



**THE ISLAND REGULATORY AND  
APPEALS COMMISSION**

Prince Edward Island  
Île-du-Prince-Édouard  
CANADA

**Docket LA12007  
Order LA12-01**

**IN THE MATTER** of an appeal under  
section 28 of the Planning Act by André  
Lavoie of a decision of the Town of Cornwall,  
dated March 21, 2012

**BEFORE THE COMMISSION**  
on Thursday, the 14th day of June, 2012.

Maurice Rodgerson, Chair  
Jean Tingley, Commissioner  
Peter McCloskey, Commissioner

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# 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 under  
section 28 of the Planning Act by André  
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**IN THE MATTER** of an appeal under  
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# Appearances & Witnesses

**1. For the Appellant Andre Lavoie**

**Witness:**

**Valda Park**

**2. For the Respondent Town of Cornwall**

**Kevin McCarville, CAO  
Dean Lewis, Planning and Development Officer**

**3. For the Developers Riverview Place**

**Counsel:**

**Jonathan Coady**

**Witness:**

**Phil Wood, Planner**

**IN THE MATTER of an appeal under  
section 28 of the Planning Act**

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# Reasons for Order

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## 1. Introduction

[1] This is an appeal under section 28 of the *Planning Act*, R.S.P.E.I. 1988, Cap. P-8, by Andre Lavoie (the Appellant). The Appellant seeks an Order of the Island Regulatory and Appeals Commission (the Commission) overturning a decision of the Town of Cornwall Council to grant preliminary approval for development on parcel numbers 684621 and 768861 located on the Ferry Road in the Town of Cornwall (the Town).

[2] The Appellant also seeks an Order that any further development action on the subject properties be delayed until the Town's Official Plan review, now underway, is completed.

[3] The hearing was held on Thursday, May 24, 2012 and Friday May 25, 2012 in the Hearing Room of the Island Regulatory and Appeals Commission.

## 2. Discussion

[4] The Appellant takes the position that:

- The Town has neither the right nor the freedom to approve a proposal that is contrary to the Official Plan. The appeal results from a chain of events, errors and misrepresentations that contravene the provisions of the Town's Official Plan, have caused frustration for those opposed to the development and demonstrate a lack of transparency.
- The proposed development is incompatible with the rural residential area in which it is proposed and would be more suited to the core area of the community. It is not a matter of opposing development but rather the proposed location of the development, which will have a higher density than the established neighbourhoods on the Ferry Road.
- The information provided at the hearing demonstrates that the existing development along the Ferry Road is single family dwellings, on traditional sized lots, and situated in manners that preserve the rural nature of the community. Much of the R1 zoning in the Town is located on the Ferry Road.

- The Official Plan takes precedence over any bylaws and even though it is proposed in a PURD zone the development should be rejected because it contravenes the Official Plan.
- The proposed development is in contravention of 19 statements and policies of the Official Plan, many relating to the rural nature of the community and the importance of preserving agriculture. Statements such as “The majority of the land in the Town ...remains in active farm use”; “The future Development Concept reflected in this Official Plan would see the Town of Cornwall protect its primarily rural, low density character..”; a goal is “To preserve the unique rural/urban character of Cornwall.”; a key objective is “To minimize land use conflicts between farmers and residents.”
- The proposed high-density development will result in more conflicts with the farm community.
- The Official Plan also seeks to protect established neighbourhoods. Section 4 of the Official Plan contains statements such as “To encourage innovative, higher density housing and development form, but only subject to stringent design standards, public input and locations which are segregated or buffered from existing neighbourhoods.”; “To protect the character and appearance of established neighbourhoods.”; “The integrity of existing low density residential areas will be protected.”; “Apartments and other high density developments will generally be located adjacent to collector or arterial streets, within close distance to amenities such as shopping, schools and recreational facilities...”.
- The proposed development does not protect existing neighbourhoods and is in fact completely out of character with the area in which it is to be located and is at one of the farthest points from the town core.
- The Official Plan states that higher density residential developments would be directed to locate adjacent to major transportation routes. The Ferry Road is classed as a “local road” by the Province.
- The petition and significant public opposition to the proposed development, as demonstrated by the large attendance at the public meeting, was not fully considered by Town Council.
- There have been problems with water pressure in the area and the impact of the development on municipal services and transportation infrastructure were not fully considered.
- The process that led to the current approval decision by Town Council began in 2004 and, while recognized to be beyond the appeal period, is important to understanding opposition to the proposal. The newspaper notice for the 2004 rezoning did not make it clear what land was to be rezoned, nor what a PURD zoning would mean. Notification letters were not received by residents living in the area that would be impacted by the change.

