



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA06001
Order LA06-02**

IN THE MATTER of an appeal by
Ernest Gallant et al of a development permit
decision of the Town of Cornwall dated
January 18, 2006.

BEFORE THE COMMISSION
on Tuesday, the 11th day of April, 2006.

Maurice Rodgerson, Chair
Weston Rose, 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 Ernest Gallant et al of a development permit decision of the Town of Cornwall dated January 18, 2006.

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IN THE MATTER of an appeal by Ernest Gallant et al of a development permit decision of the Town of Cornwall dated January 18, 2006.

Appearances & Witnesses

1. For the Appellants

**David M. Bulger
Ernest Gallant**

Witnesses:

**Michael Ives
Bruce Mac Isaac
Phillip Acorn
David Lopes**

2. For Respondent

Counsel:

John Mitchell

Witnesses:

**Kevin McCarville
Janice Harper**

IN THE MATTER of an appeal by Ernest Gallant et al of a development permit decision of the Town of Cornwall dated January 18, 2006.

Reasons for Order

1. Introduction

[1] This is an appeal under section 28 of the *Planning Act*, R.S.P.E.I. 1988, Cap. P-8 (the *Planning Act*), by Ernest Gallant, Phillip Acorn, David Bulger, Don Campbell and Marion Jones Flood (the Appellants). The Appellants filed their Notice of Appeal with the Island Regulatory and Appeals Commission (the Commission) on February 7, 2006.

[2] The Appellants are appealing a January 18, 2006 decision of the Town of Cornwall (the Respondent) to issue a development permit for a new Civic Centre, consisting of a town hall and library, to be located on parcel number 703413 at 39 Lowther Drive in Cornwall.

[3] After due public notice and suitable scheduling for the parties, and after addressing preliminary matters related to the request for a stay and the issuing of subpoenas, the Commission proceeded to hear the appeal on March 30, 2006.

2. Discussion

Appellants' Position

[4] The Appellants submit that the Respondent's Planning and Development Officer exceeded her duties in issuing the building permit under bylaw 403 and therefore issued it incorrectly. A summary of their oral arguments follow.

- Councillor Ann Doucette was not a resident of Cornwall and therefore not eligible to vote on the development permit resolution at the time the resolution was placed before council.
- A town council is defined as a Mayor and six councillors and any action of a mayor, five councillors and a "stranger" (Ms. Doucette) is not an act of the Respondent's Council.
- Council did not vote on a motion that met the requirements of the bylaw under which it was considered.

- Council had an obligation to consider operating costs and tax rate implications as part of the development permit approval process.
- The decision was not lawful because Council incorrectly interpreted section 3.15 of bylaw 403.
- Council's decision offends the process of natural justice as bylaw 403 makes no provision for hearings as Council is both applicant and decision maker. Three of the four councillors voting in favour demonstrated prejudgment bias, and all four Councillors voting in favour were interested parties.
- The Respondent's Council acted in bad faith by violating the statutory conditions with respect to corporations as the majority of members of a corporation bind the others and the members of the Respondent Corporation are its residents and a majority signed a petition opposing the construction.

[5] The Appellants seek an Order from the Commission quashing the development permit and further ordering that a directed plebiscite or public vote on the subject be held by the Respondent.

Respondent's Position

[6] The Respondent takes the position that the issue of the town hall has been on the agenda for over five years, was part of the official plan and strategic plan discussion and moved forward after other priorities had been addressed. A summary of the Respondent's oral arguments follow.

- An architect was retained, an open house held, and based on concerns of residents the square footage was reduced and the building was designed as a green building.
- Council rigorously followed the bylaw and the permit was properly approved by Council.
- The issue of the height of the building was raised by the Development Officer and the height was reduced to ensure compliance with the bylaw.
- Councillor Doucette lived in Cornwall, sold her home, started construction of a new home and met the requirements of being "ordinarily resident" and therefore was eligible to vote on the resolution.
- Some of the points raised by the Appellants are beyond the jurisdiction of the Commission.

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

3. Findings

[8] The Commission has considered the submissions of the parties, the testimony of the witnesses and relevant case law.

