



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

**Docket LA06012  
Order LA07-02**

**IN THE MATTER** of an appeal by Gregg  
Guptill and John Moore of a decision of the  
City of Summerside, dated August 18, 2006.

**BEFORE THE COMMISSION**  
on Tuesday, the 9th day of January, 2007.

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

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# Order

Compared and Certified a True Copy

(sgd.) Philip J. Rafuse

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Land and Appeals Officer  
Land, Corporate and Appellate Services Division

**IN THE MATTER** of an appeal by Gregg  
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# Appearances & Witnesses

**1. For the Appellants**

**Gregg Guptill (for himself)**  
**Barry Copeland (representative for John Moore)**

**2. For the Respondent**

**Counsel:**

**Krista MacKay**

**Witnesses:**

**Murray Pinchuk**  
**Thayne Jenkins**  
**John Hastings**

**IN THE MATTER** of an appeal by Gregg Guptill and John Moore of a decision of the City of Summerside, dated August 18, 2006.

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# Reasons for Order

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## 1. Introduction

[1] This is an appeal filed on September 11, 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 Gregg Guptill and John Moore (the Appellants).

[2] The Appellants are appealing an August 18, 2006 decision of the City of Summerside (the Respondent) to issue building permit 2006-7-0189 to 6410448 Canada Inc. (the Developer) for a condominium development (the development) to be located at 301 Notre Dame Street in Summerside.

[3] Previously, in Order LA06-07, the Commission denied two appeals concerning the Respondent's decision to rezone 320 Convent Street related to the proposed development of a five storey, 39 unit condominium development planned by Ane Huestis and Nicolle Morrison. 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 the present appeal, the development is proposed to be constructed on these rezoned parcels.

[4] Order LA06-11 was recently issued by the Commission to consider the status of two earlier appeals relating to an earlier building permit concerning the development. In Order LA06-11, building permit #2005-0554 dated June 3, 2005 and the related June 1, 2005 Development Agreement were found to be no longer valid and appeal dockets LA05012 and LA05020 were dismissed.

[5] After due public notice, the present appeal was heard by the Commission at a public hearing on October 24, 2006.

[6] At the hearing, Ane Huestis and Nicolle Morrison were present to observe the process on behalf of the Developer; however, they did not participate.

## 2. Discussion

### Appellants' Position

[7] In addition to the Appellants' Notice of Appeal (Exhibit A1), the Appellants filed Exhibit A2, a tabbed binder of documents. The Appellant Moore filed Exhibit A3, a written submission, prepared by his representative Mr. Copeland, and this submission was read into the record. The Appellants also presented oral submissions, highlights of which are summarized below.

- The mass and density of the proposed development is too large. Adding one extra small lot does not mitigate the mass of the building.
- The height of the under building parking portion of the proposed development will rise above street grade. The Appellants submit that it will not merely be 12 to 18 inches above grade. Rather, it is submitted that this "underground" structure will actually rise 4.5 to 5.5 feet above street grade at the southwest corner. By contrast, the neighbouring lot owned by Mr. Corney rises only 0.5 to 1 foot above street grade. The proposed development will come within 1 metre of Mr. Corney's lot. The Appellants contend that this will give rise to a storm water drainage problem.
- The new 2006 Official Plan contains no policy whatsoever pertaining to condominium tenure. Section 6.7 of the old 1998 Official Plan is no longer present in the new 2006 Official Plan.
- The proposed development is not within the "downtown" as newly defined in section 7.2 of the 2006 Official Plan.
- There is no evidence that the lot consolidation for the proposed development actually occurred.

[8] The Appellants request that the Commission allow the appeal and quash building permit 2006-7-0189.

### Respondent's Position

[9] Highlights of the Respondent's oral submissions are summarized below.

- The proposed development is a similar use to an apartment building with many units in the structure, common hallways and a common entrance. The proposed development is considered a condominium for ownership purposes.
- The Respondent's building inspector reviewed the National Building Code and the proposed development meets the requirements of that Code. Plans have been filed by professionals, each certified by the professional who has prepared the plan.
- The 1998 Official Plan does not apply to the proposed development. The proposed development is consistent with the 2006 Official Plan.

- Street grade is not a term considered in the Zoning, Building or Subdivision and Site Development Bylaws. “Grade” is defined in the Zoning Bylaw.
- The various parcels utilized for the proposed development have, in fact, been consolidated. This has been confirmed by a review at the Prince County Registry of Deeds.

