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

Docket LA05021
Order LA06-03

IN THE MATTER of an appeal by Peter Norton and Gary Rayner of a decision of the City of Charlottetown, dated August 8, 2005.

BEFORE THE COMMISSION
on Wednesday, the 12th day of April, 2006.

Brian J. McKenna, Vice-Chair
Weston Rose, Commissioner
James Carragher, 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 Peter Norton and Gary Rayner of a decision of the City of Charlottetown, dated August 8, 2005.

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Appearances & Witnesses

1. For the Appellants

Peter Norton
Gary Rayner

Witnesses:

Phil Wood
Jordan Hill
Arthur Jennings

2. For the Respondent

Counsel:

David W. Hooley, Q.C.

Witness:

Don Poole

3. For the Developer Avide Developments

Counsel:

Catherine M. Parkman

Witnesses:

Andrew McGillivary
Gary Richard
Stephen Davies

4. Members of the Public

Patrick O'Neil
Ed Benson

IN THE MATTER of an appeal by Peter Norton and Gary Rayner of a decision of the City of Charlottetown, dated August 8, 2005.

Reasons for Order

1. Introduction

[1] This is an appeal filed on August 26, 2005 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***) by Peter Norton and Gary Rayner (the Appellants). The appeal concerns a decision of the City of Charlottetown (the Respondent) dated August 8, 2005 approving an application by Avide Developments (the Developer) for two variances for a proposed condominium development (the development) at 1 Haviland Street, parcel number 335026, in Charlottetown. The variances consist of a height variance from the required 12 metres to approximately 14.4 metres and a lot area variance from the required 3,240 square metres to approximately 2,544 square metres.

[2] After due public notice and suitable scheduling for the parties, the Commission proceeded to hear the present appeal on October 31, 2005, January 16, 2006, February 23, 2006 and February 24, 2006.

[3] On September 7, 2005 Tim Banks filed appeal number LA05022 concerning the same decision of the Respondent. This appeal was then consolidated with the present appeal and was heard with the present appeal until Mr. Banks withdrew his appeal on February 3, 2006.

2. Discussion

Appellants' Position

[4] The Appellants provided detailed submissions orally and also filed a written text of these submissions as Exhibit A10. Highlights of the Appellants' submissions follow.

- The height, density, building massing and architectural style of the development are inappropriate for the proposed location.

- The development does not provide underground parking and accordingly, the Respondent was in error in granting a 20% allowance for lot area pursuant to section 4.44 of the Respondent's Zoning and Development Bylaw (the Bylaw). Accordingly, rather than the stated lot area variance of 6.2%, the true lot area variance is 26.2%.

- As the parking garage is above ground and not under ground, the elevation to the top of the development would be 19.19 metres. Therefore, rather than the stated height variance of 19.2%, the actual height variance amounts to 60%.

- The development would have a dramatic impact on viewscapes both from the City to the water, and from the water to the City. This clearly contravenes section 3.5(3) of the Respondent's Official Plan.

- The Respondent's written notice to nearby residents of July 19, 2005 very significantly misstated and misrepresented the impact of the development.

- The Respondent should have treated the development as a rezoning matter, rather than as a variance matter. Had the matter been dealt with on the basis of a rezoning, the public would have had the opportunity to comment on the development before the Respondent made its decision to approve the development.

- The Respondent's interpretation and use of section 4.29 of the Bylaw is highly inappropriate and in all likelihood null and void.

[5] The Appellants request that the Commission allow the appeal and set aside the Respondent's decision to grant the height and lot area variances.

Respondent's Position

[6] Highlights of the Respondent's submissions follow.

- The Respondent's July 19, 2005 notice to nearby residents did not misrepresent the facts. In fact, it included a profile drawing showing various heights for the development. The height referenced in the variance application relates to the calculation of grade and height as defined in the Bylaw.

- While section 4.44 of the Bylaw refers to underground parking, in practice many "underground" parking facilities are at least partially above ground. What matters is that the parking is placed beneath the building, thus eliminating the need for a parking lot beyond the building's surface. It is submitted that section 9 of the ***Interpretation Act***, R.S.P.E.I. 1988, Cap. I-8 is applicable and the term "underground" should not be literally interpreted.

