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

Docket LA10015
Order LA11-01

IN THE MATTER of an appeal by Biovectra Inc. of a decision of the City of Charlottetown, dated June 16, 2010.

BEFORE THE COMMISSION
on Tuesday, the 22nd day of February, 2011.

Maurice Rodgerson, Chair
Allan Rankin, Vice-Chair

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 Biovectra Inc. of a decision of the City of Charlottetown, dated June 16, 2010.

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Order

IN THE MATTER of an appeal by Biovectra Inc. of a decision of the City of Charlottetown, dated June 16, 2010.

Appearances & Witnesses

1. For the Appellant Biovectra Inc.

Counsel:

Jonathan M. Coady
Valana S. Deighan (Corporate Counsel)

Witnesses:

Ron Keefe
Dale Zajicek
Rem Gaade

2. For the Respondent City of Charlottetown

Counsel:

David W. Hooley, Q.C.

Witnesses:

Randy MacDonald
Don Poole
Laurel Palmer-Thompson

3. For the Developers Paramount Construction Ltd. and 100529 P.E.I. Inc.

Counsel:

Matthew J.W. Bradley

Witnesses:

George Fawcett
Ian Walker

IN THE MATTER of an appeal by Biovectra Inc. of a decision of the City of Charlottetown, dated June 16, 2010.

Reasons for Order

1. Introduction

[1] The Appellant Biovectra Inc. (Biovectra) 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***). Biovectra's Notice of Appeal was received on June 17, 2010. On June 23, 2010, the Commission received an amended Notice of Appeal from Biovectra.

[2] This appeal concerns a June 16, 2010 decision of the Respondent City of Charlottetown (the City) to issue a building permit to Paramount Construction Ltd. (Paramount) to construct an 18 unit apartment building on parcel number 387399 located at 80 Nicholas Lane. A previous building permit for "foundation only at this time" was issued by the City on December 11, 2009.

[3] After due public notice and suitable scheduling for the parties, this appeal was heard on September 8 and 9, October 20 and 21, December 13, 14, 15, 16 and 17, 2010.

2. Discussion

Biovectra's Submissions

[4] Counsel for Biovectra presented oral submissions to the Commission. Highlights of these submissions appear below.

- 4.60 .1 and .3(b) of the City's Zoning and Development Bylaw (the Bylaw) require the City to consider the compatibility and interrelationship of the proposed uses of the site with the adjacent land use. It is submitted that an apartment building and a chemical plant are incompatible when located adjacent to each other.

- 4.52 .6 (g) of the Bylaw permits the City to refuse to issue a building permit if *"the proposed Development would be detrimental to the convenience, health or safety of the occupants or residents in the vicinity or the general public".* It is submitted that this provision in the Bylaw allows a building permit to be refused even if codes are met if safety is an issue. It is submitted that this provision provides the City with discretion provided such discretion is exercised in a principled manner, utilizing sound, professional judgment. It is submitted that the City neither engaged the services of a consultant nor engaged Biovectra. Rather, the City relied on the view of its fire chief that the distance between Biovectra's solvent storage tanks and the proposed apartment building met the applicable code requirement.

- It is submitted that issuing a building permit for an apartment building near a chemical plant is inconsistent with sound planning principles.

- It is submitted that the evidence of Rem Gaade is the only expert evidence from a firefighting and hazardous materials perspective. Mr. Gaade visited Biovectra's Hillstrom Avenue facility, visited the site of the proposed apartment building and spoke with the City's fire chief. Mr. Gaade prepared a risk assessment report and performed computer modeling. Mr. Gaade pointed out that risk decreases with increased distance.

- It is noted that some twenty years ago when Biovectra applied for a building permit for its Hillstrom facility, an environmental assessment was required. Biovectra, then under the name of Diagnostic Chemicals Ltd. (DCL) provided considerable information to the Province's Department of Environment and the former Community of West Royalty. At that time, the lands now owned by Paramount were zoned Industrial and DCL was of the view that a 200 foot buffer was necessary to ensure safety. In response to concerns at the time from existing residents, DCL changed the planned location of the chemical reactors and storage tanks to the opposite end of the building. At that time, this action placed these facilities farther from the existing residential area and closer to what was then land zoned Industrial, but which has since been rezoned as C2 and is the site of Paramount's apartment building. As no regulations existed in Prince Edward Island at that time, DCL filed the regulations used by another province, agreed to follow those regulations and this was satisfactory to the Department of the Environment.

- It is noted that George Fawcett, the expert retained by Paramount, is an expert in codes but has no expertise in fighting fires or commanding a hazmat team. He did not review Biovectra's site other than a view from the parking lot. He was engaged late in the proceedings and did not prepare a detailed hazard assessment.

- It is submitted that the City relies on the decision of the Ontario Municipal Board (OMB) in *Toronto (City) Official Plan Redesignate Land Amendment,* [2002] O.M.B. No. 507. However, the OMB decision is distinguishable from the present appeal. The hazards represented by a 'Big Box' building supply store are different from a chemical plant and the proposed store was separated from the residential neighbourhood by four lanes of highway, a boulevard and a sidewalk. In addition, in the present appeal, the apartment building does not contain a sprinkler system, the "sleeping fireman" noted in the OMB decision.

[5] Biovectra requests that the Commission allow the appeal and quash the June 16, 2010 building permit.

The City's Submissions

[6] Counsel for the City presented oral submissions to the Commission. Highlights of these submissions appear below.

- It is submitted that from a procedural perspective, the real issue is whether the City's decision is substantially in compliance with 4.52 and 4.60 of the Bylaw. It is submitted that 4.52 .6 (g) is the heart of the matter. Is code compliance enough to conclude that the apartment building project is not detrimental to the safety of its occupants and the public? Does the City have the authority or discretion to either rise above or go below the requirements of the National Building Code and the National Fire Protection Association codes NFPA 1 [Fire Code] and NFPA 30 [Flammable and Combustible Liquids Code] requirements? In effect; is there cogent and compelling evidence to raise the bar? It is submitted that there is no reliable or scientific evidence to set the bar higher.

- It is submitted that, from the perspective of planning principles, sound planning principles are primarily associated with zoning decisions, subdivision decisions and variance decisions. Further, Biovectra did not provide evidence from a planning expert. The only evidence with respect to planning was provided by the City through the evidence of Mr. Poole and Ms. Palmer-Thompson. Both Mr. Poole and Ms. Palmer-Thompson were of the view that the 1999 rezoning from Industrial to Highway Commercial was good planning as it would prevent an Industrial zone from bordering a major highway. In addition, the City's Fire Department had advised the City's Planning Department that the apartment project was code compliant.

- Since 1999, the lands now owned by Paramount have been zoned Highway Commercial (C2). This rezoning was Biovectra's first opportunity to appeal or seek judicial review. Biovectra, or DCL as it was then known, did not appeal this zoning.

- In August 2009 a second opportunity came for Biovectra to appeal, this time at the subdivision stage. A third opportunity to appeal occurred in October 2009 as a result of a decision to revise the subdivision. Biovectra did not appeal either decision.

- In December 2009 the City issued a building permit for the foundation stage of the apartment building. Biovectra did not pursue this fourth opportunity to appeal. All this while Paramount was continuing to spend money on the apartment building project.

- It was only in April 2010 that Biovectra took action to bring its concerns to the City's attention. In June 2010 Biovectra appealed the second and final building permit issued by the City for the apartment building.

- The City was required to issue both building permits for the apartment building as an apartment building is a permitted use in a C2 zone and all the Bylaw's requirements, including code compliance, were met.

- It is submitted that Mr. Gaade has very little experience with the NFPA codes and thus had a fundamental misunderstanding of the fire codes. In addition, his evidence was not accepted in the OMB decision.

- Risk is defined as a balance of likelihood, hazard and consequences. It is submitted that Mr. Fawcett has the expertise and experience in applying the NFPA codes. Mr. Fawcett noted that the NFPA codes are experience based. He noted that one of their purposes is to protect adjacent properties. He considered the three scenarios referred to in Mr. Gaade's modeling data, noted that all three scenarios were low risk, and observed that the fire "plumes" charted in each scenario assumed that there were no efforts made to mitigate each accident. While Mr. Gaade was adamant in his views that a residential use adjacent to Biovectra's Hillstrom facility was unacceptable, he was "OK" with a commercial use in the same location. In fact, the evidence of Mr. Fawcett revealed that the "loading", as calculated by the National Building Code, is higher for commercial uses and thus the risk would be higher for a commercial use than a residential use.

[7] For the above reasons, the City requests that the Commission deny this appeal.

Paramount's Submissions

[8] Counsel for Paramount presented oral submissions to the Commission. Highlights of these submissions appear below.

