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

Docket LA10020
Order LA10-12

IN THE MATTER of an appeal by Sigrid Rolfe and Sharon Labchuk of a decision of the Minister of Finance and Municipal Affairs, dated June 25, 2010.

BEFORE THE COMMISSION
on Tuesday, the 7th day of December, 2010.

Maurice Rodgerson, Chair
Michael Campbell, Commissioner
David Holmes, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by Sigrid Rolfe and Sharon Labchuk of a decision of the Minister of Finance and Municipal Affairs, dated June 25, 2010.

Contents

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Appearances & Witnesses

1. For the Appellants

Sigrid Rolfe
Sharon Labchuk

Witnesses:

Peter Baker
Shauna Reddin
Gilles Michaud
Ron George
Vance Glover

2. For the Respondent

Counsel:

Robert MacNevin

Witnesses:

Vivian Hayward
LouAnne Wolfe
Garth Carragher
Greg Wilson
Glenda MacKinnon-Peters

3. For the Developers Angie and Charles MacDonald

Angie MacDonald
Charles MacDonald

IN THE MATTER of an appeal by Sigrid Rolfe and Sharon Labchuk of a decision of the Minister of Finance and Municipal Affairs, dated June 25, 2010.

Reasons for Order

1. Introduction

[1] The Appellants Sigrid Rolfe and Sharon Labchuk (the Appellants) 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***). The Appellants' Notice of Appeal was received on July 14, 2010.

[2] This appeal concerns the June 25, 2010 decision of the Respondent Minister of Finance and Municipal Affairs, (the Minister), to issue to the Developers Angie and Charles MacDonald (the Developers) a development permit for a storage building and to authorize a change of use to allow for a shooting range on property number 504803 located in South Granville.

[3] The hearing was scheduled for September 29, 2010 and commenced on that date. At the outset of the hearing, Counsel for the Minister requested that the appeal be adjourned to a later date as two of his proposed witnesses were unavailable. The Appellants and the Developers consented to this request for an adjournment. The Commission adjourned the hearing until November 2, 2010, the earliest available date for all parties. The hearing resumed on November 2, 2010 and concluded on November 3, 2010.

2. Discussion

The Appellants' Position

[4] The Appellants' position is contained in their Notice of Appeal:

- Grounds for Appeal: "detrimental impact, no environmental impact assessment done, noise"
- Relief Sought: "revoke the Development Permit, order an environmental assessment"

[5] As explained later in these Reasons for Order, the Appellants offered no submissions.

The Minister's Position

[6] Counsel for the Minister submitted in his closing arguments:

- On June 25, 2010 the Minister made a decision to permit a change of use and allow a small structure.
- The Developers had obtained the permit for a shooting range required under the Federal Government's ***Firearms Act***.
- The Minister's staff conducted an extensive review under applicable Provincial Government legislation.
- There is a demand for a shooting range, there is no other such facility and this facility is necessary to allow persons to maintain the necessary firearm requirements for their employment, e.g. to "qualify".

[7] The Minister submits that there is no basis in fact or in law to quash the June 25, 2010 permit.

The Developers' Position

[8] The Developers submitted in their closing submissions:

- The shooting range was designed according to the requirements of a Federal Government official. Any possible overshoot is designed to fall on the Developers' property.
- Approximately 450 firearm licenses are issued in Prince Edward Island each year. These licensees need somewhere to safely and lawfully maintain their shooting skills.
- Anyone using the range is required to be licensed and a firearms course is required as part of the licensing process. The course includes training in range officer rules and a range officer is required when more than one shooter is on the range.

3. Findings

[9] 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 this appeal. The reasons for the Commission's decision follow.

[10] The Appellants state in their grounds for appeal that an environmental impact assessment did not occur. The Appellants seek, as part of their requested relief, that the Commission order an environmental assessment. The Commission must therefore first determine whether it has the jurisdiction to grant this relief.