[9] A key motivator for the appeal of Council's decision is related, by the Appellants' own admission, to the potential impact on taxes. It is the Respondent's belief the construction of the Town Hall will lead to increased taxes or reduced services. Taxation is not a **Planning Act** matter and therefore the Commission finds that it is without jurisdiction to make a finding for or against the development permit, which is the matter under appeal, based on the potential impact on taxes and services.

[10] The Appellants attempted to link the issue to the development bylaws by suggesting the impact on taxes would be detrimental to the general public and that is prevented under the development bylaws. They point specifically to Section 3.15 (1) (h) of bylaw 403 which states:

(1) Council shall not issue a development permit for a development, if, in the opinion of Council:

(h) the proposed development would be detrimental to the convenience, health, or safety of residents in the vicinity or the general public.

[11] The Commission finds that the Appellants have not presented sufficient evidence to convince the Commission that the term "convenience" in section 3.15 (1) (h) of the Zoning and Subdivision Control Bylaw can be interpreted to include the impact of potential taxes on residents. This section is clearly written to address a variety of potential development related issues such as water and sewer services, road access and safety, impact on neighbouring properties, etc.

[12] While a novel argument, the Commission was not presented with any evidence to suggest that section 3.15 of the bylaw was intended to prevent the Respondent's Council from issuing a development permit if the proposed development impacted the convenience of the general public by potentially increasing taxes or reducing services. Even if the Commission were to accept such an argument, it is further weakened by the fact this section of the bylaw includes the term "in the opinion of Council".

[13] The Commission notes, and the Respondent's Development Officer confirms, that the bylaw is reprinted in the information provided to each Councillor on the matter before Council; and therefore the applicable portions of the bylaw are clearly before every member of council as they review the application and make a decision.

[14] It is equally obvious that the issue of cost was raised by members of the community, was discussed at public meetings, and in fact the project appears to have been downsized in part to reflect those concerns. It is therefore reasonable to conclude that the Councillors who voted in favour of the project were well aware of the cost discussions and in the majority opinion did not consider it justification for denying the permit.

[15] The Residency of Councillor Ann Doucette was raised as an issue by the Appellants. The Commission finds Ms. Doucette meets the requirements of the term "ordinarily resident" as defined by the **Election Act** R.S.P.E.I. 1988, Cap. E-1.1 (the **Election Act**). Section 76. (f) of the **Charlottetown Area Municipalities Act** R.S.P.E.I. 1988, Cap. C-4.1 (the **Charlottetown Area Municipalities Act**) reads as follows:

(f) “ordinarily resident” has the same meaning as in the *Election Act*;

[16] Section 76. (f) does not limit in any way the definition in the ***Election Act***, but rather clearly states it is the same meaning. The Appellants argue that only portions of the relevant section of the ***Election Act*** should be considered, but that position is not supported by the actual wording of the legislation.

[17] The ***Election Act*** states the term “ordinarily resident” is determined by sections 22 and 23 of said ***Act***.

[18] Upon review of these sections, the Commission believes Ms. Doucette meets the requirements of being “ordinarily resident”. In particular, the Commission notes Section 23 (10) which requires that the determination be made by reference to all the facts.

[19] The evidence and testimony presented to the Commission indicates:

- Ms. Doucette was a resident of Cornwall at the time she was elected;
- Ms. Doucette purchased a residential lot on June 17, 2005 in Cornwall.
- Ms. Doucette sold her existing home in Cornwall on June 29, 2005 with the intent of building a new residence on the property purchased prior to the sale.
- Ms. Doucette was not able to find rental accommodation in Cornwall during the construction period.
- It was Ms. Doucette's intention to reside in Cornwall and to occupy the new house when it was completed.
- Less than six months passed between the time the house was sold and the new house was occupied.
- Ms. Doucette continued to attend Council meetings and was not absent for three consecutive meetings.
- Ms. Doucette raised the matter with the Respondent's CAO.
- The Respondent's CAO testified he sought advice from the Department of Community and Cultural Affairs and was informed that the Department's legal opinion was that Ms. Doucette could continue to serve as a Councillor.