- The concept and footprint of the apartment building was approved by the City in December 2009 when the first building permit was issued. This building permit could have been appealed, but it was not. In fact, Biovectra could have appealed several earlier permits or approvals: the demolition permit of the old house on the property, the first subdivision approval or the revised subdivision approval.

- While Biovectra's appeal technically is of the second building permit, their submissions and arguments would tend to suggest that the appeal is actually of the zoning of Paramount's property, a zoning which has been in place since 1999. Nothing that Biovectra complains of pertains to the construction of the building. Rather, Biovectra has focused on the use of the land, which is a zoning issue.

- Paramount submits that the first building permit was a conditional permit. The condition of "fire department access needed before framing" was satisfied by Paramount and thus no further permit was necessary. Paramount submits that the City's bylaw does not authorize it to issue phased building permits. The ***Planning Act*** is likewise silent on phased building permits. The ***Planning Act*** does, however, set out "efficient planning" as one of its objects. Is it efficient to allow earlier phases of a project to go ahead and then deny a later phase? Is it sound planning?

- Mr. Gaade is an expert on fighting fires. However, the only expert on fire prevention codes is Mr. Fawcett. There are risks in everyday life and the codes reduce the risk of Paramounts' apartment development to an acceptable level. The code required distance from Biovectra's storage tanks to Paramount's property line is 30 feet. Biovectra uses a nitrogen system with its tanks which may, if such system meets the code requirements, reduce the code required distance to 15 feet. The actual distance from the nearest point of Biovectra's storage tanks to the property line is 37 feet.

- Mr. Zajicek is an expert in chemical engineering, but he is not an expert in fire prevention. Mr. Zajicek related his personal experience of a chemical plant fire in the 1970s. However, since that time the ignition source for that fire has been eliminated from code compliant forklifts.

- Mr. Gaade had testified in September 2010 that the City's fire department did not have the appropriate fire fighting foam needed for some of the chemicals stored and used by Biovectra. Mr. MacDonald, the City's fire chief, testified in December 2010 that the City recently acquired the proper foam.

- Mr. Gaade's modeling was performed after he had already come to his conclusion. The scenarios used in the modeling represented hypothetical circumstances and were based on no intervention from Biovectra.

- Biovectra has no right to impose on a neighbouring property a standard higher than code compliance. Biovectra is, however, free to install gas detection, flame detection and other safety standards on its own property to further reduce any risks.

[9] Paramount submits that the appeal should be dismissed as the matters raised by Biovectra relate to land use and pertain to the zoning of the property in 1999, not the issuance of a secondary building permit in June 2010.

3. Findings

[10] After a careful review of the evidence, the submissions of the parties, and the applicable law, it must be the decision of the Commission to deny this appeal. However, this decision should not be regarded as an endorsement of the City's actions regarding public safety, the zoning of the property, or the siting of the apartment building.

[11] The reasons for the Commission's decision follow.

The Legislative Framework

[12] The legislative framework in the present appeal consists of the ***Planning Act,*** the City's Official Plan and the City's Bylaw. A review of the relevant portions of these enactments is essential prior to a determination of the issues in this appeal.

The Planning Act

I. Jurisdiction of the Commission

[13] Subsection 28(1.1) of the ***Planning Act*** sets out the Commission's jurisdiction to hear appeals of certain kinds decisions made by municipalities:

> *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.*

[14] Subsections 28(1.2) through 28(1.4) inclusive read as follows:

> *(1.2) In subsection (1.1) and subsection (1.4) "bylaw" means a bylaw made under this Act.*
>
> *(1.3) A notice of appeal must be filed with the Commission within 21 days after the date of the decision being appealed.*
>
> *(1.4) For greater certainty, where a person is dissatisfied by the decision of a council of a municipality to adopt an amendment to a bylaw, the 21-day period for filing a notice of appeal under this section commences on the date that the council gave final reading to the amendment to the bylaw.*

[15] The Commission notes that the aforementioned subsections of the ***Planning Act***, as well as other amendments to the ***Planning Act***, were approved by the Legislature in 2006, with proclamation following in June 2009.

II. Notice

[16] Section 23.1 of the ***Planning Act*** was also approved by the legislature in 2006 and proclaimed in June 2009. Section 23.1 sets out the following notice requirements:

> *23.1 (1) Where*
>
> *(a) the Minister makes a decision of a type described in subsection28(1); or*
>
> *(b) the council of a municipality makes a decision of a type described in subsection 28(1.1)*
>
> *the Minister or council, as the case may be, shall, within seven days of the date the decision is made, cause a written notice of the decision to be posted*
>
> *(c) on an Internet website accessible to the public; and*
>
> *(d) at a location accessible to the public during business hours,*
>
> *(i) if the decision is made by the Minister, in*
>
> *(A) a provincial government office in Charlottetown, and*
>
> *(B) a provincial government office in the county where the land that is the subject of the decision is located, or*
>
> *(ii) if the decision is made by the council of a municipality, in that municipality.*
>
> *(2) A notice of a decision that is required to be posted under Subsection (1) shall contain*
>
> *(a) a description of the land that is the subject of the decision;*
>
> *(b) a description of the nature of the application in respect of which the decision is made;*
>
> *(c) the date of the decision;*
>
> *(d) the date on which the right to appeal the decision under section 28 expires; and*
>
> *(e) the phone number of a person or an office at which the public may obtain more information about the decision. 2006,c.15,s.1.*

III. Public Safety

[17] Subsection 20(1) of the ***Planning Act*** reads as follows:

> *20. (1) The powers of a council to make bylaws includes the power to make bylaws applicable within the municipality with respect to all of the matters set out in clauses 8(a) to (q) except clauses (i), (l) and (p) as if*
>
> *(a) references to the Crown were references to the municipality;*
>
> *(b) references to the Minister were references to the council.*

[18] Subsection 8(1)(a) reads as follows:

> *8. (1) The Lieutenant Governor in Council may make provincial planning regulations applicable to any area except a municipality with an official plan and bylaws*
>
> *(a) with respect to planning and land use matters affecting the general welfare, health, safety and convenience of persons in any area or municipality;*

[19] To summarize, taken together, subsection 8(1)(a) and subsection 20(1) give the City the statutory authority to make planning and land use bylaws affecting public safety within the City.

The City's Official Plan

[20] Section 5.7 of the City's Official Plan addresses "safety in the Community". Relevant portions of section 5.7 read as follows:

> *Starting Point*
> *…*
>
> *Public safety, and the protection of property, is a matter of great concern to the residents of Charlottetown. For its part, the City has responded by adopting the National Building Code and the National Fire Code, both of which enhance safety standards with regard to the design and construction of buildings.*
> *…*
>
> *Defining Our Direction*
>
> *Our goal is to provide the best possible protective services within our fiscal resources.*
>
> *1. Our objective is to ensure maximum efficiency of the protective services provided by the City of Charlottetown.*
> *…*
>
> - *Our policy shall be to ensure that all major development proposals will be reviewed by protective service departments to maintain the City's ability to deliver effective protective services.*

[21] To summarize within the context of the present appeal, the City has adopted the NFPA codes to enhance public safety. The City has also committed itself to ensure that major development proposals will be reviewed

by its Fire Department to maintain the City's ability to deliver effective fire protection services.

The City's Bylaw

[22] Section 1.1 .2 (b) (iii) of the City's Bylaw reads as follows:

> *This Bylaw … prescribes … the Use of a permit system that entails application for a Building permit, a Sign permit, a footing permit, a demolition permit, or a preliminary or final Subdivision approval;*

[23] Section 2.5 of the Bylaw requires compliance with other City Bylaws and reads as follows:

> ***2.5 OTHER BY-LAWS, PERMITS, AND LICENSES***
>
> *Nothing in this By-law Shall relieve any Person from the obligation to comply with the requirements of the Building and Fire Prevention By-laws or any other By-law of the City in force from time to time, or the obligation to obtain any license, permit, authority, or approval required under any By-law of the City, and in the event of a conflict between this By-law and any other By-law, the most restrictive By-law Shall prevail.*

[24] Section 2.9 of the Bylaw sets out the posting requirements for City permits and reads as follows:

> ***2.9 POSTING OF BUILDING PERMITS***
>
> *The City Shall post Building and Development Permits, subdivision/consolidation, and demolition permits that have been issued by the City on their webpage and this Shall be deemed to be notification under the Bylaw of a permit being issued. The website posting shall:*
>
> 1. *be updated at least every second week;*
> 2. *state the parcel number, property address and type of work approved.*
>
> *At least once every six (6) months the City will place an advertisement in the local newspaper indicating that the permits and approvals are posted on the City website.*

[25] Section 4.52 .6 (g) of the Bylaw reads as follows:

> *An application for a Building Permit May be refused by the Development Officer if:*
>
> *…*
>
> *(g) the proposed Development would be detrimental to the convenience, health or safety of the occupants or residents in the vicinity or the general public.*

[26] Relevant portions of section 4.60 of the Bylaw read as follows:

> ***GENERAL PROVISIONS FOR SITE DEVELOPMENT***
> ***4.60 SITE DEVELOPMENT PRINCIPLES***

.1 The site Development principles set out herein Shall be given consideration, except for a residential property containing four (4) units or less, by any Person applying for a Development Permit in the Medium Density Residential (R-3), Apartment Residential (R-4), Business Office (C-1), Highway Commercial (C-2), Shopping Centre Commercial (C-3), Downtown Mixed-Use (DMU), Mixed-Use Corridor (MUC), Light Industrial (M-1), Heavy Industrial (M-2), Business Park (M-3), Airport (A), Institutional (I) or the Comprehensive Development Area (CDA) zone and the application Shall clearly demonstrate to the City that the Development proposal upon which the application is based has been prepared to reflect these principles and to enhance the urban environment in which the Development is to be situated.

