



**THE ISLAND REGULATORY AND  
APPEALS COMMISSION**

Prince Edward Island  
Île-du-Prince-Édouard  
CANADA

**Docket LA10022  
Order LA13-03**

**IN THE MATTER** of an appeal by  
Arthur MacMillan of a decision of the  
Community of Sherbrooke, dated May 11,  
2010.

**BEFORE THE COMMISSION**  
on Friday, the 15th day of March, 2013.

Allan Rankin, Vice-Chair  
Ferne MacPhail, Commissioner  
Jean Tingley, Commissioner

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# Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

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Appeals Administrator  
Land, Corporate and Appellate Services Division

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# Contents

<i>Contents</i>	<i>ii</i>
<i>Appearances &amp; 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>	

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# Appearances & Witnesses

**1. For the Appellant Arthur MacMillan**

**Counsel:**

**Jonathan Coady**

**Witness:**

**Arthur MacMillan**

**2. For the Respondent Community of Sherbrooke**

**Counsel:**

**Stephen D.G. McKnight, Q.C.**

**Witness:**

**Lex Pate**

**3. For the Developer Trent Clow**

**Trent Clow [self-represented]**

**[Although the Developer was not present at the oral hearing, he  
otherwise participated in the appeal process]**

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# Reasons for Order

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## 1. Introduction

[1] The Appellant Arthur MacMillan (the Appellant) 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 Appellant's Notice of Appeal was dated September 14, 2010 and received by the Commission on September 16, 2010.

[2] This appeal concerns a May 11, 2010 decision of the Respondent Community of Sherbrooke (the Respondent) to approve the issuance of a building permit to the Developer Trent Clow (the Developer) subject to the filing of necessary documentation with respect to septic / sewage matters. The Respondent received the required documentation and issued a building permit on June 1, 2010 for property number 46034 (the subject property).

[3] The Appellant owns a lot next door to the subject property. During the week of August 9, 2010, the Appellant hired a surveyor to survey his property. On August 19, 2010 the surveyor shared his findings with the Appellant. Later that day, the Appellant sent a letter to the Respondent inquiring about the building permit for the subject property and raising the concern that the survey revealed that the structure "... is less than 2 feet from the property line." On September 13, 2010 the Appellant received a written response from the Respondent.

[4] On November 23, 2010, the Commission received a copy of the Respondent's file from legal counsel for the Respondent. The cover letter accompanying the file formally raised a jurisdictional issue: specifically, that the appeal was filed well beyond the 21 day appeal period set out in section 28 of the *Planning Act*.

[5] On November 26, 2010, Commission staff wrote the parties requesting written submissions on the jurisdictional issue. On December 14, 2010 the deadlines for written submissions were extended and mediation was offered.

[6] During the month of January 2011, all parties advised Commission staff that they wished to proceed with mediation. On this basis, the request for written submissions on the jurisdictional issue was postponed without a date. Mediation was scheduled to be held in February 2011 but had to be postponed due to weather conditions. Mediation was held in June 2011. However the mediation was unsuccessful.

[7] In October 2011, Commission staff inquired as to whether the Appellant wished to continue with his appeal. The Appellant's legal counsel informed Commission staff that his client wished to proceed, and the Commission issued a fresh call for written submissions. Written submissions on jurisdiction were received in early December 2011.

[8] Following an extensive review of the written submissions by the Commission panel, the Commission determined that a hearing on the jurisdictional matter was required. The Commission heard the matter with respect to the issue of jurisdiction on December 5, 2012.

[9] This order pertains only to the issue of jurisdiction.

## **2. Discussion**

### **The Appellant's Position**

[10] The Appellant takes the position that the twenty-one day appeal period only began to run when he received a written response from the Respondent. Highlights of the oral submissions made by Appellant's counsel include the following:

- Section 23.1 of the Planning Act requires a municipal decision maker to give a particular form of notice to the public. This is a mandatory obligation placed on the Respondent which it failed to do.
- While the Developer did post a copy of the building permit on the subject property, the posting of the permit does not satisfy the mandatory requirement set out in section 23.1.
- Part of the requirement of section 23.1 is an online posting of appealable municipal planning decisions. While the Respondent did not have a website, the Province of Prince Edward Island provides a website entitled "PEI Planning Decisions" [<http://bl3.baselinegeo.com/pns/view.aspx>] to allow communities to meet their online obligations under section 23.1. While it appears that the Respondent is now making use of the aforementioned website, it did not utilize it in 2010.
- While the Appellant had notice of the building permit, he did not know until September 13, 2010 that there was no by-law amendment, rezoning or a variance granted by the Respondent which otherwise might have authorized the issuance of the building permit.