[20] The testimony of the Respondent's CAO was that Ms. Doucette continued to attend council meetings and no evidence has been presented to suggest she was not available to the residents or failed to perform her duties as a member of council. As soon as her new house was completed she moved in.

[21] The Commission is of the view that it would be unreasonable to expect Ms. Doucette to refuse an offer to purchase her existing house, which she wanted to sell, until such time as her new home was completed.

[22] The Commission is convinced that a “reference to all the facts” as required by the **Election Act** leads to the conclusion that Ms. Doucette was “ordinarily resident” and therefore eligible to serve on Council and vote on matters before Council including the development permit under appeal.

[23] It should also be noted that had the vote of Ms. Doucette not been counted, the approval of the development permit would still have passed Council, albeit by a reduced margin.

[24] As to the Appellants’ suggestion that if Ms Doucette was not a legal member of Council the entire Council’s decision fails is a flawed leap of logic the Commission is not prepared to make. The Commission has not been presented with any evidence or legal precedent that would lead it to accept the argument of the Appellants on this point.

[25] The fact Councillor Doucette raised the matter reflects a desire to ensure she was able to serve and the Commission commends Councillor Doucette for her action and the Respondent’s CAO for seeking advice on the matter.

[26] The administration of the Zoning and Subdivision Control Bylaw was also raised as a reason to deny the permit.

[27] The Commission finds the testimony of the Planning and Development Officer very credible, and it appears to the Commission the application from the Respondent was handled in a consistent and professional manner.

[28] Ms. Harper was appointed by Council as a Development Officer; she conducted a full review of the application and followed the requirements of the bylaw. A detailed memo was prepared for the members of Council that covered the relevant points of the application and bylaw.

[29] The Respondent’s bylaw required Council to make a decision on the development permit, and the evidence before the Commission indicates Council made that decision and then the Development Officer, as an administrator of Council decisions, issued the development permit.

[30] The development permit carries certain conditions and those conditions must be met by the developer. It is not unusual for a permit to contain conditions and there is no evidence those conditions violated the bylaw.

[31] Drawings of the structure were provided, as was a Building Code Design Certificate, and a letter of approval in principle from the Fire Marshall. This information was provided to the Commission and appears to the Commission to be consistent with the bylaw and acceptable practice for the issuing of a development permit

[32] The Certificate of Compliance cannot be issued in advance of construction and the bylaw recognizes this with section 3.19 of bylaw 403 requiring the building not be occupied until the certificate is provided.

[33] Height of the building was also raised as an issue with a statement to the effect that it violates the maximum height restrictions of the bylaw.

[34] The Commission notes that the bylaw states maximum height in both metric (10.5 meters) and imperial (35 feet). However, the official measure of the Respondent’s bylaw is metric. In all instances where the maximum height is referenced it is stated at 10.5 meters.

[35] It was the testimony of the architect for the building that the height rounded to the second decimal of the metric measurement would be slightly higher than the maximum height stated in the bylaw. However, since the bylaw itself does not round to the second decimal point it is fair to conclude that the maximum height of 10.5 meters is being adhered to.

[36] The Development Officer testified the matter of height had been raised by her with the architect and in fact the roof of the building had been altered to bring it into compliance with the bylaw.

[37] The building has not been constructed and thus the final grade has not been determined. However, the potential variance is so minor that the Commission could not justify a rejection of the development permit on this point. It is the finding of the Commission that the height of the building meets the requirement of the bylaw.

[38] The Appellants provided the Commission with a copy of a petition circulated in the community and the Appellants argued that adherence to section 16 (c) of the **Interpretation Act** R.S.P.E.I. 1988, Cap. I-8 (the **Interpretation Act**) would require the Respondent's Council to be bound by the petition. The Appellants suggest that the petition reflects the majority opinion of the residents of the municipal corporation of the Town of Cornwall. These residents are members of the corporation and therefore the petition binds all members of the corporation, including the council.

[39] The Commission finds several flaws with this argument. First the petition itself is unclear. Those signing it say they would "like to be heard in opposing the construction of a \$2,000,000 Town Hall in Cornwall". The petition does not direct council to reject or deny anything, but rather asks to be heard. Obvious arguments can be made that the people were heard through public meetings and other means.