- Sections 4.28 and 4.29 of the Bylaw provide for variances and variances are a fairly common feature of municipal planning.

- Viewscape is defined in the Bylaw and the viewscapes envisioned by the Offical Plan are based on specific public vantage points.

[7] The Respondent requests that the Commission deny the appeal and confirm the Respondent's August 8, 2005 decision to issue the height and lot area variances for the development.

Developer's Position

[8] Highlights of the Developer's submissions follow.

- Environmental reasons demand that the site cannot be excavated. The site must be capped and parking therefore must be under building, rather than underground.
- The proposed development is oriented in order to minimize the impact on the viewscape of the surrounding area.
- While a fourth storey was added to the proposed development, the architect lowered the ceilings of each story to minimize the impact on the developments overall height.

[9] The Developer requests that the Commission deny the appeal.

Members of the Public

[10] Patrick O'Neil and Ed Benson made brief presentations as members of the public. Mr. O'Neil expressed concern about the potential environmental impact upon the silverside fishery. Mr. Benson expressed concern about the right of the general public to access Charlottetown harbour. He submitted that public access to the harbour would be negatively affected by the development. Mr. Benson also expressed concern about the height and density of the proposed development given its location in a heritage area.

3. Findings

[11] After a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission to deny the appeal. The reasons for the Commissions decision follow.

[12] 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.*

[13] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the person or body appealed from. 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 person or body appealed from 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.

[14] 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 Respondent, followed the proper procedures as required in its Bylaw in making a decision to approve the requested variances; and

- Whether the proposed use for the land for which a variance has been sought has merit based on sound planning principles.

[15] With respect to procedural concerns, the Appellants argue that the 20% allowance for lot area contained in section 4.44 of the Bylaw ought not to apply because said section applies to "underground" parking, not under building parking. However, the Commission notes the mandatory nature of section 9 of the ***Interpretation Act***:

> 9. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Section 1(e) and (f) of the ***Interpretation Act*** makes it quite clear that said ***Act*** is applicable to Bylaws.

[16] The following definitions from the Bylaw are worthy of note:

3.88 "Grade" means the average levels of finished ground adjoining the exterior walls of the Building, except that localized depressions such as for vehicle or pedestrian entrances need not be considered in the determination of average levels of finished ground.

1. Established Grade means the elevation, as fixed by the municipality, of the centre line of the Street at the mid-point of the Front Lot Line.

3.97 "Height" means the vertical distance measured from average finished Grade to the highest point of the roof surface in the case of flat roofs, or the ridge of a gable, hip, or gambrel roof, and excluding such Structures as antennas, tanks, skylights, cupolas, elevator penthouses, chimneys, smoke stacks, steeples and spires.

3.200 "Viewscape" means the line of site from one or more vantage points that will permit a viewer to obtain a reasonably unobstructed view of a specific scene or location.

[17] Section 4.44 of the Bylaw reads as follows:

> 4.44 UNDERGROUND PARKING
>
> Where there is underground parking associated with a Development in a residential (R3 or R4) zone, the density of units on a Lot May be increased by 20% of the requirements set out for the zone (# of units x 20% = increase); Parking is required for the increased density.

[18] While the Respondent may wish to seriously consider revising the wording and definitions of its Bylaw to reflect the issue of "underground" versus "under building" parking, the Commission finds in the present appeal that the 20% allowance for lot area is applicable to the proposed development. The rationale of section 4.44 would seem to be to encourage developers to construct underground parking in order to reduce, or eliminate, the need for above ground parking which would intrude on available green space. Parking which is not underground, but is under the building, would likewise preserve green space and thus it would seem appropriate to interpret section 4.44 to apply to under building parking.

[19] The Appellants have raised concerns that the Respondent did not accurately calculate the height variance sought by the Developer and therefore the actual height variance is much higher than stated by the Respondent. In this regard, the Appellants contend that the Respondent's notice letter of July 19, 2005 is misleading. Upon a review of the Bylaw, the Commission is satisfied that the Respondent did follow the definitions of "Grade" and "Height" contained in its Bylaw in calculating the requested height variance.