- The Official Plan is required by provincial legislation to be reviewed every five years. The Town has failed to meet that requirement because the current Official Plan received approval in December of 2003 and the Town is only now beginning the process of a review. A plan review would have provided the opportunity for citizen input on the location of PURD zones.
- Ms. Valda Park appeared as a witness for the Appellant. Ms. Park purchased her property from one of the developers and was not aware that such a major development was being considered. About eight months after she moved to the area she noticed fill being delivered to the site and made inquiries.
- Ms. Park was not aware that her own property was zoned PURD until the discussion over the proposed development. She expressed an interest in rezoning her property R1 but was told by the Town that such a change would cost \$300.00 and would not have any impact as R1 is permitted in a PURD zone.
- Ms. Park is concerned about the size and scope of the development and the impact it will have on a rural residential setting.

[5] The Respondent Town of Cornwall takes the position:

- The Official Plan and Bylaws before the Commission are approved by the Town and the Minister of Finance, Energy and Municipal Affairs (the Minister) and they are the current legal documents under which the Town operates and makes development decisions.
- The documents and evidence filed with the Commission demonstrates that the Town followed, and did not contravene, the Official Plan and Development Bylaws in making the decision on this matter and the development is a permitted use in the PURD zone.
- The filed documents clearly demonstrate that the members of Planning Board and Town Council adhered to the proper process. They had the property posted, advertised the proposed development, held a public meeting on the proposal, fully considered the input of the public and reviewed the relevant bylaws.
- The members of Planning Board and Town Council took the time necessary to ensure all issues were considered and the record reflects that fact.
- Recognizing that not everyone agrees with every decision, the determination is whether Town Council followed the proper process and made a decision based on the Official Plan and the Bylaws which the Town contends was done in this situation.
- A review of the Official Plan and the Bylaws indicate that in this case the decision is within the jurisdiction of Town Council, is in conformity with the Official Plan and the Bylaws, was made after a full adherence to the required process and therefore the appeal should be denied.

- [6] The Developer takes the position that:
- The Town's Council must decide the subdivision application based on the present zoning and in this case the property is clearly zoned Planned Urban Residential Development (PURD). The proposed development meets the requirements of the zoning.
  - The legal principle that a properly filed application cannot be turned away or inappropriately delayed by Town Council must be followed in this application.
  - The Appellant's concern relates more to the zoning of the property than the actual proposed development. The zoning, which was determined in 2004, is still in effect.
  - The proposal was submitted with the Official Plan in mind and the testimony of Mr. Wood demonstrates the proposal reflects a number of the objectives of the Official Plan.
  - The Town conducted an appropriate and professional review process. A public meeting was held and the Planning Board and Town Council considered the comments raised and other relevant factors required by the bylaws.
  - The detailed minutes of the Planning Board meetings and the Town Council meetings demonstrate a very thorough and professional planning based approach to the proposal.
  - The length of the Planning Board discussion and the public meeting, which was devoted specifically to this proposal, demonstrate that the Town took time to fully consider all the necessary factors before making their decision.
  - The Town considered other factors; such as sewer and water servicing, trails and sidewalks, and transportation; as indicated in the documents filed with the Commission.
  - The Town reflected public input by seeking changes to the proposal. Plans for apartments were removed, sidewalks were added, the layout of the development was altered and the density reduced.
  - Mr. Wood's presentation shows a well-planned, quality development proposal that is in keeping with the goals and objectives of the Official Plan and PURD zoning.
  - Mr. Wood states that the Official Plan makes a strong case for the need to accommodate higher density residential development and the Riverview Place development should blend in well with the sporadic residential development in the area. The higher density units are located at the back of the property, in a wooded area and farthest from the Ferry road.

