

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

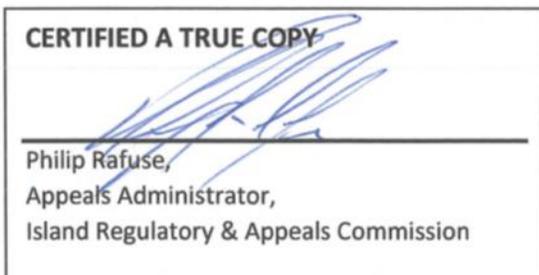
Docket: LA18-006
Order: LA19-01

IN THE MATTER of an appeal by Marlene Waddell, Ronald Thomson, Lesley Cousins, Glen McGrath, Leo Flood and Darren Baglole, of a decision by the Rural Municipality of Kinkora, dated May 16, 2018.

BEFORE THE COMMISSION ON Tuesday, March 12, 2019.

J. Scott MacKenzie, Q.C., Chair
M. Douglas Clow, Vice-Chair
John Broderick, Commissioner

ORDER



IN THE MATTER of an appeal by Marlene Waddell, Ronald Thomson, Lesley Cousins, Glen McGrath, Leo Flood and Darren Baglole, of a decision by the Rural Municipality of Kinkora, dated May 16, 2018

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IN THE MATTER of an appeal by Marlene Waddell, Ronald Thomson, Lesley Cousins, Glen McGrath, Leo Flood and Darren Baglole, of a decision by the Rural Municipality of Kinkora, dated May 16, 2018 .

Appearances & Witnesses

1. **For the Appellants,**

Representative:
Ronald Thomson

Witnesses:
Ronald Thomson
Marlene Waddell

2. **For the Respondent, Rural Municipality of Kinkora**

Representative:
Derek French

Witnesses:
Derek French
Len Keefe

3. **For the Developer, Town N Country Holdings Inc.**

Representative:
David MacLeod

Witnesses:
David MacLeod
Sharon MacLeod

Reasons for Order

Overview

1. This is an appeal by a number of residents of the Somerset Estates Subdivision in Kinkora, P.E.I. of a decision of the Rural Municipality of Kinkora (the “Municipality”) to rezone three undeveloped residential building lots in that subdivision. This rezoning allows the owner to seek to merge the three lots into two and to construct two three unit townhouses.
2. These residents, at the time of the filing of the appeal, all lived close by in houses built on lots in a part of the Somerset Estates Subdivision that is zoned R1 – Residential, allowing for only single family dwellings to be built. The residents feel that the rezoning will change the nature of the subdivision from the current single family only by allowing multi-unit dwellings to be constructed.
3. The residents who filed the appeal are Marlene Waddell (“Waddell”), Ronald Thomson (“Thomson”), Lesley Cousins (“Cousins”), Glen McGrath (“McGrath”), Leo Flood (“Flood”), and Darren Baglole (“Baglole”) (collectively the “Appellants”). They appeal the decision by the Municipality to approve a site-specific bylaw amendment to rezone provincial parcels 1080811, 1080829, and 1080837 (the “Parcels”) owned by Town N Country Holdings Inc. (“TNC Holdings”) from R-3 to R-4 (multiple family residential) to allow for the construction of two single-storey three unit townhouses .

Decision

4. The Commission finds that the Municipality complied with the procedural notification requirements of its Zoning & Subdivision Control (Development) Bylaw (the “Bylaw”). Further, the Commission is satisfied, based on the evidence before it, that the proposed rezoning and development meets the requirements of the Bylaw and Official Plan, and is consistent with sound planning principles. The appeal is denied and the decision of the Municipality is hereby confirmed.