[20] The Appellants submit that the Respondent should not have treated the matter as a variance under section 4.29 of the Bylaw and should have instead dealt with the matter by way of a change in zoning. The Commission rejects the argument that section 4.29 of the Bylaw is "…highly inappropriate and in all likelihood null and void". While rezoning to a higher density would likely have addressed the lot area requirements, and thus eliminated the need for a lot area variance, a height variance would still have been required as the maximum height without a variance is 12 metres for both the R3 and R4 zones.

[21] The Commission is of the opinion that the July 19, 2005 letter to residents could have been expressed more clearly and in a more informative manner. For example, it could have noted that the variances sought were calculated on the basis of definitions contained in the Bylaw. The letter could have then provided the definitions of grade and height contained in the Bylaw. The letter could have explained that the site would not be excavated and in fact, would be capped for environmental reasons. While technically correct according to the Bylaw, the Respondent's calculations could easily be misconstrued by people who are not familiar with the Bylaw.

[22] In hindsight the Respondent could have explained the impact of the proposed variances more clearly to the public. However, the Commission finds that, in making its decision to grant the variances, the Respondent met the first test previously referred to: that of following the proper procedures as required in its Bylaw.

[23] With respect to the second test, in a nutshell whether or not the development would have merit based on sound planning principles, the Commission notes that the Appellants presented evidence from a well known and respected professional planner. This evidence provides ample food for thought. However, Mr. Wood cannot be considered to be an expert witness in this matter as he, by his own admission, has an interest in the matter as an owner of nearby property, and therefore does not have the necessary lack of bias to give objective evidence.

[24] The proposed development will, by all accounts, be an imposing one. The Developer argues that the building was positioned on the lot in a manner such as to minimize its impact on viewscapes. However, the Commission notes that the Developer could not really have positioned the building differently given the lot's dimensions and shape. The Respondent argues that viewscapes only apply to specific public vantage points. However, from the perspective of the public, the development will have a major impact on the view to and from Charlottetown harbour.

[25] The evidence before the Commission does not support a finding that a scaling back of the height of the development, to the maximum height permissible without a variance, would significantly reduce the impact on the viewscape. The development is, from a pragmatic perspective, five stories high: the first story representing the under building parking garage and the remaining four stories utilized for residential units. Whether the development is practically speaking four stories high, or five stories high, will likely make little difference to the view enjoyed by members of the public looking toward Charlottetown Harbour, or the view of the City from the harbour or from the Town of Stratford across the harbour.

[26] Furthermore, a scaling back of the height of the building might possibly run contrary to sound planning principles if the Developer retained the same number of stories for the development. For example, it might be possible to build the development with the same number of stories without the need for a height variance by utilizing a flat roof. However, the appearance of such a building might very well clash with surrounding properties and permitting such less desirable architecture might then be considered to represent poor planning.

[27] The Commission is mindful of the evidence presented as to the environmental background of parcel 335026 upon which the development is proposed to be constructed. The Commission accepts the evidence that it would be likely impossible to excavate the site and that environmental containment by capping the site is likely the most feasible option.

[28] While the proposed development may not be the very best possible development for that parcel of land, the Commission is satisfied that the Respondent's decision to grant the height and lot area variances for this development was in accordance with sound planning principles.

[29] Accordingly, the appeal of the Respondent's August 8, 2005 decision to issue height and lot area variances is hereby denied.

[30] **ROSE, COMMISSIONER (Dissenting):** I dissent in part from the findings of the majority's Decision and Order for the following reasons.

[31] I concur with most of the reasoning of my colleagues and I concur with the finding on the density variance.

[32] However, I am of the opinion that the actual height variance will in fact exceed the variance stated by the Respondent. For this reason, I would allow the appeal of the height variance.

4. Disposition

[33] On the findings of the majority of the panel, an Order denying the appeal will therefore issue.

IN THE MATTER of an appeal by Peter Norton and Gary Rayner of a decision of the City of Charlottetown, dated August 8, 2005.

Order

WHEREAS the Appellants Peter Norton and Gary Rayner have appealed a decision of the City of Charlottetown, dated August 8, 2005;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on October 31, 2005, January 16, 2006, February 23, 2006 and February 24, 2006 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.

DATED at Charlottetown, Prince Edward Island, this 12th day of April, 2006.

BY THE COMMISSION:

Brian J. McKenna, Vice-Chair

Weston Rose, Commissioner
(Dissenting)

James Carragher, 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.*

IRAC141A(99/2)