



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

**Docket LA06003 and
LA06004
Order LA06-07**

IN THE MATTER of appeals by David
Corney and Gregg Guptill of a decision of the
City of Summerside, dated February 20,
2006.

BEFORE THE COMMISSION
on Thursday, the 15th day of June, 2006.

Brian J. McKenna, Vice-Chair
Kathy Kennedy, Commissioner
Anne Petley, Commissioner

Order

Compared and Certified a True Copy

(sgd.) Philip J. Rafuse
Land, Corporate and Appellate Services Division

IN THE MATTER of appeals by David Corney and Gregg Guptill of a decision of the City of Summerside, dated February 20, 2006.

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IN THE MATTER of appeals by David Corney and Gregg Guptill of a decision of the City of Summerside, dated February 20, 2006.

Appearances & Witnesses

1. **For the Appellant David Corney**
David Corney

2. **For the Appellant Gregg Guptill**
Gregg Guptill

3. **For the Respondent**
Counsel:
Krista J. MacKay
Witness:
Thayne Jenkins

4. **For the Developers**
Ane Huestis
Nicolle Morrison

IN THE MATTER of appeals by David Corney and Gregg Guptill of a decision of the City of Summerside, dated February 20, 2006.

Reasons for Order

1. Introduction

[1] Appeal LA06003 is an appeal filed on March 10, 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 David Corney (the Appellant Corney) appealing a decision of the City of Summerside (the Respondent).

[2] Appeal LA06004 is an appeal filed on March 10, 2006 with the Commission under section 28 of the *Planning Act* by Gregg Guptill (the Appellant Guptill) appealing a decision of the Respondent.

[3] The above noted appeals both concern the same February 20, 2006 decision of the Respondent to rezone 320 Convent Street from R3 Medium Density Residential to R4 High Density Residential.

[4] The Respondent's decision to rezone 320 Convent Street is related to the proposed development of a five storey, 39 unit condominium development planned by Ane Huestis and Nicolle Morrison (the Developers).

[5] In an earlier decision of the Commission, Order LA04-08 (which was subject to requirements which were later satisfied as noted in Order LA05-03), the Commission denied appeals of a rezoning of several parcels adjacent to 320 Convent Street. In Order LA04-08, the Developers had sought the rezoning to permit a five storey, 35 unit condominium development.

[6] Appeals LA06003 and LA06004 were consolidated and, after public notice, the appeals were heard by the Commission at a public hearing on May 3, 2006.

2. Discussion

Appellant Corney's Position

[7] Mr. Corney presented oral testimony and submissions at the hearing. He also filed with the Commission a copy of the text of his testimony. Highlights of his testimony and submissions follow.

- The Appellant Corney in 2005 built a new home on 332 Convent Street, adjacent to the recently rezoned lot. With the rezoning of 330 Convent Street, there will be no “buffer zone” between his single family residence and a five storey, 39 unit condominium. This represents a further intrusion of the R4 zone into an area zoned for R3.
- The Respondent’s Official Plan refers to a gradation of residential densities with higher density uses located around the North Granville and downtown areas. These would be better locations for a five storey residential development. The Appellant Corney is of the opinion that the Respondent is not honouring the policies contained within its Official Plan.
- 46 acres of land was recently rezoned for high density residential use. There is presently ample land available for high density residential housing development in Summerside.
- It is the position of the Appellant Corney that the wording of the Official Plan restricts condominium ownership only for areas currently zoned for mobile homes.

[8] The Appellant Corney requests that the Commission allow his appeal and quash the Respondent’s decision to rezone 320 Convent Street.

Appellant Guptill’s Position

[9] Mr. Guptill presented oral testimony and submissions at the hearing. He filed a written text of his submission. Highlights of his submissions follow.

- The Official Plan provides for individual ownership of semi-detached and row houses. The Official Plan does not provide a policy enabling condominium tenure for apartment buildings.
- While 320 Convent Street by itself is not within the Respondent’s heritage area, a portion of the new lot created in part from 320 Convent Street is within the heritage area. A heritage impact assessment should have been conducted but this was not done.
- This rezoning fails to enhance certainty for private investment. Spot zoning, the increase in density and the sheer mass of the proposed structure undermines private and public certainty by not promoting a comprehensive strategy in the manner dictated by the objectives and policies of the Official Plan.
- The rezoning of 320 Convent Street creates an unnecessary increase in R4 land inventory in Summerside. Recently, over 40 acres of land was rezoned to R4.
- The new proposal exceeds the limitations set forth in Order LA04-08. The parking garage will protrude at least four feet above grade and there will be increased shadowing on neighbouring properties.

- Planning Board's motion to enable the rezoning to proceed to Council was seconded by the Respondent's Mayor. The Mayor is an *ex officio* member of Planning Board and by definition, *ex officio* committee members are non voting. The motion was improperly seconded and thus the vote was null and void. Therefore there was a procedural failure in the Respondent's process to approve the rezoning.