- The higher density development will help conserve farm land, as low density residential development is inherently wasteful in terms of land consumption and results in massive losses of farmland as a result of urban sprawl.
- Mr. Wood contends the proposed development is not truly high density and, at 6.8 units per acre, is well below the maximum of 10 units per acre permissible in the PURD zone.
- High density development strengthens the Town's assessment base and helps maintain the Town's economic stability.
- Rising development costs require more efficient use of land and the Official Plan recognizes this by stating: "there will be a need to use land more efficiently"; "As future residential growth occurs, it must do so at higher development densities."
- The location of the PURD zone and this development is in keeping with the Official Plan which states "Higher density residential developments would be directed to locate adjacent to major transportation routes and would involve sensitive transitions to established low density neighbourhoods."
- The Ferry Road is recognized in the Cornwall Official Plan as a major Street.
- The Town holds considerable control over the development by way of the required Development Agreement and therefore can ensure it develops according to the proposal and with the required buffers.

[7] Christina Murray and Charles Arsenault were not able to attend the hearing but provided a letter to Mr. Lavoie to read into the record. They endorsed the concerns raised by Mr. Lavoie and others.

[8] The Murray-Arsenault home was purchased from one of the developers (MacIsaac's) in 2008. A primary reason for the purchase was the location of the property in a residential and agricultural area of Cornwall. They were not aware of the PURD zoning and would probably not have even made an offer on the property had that information been disclosed.

[9] Ms. Murray and Mr. Arsenault contend that the proposed development is too high in unit density for the area and existing infrastructure will not be sufficient to support an influx of potentially hundreds of people. They are concerned that the Town has repeatedly ignored the views and concerns of residents.

### **3. Findings**

[10] The Commission has considered the submissions of the parties as well as the evidence, testimony, Official Plan and Bylaws of the Town.

[11] The Commission finds and determines that for the reasons that follow the appeal is denied.

[12] The potential outcome of this appeal was, in large measure, limited when the Planned Urban Residential Development (PURD) zone was adopted by the Town of Cornwall as part of the Official Plan and Bylaws in early 2004. That is the context in which the Commission must consider this appeal.

[13] The process followed by the Town that lead to the designation of the subject properties as a PURD Zone reflect decisions made more than eight years ago and well beyond the statutory appeal period to the Commission. Some residents may not have fully appreciated the implications of the zoning change and either were not aware of the changes or did not avail themselves of the opportunity to oppose the zoning when it was being discussed by the Town.

[14] However, even if the Town's 2004 Bylaw had been appealed to the Commission, it is unlikely that such appeal would have ever proceeded, as the Commission has consistently held since 1999 that it does not have the jurisdiction to hear appeals of a new bylaw, or a series of amendments to a bylaw arising out of the required five year review process set out in the **Planning Act**.

[15] While providing background to the Appellant's concern regarding such higher density development on the subject properties, the Commission has no jurisdiction to adjudicate on that approval process and must deal with the Official Plan and the Bylaws as they currently exist and as they have been approved by the Minister.

[16] The Commission notes that Mr. Lavoie provided a copy of the 2004 newspaper notice run at the time of the zoning changes. While he is correct that the statement "changes to the designation of residential land east of Eliot Park on the Ferry Road from R1 to R1/PURD" is not as clear as it could be, it is also clear that some change in zoning was being proposed. It is also true that R1/PURD is not a specific zone. However, the information provided under the title of Changes to Zoning Map is sufficient to alert a reader that some change was being considered and further action could have been taken to learn more about the proposed changes. The Notice provided contact information and a concerned resident could have contacted the Town to obtain clarification.

[17] The failure of the Town to review the Official Plan within the time limits specified in the provincial legislation is regrettable, but the Commission accepts the evidence that the Minister has exercised his discretion regarding the review requirement and therefore has in effect sanctioned the continuation of the existing Official Plan until the current review is complete.

