



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA12008
Order LA12-06**

IN THE MATTER of an appeal by
BioVectra Inc. of several decisions of the
City of Charlottetown, dated March 13 and
17, 2012 and April 2, 2012.

BEFORE THE COMMISSION
on Friday, the 21st day of September, 2012.

John Broderick, Commissioner
Michael Campbell, Commissioner
Jean Tingley, 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
BioVectra Inc. of several decisions of the
City of Charlottetown, dated March 13 and
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Contents

<i>Contents</i>	<i>ii</i>
<i>Appearances & Witnesses</i>	<i>iii</i>
<i>Reasons for Order</i>	<i>I</i>
1. Introduction	1
2. Discussion	2
3. Findings	3
4. Disposition	8
<i>Order</i>	

IN THE MATTER of an appeal by BioVectra Inc. of several decisions of the City of Charlottetown, dated March 13 and 17, 2012 and April 2, 2012.

Appearances & Witnesses

1. For the Appellant BioVectra Inc.

Counsel:

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

2. For the Respondent City of Charlottetown

Counsel:

David W. Hooley, Q.C.

Witnesses:

**Hope Gunn
Randy MacDonald**

3. For the Developers

Matthew J. W. Bradley

IN THE MATTER of an appeal by BioVectra Inc. of several decisions of the City of Charlottetown, dated March 13 and 17, 2012 and April 2, 2012.

Reasons for Order

1. Introduction

[1] The Appellant BioVectra Inc. (BioVectra) filed three Notices of 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*).

[2] On April 3, 2012, BioVectra filed a Notice of Appeal with respect to a decision of the Respondent City of Charlottetown (the City) on March 13, 2012 to approve a subdivision application filed by 101356 PEI Inc. of a portion of Nicholas Lane.

[3] Also on April 3, 2012, BioVectra filed a Notice of Appeal with respect to a decision of the City on March 17, 2012 [See date noted in Exhibit R2 Tab 79] to issue a building permit to Paramount Construction (PEI) Ltd. for 60 and 64 Nicholas Lane.

[4] On April 13, 2012, BioVectra filed a Notice of Appeal with respect to a decision of the City on April 2, 2012 to issue a building permit to Elwin Jay Holdings for 50 Nicholas Lane.

[5] The hearing was held on June 11 and 12 and July 16, 17 and 19, 2012.

[6] At the hearing before the Commission, the developers 101356 PEI Inc., Paramount Construction (PEI) Ltd. and Elwin Jay Holdings were represented by the same legal counsel, took a unified position and are henceforth referred to in this Order as the Developers.

[7] The hearing of the appeal commenced on June 11, 2012 before Commission Vice-Chair Allan Rankin and Commissioners John Broderick and Leonard Gallant. BioVectra requested an adjournment, pending an application for Judicial Review filed with the Supreme Court of Prince Edward Island that very morning. Counsel for the three parties spoke to BioVectra's motion for an adjournment, with Counsel for the City and the Developers opposing the motion.

[8] Unrelated to the motion for an adjournment pending the disposition of the application for Judicial Review, Counsel for the City submitted that a fairly brief adjournment might be helpful for all Counsel to collaborate on submitting a book or books of documents.

[9] The Commission considered the motion for an adjournment pursuant to Rules 28 and 56 of the Commission's *Rules of Practice and Procedure for Hearings* (the Rules).

[10] On June 12, 2012, the Commission issued an oral decision denying an adjournment without date pending the outcome of the Judicial Review but granting an adjournment until July 16, 2012 to allow Counsel to file documentation in accordance with the Rules, including the transcripts of expert evidence heard by the Commission in a previous appeal: see Order LA11-01.

[11] On July 16, 2012 the hearing proceeded before a new panel of the Commission consisting of Commissioners John Broderick, Michael Campbell and Jean Tingley. The change in the composition of the panel became necessary as a result of the schedules of two Commissioners. As evidence and argument on the merits of the appeal had yet to be heard, the Commission revised the composition of the panel to avoid the necessity of a further adjournment. Counsel for all parties noted on the record that they had no objection to the change in the composition of the panel.

[12] After a full hearing day on July 16, 2012, the hearing continued on July 17 and concluded with oral argument of Counsel on July 19, 2012.

2. Discussion

BioVectra's Position

[13] Counsel for BioVectra presented oral submissions to the Commission which may be briefly summarized as follows.

- BioVectra has two issues to be considered by the Commission: first, the issuance of building permits for three apartment buildings and, second, the subdivision of a portion of Nicholas Lane to create a short section of public road.