[40] It was also testified that the project is not a two million dollar project although that was a cost estimate when the first concept was advanced. The size is reduced significantly and the dollar value is also reduced so it could equally be argued that the signatories of the petition have been heard.

[41] The Commission did not make any attempt to settle the conflicting argument over the validity of the number of names on the petition and whether or not it accurately reflects fifty percent plus one of the residents of Cornwall. The Commission is of the view that the onus of establishing this point rests on the party who seeks to argue it. Further, the Commission does not believe that it should be necessary to analyze this petition as the Commission rejects the Appellants' argument that the petition is binding on the Respondent's Council.

[42] While the **Charlottetown Area Municipalities Act** provides the Respondent with the powers of a corporation under the **Interpretation Act**, it goes further.

[43] Section 80 (1) (2) of the **Charlottetown Area Municipalities Act** states:

- (1) The administration of the town is vested in a mayor and six councillors elected in accordance with this Act, who collectively constitute the town council.
- (2) The council is the governing body of the town.

[44] Black's Law Dictionary uses words such as "*fixed, accrued, settled, absolute, complete*" to define the term vested. It is the view of the Commission that the administration of the Respondent and a variety of other powers are vested with the Council. This includes such matters as the provision of various services and the purchase of land. The administration of the Town would, in the Commission's view, include the provision of a town hall.

[45] The Commission believes that if the ***Charlottetown Area Municipalities Act*** intended a petition to be binding on a council, such a provision would have been such a divergence from the norm for municipal administration that it would have provided a more specific reference than the argument offered by the Appellants.

[46] The Respondent is legislated the responsibility to issue development permits, and since no provision is made for anyone else to issue a development permit to the Respondent, and the legislation contemplates that towns would be constructing facilities to provide services, it must be concluded the legislation gives the authority for the Respondent to issue a development permit to itself, provided it meets the requirements of the bylaws. This is consistent with other jurisdictions.

[47] For purposes of Administrative law, an interested party is recognized as those who have a legally recognized private interest. The Commission has not heard any evidence that any of the Councillors alleged to be "interested parties" have a recognized private interest in the development of the Respondent's proposed town hall.

[48] Bad Faith, prejudgment bias, and violation of the principles of natural justice were other issues raised by the Appellants.

[49] The allegation of bad faith is both serious and difficult to prove. In Sara Blake, *Administrative Law in Canada*, Second Edition (Toronto and Vancouver: Butterworths) at page 83, the author states under the heading of Bad Faith:

"Bad faith is difficult to find. A decision maker who acts surreptitiously and without candour may be suspected of lacking good faith. A hasty decision pushed through without following the decision maker's usual practice of consultation and study may also be suspect. A decision that singles out one individual for different treatment may be questioned. A decision made for an improper purpose or on the basis of extraneous considerations may be evidence of bad faith. Although one of these factors alone may be insufficient, several factors together may admonish bad faith."

[50] The Commission does not find proof of any of these factors in the present case.

[51] The testimony of the two witnesses who appeared for the Appellants related to one public meeting held in September of 2005 regarding the Respondent's town hall project. The two are credible witnesses and the Commission accepts it was their impression that the opportunity did not exist for meaningful input into the debate about the project.

[52] However, the Commission does not believe that testimony provides sufficient evidence to prove the position of the Appellants that the Councillors in question were closed to any potential change in the proposal, nor that they demonstrated prejudgment bias, nor violated the principles of natural justice.

[53] It is not clear whether minutes of the September 2005 public meeting were kept, but none were offered as evidence. The meeting appears to have involved an extensive discussion over some period of time with a number of comments made by a number of participants.

[54] The meeting in question also occurred later in the process and after some changes had been made to the proposal. That meeting also led to a delay in the process which suggests the majority of councillors were open to at least some of the issues raised.