.2 Except for a residential Building containing four (4) units or less, any Person who proposes to construct a new Building or renovate an Existing Building, or consolidate or subdivide lands for the purpose of constructing a new Building or renovating an Existing Building in the Medium Density Residential (R-3), Apartment Residential (R-4), Business Office (C-1), Highway Commercial (C-2), Shopping Centre Commercial (C-3), Downtown Mixed-Use (DMU), Mixed-Use Corridor (MUC), Light Industrial (M-1), Heavy Industrial (M-2), Business Park (M-3), Airport (A), Institutional (I) or the Comprehensive Development Area (CDA) zone Shall consider a Development proposal containing the following:

(a) a site plan, accurately drawn to scale, that shows:

i. the precise size and location of the Building or Buildings, both Existing and proposed;

ii. details of driveway size and location, on-site paved Parking Spaces and vehicle circulation lanes, loading zones, and fire safety access lanes;

…

vii. Design of appropriate landscape Buffers to maintain the integrity of any adjacent residential or institutional Uses;

…

(b) Building floor plans and elevations, accurately drawn to scale; and

(c) a written statement with accompanying graphic descriptions that address the compatibility and integration of the proposed Development with Existing adjacent land Uses;

.3 The Development Officer Shall give consideration to the disposition of an application made in accordance with this section provided the procedures as outlined in the zones are followed and having regard to the following:

(a) compatibility and interrelationship of the proposed Uses of the Building or Buildings;

(b) compatibility and interrelationship of the proposed Uses of the site and the adjacent land Use, both present and projected;

(c) the convenience, adequacy and safety of Street and pedestrian connections;

…

(g) the adequacy of fire protection access;

…

.4 Where the Development Officer experiences difficulty in evaluating the Development proposal or in reaching a satisfactory agreement with the applicant, he May, at his discretion, determine to consult with the Planning Board, who Shall consider the application and such recommendations as the Development Officer May make, and make a recommendation to Council on the disposition of the application.

.5 Upon receiving the recommendation of the Planning Board, Council May, at its discretion, call a public meeting to give an opportunity for public input on the proposed Development and, after consideration of the input received, Shall make a disposition of the application.

.6 Where Council convenes a public meeting, the applicant Shall attend to present and defend his application.

.7 Council May require that a Development agreement be Signed between the two parties indicating that the Development will be carried out in accordance with the drawings and other documents produced in respect of the proposed Development and agreed upon between both parties, and Shall bear the Signatures of the applicant and the City.

[27] To summarize within the context of the present appeal, section 4.60 sets out general site development principles which apply when a development permit is applied for in specified zones, including the C-2 zone. A detailed development proposal is required for the construction of a new building or the subdivision of lands for the purpose of constructing a new building. The development officer is required to follow the procedures outlined in the zoning requirements and is also to have regard to numerous matters, including the compatibility and interrelationship of the proposed uses of the site and the adjacent land use, both present and projected. The development officer may consult with the Planning Board. Planning Board then shall consider the application and make a recommendation to Council. Council may, at its discretion, call a public meeting.

[28] Section 7.1 of the Bylaw sets out the scope of the general principles for subdividing land:

7.1 SCOPE

.1 These provisions for subdividing land Shall be the minimum requirement for the protection of public health, safety, and welfare, and are intended to protect the public and provide a wholesome community environment, adequate Municipal Services and safe Streets.

> *.2 This section Shall not apply to any Lot or Lots forming part of a Subdivision created and recorded prior to the effective date of this By-law, nor is it intended to repeal, abrogate, annul or in any way impair or interfere with Existing provisions of other by-laws or regulations, except those specifically repealed by this By-law; or with private restrictions placed upon property by deed, covenant, or other private agreement; or with restrictive covenants running with the land to which the City is a party.*
>
> *.3 Where this By-law imposes a greater restriction upon land than is imposed or required by earlier Existing provisions of law, regulation, contract or deed, the provisions of this By-law Shall supersede those imposed by other legislation or agreement.*

[29] Section 7.3 .4 (e) reads as follows:

> *Unless the final Plan of Subdivision or Lot consolidation is clearly contrary to laws, bylaws, or regulations of the Province or the City, approval May not be refused or withheld as a result of the assessment or recommendations made by departments or agencies to which it is circulated;*

Issues for Review

[30] The Commission identified several key issues arising out of the present appeal. A review of these issues was necessary both to resolve the present appeal and to provide direction when similar issues appear before the Commission in future. These issues are: jurisdiction, notice, phased permits, discretion versus as of right, and, by way of *obiter dictum*, public safety.

Jurisdiction

[31] In the present appeal, both the City and Paramount submit that Biovectra could have appealed the zoning of what is now 80 Nicholas Lane (the subject property). However, had Biovectra, or more correctly DCL, appealed the 1999 zoning of the subject property, the Commission's jurisdiction would have been an issue given the Commission's decision in Order LA00-01.

[32] In Order LA00-01 *Arthur Jennings et al. v. City of Charlottetown* the Commission wrote:

> *With the foregoing in mind, the Commission must first determine under what authority the City made its decisions on July 26 and July 28, 1999 to give first, second and third readings to pass the Bylaw and its July 26, 1999 decision to adopt the Official Plan.*
>
> *The authority for the City to adopt an official plan is found in the provisions of the **Planning Act**, specifically Sections 11 through 14, which set out a process for holding public meetings, maintaining a public record, the contents of the official plan and the approval process.*

> *The provisions for making bylaws are found in Sections 16 through 20 of the **Planning Act**, including such matters as the requirement for public meetings and the approval process.*
>
> *Having considered all of the arguments advanced by all the parties, it is the Commission's opinion that the decisions by the City in this case were not decisions in respect of the administration of regulations or bylaws, but were decisions made pursuant to specific statutory provisions of the **Planning Act**.*
>
> *The City's Official Plan and Bylaw must be viewed as something greater than merely an amendment or series of amendments to those official plans and bylaws which previously existed. On the contrary, the Commission views Charlottetown and its Official Plan and Bylaw as a new City with a new Official Plan and Bylaw, albeit an amalgamation of many parts consisting of the former municipalities which had their own official plans and bylaws. Further, the Commission views the adoption of the Official Plan and the making of the Bylaw, decisions by Council under the statutory powers given to all municipalities to carry out these functions under the **Planning Act**, and not decisions within the administration of bylaws as provided in subsection 28(1) of the **Planning Act**.*
>
> *The City's decisions to adopt the Official Plan and make the Bylaw are therefore, quite distinct from those decisions undertaken by a municipality where it decides to rezone a parcel of land or amend its bylaw. Typically, municipal bylaws specifically provide for zoning and bylaw amendments by application. The Commission is of the opinion that decisions made under a specific bylaw provision are clearly made by a municipality in the administration of its existing bylaw and, as such, are appealable to the Commission under Section 28 of the **Planning Act**. In these cases, the Commission will also consider the implications for the official plan. The Commission and its predecessor, the Land Use Commission, have a long-standing history of considering such matters.*
>
> *…*
>
> *So that the conclusion arrived at herein is clear, the Commission hastens to reiterate its previous position that a dissatisfied person does have the right to appeal a decision by Council to approve or deny a rezoning or bylaw amendment because that is a decision of Council in the administration of the Bylaw. Contrary to that situation, what the Commission has found in this case is that the City developed a new Official Plan and Bylaw pursuant to statutory authority and these decisions are not appealable to the Commission.*

[33] In the present appeal, prior to 1999 the subject property was zoned Industrial by the former Community of West Royalty. This zoning was maintained for the first four years following the 1995 amalgamation of West Royalty, along with other communities and towns, into the new City of Charlottetown. In 1999, the new City of Charlottetown approved a new Bylaw and a new Official Plan. As a result of the new Bylaw, the zoning of the subject property was changed from Industrial to Highway Commercial (C2).