Building Permits

- With respect to the issuance of the building permits, BioVectra submits that the City did not discharge its obligation under section 4.52.6 (g) of the City's Zoning and Development Bylaw (the Bylaw).
- Originally, the City took a firm stance and insisted that the Developers obtain a risk assessment.
- However, the Developers placed pressure on the City and as a result of this pressure the City retreated from its original firm stance and the City chose instead not to require the Developers to provide a risk assessment and instead to follow the report of Rem Gaade filed as part of the previous appeal and referred to in Order LA11-01 (Gaade Report) and its recommendations.
- BioVectra maintains that not all of the Gaade Report's recommendations were followed. The City had no expertise to interpret the Gaade Report and exclude certain recommendations.

- The Gaade Report and the modelling data accompanying said report were never presented as a whole to the City's Council.
- The actions of the City therefore fell well short of due diligence.

Subdivision of Portion of Nicholas Lane

- With respect to the City's decision to approve a subdivision of a portion of Nicholas Lane, BioVectra maintains that any subdivision must be in accordance with section 7 of the City's Bylaw.
- Section 7 of the Bylaw requires the subdivider, in this case the Developers, to pay the cost of upgrading an existing private street to the City's standards.
- The City made a mistake when it approved the subdivision of the Developers' lands in both August and October 2009 as permission for road access [from the private roadway known as Nicholas Lane onto the Provincially regulated and public Upton Road] had not yet been obtained from the Provincial Government. The Developers threatened legal action against the City. In effect, the City was "bullied" by the Developers.
- The City then agreed to subdivide 200 feet of Nicholas Lane and upgrade that portion to City specifications at a cost of approximately \$25,000.
- The result is a 200 foot long public road leading to a private road resulting in a "windfall" to the Developers as the City, not the Developers, paid for the upgrade. Accordingly, the City acted contrary to section 7 of the Bylaw.

Summary

- In summary, BioVectra submits that the City failed to follow section 7 of its Bylaw, failed to discharge its obligation under section 4.52.6 (g) of its Bylaw, "circled the wagons" and acted to defend itself against possible legal action from the Developers rather than exercise due diligence.

[14] For the above reasons, BioVectra requests that its appeals be allowed and the Commission issue an Order setting aside the City's decisions to issue the building permits issued to the Developers and the subdivision pertaining to this matter.

The City's Position

[15] Counsel for the City presented oral submissions (along with a written text of those submissions) to the Commission. These submissions may be briefly summarized as follows.

Subdivision of Portion of Nicholas Lane

- The City acknowledges that an oversight occurred. The Developers should have applied in 2009 for an access permit from the Province and the City should have insisted that this be done prior to approving the subdivision.
- From time to time, the City is confronted with some situations (for example, where new development is next to an existing development) where a developer seeks some public contribution. In the present case, the Developers spent some \$80,000 to \$100,000 on Nicholas Lane and the City spent \$25,000 to upgrade a portion of that street to City standards. Such a sharing of costs is authorized by the City's Bylaw, specifically section 7.3.10.

Building Permits

- The City submits that its decisions to issue the building permits were compliant with applicable building and fire codes. The City considered and relied on the safety related recommendations contained in the Gaade Report. The City acted reasonably in relying on the Gaade Report. If BioVectra's expert says these additional buildings would be acceptable what better evidence could be obtained?
- The City submits that if the City in any way had misinterpreted the Gaade Report, BioVectra could have presented further evidence from Mr. Gaade. The City submits that it would be difficult for Mr. Gaade to offer evidence to contradict his report.
- Page 14 of the Gaade Report presented the "bottom line" recommendation. The City's Council had the benefit of page 14 and providing page 13 would not have provided any additional relevant information.
- The third recommendation on page 14 of the Gaade Report concerned a recommendation for a covenant with respect to "nuisance". While such a covenant might protect BioVectra from nuisance related legal claims, this recommendation has nothing to do with public safety.

[16] For the above reasons, the City requests that the appeals be denied.

The Developers' Position

[17] Counsel for the Developers presented oral submissions to the Commission which may be briefly summarized as follows.

- The proposed apartment buildings exceed all code requirements.
- The proposed apartment buildings meet the relevant recommendations set out in the Gaade Report.
- BioVectra has produced no evidence to suggest that these buildings would be unsafe.

