



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

**Docket LA07004 and
LA07008
Order LA07-08**

IN THE MATTER of appeals by
Valleybrook Pharmcare Ltd. and Kerry
Murphy of decisions of the Town of
Montague, dated June 11, 2007 and August
13, 2007.

BEFORE THE COMMISSION
on Thursday, the 4th day of October, 2007.

Brian J. McKenna, Vice-Chair
Maurice Rodgerson, Chair
Anne Petley, Commissioner

Order

Compared and Certified a True Copy

(sgd.) Philip J. Rafuse

Land and Appeals Officer
Land, Corporate and Appellate Services Division

IN THE MATTER of appeals by
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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 _____	6
<i>Order</i>	

IN THE MATTER of appeals by
Valleybrook Pharmcare Ltd. and Kerry
Murphy of decisions of the Town of
Montague, dated June 11, 2007 and August
13, 2007.

Appearances & Witnesses

1. For the Appellants Valleybrook Pharmcare Ltd. and Kerry Murphy

Counsel: John Hennessey, Q.C.

Witness: Kerry Murphy

2. For the Respondent Town of Montague

Andrew Daggett

Witness: Glenn Roberts

IN THE MATTER of appeals by Valleybrook Pharmcare Ltd. and Kerry Murphy of decisions of the Town of Montague, dated June 11, 2007 and August 13, 2007.

Reasons for Order

1. Introduction

[1] This Order considers two appeals filed on June 29, 2007 (LA07004) and August 31, 2007 (LA07008) 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*). Valleybrook Pharmcare Ltd. and Kerry Murphy (the Appellants) are appealing a decision of the Town of Montague (the Respondent) to amend the Respondent's Zoning Bylaw.

[2] On June 11, 2007, the Respondent's Council purportedly approved amendments to the Town of Montague Official Plan 2006 and the Town of Montague Zoning Bylaw No. 2006-01 to address inconsistencies between the Official Plan and the Zoning Bylaw and to enable a rezoning of several parcels of land in the Queen's Road and MacIntyre Avenue area. The Appellants then filed appeal docket LA07004 on June 29, 2007.

[3] On August 24, 2007, Commission staff received a letter from the Respondent's Chief Administrative Officer. Enclosed with that letter were documents that indicated that the Respondent's June 11, 2007 meeting of Council, previously thought to include the second reading of the Respondent's decision, actually only constituted the first reading. The documents noted that second reading was held on August 13, 2007. This information was forwarded to the Appellants' legal counsel who then filed appeal docket LA07008 on August 31, 2007.

[4] After due public notice and suitable scheduling for the parties, the Commission heard these appeals on September 5, 2007.

[5] A previous order of the Commission, Order LA07-01, provides a background to the present appeal. Order LA07-01 considered an appeal by the Appellants of a decision of the Respondent to issue a building permit for a proposed expansion, including a pharmacy, to the Kings County Medical Centre. In Order LA07-01, the Commission noted in paragraph 34:

[34] Although the concept has merit, the decision to approve the development permit was fatally flawed. There is a serious inconsistency between the Official Plan and the Zoning Bylaw. In the area of that inconsistency, the Official Plan shall prevail. The proposed expansion of the Kings County Medical Centre is not permitted given its current zoning. Accordingly, the Commission hereby quashes the development permit issued by the Respondent for the proposed expansion.

2. Discussion

Appellants' Position

[6] The Appellants submitted documents, testimony and oral argument at the hearing. Highlights of the Appellants' oral submissions follow.

- The Respondent's Zoning Bylaw continues to contradict the Official Plan. The Official Plan was prepared in broad consultation with the residents of the Town of Montague. The Official Plan must have priority as it demonstrates the will of the people.
- The Official Plan strives to focus commercial development in the downtown area. The Official Plan also seeks to preserve existing neighbourhoods. The Appellants read the Official Plan as protecting existing residential neighbourhoods from the 'slow creep' of an expanding commercial area.
- The zoning amendments would change the zoning of several parcels in the area of the Kings County Medical Centre from R3 to C3. Such a zoning change would allow a wide range of commercial development in the area.
- Based on the oral testimony of the Respondent's planning consultant, it is submitted that the proposed development under consideration in Order LA07-01 was very much on his mind when he drafted proposed changes to the zoning bylaw and Official Plan. The rezoning has the appearance of spot rezoning.
- No traffic studies were performed prior to the rezoning.

Respondent's Position

[7] The Respondent provided documents, testimony and oral argument at the hearing. Highlights of the Respondent's oral submissions follow.