[34] Based on the Commission's decision in Order LA00-01 and the wording of the ***Planning Act*** prior to proclamation of the amendments in 2009, the Commission would not have had the jurisdiction to have heard an appeal of the 1999 zoning change of the subject property from Industrial to C2.

[35] The City and Paramount contend that Biovectra could have appealed either decision of the City to grant subdivision approval and the initial building permit with respect to the subject property. The wording of subsection 28(1.1) of the ***Planning Act*** supports this contention.

[36] Quite frequently, municipal planning may involve a series of decisions, each which may attract the right of appeal. For example, there may be a decision to re-zone a parcel of land, followed by a decision to subdivide that land, followed by a decision to issue a building permit. There may also be a decision to issue a variance. Subject to the possible exception of deficient notice, when an appellant does not appeal an earlier decision in the process within the statutory time period set out in the ***Planning Act***, the opportunity to appeal that particular decision is lost. For each lost opportunity to appeal, the corridor of review narrows.

[37] In the present appeal, Biovectra never had a right to appeal the zoning of the subject property to the Commission. However, Biovectra did have the right to appeal each of the subdivision decisions and each of the building permits issued to Paramount or its immediate predecessor in title, 100529 P.E.I. Inc.

[38] Absent deficient notice, for each appeal opportunity missed by Biovectra, the corridor of the Commission's appellate review narrowed and with it, the list of potential remedies which could be granted, especially as it relates to public safety.

Notice of Decisions

[39] Prior to 2002, the Commission viewed the requirement that a notice of appeal be filed within 21 days of the date of decision as a matter of 'black letter law' . The ***Planning Act*** at that time provided no requirement for a municipality or the Minister to provide notice. When the 21 days expired, the right of appeal expired even if a potential appellant did not know, or could not reasonably have known, of the decision.

[40] Fortunately, the laws of Canada are not static. They evolve as the Courts and administrative tribunals wrestle with novel legal issues brought to light by unusual factual circumstances. In Order LA02-01, *Barry Copeland* v. *City of Summerside* (*Copeland*), the Commission reviewed the law of notice in some depth and wrote at paragraphs 33 to 35 of *Copeland*:

> *[33] In Laurel Construction Ltd. v. St. John's (City), [1997] N.J. No. 270 (T.D.), the court discussed the issue of extending limitation periods after the City of St. John's allowed an intervener an extension to appeal their decision concerning Laurel's development proposal. Laurel then challenged the City's decision to extend the time period for filing an appeal. The first public notice of the City's approval of Laurel's development proposal occurred through the Development Permits List attached to an Agenda for a City Council meeting. The intervener argued that the limitation period should not begin to run until the general public could discover that the subdivision permit had been issued. The City sought direction from the court as to whether it had the authority to extend the time for filing appeals. Justice Barry held that a statutory authority could not waive a condition precedent to its jurisdiction but also stated that it would be absurd to interpret the regulation that set out the time limit as contemplating that the appeal period started to run before the general public became aware of the decision to be appealed. He stated that such an interpretation would, in effect, often eliminate any real opportunity for appeal and that the regulation must be read as requiring the appeal period to begin running from the day the public became aware of the decision appealed from.*
>
> *[34] The Laurel Construction decision effectively interprets the date of a "decision" as being the date on which the public became aware of the decision. The Commission finds that the court's interpretation in Laurel Construction is very much in keeping with section 9 of the* ***Interpretation Act****. The decision in Laurel Construction also is in accord with common sense. If subsection 28(1) of the* ***Planning Act*** *is read literally and is held as being immutable, then a municipality (or the Minister) could always avoid an appeal by the simple expedient of not making the decision public for twenty-one days after making the decision. This would, of course, defy the intention of the Legislature, effectively eliminate the right of appeal and amount to a profound affront to justice in the Province. However, section 9 of the Interpretation Act ensures that the will of the Legislature would not be so corrupted.*
>
> *[35] In addition, a careful review of the wording of subsection 28(1) of the* ***Planning Act*** *is revealing. The right to an appeal under the* ***Planning Act*** *was granted by the Legislature to "…any person who is dissatisfied by a decision of a council…" In order for a person to be dissatisfied with a decision, common sense dictates that they first must be aware, or have had a reasonable opportunity to be aware, of the decision.*

[41] In *Booth and Peak v. Island Regulatory and Appeals Commission* 2004 PESCAD 18 (October 4, 2004) *(Booth and Peak*) Justice Webber reviewed various legal decisions with respect to the issue of when an appeal period begins to run. Justice Weber then stated the following commencing at paragraph 20 of the Court's decision:

> *[20] All these cases express a concern about ensuring that a right of appeal is a real rather than an illusory right.*
>
> *[21] I find that Re Hache and Minister of Municipal Affairs (1969), 2 D.L.R. (3d) 186 (NBSCAD) applies in this province and the appeal period will begin to run when an appellant has received notice of the decision. This may be specific notice or general notice through posting or*

> *publication or by some other means. The bylaws of a community could establish the type of public notice that will be given upon the issuance of a building permit, e.g. publication in a newspaper or newsletter, posting in the community office. If the public can become aware of the decision by way of this public process then the process will likely satisfy the requirements of notice.*
>
> *[22] Where, as in this case there is no process of public notice set out in either the **Planning Act** or the bylaws of the community, then time can only begin to run when an appellant has actual notice of the decision. Just seeing the mobile home on the property would not be notice of the issuance of a building permit for that home. It might have been placed on the property without a permit.*
>
> *[23] Such notice of a decision is essential to give meaning to the appeal process. If this were not the case, the right to appeal would be illusory, rendering the statutory right of appeal meaningless. It would not be reasonable to interpret the statute in a way that renders a given right meaningless. The law does not specify the manner in which notice to the public must be given but does state that there must be some public notice of a decision–or specific notice to persons affected by the development -- before an appeal period can be said to run. That being said, an appellant could not abuse this right by deliberately delaying inquiry after he/she had been put on notice that a decision appears to have been made. In the present case, the mobile home was placed on the property and the appellants became aware of that fact on June 24, 2003. There was then some responsibility on them to inquire about whether or not a permit had been issued.*

[42] Subsequent to the Court's ruling in *Booth and Peak*, the ***Planning Act*** was amended to include the notice requirements set out in section 23.1.

[43] In the present appeal, the evidence before the Commission indicates that the City placed notices of the subdivision approvals and both building permits on its website. Printouts of these notices were filed as part of Exhibit R7 during the hearing. A search on the City's website by Commission staff verified that this information is in fact available online. Biovectra did not argue before the Commission that such notices were in breach of section 23.1.

[44] Section 2.9 of the City's Bylaw does not appear to meet some of the notice requirements set out in section 23.1 of the ***Planning Act***. However, a review of the printout notices contained in Exhibit R7 suggests that the City is faithfully complying not only with its own Bylaw, but also with at least many of the stricter requirements of section 23.1 of the ***Planning Act***. In at least one respect, section 2.9 of the Bylaw provides a very helpful requirement over and above that required under section 23.1 of the ***Planning Act*** as the Bylaw requires the City to place a newspaper advertisement at least every six months to remind the public that permits and approvals are posted on the City's website.

[45] Biovectra provided evidence that it made inquiries to the City when it became apparent that some form of development activity was occurring on the subject property. The evidence suggests that the City did not provide Biovectra with information concerning the nature of the development at that early stage. The City had requested permission from Paramount, or the subject property's previous owner 100529 PEI Inc., in response to Biovectra's request for information. Paramount declined to grant permission to disclose such information and the City thus did not provide information to Biovectra.

[46] The Commission is of the view that subsection 23.1(2)(e) of the ***Planning Act*** sets forth an expectation that a municipal or ministerial decision maker would provide information about a decision to a member of the public. The Commission is further of the view that the expectation of privacy as to a proposed development ends with the filing of an application seeking a decision from a municipal decision maker, in this case the City.

[47] The website notices provided sketchy information at the subdivision approval stages:

- PID # 387399 Permit # 115-2009 Application Date August 13, 2009 Approval August 25, 2009 Property Location 295 Capital Drive Work Description "Subdivision/cons" Name 100529 PEI Inc. (Forest Green Estates) Appeals Date September 15, 2009.

- [PID and Permit numbers as above] Application Date October 14, 2009 Approval Date October 14, 2009 [Property Location as above] Work Description "Approval of 4 lots (supersedes app of Aug 25-09)" Name 100529 PEI Inc. Appeals Date "21-Jan-00" [apparently a data entry error].