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

### 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 Commission's decision follow.

[12] As stated in Order LA06-07, which dealt with the Respondent's rezoning decision required for the proposed development, and in numerous other appeals, the Commission has found that it does have the power to substitute its decision for that of the decision maker. 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 decision maker 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 Appellants requested in their Notice of Appeal that the Commission, as part of the requested remedy, quash the development agreement related to building permit 2006-7-0189, as well as the building permit itself. The Respondent requested that the reference to the development agreement be struck out, as no appeal of that document was filed.

[14] As a preliminary matter at the hearing, the Commission orally quashed the appeal of the development agreement. The development agreement, by itself, is not a “decision” within the meaning of subsection 28(1) of the **Planning Act**. Rather, a development agreement is a legally binding contract between parties, in this case between the Respondent and the Developer. However, each case must be considered on its own facts. In the present appeal, the development agreement is strongly linked to the building permit. Thus, in the event the building permit was to be quashed, the development agreement, operating in isolation, could not allow the proposed development to proceed.

[15] The Commission notes that the Respondent's 2006 Official Plan came into effect as of July 5, 2006, the Ministerial signing date. The development agreement was signed on July 18, 2006 and was registered the following day. The building permit was issued on August 18, 2006. Accordingly, the Commission finds that the 2006 Official Plan applies to this appeal.

[16] The Commission notes that the issues of the mass and density of the proposed development were previously considered and decided in earlier appeals.

[17] The Appellants expressed concern about the height above “street grade” of the under building parking facility associated with the proposed development. These concerns are raised particularly for the feared impact of storm water runoff onto an adjacent parcel or parcels.

[18] “Street grade” is not defined in the Respondent’s Zoning Bylaw. However, “grade” is defined under section 45 of that Bylaw as:

*GRADE means the highest among the average, finished ground levels around each respective **main wall** of a building, excluding consideration of local depressions on the ground, such as for vehicle or pedestrian entrances.*

[19] There is no indication in the evidence that the Respondent erred in the calculation of grade parameters when it issued the building permit for the proposed development. The Appellants argue that “street grade” is the relevant criterion for assessing the impact of storm water runoff. Their contention may have merit from an engineering perspective, and may be a valid consideration in another forum should an issue with runoff ever arise. However, in the present appeal, the Respondent has relied upon the certified plans prepared by professionals in their respective fields. The Respondent followed the grade parameters based on the definition of “grade” contained in the bylaw. The Respondent is not obligated to second guess the certified plans of professionals when administering its bylaws.

[20] The Commission finds that a “condominium” is not a type of building. Rather, it is a form of ownership or “land tenure”. The **Condominium Act** R.S.P.E.I. 1988, Cap. C-16, enables this form of land tenure and the absence, in the Respondent’s Official Plan or its various bylaws, of a “policy” or other directives on the ownership arrangements for real property ought not to jeopardize a building permit.

[21] It does appear that the proposed development is not in the “downtown” as defined in section 7.2 of the Respondent’s 2006 Official Plan. However, section 7.2 deals with commercial development. The proposed development is a high density residential development. Further, this argument is ultimately irrelevant as the zoning status of the proposed residential development has previously been decided by the Commission.

[22] The Appellants maintain that there is no evidence the parcels required for the proposed development have been consolidated. The Respondent states that consolidation of these parcels has occurred and this document is on file at the Prince County Registry of Deeds. The Appellants did not provide evidence to challenge this statement.

[23] The Commission notes that the Respondent’s building inspector testified that the various plans, certified by professionals in their various fields, meet the requirements of the Respondent’s bylaws and the National Building Code.

[24] The Commission finds that there is no evidence that the Respondent did not follow the proper procedures or apply sound planning principles in considering this building permit application. The zoning for the proposed project, and for that matter, the concept of this project, was previously considered and subjected to appellate scrutiny.

[25] For these reasons, this appeal is denied.

## **4. Disposition**

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



**IN THE MATTER** of an appeal by Gregg Guptill and John Moore of a decision of the City of Summerside, dated August 18, 2006.

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# Order

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**WHEREAS** Gregg Guptill and John Moore have appealed a decision of the City of Summerside, dated August 18, 2006;

**AND WHEREAS** the Commission heard the appeal at a public hearing conducted in Charlottetown on October 24, 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.

**DATED** at Charlottetown, Prince Edward Island, this 9th day of January, 2007.

**BY THE COMMISSION:**

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Brian J. McKenna, Vice-Chair

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Kathy Kennedy, Commissioner

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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.*

IRAC141AA(2006/10)