- The objective of the Respondent's Council was to resolve the discrepancy identified by the Commission in Order LA07-01 and bring several non-conforming uses within the Zoning Bylaw.
- The Respondent is not prepared to perform traffic and other studies on speculation before receiving an application for a building permit.
- The amendments of the Zoning Bylaw and the Official Plan were made after full consultation with the public. Public meetings were properly advertised. The Official Plan and Zoning Bylaw amendment process was followed correctly.

- The Official Plan is clear: the Town of Montague is open for business and Council's role is not to restrict business development.

3. Findings

[8] After a careful review of the evidence, the information provided by the parties, and the applicable law, it is the decision of the Commission to deny these appeals for the reasons that follow.

[9] Subsection 28(1) of the **Planning Act** reads as follows:

28. (1) Subject to subsections (2), (3) and (4), any person who is dissatisfied by a decision of a council or the Minister in respect of the administration of regulations or bylaws made pursuant to the powers conferred by this Act may, within twenty-one days of the decision appeal to the Commission.

[10] The Commission agrees with the following statement from I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 2003) at page 453 which reads as follows:

A by-law is considered as "passed" when the final action of the council in enacting it is done although it has not been authenticated in the manner prescribed by statute. It is the final enactment of a by-law by the council such that no further action by it in the nature of confirmation or ratification is required in order to make the by-law effective. The by-law must be complete in itself so that it effects the purpose for which it was intended although possibly it may not be brought into force until a later date. A by-law is regarded as being passed when it has received its third reading notwithstanding that the legislature has declared that something else must be done such as the securing of the approval of a municipal board before it is to "come into force."

In the case of the Respondent, the final action of its Council is demonstrated by a vote following second reading.

[11] In appeal LA07004, the Commission notes that there appears to have been a procedural error at the June 4, 2007 special meeting of the Respondent's Council. As a result, the June 11, 2007 regular meeting of Council, originally thought to contain the second reading of the Respondent's Official Plan and Zoning Bylaw amendments, actually amounted to only the first reading. This error was apparently discovered and corrected by reading and approving the amendments at the August 13, 2007 regular meeting of Council.

[12] Accordingly, the Commission finds that the original appeal filed on June 29, 2007 (LA07004) was, through no fault of the Appellants or their legal counsel, premature. Appeal LA07004 was premature because the Respondent had not yet "passed" the amendments to its Official Plan and Zoning Bylaw. The Respondent corrected its error, approved the amendments at its August 13, 2007 meeting, and the Appellants prudently filed a fresh appeal on August 31, 2007. As appeal LA07004 was premature, due to the incomplete decision making process, the Commission denies that appeal.

[13] The Commission finds that appeal LA07008 is a valid appeal as the Respondent on August 13, 2007 performed its final actions to amend its Official Plan and Zoning Bylaw. Accordingly, the Commission will proceed to consider the Respondent's August 13, 2007 decision to amend its Official Plan and Zoning Bylaw.

[14] Appeals under the **Planning Act** generally take the form of a hearing *de novo* before the Commission. In an often cited decision which provides considerable guidance to the Commission, In the matter of Section 14(1) of the **Island Regulatory and Appeals Commission Act** (Stated Case), [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:

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

[15] The Commission does have the power to substitute its decision for that of the person or body appealed from. However, such discretion should be exercised reasonably. The Commission ought not to interfere with a decision merely because it disagrees with the end result. There may be a "better" end result or a "better" way of making planning decisions. The Commission, with the benefit of hindsight and often the benefit of legal argument as well, is not demanding perfection. However, if the decision maker did not follow the required procedures or apply sound planning principles in considering a decision pursuant to the powers conferred by the **Planning Act**, then the Commission must proceed to review the evidence before it to determine whether or not the decision should be upheld.

[16] The Commission finds that the above-cited principle is applicable to the facts of this case. A two-part test is invoked:

- Whether the decision maker, in this case the Respondent, followed the proper procedures required to lawfully amend its Official Plan and Zoning Bylaw in order to rezone the subject parcels from R3 to C3; and
- Whether the proposed rezoning noted above has merit based on sound planning principles.

[17] In appeal LA07008, the Respondent made a decision to rezone the subject parcels bounded by:

- to the North, PID # 197566;
- to the East, PID # 198838 and PID # 197442;
- to the South, Queen's Road; and
- to the West, MacIntyre Avenue.

[18] Upon a review of the evidence and the submissions of the parties, the Commission finds that there is no evidence of any procedural error when the Respondent made its decision to amend its Official Plan and Zoning Bylaw on August 13, 2007.