Facts

5. TNC Holdings wants to develop two three-unit townhouse dwellings on the Parcels (the “Development”). The Development is opposed by the Appellants. The issue in this appeal is the site-specific amendment made by Council to the Bylaw on May 16, 2018 (the “Amendment”). The Amendment is to rezone the Parcels from R3 (Multiple Family Residential Zone) to R4 (Multiple Family Residential Zone) and reads as follows:

*The 2015 Zoning & Subdivision Control (Development) Bylaw Amendment [#2018-2] to change PID#s 1080811, 1080829 and 1080837, McGuigan Lane, Somerset Estate Subdivision from (R3) Multiple Family Residential Zone to (R4) Multiple Family Residential Zone.*¹

6. The Amendment was passed following consideration at a number of Council meetings between March and May, 2018.² On April 4, 2018, TNC Holdings filed an application to rezone the Parcels from R3 to R4.³ As will be discussed, a public meeting was held on April 23, 2018 for residents of the Municipality to consider the Development (the “Public Meeting”).⁴ The Amendment was debated at a Council meeting on April 30, 2018.⁵ It passed first reading on May 14, 2018⁶ and second reading on May 16, 2018.⁷
7. On June 12, 2018, the Appellants filed a notice of appeal under section 28 of the *Planning Act*.⁸ The Municipality’s decision was not posted on the PEI Planning Decision website until May 28, 2018. The posting indicated the deadline to appeal the decision was June 18, 2018. The parties do not dispute that the Commission has jurisdiction to hear the appeal and the Commission is satisfied that the appeal was filed in accordance with the time requirements of the *Planning Act*.⁹
8. The Municipality provided the Commission with its record on July 27, 2018, which was subsequently distributed to the parties. Mediation was held at the Commission on

¹ Exhibit R-3, Tab K.

² Exhibit R-3, Tabs C, D, E, F, & G.

³ Exhibit R-3, Tab A.

⁴ Bylaw, s.16.1(vi). Exhibit R-3, Tab D.

⁵ Exhibit R-3, Tab E.

⁶ Exhibit R-3, Tab F.

⁷ Exhibit R-3, Tab G.

⁸ RSPEI 1988, c P-8. Exhibit A-1.

⁹ RSPEI 1988, c P-8, ss.28(1.1) & (1.3).

September 10, 2018 but was unsuccessful. On November 1, 2018, the Commission requested written submissions to narrow the issues on appeal. On November 16, 2018, the parties filed their submissions with the Commission. On December 14, 2018, the Commission set the matter down for a hearing to be held on January 9, 2019. The Commission postponed the hearing due to a winter storm and hazardous driving conditions. The Commission offered the parties a rescheduled hearing date of January 15, 2019. Due to the Developer's travel plans, the parties agreed to have the appeal heard on February 6, 2019.

Preliminary Matter

9. At the outset of the hearing, the Municipality and TNC Holdings questioned whether some of the Appellants (Waddell, Thomson, and McGrath) still had standing and had status to proceed with the appeal, as they had sold their homes and no longer resided in the Municipality. TNC Holdings also questioned whether one appellant, Baglole, had actually withdrawn from the appeal. TNC Holdings noted that only Waddell and Thomson were present at the public hearing. Thomson advised the Commission that he was authorized by all of the Appellants to act on their behalf at the hearing. The Commission determined that the hearing would proceed.
10. The Commission is satisfied that the Appellants have status to bring this appeal pursuant to section 28(1.1) of the *Planning Act*. None of the Appellants advised the Commission that they had withdrawn their appeal. The Commission accepts Thomson's representation that he is authorized by the other Appellants to present the appeal on their behalf. The Appellants' decision to call only two witnesses at the hearing is not determinative. It is for the Appellants to determine their strategy, present their case, and persuade the Commission that the Municipality erred in passing the Amendment.
11. The Commission has determined that it does not have to address the issue of whether some of the Appellants have lost standing as a result of their having sold their homes and moved out of the Municipality. None of the parties to the appeal were represented by legal counsel. No submissions on the law of loss of legal standing were provided to the Commission. The Commission finds that as some of the Appellants (Cousins, Flood and

Baglole) were still resident in the Municipality and were represented by Thompson it is not necessary for the Commission to make a finding on standing.

12. Although the Commission accepts that the Appellants have status to bring the appeal, it has placed little weight on their evidence. The Appellants' submissions consisted primarily of argument, with little relevant evidence. Upon a thorough review of the entire record, the Commission finds that the evidence of the Appellants was of limited value in deciding this appeal.

