policies under section 3.3 Housing Needs and Variety:

Defining Our Direction

*Our **goal** is to work with public and private sector partners to create an attractive physical environment and positive investment climate in which the housing requirements of all residents can be met (including those with special needs), and to provide clear direction as to where residential development should take place.*

1. *Our **objective** is to encourage development in fully serviced areas of the City, to promote settlement and neighbourhood policies as mechanisms for directing the location of new housing, and to encourage new residential development near centres of employment.*

- *Our **policy** shall be to ensure that all new multiple dwelling unit buildings are serviced by water and wastewater systems which have the capacity to accept the development proposed. **Amended May 25, 2005.***
- *Our **policy** shall be to base residential densities on the availability of municipal services, education facilities, recreation and open space amenities, transportation routes, and such other factors as the City may need to consider.*
- *Our **policy** shall be to provide medium density housing styles to meet future housing needs.*
- *Our **policy** shall be to direct the location of medium rise multiple dwelling unit buildings to the Downtown Growth Area located in the Downtown Core Area. **Amended May 25, 2005***
- *Our **policy** shall be to allow the conversion of upper floors of commercial buildings in the downtown core for residential use.*

2. *Our **objective** is to enhance the range of housing available to residents who have special social, economic or physical needs. **Amended May 25, 2005***

- *Our **policy** shall be to work with our partners to address social housing needs, and to encourage its equitable distribution throughout the City.*

- Our **policy** shall be to allow accessory suites in detached houses, subject to all other applicable land-use and development regulations.
- Our **policy** shall be to actively work with our partners to address the housing needs of seniors, to expand the range of affordable housing available to them, and to provide it in neighbourhoods preferred by them.

[25] The planning professionals favour the proposed rezoning. Based on the written submissions received, a majority of the area residents are opposed to the proposed rezoning.

[26] The non-verbatim minutes of the March 8, 2010 regular meeting of Council provide inadequate support for Council's decision to deny the proposed rezoning. At the first day of the hearing before the Commission, Counsel for the City offered to try to obtain verbatim minutes for the March 8, 2010 meeting. These verbatim minutes were received by the Commission on May 31, 2010.

[27] The verbatim minutes provide the Commission with insight as to the basis for Council's decision. The following remark appears to sum up Council's rationale:

Councillor Rob Lantz: I will be very brief because I was going to say something similar to what Councillor MacDonald already said. If you read the notes from Planning staff in the report from Planning Board, it is very sound planning principles that they are advocating here, I think. I agree with Councilor MacDonald that these people bought their property understanding of the circumstances at the time and so did the developer for that matter. I did speak to Planning Board about if these are important principles to use about density, step zoning on the highways and so on and so forth that we start looking at land outside the city that is currently undeveloped or very little development on it and start planning for the future so that we are not having to deal with these rezonings after a certain parcel of land is half developed and there are residents who have certain expectations for their property.

[28] As previously noted, an appeal hearing before the Commission is a hearing *de novo*. In effect, such a hearing is a hybrid of an appeal, on the record, of the City's decision with a fresh public hearing where new evidence may be heard.

[29] Land use planning for the subject property presents major challenges. On the one hand, the subject property is immediately adjacent to a very recently developed single family residential area. On the other hand, it is adjacent to the arterial highway. The Commission finds that there is support in the text of the Official Plan for both the proposed rezoning and the current zoning. However, the Commission is of the view that the proposed rezoning, as a blend of single family, semi-detached and multi-unit residential housing would simultaneously meet the objectives of preserving the existing neighbourhood and providing housing diversity. The evidence of both planning professionals can be characterized as endorsing the proposed rezoning as superior planning to the status quo. The Commission finds, on the strength of the planning evidence before it, that the proposed rezoning represents better planning than the single family status quo, given the challenges of placing high quality residential development adjacent to a busy perimeter highway.

[30] The Official Plan, text and Future Land Use Map alike, was developed in consultation with members of the public and, presumably, with the advice of a planning professional. The policies and objectives set out in the text of the Official Plan apply, unless targeted to a specific area such as the downtown core, to the City generally. The Official Plan's Future Land Use Map, in a clear and very visual manner, sets out the City's intention as to the type of desired development particular to various areas and neighbourhoods contained within the City. In all likelihood, residents who wonder what the future holds for their neighbourhood will consult the Future Land Use Map rather than read through the various policies and objectives within the text of the Official Plan. The Future Land Use Map indicates that the subject property would be developed for single family residences.

[31] In effect, the position of City Council appears to be supported on the basis of consistently adhering to the "plan" earmarked for the neighbourhood; the very same plan which may have guided the residents to purchase homes there. The Commission finds that there is some merit in this "consistent" approach.

[32] The majority of the Commission panel finds that the City's decision to deny the proposed rezoning of the subject parcel was in fact reasonable. While the proposed rezoning of the subject property would result in better land use planning than the present zoning; the present zoning is nonetheless reasonable, has support in the Official Plan, and thus the majority of the Commission panel will defer to the decision of City Council. Accordingly, the appeal is denied.

[33] RODGERSON, CHAIR (Dissenting): I dissent from the findings of the majority's Decision and Order and would allow the appeal for the reasons that follow.

[34] In the previously cited Supreme Court Appeal Division decision *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act (Stated Case)* it was noted that a hearing before the Commission is by way of a hearing *de novo*. The Commission is required to "hear the matter anew". The Commission, as a quasi judicial body must make a decision based both on the record that is before the Commission and the evidence presented and argued by the parties involved. In this matter the overwhelming evidence before the Commission supports rezoning.

