



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

**Docket LA09011
Order LA09-10**

IN THE MATTER of an appeal by
Joseph Dyck of a decision of the Town of
Kensington, dated May 28, 2009.

BEFORE THE COMMISSION
on Friday, the 23rd day of October, 2009.

Allan Rankin, Vice-Chair
Gordon McCarville, Commissioner
Anne Petley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by
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Kensington, dated May 28, 2009.

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IN THE MATTER of an appeal by
Joseph Dyck of a decision of the Town of
Kensington, dated May 28, 2009.

Appearances & Witnesses

1. For the Appellant Joseph Dyck

Joseph Dyck

2. For the Respondent Town of Kensington

Counsel:

Stephen McKnight, Q.C.

Witnesses:

**Geoff Baker
Rodney Mann**

IN THE MATTER of an appeal by
Joseph Dyck of a decision of the Town of
Kensington, dated May 28, 2009.

Reasons for Order

1. Introduction

[1] The Appellant Joseph Dyck (Mr. Dyck) has filed an appeal 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*). Mr. Dyck's Notice of Appeal was received on June 18, 2009.

[2] This appeal concerns a May 28, 2009 decision of the Respondent Town of Kensington (the Town) to deny Mr. Dyck's application to re-zone property number 76711 (the subject property), located at 63 Victoria Street West, from Single Family Residential (R1) to Commercial (C1).

[3] After due public notice and suitable scheduling for the parties, the appeal was heard on September 11, 2009.

2. Discussion

Mr. Dyck's Position

[4] Mr. Dyck's submissions may be briefly summarized as follows:

- The subject property is adjacent to several commercial properties. Mr. Dyck has tried to sell the subject property as a residence but there has been no interest. Mr. Dyck, who is a real estate agent, would like to use the subject property as a real estate office. He does not intend to use the subject property as an in-home type business.
- In response to concerns raised by the Town about parking in the vicinity of the subject property, Mr. Dyck noted that Francis Street is not merely a residential lane, but is marked with two-hour parking signs on one side of the street.
- Mr. Dyck acknowledged that the Town followed its procedures with respect to providing public notice of the proposed rezoning. However, he submitted that the Town's decision was based on factors that do not have merit. He noted that "local politics" may have been a factor.

[5] Mr. Dyck requests that the Commission allow his appeal, quash the Town's decision, and order the subject property to be rezoned to Commercial (C1).

The Town's Position

[6] The Town's submissions may be briefly summarized as follows:

- Mr. McKnight referred the Commission to his brief of legal argument contained at Tab 10 of the Town's Record on Appeal (Exhibit R3).
- The Town submitted that it followed all procedures required for a rezoning application. The public and Mr. Dyck were provided an opportunity to be heard.
- The Town submitted that it could not just look at Mr. Dyck's proposed use for the subject property. Rather, the Town had to consider a long term view and the range of possible commercial uses permitted by a C1 zone.
- The Town submitted that its decision followed the dictates of its Official Plan and was consistent with sound planning principles.
- The Town submits that its decision should not be disturbed.

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

3. Findings

[8] After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission to allow this appeal. The reasons for the Commission's decision follow.

[9] 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.*

[10] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial 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 **Act**, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[11] In the present appeal, the Appellant acknowledges that the Town followed the notification procedures set out in its Development Bylaw (the Bylaw). However, the Commission is concerned as to whether a decision maker has followed procedural fairness and has properly considered the information available prior to making a decision to approve, or deny an application for rezoning.

[12] The minutes of the Town's Public Meeting, held at 6:00 p.m. May 28, 2009 reveal opposition from neighbouring residents to the proposed rezoning of the subject property to C1. No opposition was voiced with respect to the proposed rezoning of four other parcels on Victoria Street.

[13] The minutes of the Town's Special May Council Meeting, held at 6:35 p.m. reveal a motion "to not approve" the rezoning of the subject property from R1 to C1. This motion "to not approve" was unanimously carried. Four motions "to approve" the rezoning of the other Victoria Street properties from R1 to C1 were unanimously carried. These minutes do not reflect any discussion for or against these five rezonings.

[14] In a letter dated June 9, 2009 from the Town's Chief Administrative Officer to Mr. Dyck, reasons for the Town's decision to not approve the rezoning were cited.

[15] It was the evidence of the Town at the hearing that it does not have a separate planning board. Rather, the Town's Council serves as its own planning board. There is no evidence of a recommendation from this planning board. There is no evidence that there was a staff recommendation or a staff analysis presented for Council's consideration.

[16] Counsel for the Town placed great emphasis on various portions of the Official Plan which support the Town's decision. These portions are cited in Counsel's brief.

