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

Docket LA06002
Order LA06-06

IN THE MATTER of an appeal by Carol Corbett et al of a decision of the Town of Stratford, dated February 3, 2006.

BEFORE THE COMMISSION
on Wednesday, the 31st day of May, 2006.

Brian J. McKenna, Vice-Chair
Kathy Kennedy, 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 Carol Corbett et al of a decision of the Town of Stratford, dated February 3, 2006.

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Appearances & Witnesses

1. For the Appellants

Representatives:

Carol Corbett
Bob Sherren

Witnesses:

Bea Sherry
Jim Sherren
Robert Hughes
Pat Vanouwerkerk
Rosemary Gallant

2. For the Respondent

Counsel:

John K. Mitchell, Q.C.

Witness:

Dale MacKeigan

3. For the Developer APM group

Tim Banks

IN THE MATTER of an appeal by Carol Corbett et al of a decision of the Town of Stratford, dated February 3, 2006.

Reasons for Order

1. Introduction

[1] This is an appeal filed on February 22, 2006 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 Carol Corbett, Elwin Corbett, Allie Donovan, Rosemary Gallant, Mervin MacKenzie, Barbara MacKenzie, Bob Sherren, James Sherren, Mary Sherren, Bea Sherry, James Sherry, John Vanouwerkerk and Pat Vanouwerkerk (the Appellants) appealing a decision of the Town of Stratford (the Respondent).

[2] On February 3, 2006, the Respondent approved an application by the APM group (the Developer) to rezone parcels 739003 and 790246 (the subject property) located near Dale Drive and Carole Drive from Planned Unit Residential Development Zone (PURD) to Highway Commercial Zone (C2).

[3] After due public notice and suitable scheduling for the parties, the hearing commenced on April 19, 2006. The Appellants requested that the hearing be adjourned to a later date as they had computer problems resulting in an extensive loss of information which they had prepared for the appeal. The Respondent was not opposed to this request. The hearing resumed on May 1, 2006 and was concluded on May 2, 2006.

2. Discussion

Appellants' Position

[4] The Appellants submitted numerous documents, including written submissions, at the hearing. Highlights of the Appellants' oral submissions follow.

- There is no evidence that the Respondent reviewed and discussed whether the proposed rezoning application was in conformity with the Respondent's Official Plan.

- The Respondent's planning staff and Chair of Planning Board raised concerns at the December 6, 2005 meeting of Planning Board that the process was proceeding too fast and that staff needed more time to review the application and provide advice to Planning Board.

- The Respondent's Official Plan was last revised in 2003. What factors have lead to a need to rezone the subject property two or three years later? It is submitted that there is no need for the present land owner to rezone from PURD to C2. It is also submitted that there are a number of unused properties in the Respondent's core area that are already zoned for commercial use.

- Policies PC-1, PC-4 and PC-5 of the Official Plan are relevant to the present matter. PC-1 requires significant buffering between highway commercial and residential areas. PC-4 notes that close proximity of commercial uses to residential neighbourhoods will be avoided in order to minimize land use conflicts. Policy PC-5 defines the Respondents core area and, by this definition, the subject property is included within the core area. It is further stated that the core area should not be developed in an unplanned or ad hoc manner.

- The January 5, 2006 public meeting was rushed. While the minutes seem to reflect a lengthy presentation from the Appellants, the Appellants were actually not permitted to give an oral presentation. A copy of their written presentation was requested and was reproduced in the minutes for the meeting.

- The Respondent's Zoning and Subdivision (Development) Bylaw #17 (the Bylaw) provides adjacency requirements between commercial C1 and C3 zones and residential areas. However, no such adjacency requirements are provided with respect to C2 zones. It is submitted that this is not an oversight: rather, that it was understood that a C2 zone would not be placed adjacent to a low density residential area.

- Both the Mayor and Deputy Mayor are related to a landowner who owns land where the proposed road is planned to go through. It is submitted that this amounts to a conflict of interest. While these officials could have opted to refrain from comment or voting, they did not choose to do so.

- The rezoning application was not date stamped. Presumably it was filed in early December 2005. However, it is not until March 2006 that a receipt was issued for the application fee which must accompany the application.