Issues

13. The Appellants made a number of arguments in this appeal. In light of the parties' arguments and the evidence presented at the hearing, the Commission understands that the Appellants have two primary submissions:
 - a. Did the Municipality err in issuing notice of the Public Meeting?
 - b. Does the Development have merit based on sound planning principles?

Analysis

14. The Commission accepts that the Municipality complied with the Bylaw in issuing public notice of the meeting and that the Development has merit based on sound planning principles.

Notice

15. The Appellants argued that some of them did not receive notice of the Public Meeting and therefore the Municipality failed to comply with the requirement in section 16.1 of the Bylaw to provide nearby homeowners with a notification letter of the proposed Bylaw amendment and the mandatory Public Meeting.¹⁰
16. The Commission accepts the evidence of the Municipality and finds that it complied with the procedural notice requirements of the Bylaw. The Commission is also satisfied that

¹⁰ Bylaw, s.16.1

the Appellants had actual notice of the Public Meeting and were provided an opportunity to make submissions to the Municipality regarding the Development.¹¹ These submissions were considered by the Municipality in passing the Amendment.¹²

17. Section 16.1 of the Bylaw requires the Municipality to hold a Public Meeting to solicit community input on a rezoning request.¹³ The Municipality must notify its residents of this meeting in two ways: it must publish notice of this meeting in a newspaper¹⁴ and it must forward a “notification letter” to property owners within 200 feet of any lot line of the parcel(s) being proposed for rezoning.¹⁵ These notification requirements were met.

18. There is no dispute that the Municipality properly posted notice of the Public Meeting in the Journal Pioneer newspaper on April 16, 2018 and again on April 19, 2018.¹⁶

19. The Commission accepts the evidence of the Municipality’s development officer, Derek French (“French”), who testified that a newsletter with respect to the Public Meeting was forwarded via Canada Post to all residents of the Municipality, not just adjacent homeowners. This is supported by the record, which includes a copy of the newsletter and a cheque stub for “rezoning meeting flyers” made out to Canada Post.¹⁷ French testified that the Municipality wanted to notify all residents, not just twenty-four people, so that the community would have an opportunity to provide input on the Amendment. The Commission is satisfied that the newsletter, mailed to all residents, meets the requirements of the Bylaw in this instance.

20. Based on the specific facts of this case, the Commission is not concerned with the Appellants’ technical distinction between mailing a “newsletter” and a “notification letter”. The newsletter contained all information necessary to inform residents of the Municipality

¹¹ Exhibit R-3, Tabs M-Q.

¹² Exhibit R-3, Tab E. The Municipality also received twenty-four submissions in support of the Development. Exhibit R-3, Tab R.

¹³ Bylaw, s.16.1(vi).

¹⁴ Bylaw, s.16.1(vi)(1).

¹⁵ Bylaw, s.16.1(vi)(2).

¹⁶ Exhibit R-3, Tab B.

¹⁷ Exhibit R-11.

of the Public Meeting and rezoning request. This information includes the date, location, and purpose of the meeting and a description of the proposed Amendment.¹⁸

21. Even if some of the Appellants did not actually receive the newsletter, the Commission is not persuaded that that they suffered any prejudice as a result. The evidence indicates that all of the Appellants were aware of the Public Meeting and made written submissions to the Municipality.¹⁹ Four of the Appellants (Flood, Baglole, Cousins and McGrath) attended the meeting.²⁰
22. Thomson and Waddell testified that they were informed of the meeting at the Kinkora Post Office on April 22, 2018. The record suggests that Thomson was actually aware of the Public Meeting as early as April 19, 2018.²¹ They did not attend the meeting but did submit written comments to the Municipality.²²
23. Given all of the above, the Commission finds that the Municipality met its notice obligations under section 16.1 of the Bylaw. The Commission is also satisfied that the Appellants had actual notice of the Public Meeting and, even if some of the Appellants did not receive the newsletter (which has not been established), they did not suffer any prejudice. All of the Appellants were aware of the meeting. The Commission finds that there was no procedural error made by the Municipality.