[11] In *Canada (Human Rights Commission)* v. *Canadian Liberty Net*, [1998] 1 S.C.R. 626, Bastarache J., writing for the majority of the Supreme Court of Canada, addressed the doctrine of inherent jurisdiction at paragraph 35:

> *35 In my view, the doctrine of inherent jurisdiction operates to ensure that, having once analysed the various statutory grants of jurisdiction, there will always be a court which has the power to vindicate a legal right independent of any statutory grant. The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court. The doctrine does not operate to narrowly confine a statutory grant of jurisdiction; indeed, it says nothing about the proper interpretation of such a grant. As noted by McLachlin J. in Brotherhood, supra, at para. 7, it is a "residual jurisdiction". In a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court.*

[12] Canadian administrative tribunals, for example the Nova Scotia Utility and Review Board, the Ontario Municipal Board and the Prince Edward Island Regulatory and Appeals Commission, and Canadian statutory courts, for example, the Federal Court of Canada, obtain their jurisdiction by way of "statutory grants of jurisdiction". These tribunals and statutory courts do not have inherent jurisdiction. In the Province of Prince Edward Island, inherent jurisdiction lies with the Supreme Court of Prince Edward Island and the Prince Edward Island Court of Appeal, which are superior courts with general jurisdiction.

[13] The right to appeal the Minister's June 25, 2010 decision to the Commission arises out of the appeal provisions specified in section 28 of the ***Planning Act***. Section 28 of the ***Planning Act*** is a statutory grant of jurisdiction to the Commission. A decision to order, or not to order, an environmental impact assessment is a decision made pursuant to the ***Environmental Protection Act.*** The Commission has not been provided with a statutory grant of jurisdiction to hear appeals of decisions to order, or not to order, an environmental impact assessment under the ***Environmental Protection Act***. Further, the Commission does not have inherent jurisdiction. Therefore, the Appellants have raised a ground of appeal, and requested relief for, a matter beyond the Commission's jurisdiction.

[14] The appeal was filed under the ***Planning Act***; however the Appellants did not lead any evidence to demonstrate that the ***Planning Act*** and its various regulations were not followed by the Minister's staff when they reviewed the shooting range development. The Minister did provide significant evidence that the staff, when they became aware of the operation of the shooting range, took immediate steps to address compliance issues under the ***Planning Act***. The main issue was the requirement for a change of use permit and when the permit was issued it triggered the opportunity for an appeal under the ***Planning Act***. In addressing the concerns raised by one of the Appellants, the Minister went so far as to accept certain protection standards, submitted by that Appellant, to prevent lead contamination of the soil and groundwater. The Developers then accepted the Minister's requirements.

[15] The Commission appreciates the surprise and concern expressed by some witnesses at the construction of a shooting range in the area where they live without prior consultation. This is one of the challenges associated with living in an unincorporated area where only the minimum planning requirements and regulations of the Province apply. Ms. Reddin, a witness for the Appellants, cited an example of people addressing this concern by working to establish their own community council and assume planning responsibility. It is the experience of the Commission that such communities usually provide a greater opportunity for local consultation and afford the opportunity to establish an Official Plan for the community and develop bylaws to control development.

[16] The subject matter of this appeal is further complicated by the fact that the authority to regulate and approve shooting ranges is established under Federal legislation, specifically the ***Firearms Act***, S.C. 1995, c. 39. The Commission has no jurisdiction with respect to the ***Firearms Act***.

[17] It is regrettable that poor communications between the Federal and Provincial entities resulted in the Minister's staff not being aware of the development when concerns were first brought to their attention. The Province's Chief Firearms Officer was aware of the development and, in future, steps should be taken to ensure information pertaining to developments is shared to ensure compliance with all requirements.

[18] Counsel for the Minister presented the testimony of the Province's Chief Firearms Officer. Ms. Hayward told the Commission that the Developers' shooting range was approved pursuant to the ***Firearms Act***.

[19] The Commission also heard the testimony of the Minister's Hazardous Materials Specialist. Ms. MacKinnon-Peters, who has expertise in the area of heavy metals, told the Commission that she is satisfied that the plan for regular sifting of the soil to remove bullets, and post sifting soil testing, will protect the environment from potential lead contamination associated with the shooting range. She noted that lead typically binds to the soil and in the event that post sifting tests reveal the presence of lead in the soil, the soil will be removed. She also testified that noise testing was not performed as the Minister had not received <u>any</u> noise complaints associated with the shooting range.

[20] Mr. MacDonald, one of the Developers, testified the majority of shotgun shells are all steel, that over 90% of 9 mm and 307 bullets are copper coated [lead contained inside a copper jacket], and the majority of 22 caliber bullets are also copper coated. He noted that coating bullets with copper is better for the gun, requires less cleaning and are also better for the environment. He noted that "green" or completely lead free bullets are more expensive but he expects they will eventually prevail in the market.