- BioVectra is the source of risk, not these apartment buildings. BioVectra is the “bully” as they are trying to control the use of the Developers’ property.
- With respect to the subdivision of a portion of Nicholas Lane: creating 200 feet of public road improves the safety of access on and off of Upton Road from Nicholas Lane.

[18] The Developers submit that these appeals are without merit and should be dismissed.

3. Findings

[19] After a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission to deny these appeals. The reasons for the Commission's decision follow.

[20] In the present appeals, none of the parties challenged the Commission's jurisdiction. Appeals under the **Planning Act** take the form of a hearing *de novo* before the Commission. In an often cited decision which provides considerable guidance to the Commission, *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act* (Stated Case), [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:

*it becomes apparent that the Legislature contemplated and intended that appeals under the **Planning Act** would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.*

[21] The Commission is of the view that appeals must take the form of a hearing *de novo*. There is nothing in the Stated Case, the **Planning Act** or the **Island Regulatory and Appeals Commission Act** to suggest that the Commission has the authority to hear an appeal other than *de novo*.

[22] In considering a **Planning Act** appeal, the Commission is always mindful of two important questions. First, did the decision maker follow the proper process and procedure as required in its Bylaw, in the **Planning Act** and in the law in general, including the principles of natural justice and fairness, in making its decision? Second, does the decision have merit based on sound planning principles within the field of land use and municipal planning and as enumerated in the Official Plan?

[23] With respect to the appeal of the decision of the City on March 13, 2012 to approve a subdivision application filed by 101356 PEI Inc. of a portion of Nicholas Lane; the Commission notes that BioVectra submitted that the City failed to follow section 7 of its own Bylaw. The City contended that its decision was lawful in accordance with section 7.3.10 (b) of the Bylaw, which reads:

A Subdivider shall be required:

...

(b) to pay all or any part of the cost of:

i. upgrading any existing Street which does not meet City standards and forms part of the proposed Subdivision or which provides Street access and egress to the Subdivision;

ii. constructing any new Streets within the proposed Subdivision;

iii. constructing a new Street which meets City standards or upgrading an existing Street to City standards in order to connect the proposed Subdivision to an existing Street in the vicinity of the proposed Subdivision which meets City standards;

iv. access points or upgrading the existing Street network in the vicinity of the proposed Subdivision including, but not limited to, traffic signals, widening of intersections and access turning lanes.

Emphasis added.

[24] The City submitted that it paid approximately \$25,000 toward the cost of upgrading a portion of Nicholas Lane. The City also submitted that it understood that the Developers previously paid in the range of \$80,000 to \$100,000 to upgrade Nicholas Lane. Based on the available evidence, the Commission finds that the Developers did pay part of the cost of improvements to Nicholas Lane, including that portion which is now a public road.

[25] The Commission finds that the specific wording contained in section 7.3.10 (b) of the Bylaw overrides any general requirement to the contrary that may be inferred in the Bylaw.

[26] The Commission also finds that there are good policy reasons for the portion of Nicholas Lane which intersects with Upton Road. The Commission heard testimony to the effect that the private portion of Nicholas Lane runs parallel with an unimproved road owned by a nearby construction company. Light vehicles travel on Nicholas Lane while heavy construction vehicles travel on the unimproved road. The newly public 200 foot “stub” of road connecting Nicholas Lane with Upton Road allows these two distinct flows of traffic to combine before intersecting with Upton Road, thus avoiding a potentially chaotic traffic situation. In the Commission’s view, the City’s decision to upgrade this “stub” was consistent with sound planning.

[27] Accordingly, the Commission denies the appeal of the City’s March 13, 2012 subdivision decision relating to the upgrading to a public road of a 200 foot portion of Nicholas Lane.

[28] With respect to the various building permit decisions pertaining to the present matter, the Commission notes the following from the Gaade Report:

[Page 13]

5. CONCLUSIONS RESULTING FROM THE STUDY

5.1 The proposed development project presents an unreasonable level of risk, especially for Apartment Buildings #1 and #2.

...

5.5 This residential development project, especially buildings #1 and #2, is unsafe and not sensible in light of adjacent land use.

...

It is my opinion that the current proposal is unconscionable from a Public Safety point of view, and should be changed in accordance with my recommendations listed overleaf.

[Page 14]

6. RECOMMENDATIONS

...