[19] In the Appellants' Notice of Appeal, the grounds for appeal are set out as follows:

1. *That the proposed zoning bylaw contravenes the Town of Montague Official Plan adopted and approved by Council on January 24, 2006 as follows:*

- (a) Development Goal 3.2 – fails to promote commercial development along Main Street in Montague.*
- (b) Development Goal 3.3 – fails to protect and enhance residential neighborhoods.*
- (c) Residential Development 4.2 – fails to permit uses that are appropriate to existing residential neighborhood character. – fails to promote and encourage a revitalization of established neighborhoods.*
- (d) Commercial Objectives – fails to encourage additional commercial investment to be made in the appropriate locations in Town. – fails to minimize potential conflicts between commercial development and existing or future residential use. – fails to ensure that future development is of high quality in terms of appearance, traffic safety and compatibility with adjacent land uses.*

[20] The Commission notes that the Respondent amended Policy 4.7 of its Official Plan to include:

Retail

- those operations which provide services and/or sell products associated with the services provided by the above-noted general category of businesses and professional offices and funeral homes, including, but not limited to, pharmacies, eyeglass sales, medical device sales, etc.;

[21] The Respondent also amended section 17.1.1 of its Zoning Bylaw to include:

- Retail operations which provide services and/or sell products associated with the services provided by the above-noted businesses and professional offices, including, but not limited to, pharmacies, eyeglass sales, medical device sales, etc.;

[22] In his oral evidence, Glenn Roberts, the Respondent's planning consultant, testified that he was hired to bring the Respondent's Official Plan and Zoning Bylaw into harmony, given the inconsistencies identified in Order LA07-01. The amendments to Policy 4.7 of the Official Plan and the rezoning of the subject properties to C3 made sense as the subject properties abut a C2 zone. Providing a transition between zones is a mark of good planning and the existing uses within the subject properties - hospital, medical clinic etc. - were appropriate uses for a C3 zone. Mr. Roberts acknowledged that one of his considerations was to accommodate the proposed medical centre expansion, should a fresh development permit application be received.

[23] The Commission notes that the primary thrust of the Appellants' arguments appear to be that rezoning the subject parcels to C3, thus permitting certain retail uses, runs contrary to several development goals and objectives in the Official Plan. However, the Commission takes notice that the goals and objectives of an Official Plan provide a general framework within which more

detailed policies may be set forth. Thus, it may be said that while the goals and objectives in the Respondent's Official Plan generally encourage commercial development to locate in the downtown core, the amended policy permits certain kinds of retail development to locate outside the downtown core in a C3 zone.

[24] The Commission, in considering whether amendments to an Official Plan and a Zoning Bylaw have merit based on sound planning principles, places considerable weight on expert testimony from a professional planner. In the present appeal, the only evidence from a professional planner is that of Mr. Roberts.

[25] Accordingly, based on the evidence of Mr. Roberts, the Commission finds that the proposed rezoning of the subjects parcels does have merit based on sound planning principles.

[26] The Commission also notes that the Appellants view the Official Plan as protecting existing residential neighbourhoods from the 'slow creep' of an expanding commercial area. With respect to the general character of the subject parcels and the immediately adjacent area, the Commission does not believe that it is entirely accurate to describe it as a purely residential neighbourhood. Rather, the 'slow creep' appears to have occurred quite some time ago as the subject parcels and the immediate area include residential homes, a seniors' housing development, a medical clinic, a hospital and an ambulance facility.

[27] For the reasons stated throughout, the Commission hereby denies these appeals.

4. Disposition

[28] An order denying appeals LA07004 and LA07008 will therefore issue.

IN THE MATTER of appeals by Valleybrook Pharmcare Ltd. and Kerry Murphy of decisions of the Town of Montague, dated June 11, 2007 and August 13, 2007.

Order

WHEREAS Valleybrook Pharmcare Ltd. and Kerry Murphy (the Appellants) have appealed decisions of the Town of Montague (the Respondent), dated June 11, 2007 and August 13, 2007;

AND WHEREAS the Commission heard the appeals at public hearings conducted in Charlottetown on September 5, 2007 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

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

IT IS ORDERED THAT

1. The appeals are hereby denied.

DATED at Charlottetown, Prince Edward Island, this 4th day of October, 2007.

BY THE COMMISSION:

Brian J. McKenna, Vice-Chair

Maurice Rodgerson, Chair

Anne Petley, Commissioner

NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1) and 13(2) of the *Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.

IRAC141A(99/2)