[18] The Commission, as a creature of statute, is bound by the Town's Official Plan and the Bylaws in considering the merits of the appeal.

[19] Mr. Lavoie presented a compelling personal argument about the character of the neighbourhood along the Ferry Road, and his concerns and that of his neighbours about the potential impacts of the proposed development. It does represent a change and the Commission recognizes and appreciates the potential impacts that are deemed undesirable by many residents in this area.

[20] Many of the homes are set on larger lots and shielded from the Ferry Road giving more of the appearance of a rural setting. However that does not mean that another approach to development is automatically rejected, especially when it is permitted by zoning and subdivision bylaws.

[21] The PURD zone, as defined in the Town bylaws, permits such a development.

[22] The Official Plan is cited by both parties in support of their arguments. In some instances the same sections and very same statements can be read to support both those who oppose the development and those who support it. This is often the case in such appeals.

[23] The Official Plan, by its very nature, sets out the broad strokes of the vision for the community. The Plan therefore encompasses a variety of goals and objectives that at times can be seen to be in blatant conflict with each other. It then falls to the Bylaws and zoning to turn the broad views into workable realities. While the more powerful of the two documents, the wording of the Official Plan is subject to interpretation and the various policies and objectives must be weighed and balanced.

[24] A reading of the entire Official Plan indicates that the Town of Cornwall wishes to preserve its rural nature, protect existing neighbourhoods, and at the same time be open to new concepts of development that include high densities, maximize land preservation and the use of services. The challenge becomes the blending of the objectives. The Town decided in 2004 that blending would take place on the Ferry Road through a PURD Zone for the subject properties.

[25] While the Appellant made numerous references to potential farm conflicts resulting from the proposed development, the Commission notes that no one from the farm community appeared at the hearing to support such concerns. A review of the minutes of the public meeting, held by the Town to gain input on the proposal, does not identify any farmers or farm representatives who spoke in opposition to the development proposal based on potential impact on farm land or rural urban conflicts. The Commission appreciates the points raised by Mr. Lavoie on this topic and his interest in supporting the agriculture sector. However, the argument carries less weight than if it had been accompanied by direct testimony from active farmers.

[26] The petition collected and presented to Town Council demonstrates a level of concern about high density development. It is well organized and analysed but a petition cannot override a planning decision based on established bylaws. By necessity, a democracy must follow the rule of law and therefore cannot make specific development decisions based on current public opinion and ignore the bylaws that are in place to provide fairness and certainty in the development process.

[27] This causes challenges for communities. They desire public engagement in the development process of the community but must also adhere to the zoning and bylaws under which they operate. The input is desired, but the decision may not fully reflect that input.

[28] A development proposal, properly submitted and meeting the requirements of the appropriate bylaws, is considered an “as of right” development. It simply means the Developer has a right to develop if they have met the necessary legal requirements. A decision to turn down such a development based on public opposition, might be very popular, but might have a short life on appeal.

[29] In this matter, the minutes of the public meeting, the letters received and the direct comments of residents were made known to the members of Planning Board and the statements of Councillors demonstrates those comments were heard.

[30] The Planning Board and Town Council are charged with the role of determining if development proposals meet the requirements of the Bylaws.

[31] The Zoning and Subdivision Control Bylaw (Section 3.15) also places a reverse onus on Council in that it “shall not issue a development permit” if, in the opinion of Council, certain impacts may result.

[32] The Commission, in considering an appeal from a decision of a community, first reviews the decision in terms of whether the appropriate process set out in the Bylaws, **Planning Act** and established laws were followed.

[33] The process on this specific proposal is not in question. That process is clearly laid out in the Bylaws and was followed. A formal proposal was submitted to the Planning Board and it was discussed. Some concerns were raised, such as the use of private roads and the density at the maximum permitted. The proposal was revised. The property was posted. Those in the designated area received letters. Those that did not get a copy of the map in the mail were hand delivered a copy.