[5] The Appellants request that the Commission allow the appeal and quash the Respondent's February 3, 2006 decision to rezone the subject property from PURD to C2.

Respondent's Position

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

- Prior to the rezoning, there were four properties in the area which abutted the C2 zone. With the rezoning, the C2 zone will be no closer to existing residences than before the rezoning.

- The Official Plan does not guarantee a specific sized buffer. Parcel 790253 will, however, remain zoned PURD thus providing buffering between the existing R2 area and the subject property.

- Some of the Appellants' concerns do not arise out of the rezoning. These concerns, such as noise, light and parking issues would be relevant at any future building permit stage.

- While the Respondent's Official Plan is a recent document, a major change has occurred since that time which warrants a rezoning. That major change is that, after years of consideration, the Province and the Respondent have agreed on the location for a new intersection.

- The Respondent followed the required process for the rezoning application. A public meeting was held on January 5, 2006. This meeting was advertised in a local newspaper. The Respondent's Bylaw requires notification be mailed to property owners whose properties are within 200 feet of the subject property. The Respondent went beyond this requirement and notified property owners within 500 feet. A sign notifying the public of the proposed rezoning was posted on the subject property. When this sign disappeared, the Respondent reposted the sign.

- The allegations of conflict of interest do not pertain to the decision to rezone the subject property. The decision to approve the location of the new intersection is not the subject of the present appeal.

- The Respondent submits that members of its Council did direct their minds to the Official Plan before making a decision on the rezoning of the subject property.

[7] The Respondent requests that the Commission deny the appeal and confirm the Respondent's decision to rezone the subject property.

Developer's Position

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

- One of the Appellants, Bob Sherren, does not live in the area. The Developer operates a business in the neighbourhood and has been involved in the community.

- For the last five years, the Respondent and the Developer have been trying to resolve the intersection issue. Numerous meetings have been held, and the Developer has addressed issues raised by the Appellants.

- There is no evidence that the rezoning would decrease property values. It is the experience of the Developer that nearby property values often increase in value when land is rezoned to permit retail development.

[9] The Developer requests that the Commission deny the appeal and confirm the Respondent's decision to rezone the subject property.

3. Findings

[10] After a careful review of the evidence, the information provided by the parties, and the applicable law, it is the decision of the Commission to allow the appeal and quash the Respondent's decision to rezone the subject property for the reasons that follow.

[11] Appeals under the ***Planning 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.*

[12] 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 ***Planning Act***, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[13] 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 rezoning; and

- Whether the proposed rezoning of the land has merit based on sound planning principles.

[14] A review of the evidence before the Commission suggests that the Respondent rushed its consideration of the Developer's application to rezone the subject parcel. While some of the procedural errors which resulted are of a minor nature, they are part of a pattern which suggests that the application did not receive a thorough consideration by the Respondent.

[15] The evidence reveals that the rezoning application under appeal was not date stamped. There is no evidence that the required fee was paid at the time of application. The application was dated Friday December 2, 2005 and the subject matter was presented to the Respondent's Planning Board on Tuesday December 6, 2005. Accordingly, it would appear that the application was received either on December 2, 2005, or very shortly thereafter. A receipt for the sum of $300.00 was issued to the Developer by the Respondent on March 14, 2006. Unfortunately, there is no indication on this receipt when the Respondent received this application fee.

[16] The Commission is of the opinion that the Respondent's staff, through no fault of their own, were rushed through the rezoning process. In the minutes of the December 6, 2005 meeting of Planning Board, it is stated on pages 3 and 4:

> *The Town Planner noted that he has concerns and issues that the Town should deal with before we go to a public meeting. The physical, social, economic and environmental aspects need to be considered and addressed. If we have a better opportunity to understand the issues and provide answers, then bringing the re-zoning application forward can assure the public that their concerns are being recognizes [sic] and addressed. The Town Planner believes that you can lessen the possibility of an appeal if we take steps up front via due diligence and answer as many questions as possible. Some issues on the table need to be addressed and identified more clearly and to agree-upon development and financial responsibilities. The Town agrees with APM and likes the idea of commercial development but there are some questions and concern [sic] that need to be addressed and if the Town, APM, Province and Residents could meet and discuss these issues and provide answers before the public meeting it may be a benefit to all parties.*
>
> *…*