[35] An appeal process exists for a reason. It is recourse for those who believe they were not fairly dealt with or that errors were made in the process of the original decision maker. The body being appealed from is a party to the appeal and should take that opportunity to fully explain the decision and how it was reached. To overturn a decision of an elected body is never easy, but to suggest it should not be done is to render the appeal process meaningless.

[36] The Commission rightly gives deference to decisions of municipal councils but in doing so must be satisfied they acted appropriately. The Commission's test on land use planning appeals is to determine whether the proper procedures were followed and sound planning principles applied.

[37] The procedure test is reasonably straight forward – did the municipality properly follow its own Bylaw and procedures in making a decision? In this case it is clear the City Council followed the established procedures.

[38] The test of sound planning principles can be more challenging given that sound planning principles are not clearly defined. What is critical is that evidence be presented that demonstrates “sound planning” was at least considered. In this case the planning department staff and Planning Board clearly considered sound planning principles; the evidence is in the recommendation and Planning Board discussion. It is far less clear what planning factors were considered, let alone relied upon, by the City Council in its decision on the matter. In order to meet the “deference test” sound planning principles cannot be inferred; there must be evidence that they were truly considered.

[39] City Council is not bound by recommendations of their planning department. In fact I believe that they have a public duty to not blindly follow submitted recommendations and to judge the validity of those recommendations. The Council is free to decide in the alternative but they should expect no less of their decision making process than they expect of the basis upon which a staff recommendation is made. In rejecting a recommendation they should demonstrate sound planning reasons for doing so, and if they wish to have the decisions sustained on appeal then it should be clear in the City's decision making process that other factors were considered that support the final decision and give weight to the decision. As it is a planning matter, the final decision should be rooted in planning principles. If the evidence showed that Council fully considered the points raised by Planning Board and then considered the Official Plan and Bylaw to offer reasonable arguments in the alternative, I would be satisfied that sound planning applied to the decision. No substantive evidence was led by the City to demonstrate “sound planning” was even a topic of discussion as Council voted to reject Planning Board's recommendation.

[40] Two witnesses with direct expertise in planning appeared before the Commission at the appeal hearing. One employed by the City of Charlottetown, the other an established expert offered by New Homes. Both witnesses supported the recommendation for rezoning as being based on sound planning principles. Both witnesses quoted sections of the Official Plan to support their position.

[41] In this matter, the fact the Future Land Use Map identifies the subject property as Low Density Residential could be a very strong argument in favour of the Council's decision to reject the Planning Board recommendation. However, there is no evidence the Future Land Use Map was discussed by Council nor relied upon in voting to reject the application.

[42] A scanning of the Official Plan suggests there may be several aspects of the document that could support the decision made by City Council, but none are referenced in the transcript of the Council discussion. There is acknowledgement of the validity of the position advanced by Planning Board and the planning staff, but other than a comment about avoiding spot zoning there is very little in the way of evidence to suggest that sound planning principles were a consideration of Council.

[43] Based on the evidence, it appears the driving factor in the City Council decision was the fact that a number of residents opposed the proposal at the public meeting and through a petition and phone calls.

[44] In comments both to councillors and to the Commission upon appeal, residents objected to the fact there had been previous attempts to rezone the property; twice to industrial and twice to commercial. The present proposal appealed to the Commission retained the current residential designation, but sought a higher density than single family residential for some of the subject property. In a stepped manner, the proposal would have zoned the area adjacent to the arterial highway Medium Density Residential (5.3 acres), then Low Density Residential (2.6 acres) and then Single Detached Residential (6.1 acres). Re-zoning would thus apply to only a portion of the subject parcel. There is no evidence Council considered this information.

[45] The fact that previous attempts at rezoning for dramatically different purposes failed is not evidence sound planning principles were applied to the current application. The Bylaw outlines a detailed process for amendments to the Bylaw and such amendments are fairly common. Each application for a zoning amendment should be considered on its own merits.

[46] The Bylaw requires the Development Officer to advise affected property owners within 100 metres of the subject property. That requirement was met in this case with letters mailed to some 45 property identification numbers. It appears three of those property owners objected to the development, one agreed, while most were silent on the subject. Complaints were received from others beyond the 100 metres as a result of the advertisements for the public meeting, also required by the Bylaw. The fact a substantial majority of property owners within the 100 metre area did not object to the proposal was not referenced by Council.

[47] Some of the reasons advanced by concerned residents against the zoning amendment are not supported by evidence. It was suggested development other than single family homes would lead to rental properties and a drop in land values. No evidence was presented to support this contention, but it was referenced at the Council meeting.

[48] A development agreement could have stipulated the manner in which the property would be developed and the type and style of housing constructed. A development agreement was offered by the Developer prior to the Council decision on the matter but the pros and cons of such a proposal were not considered by Council.

[49] On appeal, the Commission relies on the decision maker's record and on the evidence presented at the Commission's public hearing. The planning principles advanced by the City's staff report, Planning Board's recommendation and the expert witness who testified at the hearing were not adequately refuted by the City. The evidence of Council's action suggests the matter was not cast in a planning focus and more weight was given to political than planning considerations. I would therefore allow the appeal.

4. Disposition

[50] An Order denying this appeal follows.

IN THE MATTER of an appeal by
Warren Doiron of a decision of the City of
Charlottetown, dated March 8, 2010.

Order

WHEREAS the Appellant Warren Doiron has appealed a decision of the City of Charlottetown, dated March 8, 2010;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on May 27, 2010 and June 9, 2010 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 denied.

DATED at Charlottetown, Prince Edward Island, this 14th day of July, 2010.

BY THE COMMISSION:

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

(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 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)