



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

**Docket LA09017
Order LA10-02**

IN THE MATTER of an appeal by
Raymond Nicholson of a decision of the
Town of Cornwall, dated August 19, 2009.

BEFORE THE COMMISSION
on Monday, the 1st day of March, 2010.

Allan Rankin, Vice-Chair
John Broderick, Commissioner
David Holmes, 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
Raymond Nicholson of a decision of the
Town of Cornwall, dated August 19, 2009.

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IN THE MATTER of an appeal by
Raymond Nicholson of a decision of the
Town of Cornwall, dated August 19, 2009.

Appearances & Witnesses

1. For the Appellant Raymond Nicholson

**Raymond Nicholson
Glen Fullerton**

2. For the Respondent

**Kevin McCarville
Dean Lewis**

IN THE MATTER of an appeal by
Raymond Nicholson of a decision of the
Town of Cornwall, dated August 19, 2009.

Reasons for Order

1. Introduction

[1] The Appellant Raymond Nicholson (Mr. Nicholson) 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. Nicholson's Notice of Appeal was received on September 8, 2009.

[2] This appeal concerns an August 19, 2009 decision of the Respondent Town of Cornwall (the Town) to deny a height variance application for an accessory building constructed on parcel number 603290 (the subject property), located at 31 James Street in Cornwall.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard on January 13, 2010.

2. Discussion

Mr. Nicholson's Position

[4] Mr. Nicholson's position may be briefly summarized as follows:

- In April 2008 he applied for a building permit to construct a storage building on the subject property. He received a building permit but did not construct the building that year. In 2009 he re-applied in order to renew the building permit. He received the permit and started construction. In June 2009 Town staff visited the subject property and Mr. Nicholson was informed that his building was too high. He applied to the Town for a variance from the height requirements of the Town of Cornwall Zoning and Subdivision Control (Development) Bylaw (the Bylaw). On August 19, 2009, the Town denied his application for a height variance.

- Mr. Nicholson told the Commission that his storage building is approximately 18 feet high. He informed the Commission that he was not aware that the Bylaw restricted accessory buildings to a maximum height of 12 feet. Mr. Nicholson stated that the application form for a development permit does not ask an applicant for the height of the proposed building; rather it only asks the number of stories for the proposed building. Mr. Nicholson states that he does recall having signed “a paper” when he picked up his permit. However, he believes that he never received a copy of the paper he signed. Mr. Nicholson told the Commission that it would be very expensive to make the building conform with the Bylaw as much of the building would have to be dismantled and the building reconstructed.

[5] Mr. Nicholson requests that the Commission allow his appeal, quash the Town’s decision and grant him a height variance for his accessory building.

The Town’s Position

[6] The Town’s position may be briefly summarized as follows:

- The Bylaw specifies that, in a residential zone, an accessory structure shall not exceed 12 feet in height above grade.
- Both the April 9, 2008 and March 23, 2009 development permits contained a list of specific conditions. On page 2 of the permits, condition number 4 specified that the “accessory structure shall not exceed twelve (12) feet (3.6 m) in height above grade.” Page 2 of both permits was signed by Mr. Nicholson and Town staff. The Town submitted that it is staff’s practice to provide an applicant with a copy of all pages of a building permit. The Town submitted that Mr. Nicholson ought to have been aware of the height requirement as that information was included as a condition on the building permit and Mr. Nicholson confirmed his agreement of the conditions with his signature.

[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 deny this appeal. The reasons for the Commission’s decision follow.

[9] Subsection 28(1.1) of the **Planning Act** reads as follows:

28(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality

(a) that is made in respect of an application by the person, or any other person, under a bylaw for

(i) a building, development or occupancy permit,

(ii) a preliminary approval of a subdivision,

(iii) a final approval of a subdivision; or

(b) to adopt an amendment to a bylaw, including

(i) an amendment to a zoning map established in a bylaw, or

(ii) an amendment to the text of a bylaw,

may appeal the decision to the Commission by filing with the Commission a notice of appeal.

[10] While the term “variance” is not specifically listed in subsection 28(1.1) of the **Planning Act**, the Commission finds that Mr. Nicholson’s application for a variance, and the Town’s decision to deny the requested variance, were made in respect of an application for a development permit. Accordingly, the Commission finds that it has the jurisdiction to hear this appeal.

[11] The core of Mr. Nicholson’s position is that he should be granted a height variance for his storage building as he was unaware of the maximum height requirement set out in the Town’s Bylaw. The core of the Town’s position is that the height requirement was listed as a condition on the building permit.

[12] The second page of the March 23, 2009 development permit reads, in part, as follows:

SPECIFIC CONDITIONS TO PERMIT

...

4. *The accessory structure shall not exceed twelve (12) feet (3.6 m) in height above grade.*

...

Conditions agreed to and signed at Cornwall, Prince Edward Island, this 23 day of March 2009.

FOR THE DEVELOPER

FOR THE TOWN

(Sgd.) Ray Nicholson

(Sgd.) Dean Lewis

[13] Mr. Nicholson believes that he did not receive a copy of page 2 of the permit. The Town states that it provides a copy of the full permit to each successful permit applicant.

[14] In the present matter, it is possible that the Town inadvertently failed to provide a copy of page 2 of the permit to Mr. Nicholson. It is also possible that Mr. Nicholson received a copy of page 2 but lost it.

[15] The Commission notes that the Town’s development permit application form requests that an applicant fill in the number of stories of the proposed structure, but there is no request for describing the height of the structure. The Commission is of the view that the Town should consider amending this form to request the height of the proposed structure. Had this information been requested, and had Mr. Nicholson entered a height of 18 feet, it would have served as a ‘red flag’ for the Town’s staff that Mr. Nicholson’s plan’s overstepped the maximum parameters of the Bylaw.

[16] However, what is crucial is that the Town clearly specified the maximum height condition on the permit and that Mr. Nicholson signed his agreement to the conditions. While it is quite possible that Mr. Nicholson did not read the conditions before signing, any such failure to read the conditions was his omission, rather than an error or omission of the Town.

[17] While the Town had the discretion to grant a height variance to Mr. Nicholson, such a variance would have amounted to a 50% variance, a very major and potentially precedent setting variance. If Mr. Nicholson could not have reasonably been aware of the height restriction, the Commission is of the view that the requested variance would have been a fair and just remedy. However, the Commission finds that the development permit clearly set out the maximum height for the accessory building.

[18] For the above reasons, the Commission finds that the Town acted reasonably when it made the decision to deny a height variance for Mr. Nicholson's accessory building. Accordingly, the Commission denies this appeal.

4. Disposition

[19] An Order denying this appeal follows.

IN THE MATTER of an appeal by
Raymond Nicholson of a decision of the
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Order

WHEREAS the Appellant Raymond Nicholson has appealed a decision of the Town of Cornwall, dated August 19, 2009;

AND WHEREAS the Commission heard the appeal at a public hearing conducted in Charlottetown on January 13, 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 denied.

DATED at Charlottetown, Prince Edward Island, this 1st day of March, 2010.

BY THE COMMISSION:

(Sgd.) *Allan Rankin*
Allan Rankin, Vice-Chair

(Sgd.) *John Broderick*
John Broderick, Commissioner

(Sgd.) *David Holmes*
David Holmes, 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 rules of court respecting appeals apply with the necessary changes.

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)