[48] The Commission finds that the two subdivision notices were inadequate in their detail. Notices should be presented in such manner and detail as to ensure easy understanding of what is proposed. However, such lack of detail in of itself is not fatal. There is a limit to how much detail can be expressed on an online form, and a member of the public seeking more detail could simply contact the City for more details. As long as the City is forthright in providing basic information, the online notice would provide the required information to the public.

[49] While it could be argued that the two subdivision notices may have been inadequate to alert Biovectra to the nature of the development of the subject property, Exhibit A7 makes it clear that Biovectra had a strong suspicion by late June 2009 that a residential development was planned for the subject property. Legal counsel for Biovectra then contacted the City and was informed that a building permit had been applied for but not issued. Apparently City staff advised Biovectra that the contents of the application, including the specifics of the nature of the application, were private.

[50] At the building permit stage, the online information became more meaningful. For example, the December 10, 2009 building permit is described as "18 unit apartment building (Phase I – foundation only)" with the developer now listed as Paramount and an appeal deadline date of December 31, 2009.

[51] The Commission finds that the City provided adequate general notice of both the December 2009 and June 2010 building permits. The Commission finds that Biovectra was aware that some type of development had been applied for and had suspicions that it was "a residential condo or apartment unit along the Trans Canada right next to 17 Hillstrom tank farm".

Phased Permits

[52] The Commission takes official notice that, in the context of building construction, the term "footing" has a similar meaning to "foundation". Based on section 1.1 .2 (b) (iii) of the City's Bylaw, the Commission is of the view that the City has the authority to issue a permit for a building's foundation and a separate permit for the rest of the building. Accordingly, the issue raised by Paramount as to whether or not the City's Bylaw authorizes phased permits is perhaps not as critical within the context of this appeal as it might otherwise be, given that the December 2009 building permit could be viewed as a footing permit.

[53] The Commission notes that it has been a long standing practice of the City to issue phased building permits. The Commission can find nothing in the ***Planning Act***, the Official Plan or the Bylaw that prohibits this practice.

[54] In Order LA10-07, *Judy Gallant and Lys-Ondray Goulet* v. *City of Charlottetown*, the Commission noted the following at paragraphs 13 to 18:

> *[13] While not raised by the City or Pan American, it might be possible to view the City's decision of April 12, 2010 as falling outside the types of municipal decisions listed in subsection 28(1.1). Counsel for the City characterized the City's decision as an "approval in principle". The City and Pan American acknowledge that the City's decision is not a building permit. The question for the Commission is whether the City's April 12, 2010 decision is a decision made in respect of an application by Pan American under the City's Bylaw for "a building, development or occupancy permit".*
>
> *[14] Section 9 of the **Interpretation Act**, R.S.P.E.I. 1988, Cap. I-8 (the **Interpretation Act**), reads as follows:*
>
> > *9. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. 1981,c.18,s.9.*
>
> *[15] Section 2 of the **Planning Act** reads as follows:*
>
> > *2. The objects of this **Act** are*
> >
> > *(a) to provide for efficient planning at the provincial and municipal level;*
> >
> > *(b) to encourage the orderly and efficient development of public services;*
> >
> > *(c) to protect the unique environment of the province;*
> >
> > *(d) to provide effective means for resolving conflicts respecting land use;*

> *(e) to provide the opportunity for public participation in the planning process. 1988,c.4,s.2.*
>
> *[16] While at first blush it might seem to the advantage of the City and Pan American to argue that the Commission did not have the jurisdiction to hear this appeal, such a position could be viewed as short sighted, as it would effectively delay the right of appeal to the building permit stage. Pan American quite appropriately pointed out that the costs for a developer to be incurred at the building permit stage will be much higher than at the approval in principle stage.*
>
> *[17] Regardless of whether the Commission has the jurisdiction to hear the present appeal, there is a future right to appeal a building permit issued for the proposed hotel. That being said, provided the present appeal is heard, and heard within the principles of natural justice and fairness, the range of issues to be considered on any future appeal at the building permit stage would be significantly narrowed pursuant to the principle of issue estoppel as considered by the Supreme Court of Canada in Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44.*
>
> *[18] Given the objects of the **Planning Act** and the requirements of section 9 of the **Interpretation Act**, the Commission finds that the City's decision of April 12, 2010 is a decision made in respect of an application by Pan American to develop parcels of land for a proposed hotel. Indeed, while a building permit has not been issued, Pan American did apply for a building permit on February 24, 2010 (Tab 19 of the City's Record). In effect, through a "fair, large and liberal construction and interpretation", the City's April 12, 2010 decision serves as a development permit. Accordingly, the Commission finds that it has the jurisdiction to hear the present appeal.*

[55] In Order LA10-10, *Andrea Battison and Joan Cumming* v. *City of Charlottetown*, the Commission noted the following at paragraphs 21 to 23:

> *[21] The Commission has often referred to section 9 of the **Interpretation Act** where a strict reading of legislation would appear to frustrate the appeal process. The Commission is mindful of the above cited objects of the **Planning Act**. Objects (a) and (d) are particularly germane to this jurisdictional issue. There is considerable merit in encouraging the appeal process to be exercised as early as practical in the planning process, as this allows an appellant to exercise the right to appeal a project in its early stages before a developer incurs greater development costs. In addition, if the outcome of an appeal requires modifications to a project, it is easier and less expensive to implement such modifications in the concept stage, rather than at a much later stage. Simply put, it is often good for all parties to an appeal to deal with the issues as early as practical provided that such an early determination is also just and fair. It is often said that justice delayed is justice denied. It may also be said that justice rushed is justice hushed. These two sayings may be reconciled by proceeding as swiftly as possible, provided that due process is followed and the rights and responsibilities of all parties are respected.*
>
> *[22] The Commission finds that proceeding with an appeal in the early stages of a project helps to facilitate efficient municipal land use planning. It also helps to provide an effective means for resolving land*

> *use conflicts by addressing the issues before plans become highly detailed and fixed. In the present appeal, proceeding with the appeal benefits all three parties while delaying the appeal until after a final reading of the various bylaw amendments was passed would cause confusion, delay, added expense and runs the risk of bringing the administration of justice into disrepute.*
>
> *[23] Given that all parties to this appeal consented to the Commission's jurisdiction with respect to this present appeal, the Commission hereby applies a fair, large and liberal construction to section 28 of the **Planning Act**, as it applies to the City's June 14, 2010 Resolution, in order to best ensure the attainment of the objects of the **Planning Act**. Accordingly, the Commission finds that it has the jurisdiction to hear the present appeal.*

[56] Fundamental to the appeal process is a balance of rights. A dissatisfied "person" has the right to file an appeal provided they do so within the requirements of section 28 of the ***Planning Act***, most importantly, the appeal must be filed within 21 days. Provided the decision maker, be it a municipality or the Minister, has followed the notice requirements set out in section 23.1 of the ***Planning Act***, the decision maker has every right to expect that the decision will not be challenged if no appeal has been filed with the Commission during the 21 day appeal period. Likewise, a developer has every right to expect that, following the expiry of the 21 day appeal period, the developer may proceed with the specific development authorized by the building permit if no appeal of that permit has been filed with the Commission. Indeed, Commission staff frequently receive inquiries, 'on the 22nd day', from decision makers and developers who seek assurance that no appeal has been filed.

[57] The Commission finds that each phase of the building permit may be appealed. However, absent facts establishing deficient notice, each phase creates an appeal opportunity and for each appeal opportunity missed by a would-be appellant, the corridor of the Commission's appellate review narrows and with it, the list of potential remedies which could be granted.

Discretion versus as-of-right

[58] In *Re East Royalty; Affleck* v. *East Royalty, Village Commissioners of* [1983] P.E.I.J. No. 62, Justice MacDonald of the Supreme Court of Prince Edward Island (Appeals Division) noted:

> *5 The case law in this area has been stated many times and it is that any by-law, regulation or statute that is restrictive on the common law rights of a person or the liberty with which he may exercise those rights are to be strictly construed. If the rights of a person are to be effected it must be done in the clearest legislative language and if the right is to be restricted by a municipal government, the authority to do so must be found in the legislative language.*

[59] In Ottawa (City) v. Boyd Builders Ltd. [1965] S.C.R. 408 Justice Spence of the Supreme Court of Canada stated:

> *An owner has a prima facie right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, e.g., nuisance, etc. This prima facie right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch.*
>
> *…*
>
> *In these circumstances, Boyd Builders Limited inquired carefully as to the restrictions covering the property and were correctly assured by municipal officers that the lands were zoned to permit apartment houses. Acting on that assurance, Boyd Builders Limited took options and have since completed the purchase of two pieces of land at a total cost of about $60,000 then immediately instructed its architects to draft plans for an apartment house and by the agency of the architects, on September 9, 1963, submitted an application for a building permit. Apart from certain minor modifications, these plans were such as would justify the granting of a building permit and the acting building inspector, the appellant Instance, admitted that if he had not been instructed to refuse the permit he would have granted one on September 19, 1963. He did not do so, however, because upon it becoming known that the application had been made for such permit surrounding residents raised a clamour, the Ottawa Planning Board met on September 19, 1963, considered the objections of these surrounding property owners, and recommended that the lands in question be rezoned in such a fashion as to prohibit the building of apartment houses. No notice of this meeting of the Ottawa Planning Board was given to any representative of Boyd Builders Limited and no officer of that company had knowledge of it.*