It is further stated on pages 5 to 7 of the December 6, 2005 minutes of Planning Board:

> *The Town Planner noted that, as I understand it, if we don't fulfill what APM wants they say that they are not coming here. Then we need to have the answers to a lot of questions before we go to the Public with a re-zoning process.*
>
> *The Planning Technician noted the following list includes some of the residents and town's issues that need answers:*
>
> - *Storm water*
> - *Dale Drive re-alignment and cul-de-sac*
> - *Transportation design/pattern*
> - *Buffer from commercial*
> - *Impact on property/affected properties*
> - *Taxpayer cost*
> - *Land use changes to from residential to public road*
> - *Old Home Hardware site*
> - *Re-zoning process*
> - *Gov't responsibility – survey, legal, land, infrastructure*
> - *North side alignment*

- *Impact on land purchase*
- *Impact on development*
- *Traffic impact analysis for this and any options*

The Town Planner and Planning Technician presented a re-design to the APM site plan (shown on a [sic] overhead projector) to the Planning Members. They noted that the Town needs to look at the best internal circulation pattern for the whole area. This is a major project with the potential for extensive impact on businesses and residents in the area and we need to take time to ensure that the project is done right.

Mayor Jenkins noted that he has some concerns that this project has been going on for four years and we started public meeting in June. If we put forward a new option(s) to APM and T&PW, it may set us back in the whole process.

Deputy Mayor Jenkins noted that he is very much in favor of the re-zoning and we should proceed with the request.

The Town Planner noted that the Town has to agree on the design and also agree on who's [sic] responsibility it is to purchase the land and cover the costs. Once those and other questions are answered we can have a comfort level to go to a public meeting.

Planning Technician noted that if the residents have their questions answered in advance they are less likely to appeal the process.

Mayor Jenkins noted that the residents will probably appeal because we are moving the commercial zone closer to the residential zone and they will appeal on that basis.

The C.A.O. noted that we did go through a process with the business owner and residents and we owe it to them to have their issues answered.

Councillor McMillan noted that she realizes this issue is putting a lot of pressure on staff and they have concerns that there may not be enough time to prepare for the public meeting. The less time that staff have to prepare for the meeting the greater the risk that the application may be appealed at IRAC.

After a lengthy discussion Committee members agreed to set January 5, 2006 as the Public Meeting date for the re-zoning application from the APM group.

[17] The first part of the Commission's two part test is whether the Respondent followed the proper procedures set out in its Bylaw. Section 21 of the Respondent's Bylaw sets out the procedure to be followed for a rezoning. The evidence reveals that the receipt for the application fee was issued a few months after the application was filed. As the receipt did not indicate the date the funds were received, the record does not demonstrate compliance with section 21.1 (iii). However, that alone would appear to be only a minor technical error, given that the record does show that the funds were ultimately received at some point prior to March 14, 2006.

[18] Section 21.1 (iv) requires Planning Board to review the rezoning request and advise Council accordingly. Section 21.1 (v) then reads as follows:

> *Council retains the right to deny a re-zoning request – without holding a public meeting – if such request is deemed to be inconsistent with appropriate land use planning standards or the Official Plan. Should Council not proceed with a public meeting, the deposit as per Section 21.1 9iii) shall be returned to the applicant.*

[19] In considering an application for a rezoning, the Commission finds it imperative that the municipal decision maker review the Official Plan to ensure that the application is consistent with the relevant policies and objectives contained in the Official Plan. Unfortunately, nowhere in the record can the Commission find a written staff report presented to Planning Board or Council reviewing the application together with the relevant provisions of the Respondent's Official Plan. There was a suggestion at the hearing that the Respondent's staff reviewed the Official Plan orally with the Respondent's Council or Planning Board. However, the specifics of any such review are not revealed in the Respondent's minutes.

[20] Accordingly, the Commission finds that the Respondent has not met the first part of the Commission's two part test.