[17] In the final page of Counsel's brief, it is noted:

Council, in its judgment, exercised its discretion by deciding that it was not in the best interest of the Town to allow the degradation of this particular neighbourhood. In so doing, it acted in accordance with, and, in fact, upheld one of the core tenets of the Official Plan. Given all the foregoing, I respectfully submit that this is not an appropriate case which requires the Commission to substitute its opinion for that of the elected officials – the Council – of the Town of Kensington. The Council acted appropriately, thoughtfully and in accordance with the Official Plan in reaching its decision in these regards. Council applied sound planning principles as enunciated in the Official Plan in the exercise of the discretion afforded to it under the Act.

[18] Under cross examination, the Town's Deputy Mayor admitted that he had not read the Official Plan in its entirety. The Commission notes that the Official Plan not only speaks of maintaining neighbourhoods; it also speaks of developing commercial activity in the commercial area of the Town. The Commission takes official notice that the "crossroads" is the traditional heart of the commercial area of Kensington. The subject property is located in the immediate vicinity of the crossroads.

[19] Given the foregoing, it appears, from the record, that the Town's Council considered the objections of the residents opposed to the proposed rezoning of the subject property. That was indeed appropriate. However, it is equally appropriate that Council also consider Official Plan policies relevant to the proposed rezoning of the subject property. There is no evidence of such consideration in Council's minutes.

[20] While it might be possible for the Commission to give Council the benefit of the doubt, and assume that Council was intimately familiar with the Official Plan and thus had implicitly "considered" all Official Plan policies, both against and in favour of the proposed rezoning, such an assumption would falter given the testimony of the Deputy Mayor noted above.

[21] The Town submits that a rezoning of the subject property to C1 would run the risk of more intensive commercial development than currently planned by Mr. Dyck. There is certainly merit in that argument. The Commission notes that the Town does not presently provide a "light" commercial zone, or a zone pertaining only to professional offices, or a multipurpose zone which would allow Mr. Dyck's intended use, but only by way of Council's permit.

[22] However, a careful review of the Town's Bylaw reveals that the Town could retain some control over Mr. Dyck's proposal for a real estate office in the event the subject property is rezoned to C1. This would provide the Town with some important tools to prevent a "degradation of this particular neighbourhood". For example, section 4.15 of the Bylaw reads in part:

4.15 Development Restrictions

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

...

(6) the proposed development would create unsafe traffic conditions;

(7) the proposed development would significantly or permanently injure neighbouring properties by reason of architectural disharmony; or

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

[23] The Commission also notes that section 10.7 of the Bylaw sets out special requirements for commercial zones adjacent to residential zones.

[24] The Commission also notes that Section 11 of the Town's Bylaw provides for a Heritage District (HD) Zone:

Section #11 Heritage District Zone (HD)

1.1 General

In the Heritage District (HD) Zone, the following provisions shall apply, in addition to the standard provisions which apply to the underlying zone.

...

Any developer wishing to construct a building or convert a building to a commercial use with a Heritage District (HD) Zone, shall be required to enter into a development agreement with Council.

[25] Indeed, Council's approval is required, under section 11.4, before a building or structure in a HD zone may be moved or demolished.

[26] From a review of section 11, it appears possible for a parcel to be zoned "(C1) (HD)". The underlying zone is commercial and the heritage district zone requirements apply, in addition to the standard provisions of the underlying Commercial (C1) zone.

[27] The foregoing development restrictions, and the possible implementation of an Heritage District (HD) zone, would, in the Commission's view, largely address the concerns raised by the residents.

[28] Given the foregoing, the Commission finds that it is appropriate to allow the appeal, quash the Town's May 28, 2009 decision pertaining to the subject property, and order the Town to rezone the subject property to Commercial (C1).

[29] However, the Commission wishes to remind Mr. Dyck that the Town's Bylaw does provide some significant control over the nature of commercial development. In addition, the Town appears to have the authority to apply the HD zone designation in combination with the Commercial (C1) zone, provided the requirements of section 11 of the Bylaw are met.

4. Disposition

[30] An Order allowing the appeal and requiring the rezoning of the subject property to Commercial (C1) will be issued.

IN THE MATTER of an appeal by
Joseph Dyck of a decision of the Town of
Kensington, dated May 28, 2009.

Order

WHEREAS the Appellant Joseph Dyck has appealed a decision of the Respondent Town of Kensington, dated May 28, 2009;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on September 11, 2009 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 hereby allowed.
2. The May 28, 2009 decision of the Town of Kensington pertaining to this matter is hereby quashed, and the Town of Kensington is hereby ordered to rezone parcel number 76711 to the Commercial (C1) zone.

DATED at Charlottetown, Prince Edward Island, this 23rd day of October, 2009.

BY THE COMMISSION:

(Sgd.) *Allan Rankin*

Allan Rankin, Vice-Chair

(Sgd.) *Gordon McCarville*

Gordon McCarville, Commissioner

(Sgd.) *Anne Petley*

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 Court of Appeal upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal 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)