Sound Planning

24. The Appellants argue that the Development does not meet sound planning principles. Their position relies primarily on their interpretation of “Policy PR-1: Zoning,” contained in the Municipality’s Official Plan (the “Policy”).²³
25. The Policy states, in part, that the Municipality will provide “more specific protection for existing residential neighbourhoods through designation as Single Family Residential (R1)

¹⁸ Including the provincial parcel numbers and street location of the Parcels. The newsletter also invited written comments.

¹⁹ Exhibit R-3, Tabs M-Q.

²⁰ Exhibit R-3, Tab D.

²¹ In an email to Flood dated April 19, 2018, Thomson stated that he spoke to the Mayor that day, expressed his concerns with the Development, and advised the Mayor that he would not be able to attend the public meeting. Exhibit R-3, Tab P.

²² Exhibit R-3, Tab O. See also Exhibit R-3, Tab P.

²³ Official Plan, Policy PR-1” Zoning, p.22.

Zones.” The Appellants further rely on a bullet point under the heading “Plan Action”, which states:

Additional apartment developments may be permitted but shall proceed via a re-zoning application. Apartments shall generally be directed to locate in higher traffic locations and adjacent to commercial developments and existing apartments.²⁴

26. Relying on the Policy, the Appellants argue that that proposed town houses are “apartments” because they are rental units. The Appellants argue that “apartments” (or rental units) cannot be built in proximity to single family homes. Rather, apartments should be built in Duffy Court, another subdivision in the Municipality that the Appellants state contains duplexes and triplexes. As such, permitting “apartments” near single-family residential homes is not sound planning.
27. The Appellants’ reliance on this excerpt of the Policy is misplaced. When interpreting the Official Plan and Bylaw, effect must be given to the specific language employed by the Municipality. Consideration must also be given to the nature of the decision under appeal, being a site-specific Bylaw amendment to rezone the Parcels from R3 (Multiple Family Residential) to R4 (Multiple Family Residential).
28. The Bylaw defines “townhouse dwelling”.²⁵ The Development meets this definition. It does not define an “apartment”, but clearly distinguishes between townhouse dwellings and apartments.²⁶ The Development and Amendment relate to a proposed townhouse dwelling. The Policy excerpt relied upon by the Appellants relates to apartments, a permitted use in the R4 Zone, but that is not the use under appeal.
29. The best evidence with respect to sound planning principles was provided by French. French is the Municipality’s development officer and has previously appeared before the Commission. The Commission finds that French has planning experience and is familiar with the Municipality’s Official Plan and Bylaw.

²⁴ Official Plan, Policy PR-1: Zoning, Plan Action, p.22.

²⁵ Bylaw, s.2 – “Townhouse Dwelling or Row House Dwelling”

²⁶ See for example Bylaw, s.9.2(2),(3).

30. French testified that the Parcels were zoned R3. As of right, TNC Holdings is permitted to construct two semi-detached dwellings on each parcel, for a total of six units.²⁷ He stated that the Amendment to R4 would permit two three-unit townhouse dwellings, resulting in no increase in the total number of units located on the Parcels.²⁸
31. French also testified that there is a buffer of approximately 154 feet between the Development and the nearest property line of the Appellants. In his view, this is sufficient space between the Development and a single family dwelling.²⁹ According to French, the Development would be for two single-story townhouse dwellings, which fit with the surrounding single family residences. He stated that he would have been “leery” if the Development was for two-stories, but that is not the case. He also stated that there is another lot that is zoned R4 near the Parcels. In French’s opinion, the Development is consistent with sound planning principles as it provides a transition from single family residential to multi-family residential, does not increase the number of units on the Parcels and, like the single family homes in the area, will be single-story.
32. The Commission accepts French’s evidence and finds that the Development is consistent with and based on sound planning principles. The Commission agrees that there is an adequate buffer between nearby single family homes and the Development, it will not increase the number of units on the Parcels, and the single-story Development fits with the surrounding properties in the area. The Commission notes that the result could have been different, had the Developer proposed to develop, for example, a twelve-unit apartment building. However, that is not what TNC Holdings has proposed or the Municipality has approved.

