

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

**Docket: LA19009**  
**Order: LA19-03**


**IN THE MATTER** of an appeal by Brown's Volkswagen, Phillips Suzuki, Centennial Auto Group and Cathy Feener, of a decision by the City of Charlottetown, dated June 21, 2019.

**AND IN THE MATTER** of a Preliminary Hearing regarding the record to be filed by the City of Charlottetown.

**BEFORE THE COMMISSION ON**  
**Thursday, November 28, 2019.**

J. Scott MacKenzie, Q.C., Chair  
M. Douglas Clow, Vice-Chair  
John Broderick, Commissioner

**CERTIFIED A TRUE COPY**

  
Jonah Clements,  
General Counsel  
Island Regulatory & Appeals Commission

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## **DECISION and ORDER**

**IN THE MATTER** of an appeal by Brown's Volkswagen, Phillips Suzuki, Centennial Auto Group and Cathy Feener, of a decision by the City of Charlottetown, dated June 21, 2019.

**AND IN THE MATTER** of a Preliminary Hearing regarding the record to be filed by the City of Charlottetown.

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1. This is a decision arising out of the preliminary hearing that was held as a result of a request of the Appellant for further documentation to be filed as part of the record of the Respondent.
  2. This matter is an appeal of a resolution of the council of the City of Charlottetown ("City" or "Respondent") to amend Sec. 36 of the City of Charlottetown Zoning and Development Bylaw ("Bylaw") to permit an asphalt, aggregate and concrete plant and insert a definition for the said use of same under Appendix A to the bylaw ("the Bylaw Amendment").
  3. The Appellants have appealed the Bylaw Amendment and as a result of the appeal, the City filed a record with the Commission on August 5, 2019.
  4. It is the position of the Respondent that the record that was filed comprises the full record of the City with respect the Bylaw Amendment.
  5. The Appellants contend that the record may not be complete and that there may have been much that transpired at the City with respect to certain lands that are effected by the Bylaw Amendment and, therefore, that the Appellants require further documents to be filed as part of the City's record to adequately pursue their appeal.
  6. The Commission, therefore, scheduled a preliminary hearing to determine whether or not the City should be required to file the further documents that the Appellant has requested.
  7. In an appeal under the Planning Act for the granting of a building permit by a municipality, the record of the municipality consists of all of the documents, minutes and resolutions of the municipal council dealing specifically with the granting of the permit that is the subject of the appeal.
  8. This Commission in the decision of an appeal by *Smooth Coat Drywall*<sup>1</sup> dealt with the request of an appellant to have other documents and records of the municipality provided as part of the record with respect to the decision of the municipality to deny a building permit. In that decision the Commission determined that the record for the purposes of

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<sup>1</sup> In the matter of an appeal by Smooth Coat Drywall, IRAC Order LA19-02, dated July 5, 2019.

the appeal was restricted to the documents, minutes, correspondence specifically related to the building permit that was being applied for and found that other documents which were extraneous to that application including previous decisions of the municipality, correspondence from councillors, etc. did not form part of the record for the purposes of the appeal.

9. However, this appeal of the matter that is now before the Commission is not a simple appeal with respect to the granting or the denial of the issuance of a building permit with respect to a specific parcel of land. The appeal at hand is one that deals with a bylaw amendment concerning the use that may be made of lands within a particular section of the bylaw. Counsel for the Appellant submits that the items and documents that the Appellants have requested are all relevant to the decision that was made by council to amend the bylaw. Counsel submitted that all of the documents that have been requested are referred to in the record that has been provided by the City of Charlottetown, that the information is in the hands of councillors and that the City itself has access to the documents. Counsel has advised that there is a concern over the lack of transparency of not providing these documents and that it is the City that is trying to dictate what documents are or are not relevant to the Appellants' appeal. Counsel submits that the City has no right to make this determination.
10. Counsel for the City has taken the position that the record of the City with respect to the Bylaw Amendment has been filed in its entirety and that the documents that are being requested are extraneous to the record of the City concerning the Bylaw Amendment. Counsel suggests that this is a text amendment of a bylaw and that any prior applications or document that the City has in its possession that were in existence prior to the file dealing with this text amendment of the bylaw are not relevant.
11. Counsel for the City filed a number of cases in support of his position that the requested disclosure ought not be ordered, on the basis that it was irrelevant.<sup>2</sup> Counsel argued that the test for relevance was similar to that at a civil trial, and something more than a semblance of relevance is necessary. In response, counsel for the Appellants argued that the Commission is not bound by the Prince Edward Island Rules of Civil Procedure and the civil court standard for relevance does not apply to this planning appeal. Counsel for the Appellants noted that the Commission's own Rules of Practice and Procedure provide a broader test for relevancy and, given this, all of the documents requested by the Appellants are relevant.
12. The Commission agrees with the position of counsel for the Appellants. The Commission is not a court, and a planning appeal is not a discovery nor a trial. The Rules of Civil Procedure in this province with respect to the admission of evidence do not apply to planning appeals before the Commission. The Commission's own Rules of Practice and Procedure clearly provide that it is not bound by the formal rules of evidence and can receive all relevant evidence, even where it may not be admissible in court.<sup>3</sup> As the Commission is not bound by the same rules, it cannot be and is not bound by the same