[21] As this appeal is a hearing *de novo*, the Commission has reviewed the Respondent's Official Plan in order to determine whether the rezoning of the subject parcel has merit based on sound planning principles. A portion of *Policy PC-1: Commercial Designations* contained in the Respondent's Official Plan reads as follows:

> *Highway Commercial activities include a range of commercial service activities which because of their relatively large scale, long hours of operation and heavy traffic generation must locate on the highest traffic location such as provincial arterial highways* ***and require significant physical buffering from residential areas.*** *Examples of such uses are service stations, auto sales and service facilities, lounges, motels and hotels.* (emphasis added)

[22] The introduction to *Policy PC-4: Highway Commercial* reads as follows:

> *Highway Commercial uses shall be located adjacent to the Trans Canada Highway to maximize visibility and opportunities for vehicular access.* ***Close proximity to residential neighbourhoods will be avoided in order to minimize land use conflicts.*** (emphasis added)

[23] The Official Plan is quite clear: significant physical buffering is required between Highway Commercial uses and residential areas and close proximity of Highway Commercial uses to residential neighbourhoods will be avoided. These are important portions of the Official Plan and appear to reflect some of the fundamental planning principles that the Respondents presented into evidence during the course of their cross-examination of the Respondent's planner.

[24] The Respondent emphasized in oral argument that the Official Plan does not guarantee a specific sized buffer and that parcel 790253 will remain zoned PURD thus providing buffering between the existing R2 area and the subject property.

[25] However, the Commission is not convinced that parcel 790253 is sufficiently large enough to provide significant physical buffering and to ensure that close proximity to the existing residential neighbourhood will be avoided.

[26] At the hearing, it was emphasized by the Appellants that the Respondent's Official Plan is a recent document, having been approved in December 2003. The Appellants argued that there were no changes in the intervening two years to justify a rezoning. The Respondent countered that there was a significant change: the location of a new exit and roadway had been agreed upon by the Respondent and the Province.

[27] While the location of the long sought new exit is a change realized since the adoption of the current Official Plan, the Commission is not convinced that the new exit would require a rezoning of the subject property.

[28] For these reasons, the Commission will allow the appeal and quash the Respondent's February 3, 2006 decision to rezone parcels 739003 and 790246 from Planned Unit Residential Development Zone (PURD) to Highway Commercial Zone (C2).

[29] The Appellants submitted that a conflict of interest occurred given that the property where the proposed road would run through is currently owned by a close relative of the Mayor and Deputy Mayor. The Commission notes that it is a rezoning of parcels 739003 and 790246 which is under appeal, not the creation of a new highway exit and roadway. However, as it appears that at least some of the impetus for the haste of the Respondent's rezoning process was as a result of a desire to move forward on the new highway exit and roadway, it would be prudent for the Mayor and Deputy Mayor to abstain from any future participation in discussions or voting.

[30] The Commission notes that many of the larger municipalities in the Province are now using a checklist type system to assist their staff, Planning Boards and Council in ensuring that all procedural steps are met. Based on the evidence before the Commission, it would appear that the Respondent does not have such a system. Such a system may be helpful to assist busy staff and councillors alike in ensuring that all procedural steps have been followed. The Commission has found such a system of great benefit to all parties in recent past hearings involving other municipal decision makers.

4. Disposition

[31] An Order allowing the appeal and quashing the Respondent's February 3, 2006 decision to rezone parcels 739003 and 790246 from Planned Unit Residential Development Zone (PURD) to Highway Commercial Zone (C2).
will therefore issue.

IN THE MATTER of an appeal by Carol Corbett et al of a decision of the Town of Stratford, dated February 3, 2006.

Order

WHEREAS Carol Corbett, Elwin Corbett, Allie Donovan, Rosemary Gallant, Mervin MacKenzie, Barbara MacKenzie, Bob Sherren, James Sherren, Mary Sherren, Bea Sherry, James Sherry, John Vanouwerkerk and Pat Vanouwerkerk (the Appellants) have appealed a decision of the Town of Stratford (the Respondent), dated February 3, 2006;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on April 19, May 1 and May 2, 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 allowed.**

2. **The Respondent's February 3, 2006 decision to rezone parcels 739003 and 790246 from Planned Unit Residential Development Zone (PURD) to Highway Commercial Zone (C2) is hereby quashed.**

DATED at Charlottetown, Prince Edward Island, this 31st day of May, 2006.

BY THE COMMISSION:

Brian J. McKenna, Vice-Chair

Kathy Kennedy, 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.*

IRAC141A(99/2)