Other Arguments Raised by the Appellants

33. The Appellants raised a number of secondary arguments, including concerns with signage, development funding, property values, and an alleged conflict of interest. These arguments were either irrelevant to the matter under appeal, unfounded on the evidence,

²⁷ Bylaw, s.8.2(2).

²⁸ Bylaw, s.9.2(2).

²⁹ Exhibits R-12 and R-13.

or outside of the jurisdiction of the Commission. For completeness, the Commission will briefly address each argument.

Signage

34. The Appellants contend that the signage advertising the availability of lots in Somerset Estates is misleading. Specifically, a sign does not identify that there are duplex lots for sale.³⁰

35. Whether signage is misleading or not has no bearing on this appeal. The appropriateness of signage advertising lands for sale in the province does not fall under the jurisdiction of the Commission, which is to determine planning appeals.

Government funding

36. The Appellants state their belief that Somerset Estates was developed using federal, provincial, and municipal funds and that the government officials involved in this financing did not consider the possibility of a “duplex and triplex community”.³¹

37. The Appellants led no evidence in support of their belief. This is not an appeal of the development of Somerset Estates. The possible sources of funding for a development that is not the subject of this appeal, developed by a developer that is not a party to this appeal, and the knowledge or intention of the funders of that development, is not in evidence or a relevant consideration for the Commission in deciding this appeal.

Impact on property values

38. The Appellants argue that the development of town house dwellings will “eventually lead to a decrease in the property values of existing single family dwellings.”³² There is no evidence before the Commission to support this statement. Further, the Bylaw does not provide for the protection of property values during the development process.

Allegation of conflict of interest

39. The Appellants raised the suggestion of a possible conflict of interest with respect to some of the councillors, including the Deputy Mayor, who cast the deciding vote on the

³⁰ Exhibit A-4.

³¹ Exhibit A-2 and R-10.

³² Exhibit A-2.

Amendment. The Appellants submitted that the Deputy Mayor “ran the bingo” and had a cleaning contract with the Municipality, and therefore ought to have excused himself from voting on the Amendment.³³

40. The Appellants bear the burden of establishing the alleged conflict of interest. To succeed, they must prove admissible evidence. A bare assertion or assumptions and rhetoric of a potential conflict without more is not evidence and is insufficient to ground the Appellants’ serious allegation. Here there is no evidence to corroborate the Appellants’ argument and the Commission has been provided no reason to doubt the propriety of Council’s decision-making process or the motivations or bona fides of its councillors.

Conclusion

41. The Commission is satisfied, based on the evidence before it, that the Municipality complied with the procedural requirements of the Bylaw, that the proposed rezoning and development meets the requirements of the Bylaw and Official Plan and is consistent with sound planning principles. The appeal is denied and the decision of the Municipality is hereby confirmed.

³³ Exhibit A-2.

IN THE MATTER of an appeal by Marlene Waddell, Ronald Thomson, Lesley Cousins, Glen McGrath, Leo Flood and Darren Baglole, of a decision by the Rural Municipality of Kinkora, dated May 16, 2018.

Order

WHEREAS the Appellants appealed a May 16, 2018 decision of the Rural Municipality of Kinkora to approve a site-specific bylaw amendment for provincial parcels 1080811, 1080829, and 1080837, Kinkora;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on February 6, 2019, 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 denied and the decision of the Municipality is hereby confirmed.

DATED at Charlottetown, Prince Edward Island, Tuesday, March 12th, 2019

BY THE COMMISSION:

(sgd.) *J. Scott MacKenzie*

J. Scott MacKenzie, Q.C., Chair

(sgd.) *M. Douglas Clow*

M. Douglas Clow, Vice-Chair

(sgd.) *John Broderick*

John Broderick, 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.