[55] The Commission recognizes that town councillors are often placed in challenging positions. They are questioned by residents on issues and expected to respond. Then, when they do respond, they are viewed by some as being prejudiced against one side of the argument. They are also faced with conflicting arguments and competing interests on issues. They are for the most part volunteers interested in community service who invest many hours of work toward that end. They cannot be expected to wrap every word or comment in the blanket of legal perfection.

[56] In the context of a public meeting, or even a conversation, it is natural to view comments through the screen of one's own beliefs or position. While one views a comment as reflecting a hard and fast position, another might consider it as testing the validity of an argument, or representing another view. Not every decision pleases every resident and the Commission takes the position the matter cannot be isolated to one statement but must be considered in the overall actions taken.

[57] The evidence of the Respondent's CAO indicates that the concept of a new town hall was not a sudden and inalterable decision. It appears that the matter was raised as early as five years before the specific plan was finalized. Reference was made to the need for such a facility in several official documents of the town including the Official Plan which went through a formal citizen input process.

[58] It is also clear the proposed town hall changed. The square footage of the tendered building was almost half the size of the building first proposed, 9,680 square feet vs. 18,000 square feet. By any standard that is a significant change. That change was accepted by council which suggests an interest in addressing citizens concerns.

[59] The building was also changed from a standard construction model to a more environmentally sensitive or green model. It was the testimony of the Respondent that this was done in response to public input and because the building would have lower operating costs. That would suggest some sensitivity to issues raised and the issue of operating costs.

[60] One of the Appellants testified that he in fact served on a committee established by the Mayor in response to public opposition and comments about the proposed building, the cost and impact on residents.

[61] There was also at least one delay in the project reflecting concerns over spiking energy costs, and the potential economic fall out of those increasing costs, resulting from the hurricane disasters in the United States in 2005.

[62] It is also true that projects have promoters or otherwise these projects would never be completed. If one were to take the position that councillors have to be completely passive about every matter relating to the administration of the Respondent then it would be almost impossible for them to carry out their legislated duties and responsibilities.

[63] The Appellants are so dissatisfied with the actions of a number of the Respondent's Councillors that they request the Commission to not only quash the development permit but instruct the Respondent to hold a plebiscite on whether or not the town hall project should proceed. The request is itself a demonstration of the level of frustration felt by some residents.

[64] The Commission has reviewed the legislation under which it operates and can not find any legal basis upon which to make such an order, even if the Commission could be convinced that such an order was appropriate.

[65] The Respondent must operate within the legislative framework governing its operations and the bylaws that flow from that legislation. While the matter under appeal relates to a controversial development, the Commission has not been provided with evidence that would lead it to conclude the Respondent abused that authority.

[66] The Commission appreciates the views of the various participants in the debate, but it is not a debate for the Commission to judge. The Commission must act within the bounds of the legislation that governs its jurisdiction, and for this appeal that relevant jurisdiction relates to Section 28 (1) of the **Planning Act** and "the administration of the regulations or bylaws made pursuant to the powers conferred by this Act".

[67] The Commission has not been presented with evidence that would lead it to conclude that the regulations or bylaws were inappropriately administered.

[68] The Commission finds and determines that the development permit approved by the Town Council of the Town of Cornwall on January 18, 2006 and the resulting development permit issued January 23, 2006 were issued in compliance with the provisions of the bylaw and are valid. The appeal is therefore denied.

4. Disposition

[69] An Order denying the appeal will therefore issue.

IN THE MATTER of an appeal by Ernest Gallant et al of a development permit decision of the Town of Cornwall dated January 18, 2006.

Order

WHEREAS Ernest Gallant, Phillip Acorn, David Bulger, Don Campbell and Marion Flood Jones (the Appellants) have appealed a decision of the Town of Cornwall (the Respondent), dated January 18, 2006 to approve development permit C-01-06 for the construction of a civic centre consisting of a town hall and library;

AND WHEREAS the Commission heard the appeal at a public hearing conducted in Charlottetown on Friday, March 30, 2006 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 and the development permit is confirmed.**

DATED at Charlottetown, Prince Edward Island, this 11th day of April, 2006.

BY THE COMMISSION:

Maurice Rodgerson, Chair

Weston Rose, Commissioner

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.

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