[10] The Appellant Guptill requests that the Commission allow his appeal and quash the Respondent's decision to rezone 320 Convent Street.

Respondent's Position

[11] The Respondent presented the testimony of its Development Officer at the hearing. Highlights of the Respondent's submissions follow.

- The purpose of the rezoning was to add a portion of a parcel to the land previously rezoned. The issue of sound planning was already considered and decided in Order LA04-08. The proposal for placing a high density condominium apartment in this area of Summerside was approved almost two years ago.
- No significant changes will result to the proposed development. The footprint, length, height and width of the proposed five storey condominium development will be the same as that considered in Order LA04-08. The addition of the remaining portion of 320 Convent Street will allow the proposed building to be turned sideways, with increased setbacks and the addition of a portico. The increase in units from 35 to 39 results from changes to the floor plan rather than an increase in the size of the proposed building.
- 320 Convent Street is not in a heritage zone, no heritage building was on the property and thus a heritage study was not required.
- The Respondent correctly followed its procedures in approving the rezoning. The term *ex-officio* does not mean non-voting and it was proper for the Mayor to second a motion of Planning Board and vote on said motion.
- While there may not be a specific policy in the Official Plan for condominium developments, there is no policy for many other types of dwellings. Section 6.7 of the Official Plan does refer to condominium arrangements.

[12] The Respondent requests that the Commission deny both appeals.

[13] The Developers did not offer testimony or present submissions at the hearing.

3. Findings

[14] 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 these appeals. The reasons for the Commission's decision follow.

[15] 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.*

[16] In previous appeals, including the appeals that were the subject of Order LA04-08, 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.

[17] The Commission finds that the above-cited principle, originally applied to decisions concerning building or development permits, and later applied to applications for variances, applies equally where a municipal decision making body, such as the Respondent's council, approves an application for rezoning pursuant to its Zoning Bylaw. Thus, 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 use for the rezoning has merit based on sound planning principles.

[18] In Order LA04-08 the Commission denied previous appeals of a rezoning of several parcels, subject to the Respondent correcting procedural errors. The Respondent did, in fact, correct these errors as noted in Order LA05-03.

[19] In the Respondent's previous rezoning decision (which was the subject of Order LA04-08) several parcels, including a portion of parcel number 304824, also known as 320 Convent Street, were rezoned from R3 to R4. In the present appeal, the Appellants have appealed the decision of the Respondent to rezone the remainder of 320 Convent Street.

[20] The evidence before the Commission indicates that the proposed condominium development has undergone minor changes from that considered in 2004. With the exception of the addition of a portico, the dimensions of the proposed building remain the same. While four additional units have been planned, this increase in the number of units is based on a reconfiguration of the floor plan: simply put; more, smaller units. The proposed building has also been "turned around"; with the building now proposed to front on Notre Dame Street, rather than Central Street.

[21] The Commission finds that there are no errors in procedure concerning the process leading up to, and including, the Respondent's February 20, 2006 rezoning decision of 320 Convent Street.

[22] The Appellant Guptill raised the issue of an error in the seconding of a motion before Planning Board. The Commission notes that the Respondent's Bylaw SS-04 Committee Bylaw refers to the Mayor as "*ex-officio*", while both the Chief Administrative Officer and the Director of Technical Services are "*ex-officio* – non-voting". The Commission is satisfied that it is the clear intention of the Committee Bylaw that the Mayor is a voting member of the Technical Services Committee (Planning Board).

[23] Further, it would appear that the intended meaning of *ex officio* in the Respondent's Committee Bylaw is in step with the legal understanding of the term. In Black's Law Dictionary, 6th Edition, *ex officio* is defined as:

Ex officio. From office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer which are not specifically conferred on him, but are necessarily implied in his office; these are ex officio. Thus, a judge has ex officio the powers of a conservator of the peace.

[24] Accordingly, the Commission finds that there was no error in the seconding of the motion before Planning Board.

[25] With respect to sound planning principles, the basic concept of the proposed development was already accepted` in Order LA04-08. The changes, as noted previously, are minor. There are no details on the shadowing changes which would result from the changes of the proposed development. Setbacks and lot density appear to be improved with the most recent proposal, which incorporates all of 320 Convent Street. However, such matters can be more fully considered at the building permit stage along with other specific details of the proposed development.

[26] For these reasons, the appeals are hereby denied.

4. Disposition

[27] An Order denying the appeals will therefore issue.

IN THE MATTER of appeals by David Corney and Gregg Guptill of a decision of the City of Summerside, dated February 20, 2006.

Order

WHEREAS David Corney and Gregg Guptill have appealed a decision of the City of Summerside, dated February 20, 2006;

AND WHEREAS the Commission heard these appeals at a public hearing conducted in Charlottetown on May 3, 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 appeals are denied.

DATED at Charlottetown, Prince Edward Island, this 15th day of June, 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)