[60] In *MacArthur* v. *City of Charlottetown* 2005 PESCTD, Justice Cheverie of the Supreme Court of Prince Edward Island (Trial Division) reviewed section 4.73 of the City's Bylaw as it read in 2005 and noted:

> *[22] Exactly the same conclusion may be reached when one examines s. 4.73 of the present bylaw. Although it contains a medley of events, circumstances, or things which "in the opinion of Council" constitute reasons for refusing any development, it is, in effect, a menu without detail. It leaves to the exclusive discretion of the members of City Council of the day the ultimate authority to deny any development which, in its opinion, falls into any of the myriad of things contained in s. 4.73. For example, the development might be inferior to the general standard of appearance prevailing or intended to prevail in the area. What does that mean? Where are the objective criteria for that statement? Likewise, the development might significantly, or permanently, injure neighbouring properties by reason of architectural disharmony. What does that mean? And what are the criteria by which it is judged? When the bylaw refers to such things as traffic generation, or noise, or vibration, then presumably there are some objective criteria for that. However, with respect to traffic generation, the only real evidence gathered by the City is contained in a report from the Manager of Public Works (tab 15 of the record) and the Deputy Chief of Police (tab 17 of the record). In each case their responses do not reflect any serious concerns. One could pluck out other examples within this section of the bylaw, but the point is, much of the*

> *criteria are very subjective in nature, and those which are not stand alone without description. In my view, this section "Effectively transforms* an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution a right which...could only...be regulated.". *One must keep in mind that MacArthur's proposal met the as of right provisions in the bylaw for a project like a 23 unit apartment building.*

[61] The caselaw is clear. At common law, a property owner may do with his land what he wishes, subject to the rights of surrounding property owners, for example, the law of nuisance. However, these rights may be restricted by statute, regulation or bylaw. Such restrictions must be expressed clearly and with solid legislative authority. To the extent that discretion is permitted by the statute, regulation or bylaw the wording must be clear and the criteria objective. Arbitrary discretion is to be avoided.

[62] In the present appeal, section 7.1 sets the tone for a series of provisions for the protection of public health and safety. This is consistent with the public safety provisions set out in the ***Planning Act*** referenced earlier. Section 7.1 is also consistent with section 5.7 of the Official Plan. However, section 7.3 .4 (e) seems to rein in the impact of section 7.1. Given the Court's decision in *MacArthur* v. *City of Charlottetown*, the effort to place discretion within objective parameters is certainly laudable.

[63] However, given the goal of best possible protective services within financial resources, the objective of maximum efficiency of the protective services and the policy to "ensure that all major development proposals will be reviewed by protective service departments to maintain the City's ability to deliver effective protective services", it is the view of the Commission that section 7.3 .4 (e) of the Bylaw may have strayed from the goals, objectives and policies of the Official Plan.

[64] In dealing with public safety, some serious consideration should be given to the professional assessment or recommendations made by departments or agencies. Admittedly, it can be a very fine line to walk to avoid arbitrary discretion, yet pay heed to the professional opinions of the City's protective service departments. However, a distinction can be made between the mere whim of arbitrary discretion and the principled discretion of a well trained professional.

[65] Ultimately, subsection 15(2) of the ***Planning Act***: ensures that the Official Plan shall prevail:

> *15(2) The bylaws or regulations made under clause (1)(d) shall conform with the official plan and in the event of any conflict or inconsistency, the official plan prevails. 1988,c.4,s.15; 1991,c.1,s.1; 1991,c.18,s.22; 1994,c.46,s.4* {eff.} *Sept. 1/94; 1995,c.29,s.6 {eff.} Oct. 14/95.*

[66] Section 4.60 appears to give the development officer some measure of discretion at the subdivision and development permit stages to consider "the compatibility and interrelationship of the proposed uses of the site and the adjacent land use, both present and projected". However, any such site development discretion would have to be based on the principles set out in *MacArthur* v. *City of Charlottetown*, thus including "objective criteria" from the evidence in general and "serious concerns" reflected in the professional reports of City staff and, by extension, expert witnesses heard by the Commission.

Public Safety

[67] By way of *obiter dictum* [comments made by a court or tribunal not strictly necessary to the determination of the matter], the Commission offers the following comments.

[68] A key aspect of the services a City provides to its residents is the fostering of a safe environment.

[69] Public safety involves protecting people from events or actions that could endanger people or cause unnecessary injury. It is not only a matter of responding to safety issues after they occur, it is an evolving area and one that has become more and more focused on proper planning and preventing accidents before they happen. Playgrounds are designed to avoid injuries, streets and intersections are reviewed to avoid accidents, buildings are required to meet building and fire codes. The right to enact measures to protect public safety are more and more evident in our society and often more intrusive on traditional rights such as airport passenger screening versus personal freedom or environmental protection versus land development.

[70] The City of Charlottetown references public safety in its' Official Plan suggesting it is a matter of "great concern".

[71] Two things are essential for the provision of effective public safety. The authority must be aware of the potential dangers, and willing and able to take measures to minimize those dangers. In order to be aware of the potential dangers the authority must not only be open to receiving information, but prepared to review and analyze that information. It is this aspect of the management of public safety that concerns the Commission in this matter.

[72] The City was confronted with a unique set of circumstances. There was a request for residential development next to an industrial park and more importantly next to a chemical plant located in that park. Biovectra's Hillstrom plant is unlike anything else in the City of Charlottetown and those characteristics place it in a unique category in terms of the protection of public safety by proper planning. Efforts to cast it in the same category as a service station are to over minimize the potential dangers. Biovectra not only has volatile liquids, it conducts processes that require the mixing of those chemicals in precise quantities. Material is moved by tanker truck, portable containers, and piping systems. It is stored in outdoor tanks, and barrels inside the building. At the same site Biovectra operates a number of reactors that offer their own unique dangers.

[73] Biovectra, by all accounts operate a facility with strict safety protocols, specialized training, incident suppression equipment, and a disaster response plan. The plant meets or exceeds all required codes and the inspections of both government and industry agencies. They could easily have taken the position that by meeting all the codes 'what happens next door' is of no concern to them. That was not their response.

[74] When the proposed use of the adjacent site for an apartment complex became clear Biovectra made the City aware of their concerns. Both the founder of DCL, Dr. Regis Duffy, and the CEO of Biovectra, Ron Keefe addressed their concerns to City officials, including a presentation to Council. Neither gentleman could be classed as an anti-development activist as both reflect careers of promoting and fostering development. Dr. Duffy had the added experience of serving on City Council. They are credible individuals and their concerns merited serious consideration. Yet there is no evidence any serious effort was made by the City of Charlottetown to confirm or refute their concerns. It seems to have quickly become a debate over as-of-right development rather than an effort to permit development within a public safety context.

[75] Mr. Zajick of Biovectra is a Chemical Engineer. He had the additional experience of witnessing a chemical fire and explosion and expressed his concern about the proximity of a residential apartment complex to the plant.

[76] Biovectra went further. They employed Rem Gaade, a HazMat specialist, to come to the province, visit the plant, review the planned development and offer informed comment. He was made available to meet with city officials and met with them. Again, no evidence was presented to suggest that his concerns were treated seriously. In fact during the appeal process it was suggested that because Mr. Gaade had testified for an unsuccessful party at an Ontario Municipal Board hearing more than a decade ago on a matter relating to public safety he was the “boy crying wolf”.

[77] Dissatisfied with the City’s response, Biovectra appealed to the Commission.

[78] The property was zoned Industrial by the Community of West Royalty. After municipal amalgamation the City of Charlottetown, in developing its official plan, opted to rezone the land as C2. This opened the property up to a wide variety of uses including apartment buildings. There is no evidence before the Commission that public safety was considered at the time this property was rezoned.

[79] Paramount first asked about the possibility of using the property for an apartment building. They did not apply for any permits until informed by the City it was an acceptable use of the property. In processing the Paramount inquiry and applications the Development Officer admitted to limited knowledge of what Biovectra did, what processes were carried out at the Hillstrom plant, and what chemicals were stored on the property. In terms of siting the City appeared as concerned about not having a parking lot border Capital Drive as they were about protecting public safety in the locating of the apartment complex.