[11] Accordingly, the Appellant requests that the Commission find that it has the jurisdiction to hear the appeal on its merits.

### The Respondent's Position

[12] The Respondent takes the position that the appeal period had expired prior to the filing of the Appellant's Notice of Appeal. Highlights of the oral submissions made by Respondent's counsel include the following:

- The statutory right of appeal contained in section 28 of the **Planning Act** pertains to the Respondent's decision to issue the building permit.
- It is acknowledged that the Respondent at the time did not comply with the notice requirements under section 23.1 of the **Planning Act**. However, there is nothing in the legislation to undermine actual knowledge when the statutory requirement has not been met.
- When the Appellant wrote the Respondent on August 19, 2010 he was aware that a building permit had been issued and he had all the knowledge he needed to file an appeal. Accordingly, at the very latest, the appeal period expired twenty-one days after August 19, 2010.

[13] Accordingly, the Respondent requests that the Commission find that it has no jurisdiction to hear this appeal.

### The Developer's Position

[14] The Developer was unable to attend the hearing due to his offshore work commitments. However, on December 4, 2012 he sent an email to Commission staff which included some attached documents. In his email, the Developer advised that he displayed the building permit on a utility pole on the north side of the subject property commencing June 2, 2010. He also advised that the pictures attached were taken on June 20, 2010. He submitted that the pictures reveal the progress of the project in the first 20 days, show that the ground was broken soon after the permit was issued, and also show the posted building permit.

[15] The Developer also attached documents noting that the septic permit for the subject property was issued in July 2007. The Developer advised the Commission that the septic system was installed in 2007-2008. He noted that the construction of the septic system would "... have indicated a project was starting on the property, and would have created awareness in the community of a project."

## 3. Findings

[16] The Commission has considered the written and oral submissions of the parties as well as the documentary record filed by the Respondent and any documents filed by the Appellant and Developer as part of the appeal process. However, the Commission panel has not been privy to any submissions and documents filed exclusively as part of the mediation process as the mediation process was, and remains, confidential and not part of the record before the Commission.

[17] After a careful review of the provisions of sections 23.1 and 28 of the **Planning Act** and a review of the caselaw filed by Counsel for the Appellant and Respondent, the Commission finds that it does have the jurisdiction to hear this appeal for the reasons that follow.

[18] Section 23.1 of the **Planning Act** lies at the heart of this appeal and reads as follows:

23.1 (1) *Where*

(a) *the Minister makes a decision of a type described in subsection 28(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.*

*Contents of notice*

(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

[19] The Appellant contends, and the Respondent concedes, that the Respondent did not, in this case, comply with the requirements of section 23.1 cited above.

[20] Section 28 of the **Planning Act** sets out the kinds of decisions which may be appealed to the Commission and the process for doing so. Subsection 28(1.1) is noteworthy for the purposes of this decision on jurisdiction:

*Appeals  
from  
decisions  
of  
council*

*(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.*

[21] Counsel for the Appellant submitted that it was not until September 13, 2010 that the Appellant knew that no decision for a by-law amendment, rezoning or a variance had been made which could have authorized the issuance of the building permit. While the Commission notes that a variance is not specifically listed in subsection 28(1.1) it is present by necessary implication: a decision to grant a variance can be appealed to the extent that it is a decision made in respect of an application for a matter set out in 28(1.1)(a)

[22] In *Booth and Peak v. Island Regulatory and Appeals Commission* 2004 PESCAD 18 (October 4, 2004) (*Booth and Peak*), a case which predates the creation of section 23.1 of the **Planning Act**, Justice Webber reviewed various judicial decisions addressing the issue of when an appeal period begins to run. Justice Webber 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.*

[23] The Commission finds that where a municipality fails to comply with the statutory notice requirements set out in section 23.1 of the **Planning Act** the Court's decision in *Booth and Peake* applies.