[21] Upon a review of all the evidence, the Commission finds that there is no evidence that the Minister failed to follow the relevant specific requirements set out in the ***Planning Act*** or in any Regulations made under the ***Planning Act***. The South Granville area does not have an official plan and a land use bylaw setting out zoning and development requirements. As a result, there are fewer restrictions on development.

[22] In Order LA09-02, *Michael Reid* v. *Minister of Communities, Cultural Affairs and Labour*, the Commission had extensively reviewed the law with respect to "detrimental impact" as defined in the ***Planning Act*** Subdivision and Development Regulations. In the present appeal, the Commission has heard from several witnesses who reside in the area surrounding the shooting range. These witnesses have provided the Commission with their personal observations concerning noise associated with the Developers' shooting range. The Commission finds these witnesses to be credible. The Commission finds that the noise associated with the shooting range has had a negative impact on these residents and no doubt on others who reside in the area.

[23] However, the evidence before the Commission does not support a finding that the noise associated with the shooting range is of such a degree as to constitute a detrimental impact. Had the Minister received a complaint and noise testing been initiated, the evidence might have been different.

[24] For the above reasons, the Commission denies this appeal.

Issue of Concern

[25] Near the outset of the proceedings on November 2, 2010, the Appellant Ms. Labchuk offered commentary with respect to the role of the Commission and the role of the Minister's legal counsel and staff. Later in the proceedings Ms. Labchuk attempted to trivialize a sincere offer by the Developers to install low cost baffles to attenuate sound.

[26] At the resumption of the final portion of the hearing at 1:30 p.m. on November 3, 2010, neither Appellant was present in the hearing room. The Commission and the other two parties to the appeal waited for the return of the Appellants. Commission staff checked to see if the Appellants had left email or telephone messages to explain that they were running late, or if an emergency had occurred. There were no such messages. The Commission resumed the hearing at 1:43 p.m. to hear the evidence of Ms. MacKinnon-Peters and oral submissions from the parties. The hearing then concluded approximately one hour later.

[27] According to a media report of November 8, 2010, the Appellant Ms. Labchuk made it quite clear that the absence of the Appellants was intentional.

[28] In the view of the Commission, these actions are irresponsible and constitute a deliberate disregard for the appeal process and the parties who responded to the appeal filed by the Appellants. Although this behaviour was directed mainly to the Commission and the appeal process, it was also directed towards the Developers and the Minister's legal counsel and staff. Such conduct also shows great disrespect for the witnesses who took the time to appear before the Commission to testify on behalf of the Appellants.

[29] The Commission notes that the Minister's legal counsel and staff witnesses acted in good faith, showed respect for the public interest, and were respectful of the law and the appellate process. The Commission was impressed with the sincerity and cooperativeness of the Developers. The Commission was also very impressed with the honesty and candour of the witnesses called by the Appellants. All these people took the time to appear before the Commission because the Appellants chose to file, and maintain, their appeal. The witnesses' concerns were obvious; the weight of the actual Appellants' concerns was diminished by their behavior.

[30] The Commission could have determined that the Appellants had abandoned their appeal and dismissed the appeal on that basis, as the Appellants intentionally did not appear for the final stage of the appeal, that of oral submissions. Out of respect for the sincerity of the Appellants' witnesses and the legitimate issues they brought forward, the Commission has not deemed this appeal to be abandoned.

4. Disposition

[31] An Order denying this appeal follows.

IN THE MATTER of an appeal by Sigrid Rolfe and Sharon Labchuk of a decision of the Minister of Finance and Municipal Affairs, dated June 25, 2010.

Order

WHEREAS the Appellants Sigrid Rolfe and Sharon Labchuk have appealed a decision of the Minister of Finance and Municipal Affairs, dated June 25, 2010;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on September 29, 2010 and November 2 and 3, 2010 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 appeal is hereby dismissed.

DATED at Charlottetown, Prince Edward Island, this 7th day of December, 2010.

BY THE COMMISSION:

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

(Sgd.) *Michael Campbell*
Michael Campbell, Commissioner

(Sgd.) *David Holmes*
David Holmes, Commissioner

NOTICE

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

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

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

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

> *13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

NOTICE: IRAC File Retention

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

IRAC141AA(2009/11)