[80] In the face of expressed concerns, the City felt that, without clear and objective criteria to base a decision upon, they could not deal with the public safety concerns raised by Biovectra. The provincial tank inspector was asked to go to the site and look at the propane tanks. No assessment of the other tanks, let alone the materials they contained and the processes employed at the plant, were undertaken. At no time, not when the initial development inquiries were made, not when the applications were filed, not when BioVectra raised concerns, not when the matter was appealed, did the City employ any expertise to determine if there was a potential public safety issue and how it might be properly addressed.

[81] The City's Official Plan states "Public safety, and the protection of property, is a matter of great concern to the residents of Charlottetown." In defining direction the city states "Our Policy shall be to ensure that all major development proposals will be reviewed by protective service departments to maintain the city's ability to deliver effective protective services."

[82] The City followed that policy in this matter, but far too literally. The biggest concern raised and addressed appears to be turning radius for any fire truck that might respond to an incident at the apartment complex. The only other reference to public safety was to measure the distance between the Biovectra tanks and the adjacent property line to ensure it met NFPA codes. That done, the book was closed on public safety.

[83] Fire Chief MacDonald, at the appeal hearing, refused to offer a professional opinion on whether or not the apartment complex and its proximity to the plant were safe. His only role was to ensure it met code.

[84] Faced with concerns about the public safety implications, the City circled the wagons and 'as-of-right development' and meeting the fire and building codes became the defense.

[85] The Commission believes that public safety can supersede as-of-right development, if public safety is properly considered and assessed at the appropriate stage.

[86] Had this appeal been filed at the time of the permit being granted for the foundation, and the evidence provided at this hearing been provided at that appeal hearing, a different decision might have resulted.

Synthesis of the Law

[87] In the present appeal, the City gave crystal clear general notice to the public of the December 2009 building permit. This permit may be characterized as a phase 1 building permit. It may alternatively be characterized as a footing permit. The Commission finds that the December 2009 permit was appealable under section 28 of the ***Planning Act*** as this permit was a decision made by the City in respect of an application by Paramount for a building or development permit. Biovectra failed to appeal the December 2009 permit and accordingly, failed to appeal the concept of an apartment building on the subject property and the location of the building on the property, as determined by the building's foundation.

[88] As the December 2009 building permit was not appealed, the City had no discretion to prevent the completion of the apartment building, provided the building met all City bylaws and applicable building and fire codes.

The Evidence of the Experts

The Right to Cross Examination

[89] Biovectra presented Rem Gaade as an expert witness. Mr. Gaade commenced his testimony on September 9, 2010; however, his evidence was not completed that day. The hearing was adjourned to October 20, 2010 so Mr. Gaade could resume his testimony, including cross examination and so

that, at the request of the City's legal counsel, he could provide the modeling data he referred to in his testimony.

[90] However, by letter dated September 20, 2010, Ron Keefe, Biovectra's President and Chief Executive Officer, advised the Commission … "Mr. Gaade will not be filing any additional information or re-appearing before the Commission."

[91] By letter dated September 27, 2010, David Hooley, Q.C., the City's legal counsel, submitted a letter in response to Mr. Keefe's letter. Mr. Hooley suggested that the Commission could dismiss Biovectra's appeal entirely given their refusal to make their expert witness available for cross examination. In the alternative, Mr. Hooley suggested that the Commission could strike Mr. Gaade's oral and documentary evidence from the record and ignore such evidence in reaching its final decision.

[92] On September 28, 2010, the Commission's Appeals Administrator identified Mr. Hooley's September 27, 2010 letter as a written submission on a preliminary matter and invited all the parties to file written submissions on the matter, with a deadline of October 8, 2010. Mr. Hooley was invited to file a written rebuttal with a deadline of October 15, 2010. The matter would then be considered as a preliminary matter near the outset of the resumption of the hearing on October 20, 2010. All counsel would be permitted to speak to the matter; the Commission would consider the issue and give a ruling or direction on the matter.

[93] On October 20, 2010, the Commission, after reviewing the written submissions and oral arguments of counsel, issued a verbal order to Biovectra to produce Mr. Gaade and his documents to allow for the completion of his direct evidence and to provide the opportunity for counsel for the City and for Paramount to cross examine him. Following the issuance of this verbal order, testimony of other witnesses for Biovectra resumed.

[94] At the beginning of the hearing day on October 21, 2010, counsel for Biovectra informed the Commission that Biovectra did not believe that Mr. Gaade's presence was necessary. However, Biovectra would "facilitate" Mr. Gaade's return if the Commission feels it necessary. In other words, "… if ordered to bring him [Mr. Gaade] back, we will". Counsel for the City and counsel for Paramount noted that the Commission had provided clear direction in the verbal order issued the previous day. The Commission then reiterated its verbal order, and Biovectra agreed that Mr. Gaade would return on December 13, 2010 to complete his testimony.

[95] The Commission reiterates that the right to cross examination of a witness is a fundamental principle of the Canadian justice system which applies to administrative tribunals as well as the Courts.

Rem Gaade

[96] Mr. Gaade gave approximately two days of detailed testimony, all of which is contained on the Commission's audio record. This testimony, as was the entire hearing, was broadcast to the public on the Commission's website. He also filed a written report [Exhibit A3] and provided follow up computer modeling documentation [Exhibit A12].

[97] Mr. Gaade is the former Chief of Hazardous Materials and Special Operations, Fire Fighting Division, of the City of Toronto Fire Department. He joined the Toronto Fire Department in 1979 and set up their HazMat program. He has served in a command role at a large number of HazMat emergencies. He was chairman of the Canadian Association of Fire Chief's' HazMat Committee for 8 years. He has been a member of the Standing Committee on Hazardous Materials and Activities of the National Fire and Building Codes of Canada since 1982. He was a member of the NFPA's Technical Committee on Hazardous Materials Response Personnel for over 20 years. He was one of the authors of the NFPA's Terrorism Response protocols. He has 35 years of operational fire fighting experience. He has been associated with various North American fire service and law enforcement agencies since 1998 as an emergency planner and educator.

[98] The pith and substance of Mr. Gaade's testimony is that Paramount's apartment building project presents an unreasonable level of risk. Paraphrasing from the conclusions of his report, Mr. Gaade is of the view that the access road built for the apartment building is only marginally acceptable as it contains two bends which would be difficult for fire trucks to negotiate, especially when the road is narrowed by plowed snow. Mr. Gaade also felt that it would be difficult for the fire trucks to negotiate the roadway while residents are fleeing from the development. While Mr. Gaade is of the view that Biovectra's Hillstrom Avenue plant adheres to good operating practices, industrial operations can involve minor releases of vapours, noise and even the occasional mishap. Mr. Gaade made the following additional observations:

- The potential for ongoing nuisance complaints from abutting residents is very high and should be addressed through preventing people from living this close to an industrial facility.

- The apartment development is unsafe and not sensible in light of adjacent land use.

- The project is wrong from a public safety perspective, from a firefighting and rescue perspective and from the standpoint of a HazMat Incident Commander having to resolve any chemical emergency at the facility.

[99] Mr. Gaade performed computer modeling using the U.S. National Oceanic and Atmospheric Administration's ALOHA plume modeling software program. He presented three hypothetical scenarios in his modeling data. He acknowledged that these scenarios represented a "worst case" scenario.

George Fawcett

[100] Paramount presented George Fawcett as an expert witness.

[101] Mr. Fawcett is a Vice President and the Ottawa Branch Manager with Leber/Rubes Inc., Canada's largest firm specializing in Building Code Consulting and Fire Protection Engineering. He has spent his entire career, spanning over 29 years, in the fire protection consulting engineering field. He specializes in the application of Building and Fire Codes for industrial facilities. This includes fire hazard assessments and the design of a wide range of fire protection systems. He has personally worked on over 300 industrial related projects during his career. These projects include: petrochemical refineries, military bases, manufacturing facilities, mines and nuclear power plants. He is

presently a member of numerous Standards and Code Writing Committees, including Chair of the National Building & Fire Codes committee on Hazardous Materials & Activities. He is also a member of the Advisory Committees to the Ontario Fire Code, numerous ULC committees, and a Canadian delegate to the International Standards Organization. He is a Past President of the Society of Fire Protection Engineers Chapters in Ottawa and Toronto and is a Past President of the Ontario Industrial Fire Protection Association. In 2006 the Fire Marshal of Ontario requested Mr. Fawcett to convene a committee to evaluate and provide recommendations, including training materials to reduce industrial fire losses throughout the province.

[102] Mr. Fawcett is the 1999 Ontario Fire Marshal's recipient of the award for "Excellence in Fire Safety". In addition, he has written numerous articles related to the fire protection-engineering field.