6.2 Buildings #3 and #4

- *Building #3 should have its orientation rotated by 90 degrees, so it lies in a north-south orientation, the same as Building #4.*
- *Both buildings should be located as far South-West on their lot as possible, in order to maximize the distance between them and the BioVectra building.*
- *A restrictive covenant should be placed in the deeds / leases whereby the occupants acknowledge that they are settling adjacent to an industrial facility that operates 24/7, and that they are not entitled to file any “nuisance” complaints regarding fugitive emissions such as noise, odours, dust and lighting.*

[29] BioVectra contended that the City failed to require the Developers to follow the third recommendation, that is to say the recommendation with respect to a restrictive covenant. BioVectra also contended that City Council did not have an opportunity to review page 13 of the Gaade Report, (or for that matter the entire report) as City staff only provided Council with page 14.

[30] The City and the Developers both contended that the proposed apartment buildings [corresponding to Buildings #3 and #4 as referred to in the Gaade Report] meet the required safety recommendations noted in the Gaade Report. The third recommendation pertains to “nuisance” matters rather than public safety.

[31] The City contended that City Council had sufficient information before it in the form of page 14 and that the provision of page 13, or for that matter the rest of the report, was not necessary.

[32] Section 4.52.6 (g) of the City’s Bylaw reads as follows:

.6 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.

[33] The Commission finds that the evidence does not support a finding that the proposed apartment buildings would be “detrimental to the convenience, health or safety of the occupants or residents in the vicinity or the general public”. The evidence before the Commission suggested that these apartment buildings were fully compliant with relevant building and fire codes. The evidence also suggested that these apartment buildings met the two specific safety recommendations made by an expert hired by BioVectra for the purposes of the earlier appeal [see Order LA11-01]. While there may be some utility in the third, “nuisance” recommendation, the Commission finds that failing to impose such a requirement is not “detrimental to the convenience, health or safety of the occupants or residents in the vicinity or the general public”.

[34] While the location of the apartment buildings in relation to BioVectra’s Hillstrom facility is not an ideal situation, the fact that the apartment buildings meet or exceed code requirements and follow the applicable safety recommendations set out in the Gaade report satisfy the Commission that the proposed development is acceptable in principle, fully satisfies the requirement set out in section 4.52.6 (g) of the City’s Bylaw and is consistent with sound planning principles.

[35] In the present matter, the Commission finds that the City followed the process required by its Bylaw and the law in general. Given the zoning of the land in effect since 1999, as well as the subdivision approval granted in 2009 (both of which were discussed at length in Order LA11-01), the Commission finds that the City’s decisions which are the subject of the present appeal do have merit based on sound planning principles.

[36] Accordingly, the Commission denies the various building permit appeals filed by BioVectra in this matter.

[37] At the hearing, Counsel for BioVectra emphasized most strongly that the City initially took a very firm approach of requiring an independent risk assessment and then retreated from that approach. The Commission commends the City for taking up the clarion call for a firm approach to risk assessment and the importance of public safety within land use planning. While to some it might seem that the City did retreat from its initial firm position, the Commission is of the view that the City utilized a pragmatic approach in this particular case by making good use of existing reports filed at the previous appeal [LA11-01] and admitted into evidence with the consent of all Counsel at this present appeal. In effect, the City chose not to insist on the Developers ‘re-inventing the wheel’. Given the available documentation, and the fact that “Buildings #3 and #4” were very much contemplated by the Gaade Report, the City’s pragmatic approach was certainly appropriate under the circumstances and was consistent with sound planning. That said, it would be the exception rather than the rule that existing reports would be available, pertinent and comparably recent. As a general rule, and in the absence of recent and relevant pre-existing reports, the City’s firm approach to risk assessment is prudent, in the best interests of the public and is necessary to demonstrate that any resulting decision is founded on sound planning principles.

4. Disposition

[38] An Order denying the appeals follows.

IN THE MATTER of an appeal by BioVectra Inc. of several decisions of the City of Charlottetown, dated March 13 and 17, 2012 and April 2, 2012.

Order

WHEREAS the Appellant BioVectra Inc. appealed several decisions of the Respondent City of Charlottetown, the particulars of which are set out in the Reasons for Order issued with this Order;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on June 11 and 12, 2012 and July 16, 17 and 19, 2012 after due public notice and suitable scheduling for 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 appeals of these various decisions are denied.

DATED at Charlottetown, Prince Edward Island, this 21st day of September, 2012.

BY THE COMMISSION:

(Sgd.) *John Broderick*

John Broderick, Commissioner

(Sgd.) *Michael Campbell*

Michael Campbell, Commissioner

(Sgd.) *Jean Tingley*

Jean Tingley, 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)