[34] A public meeting was advertised and held. It dealt with only one topic and, regardless of how you estimate the numbers, there was a large crowd that turned out and had the opportunity to provide input. The meeting lasted two hours.

[35] The records of Planning Board demonstrate, to the full satisfaction of the Commission, that the required factors were considered. The February 27, 2012 meeting considered the requirements of the bylaws, municipal service and infrastructure, transportation, parks and recreation, future development goals of the Official Plan and a review of the proposed Development Agreement.

[36] The minute states “Although residents question the appropriateness of this development Planning Board has reviewed Mr. Lavoie’s presentation made to Council at the Public Meeting held on January 16, 2012 and noted the comments made.”

[37] The matter was again discussed at Planning Board on March 5, 2012 and recommended for approval.

[38] The minutes of the March 21, 2012 Town Council meeting indicate that the Planning Board, in making their recommendation for approval, provided Councillors with an overview of the actions taken by Planning Board, including consideration of the petition, Official Plan and the public input.

[39] The two Councillors that voted against the proposal, clearly explained why they did not support the proposal, referring to the petition and location, thus providing further evidence those public concerns were heard.

[40] A second level of test utilized by the Commission is the adherence to sound planning principles. Usually, if the proper process has been followed and the decision is in keeping with sound planning principles, the Commission is reluctant to overturn the decision of the municipal body which is elected by residents to make such decisions.

[41] In this appeal the Commission takes comfort in the Official Plan and the Bylaws. It is clear that such type of development was contemplated at the time the Official Plan and the zoning was approved. The zoning and bylaws have been in effect for over eight years and this is not the only PURD zone in the community.

[42] The existence of a PURD zone designation in the Bylaws suggests the Town is not only open to such development but also sought to encourage such development by clearly established zones where it would be permitted.

[43] The Bylaw can trace its origin to the Official Plan which talks openly about a move to higher density development in the Town.

[44] The concept of high density residential arrangements is becoming more popular and more common. It may be driven by development costs, changing residential preferences or greater sensitivity to land and service utilization. It is however, recognized as sound planning.

[45] The Commission has reviewed the specific proposal advanced by the developers and presented at the hearing. The proposal is less than the maximum density permitted in a PURD zone and was reduced from the maximum in an effort to address some of the resident's concerns.

[46] The proposal has utilized buffers to increase the setbacks from adjacent properties, with the proposed setbacks exceeding the requirements of the Town.

[47] The area of the proposed development closest to the Ferry Road will have duplex lots and some of the higher density buildings may incorporate the features of single level buildings.

[48] The proposal calls for a quality level of housing. Space has been made available for future sidewalks and a trail system.

[49] The Town has testified that the municipal sewer and water infrastructure has the capacity to accommodate the development.

[50] The Department of Transportation and Infrastructure Renewal does not have any concerns about the impact of the development on transportation infrastructure in the Town.

[51] The proposal meets all the requirements of the Bylaws. It can find root in the Official Plan.

[52] The Commission, hearing the matter anew, reviewing the documents and evidence, comes to the same conclusion as the majority of the Town of Cornwall Council. The development meets the requirement of the Bylaw and must be approved.

## **4. Disposition**

[53] An Order dismissing the appeal will therefore issue.

**IN THE MATTER** of an appeal under  
section 28 of the Planning Act

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# Order

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**WHEREAS** the Appellant André Lavoie has appealed a decision of the Town of Cornwall, dated March 21, 2012;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on May 24 & 25, 2012 after due public notice and suitable scheduling for the parties;

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

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

## IT IS ORDERED THAT

1. The appeal is hereby denied.
2. The March 21, 2012 decision of the Town of Cornwall pertaining to this matter is hereby upheld.

**DATED** at Charlottetown, Prince Edward Island, this 14th day of June, 2012.

### BY THE COMMISSION:

\_\_\_\_\_  
(Sgd.) *Maurice Rodgerson*

Maurice Rodgerson, Chair

\_\_\_\_\_  
(Sgd.) *Jean Tingley*

Jean Tingley, Commissioner

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(Sgd.) *Peter McCloskey*

Peter McCloskey, 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)