[103] The pith and substance of Mr. Fawcett's testimony is that Paramount's apartment project meets or exceeds all safety code requires, including distance requirements from Biovectra's Hillstrom Avenue chemical plant. He noted that the codes are experienced based. In his December 10, 2010 Report [Exhibit D4], Mr. Fawcett wrote under the heading "2.0 Codes and Standards":

> **2.0 CODES AND STANDARDS**
>
> One of the core objectives and intents behind the Codes is to minimize and mitigate hazards to people and other structures on the site, responding emergency personnel and to adjacent properties.
>
> With respect to adjacent properties, the Codes utilize property lines as the extent of their application. This was confirmed in a letter from the Canadian Codes Centre to BioVectra Inc., dated September 27, 2010 stating "*...The requirements in the National Building and Fire Codes are intended to be applied to the* ***subject building*** *in relation to a property line, centre line of a street, or an imaginary line between two buildings on the same property*". The premise behind this is a property the Owner has no direct control over what an adjacent Owner does on his property, including types of operations, inspections, maintenance, etc.
>
> The Codes do not differentiate between the types of adjacent occupancies, i.e. residential, commercial, and industrial, etc. with respect to their application to the site in question. The application of the Codes stop at the property line.
>
> The Codes have an objective behind them based on minimizing and mitigating danger to people on the site and to the adjacent building property line. Various Codes have more detailed objectives i.e. the National Building and Fire Code have functional requirements, objectives and intent statements as part of the objective based code system. These are identified to clarify the intent, objective and functional statement behind each clause. This also allows alternative compliance measures to be developed for acceptance by the Authority Having Jurisdiction.

[104] Mr. Fawcett went on to write:

> Most, if not all Provinces and Territories enact laws that permit the "Chief Fire Official" to mandate an Owner to evaluate and mitigate hazards they may create within their community. It is my understanding that the Charlottetown Fire Chief has not issued such an Order to BioVectra. Further, in correspondence, dated September 14, 2010 between The Charlottetown Fire Chief and Mr. Bob Benedetti, Principal Flammable Liquids Engineer of the National Fire Protection Association Mr. Benedetti states, *"In my opinion, the installation described meets the requirements for NFPA 30 for location of the storage tanks".*

[105] In his oral testimony before the Commission, Mr. Fawcett noted that he had visited the site of Paramount's apartment building. After considering the proximity of the apartment building to Biovectra's Hillstrom Avenue facility, Mr. Fawcett described the fire risk as low on a three point scale of 'high-medium-low'. He characterized the risk as an "acceptable risk". He stated that the NFPA 30 code requirements were met.

The Commission's Decision

[106] The Commission finds both Mr. Gaade and Mr. Fawcett to be compelling witnesses, both of whom are experts in their respective fields. Mr. Gaade is an expert in HazMat response and HazMat planning. Mr. Fawcett is an expert in fire protection systems and the application of the fire codes.

[107] In the Commission's view, Mr. Gaade's evidence would have been more determinative had it been provided to the Commission on an appeal at the subdivision permit stage or even at an appeal of the issuance of the December 2009 phase 1 building permit. For that matter, his report and recommendations would have been extremely helpful had it been made available when the City rezoned the subject property to C2 in 1999 or when the City's statutory review of its Official Plan and Bylaw, including zoning, occurred in 2005. Mr. Gaade's findings essentially deal with HazMat planning, a subject that would best be dealt with at the re-zoning stage, or the zoning review stage. That said, Mr. Gaade's findings could have been very helpful in the design of the subdivision or the specific siting of the apartment building and thus germane at any appeal at the subdivision approval or initial building permit stages.

[108] However, as previously noted, Biovectra missed two opportunities to appeal at the subdivision stage and also missed the opportunity to appeal the December 2009 building permit for the foundation of Paramount's apartment building. Mr. Gaade's evidence was presented on an appeal of the second stage or phase of a building permit after Biovectra had failed to challenge the subdivision of the subject property and failed to challenge the specific siting of the building in question. When Mr. Gaade was asked what could be done to make the existing apartment building safer, he could not think of anything. His evidence was focused on preventing the building from being sited where it was. Unfortunately, the opportunity to appeal at an appropriate stage had slipped by.

[109] By contrast, Mr. Fawcett's evidence was provided at the right time. With the siting of the apartment building not under appeal, the remaining focus was limited to the safety essentials, code compliance. Mr. Fawcett characterized the risk both as "low" and as "acceptable". Mr. Fawcett discussed in his oral evidence some measures that could be taken to further reduce the risk. This included the possibility of a sprinkler system for the apartment building and the possibility of gas detection equipment for Biovectra's Hillstrom facility.

[110] The Commission finds that the siting of Paramount's apartment building in relation to the Biovectra facility meets code requirements. In the view of the Commission, this provides a minimum objective standard to assure the public that the siting of these buildings represents an acceptable risk. Zoning should have provided buffering to isolate the industrial and residential uses, but this did not happen. The Commission believes that some professional discretion ought to have been exercised at the subdivision approval stage to provide further buffering distance and thus additional safety. This also did not happen; however, the subdivision approval stages, and the initial building permit, were never appealed, and thus the Commission has no jurisdiction to vary or overturn those earlier decisions.

[111] For the foregoing reasons, the Commission denies the appeal, and upholds the City's June 16, 2010 second phase building permit.

[112] Again by way of *obiter dictum*, the Commission is, however, concerned that in 1999 the City had rezoned the subject property from Industrial to C2. While zoning this property C2 made some sense as it bordered a major highway, there were other factors that should have been considered. Had the zoning been C2 in merely a simple sense, the C2 zone might have been very appropriate.

[113] However, as R4 multi-family residential developments are permitted in the C2 zone, under the principle of what was termed at the hearing "stacked zoning", a bizarre situation unfolded where an apartment building, with three other similar buildings also planned, could be lawfully constructed next door to a chemical plant with chemical reactors, a blow out wall and storing some 100,000 litres or so of flammable solvents. Documentation describing the plant and its processes were filed with the former Community of West Royalty in 1989 and 1990. Following the 1995 amalgamation, the West Royalty file became the City's file and accordingly, the City cannot plead that it had no knowledge of these documents. Mr. Gaade testified as to his views regarding the soundness of placing a residential structure so close to a chemical plant. However, Mr. Gaade is not a land use planner and as no independent expert planning witness testified before the Commission, it is an open question as to whether the rezoning of Industrial lands, adjacent to a chemical plant, to C2, with R4 uses permitted in such zone, is consistent with sound planning principles, given the reality of Paramount's development on the subject property.

[114] While not properly the subject of this appeal, given the narrowed corridor of review, the Commission is of the opinion that the 1999 re-zoning of the subject property from Industrial to C2 defies common sense and represents a serious affront to the interests of public safety in an otherwise well planned city.

[115] Public safety, like public health and environmental protection, is a principal mission and responsibility of every level of government in Canada. The City of Charlottetown reflects this mission and responsibility in its official plan, its bylaws, and the work of its senior officials, and the Commission does not doubt the good intentions or integrity of those professionals involved in the decision making process around the development under appeal.

[116] As already stated, this appeal is denied on the basis of evidence presented and a thorough review of applicable law. Notwithstanding, the Commission is left with a disquieting and troubled feeling that the City of Charlottetown did not adequately take public safety issues into consideration throughout the approval process.

[117] When it comes to ensuring public health and safety, a local government should at times be willing to reach beyond the strict adherence to codes and bylaws in order to protect its citizens.

[118] When Canada was confronted with H1N1 influenza virus in 2009, the actual threat to the health of Islanders was real but somewhat unpredictable, and yet public health officials at all levels took every precaution and a mass immunization program was carried out. Fortunately, the anticipated morbidity and mortality rates did not materialize and the people of the province escaped relatively unscathed. The point is that risk was thoroughly investigated and assessed, precautions were taken, every protective measure was considered, and citizens were comforted in knowing that government officials had acted prudently on their behalf.

[119] At the end of the day, having considered the evidence before it, the Commission is not at all certain that the City of Charlottetown exercised such prudence, or took such precautions, with regard to the Paramount apartment development and the public safety issues surrounding it. During the hearing one witness rhetorically asked: “Would the City approve the locating of a chemical plant adjacent to an existing apartment building?” This provocative question haunts the Commission and deserves serious reflection.

4. Disposition

[120] An Order denying this appeal follows.

IN THE MATTER of an appeal by Biovectra Inc. of a decision of the City of Charlottetown, dated June 16, 2010.

Order

WHEREAS the Appellant Biovectra Inc. appealed a decision of the City of Charlottetown, dated June 16, 2010;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on September 8 and 9, October 20 and 21, December 13, 14, 15, 16 and 17, 2010 after due public notice and suitable scheduling for all 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 hereby denied.

DATED at Charlottetown, Prince Edward Island, this 22nd day of February, 2011.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*
Maurice Rodgerson, Chair

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

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)