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<sup>2</sup> *Re IRAC*, [1997] 2 P.E.I.R. 40 (PESCAD), *Mullin v. PricewaterhouseCoopers*, 2004 PESCTD 23, *Jay v. DHL Express Canada Ltd.*, 2006 PESCTD 1, *Alumna Systems Canada Inc. v. Strait Crossing Inc.*, 2002 PESCTD 19.

<sup>3</sup> Rule 43.0.

test for admissibility of evidence.

13. The Commission's own rules permit it to request further information or documents that the Commission considers necessary for a complete understanding of an issue in a hearing.<sup>4</sup> Given the nature of this proceeding (a planning appeal) where the Respondent municipality files the Record and has knowledge of the documents and information in its own files (and the Appellant does not), Rules 33 and 34 of the Commission's Rules of Practice and Procedure weigh in favour of disclosure of the requested information, particularly at this pre-hearing stage. The parties will, of course, have the opportunity to argue as to the appropriate weight the Commission ought to afford to the documents at the hearing proper.
14. The Commission is satisfied that the documents requested by the Appellants in the disclosure request, are relevant to the Commission's determination of this matter or, alternatively, will assist the Commission in obtaining a complete understanding of the issues raised in the Notice of Appeal;

**NOW THEREFORE**, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Planning Act*

## **IT IS ORDERED THAT:**

The City provide disclosure of the following records in its possession as referenced in the disclosure request of counsel for the Appellants dated September 3, 2019 (the "disclosure request"):

1. A copy of inquiries and/or applications relating to the construction of an asphalt, aggregate and/or concrete plant within the City (Item 1 of the disclosure request) limited to the applications / inquiries referred to by Robert Zilke at the March 4, 2019 Planning Board meeting;
2. Complete records of any communication between City employee(s) and any potential developer (or the representative of any potential developer) regarding an asphalt, aggregate and/or concrete plant within the City, further particulars of which are noted in Item 2(a) of the disclosure request;
3. Complete records of any communication between City Councillor(s) and any potential developer (or the representative of any potential developer) regarding an asphalt, aggregate and/or concrete plant within the City, further particulars of which are noted in Item 3 of the disclosure request;
4. Complete records of any communication between City employee(s) and any potential developer (or the representative of any potential developer) regarding the amendment to the Zoning Bylaw which is currently under appeal (Item 4 of the disclosure request);
5. Complete records of any communication between City Councillor(s) and any potential developer (or the representative of any potential developer) regarding the amendment to the Zoning Bylaw which is currently under appeal. (Item 5 of the disclosure request);
6. The particulars of items 6, 7 and 8 of the disclosure request to the extent such particulars have not yet been disclosed;
7. Records relating to the 2018 application made by Chapman Bros. Construction Ltd. to construct

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<sup>4</sup> Rule 44.0.

an asphalt plant within the City, limited to the identified particulars set out in item 11 of the disclosure request.

**DATED** at Charlottetown, Prince Edward Island, this 28<sup>th</sup> day of November, 2019.

**BY THE COMMISSION:**

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

M. Douglas Clow, Vice-Chair

(sgd) John Broderick

John Broderick, 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.*