[24] From the testimony heard by the Commission, it is apparent that the Appellant knew for some time prior to August 19, 2010 that a structure was being constructed on the subject property. He also knew that the Respondent had issued a building permit as the permit was posted on a nearby utility pole. As the construction proceeded, the Appellant became concerned that the structure might be too close to his own property and he hired a surveyor. Upon learning of the surveyor's findings on August 19, 2010, the Appellant promptly wrote and hand delivered a letter to the Respondent's administrator and councillors. The main body of the Appellant's letter reads:

*We are the owners of property no. 494500-00, Sherbrooke, P.E.I. (Fox Lane).*

*A building permit, #CS-03-10, has been issued for parcel 46034, Fox Run, Sherbrooke, P.E.I.*

*Please find attached a photo of the structure that is being built. We have undertaken to have our property surveyed. The surveyor has indicated that this structure is less than 2 feet from the property line.*

*Would you be so kind as to explain how this structure can be permitted to be built in such proximity to the property line?*

*We look forward to your response.*

[25] The Commission is of the view that most property owners will presume that a municipality knows its own bylaw and issues permits in accordance with its bylaw. Such a presumption should not be discouraged as it fosters respect for the municipal decision maker and the bylaws it creates and administers.

[26] In the present matter, the Appellant knew that the structure was being built on the subject property and that there was a permit. He had notice of the permit. He had his own concerns and he brought them to the attention of the Respondent once his surveyor had advised him of the distance from the dwelling to the property line.

[27] The very presence of a structure constructed less than two feet from a property line, with a posted building permit, did not necessarily mean that the Respondent had approved that distance. The structure might have been constructed in violation of the building permit, thus triggering a bylaw enforcement matter rather than a flawed decision. Or, the Respondent might have granted a variance or amended the bylaw so the permit could be lawfully issued. Rather than impulsively file an appeal and ask questions later, the Appellant sought an explanation first. Three weeks later, the Appellant received the Respondent's September 13, 2010 response the main body of which reads as follows:

RE: Building permit #CS-03-10 for a home construction on parcel #46034.

This letter is in response to your August 19/10 letter to Sherbrooke Council.

Council has voted to stand by their decision to allow the above noted building permit, as it was issued.

There is no ruling, at present, in the Community of Sherbrooke bylaws, governing the distance a deck must be from a neighbouring property. In situations such as this the ruling is made considering Province of P.E.I. bylaws.

They state a 2' distance in the bylaw with a 10% variance allowed. Therefore 21.6" is sufficient space according to the bylaws.

[28] Commencing September 13, 2010, the Appellant had notice not just of the permit but of the decision and reasoning to issue such permit. Upon learning of the decision behind the permit the Appellant promptly filed his appeal. The Appellant's Notice of Appeal makes reference to a "mistake" and an "injustice" and the "Schedule 2" attached to his Notice of Appeal submitted that the Respondent "erred". The Commission is of the view that the permit, by itself, combined with the structure under construction, could not have provided a solid basis to presume that a mistake, error or an injustice had been made. The Commission finds that, having the benefit of the Respondent's September 13, 2010 letter, the Appellant had a reasonable basis for assuming that an error was made and thus, given non-compliance with section 23.1 of the **Planning Act**, the twenty-one day appeal period began to run on September 13, 2010.

[29] Accordingly, given the very unique circumstances of this matter, including the fact that the Respondent, in this case, had not followed the statutory notice procedure mandated under section 23.1 of the **Planning Act**, the Commission finds that it has the jurisdiction to hear this appeal on its merits.

## 4. Disposition

[30] An Order determining that the Commission has the jurisdiction to hear this appeal follows.

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# Order

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**WHEREAS** the Appellant Arthur MacMillan appealed a decision of the Respondent Community of Sherbrooke;

**AND WHEREAS** the Commission considered written submission on the issue of jurisdiction and heard testimony and oral argument on the issue of jurisdiction at a public hearing conducted in Charlottetown on December 5, 2012 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 Commission has the jurisdiction to hear this appeal.

**DATED** at Charlottetown, Prince Edward Island, this 15th day of March, 2013.

**BY THE COMMISSION:**

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

\_\_\_\_\_  
(Sgd.) *Ferne MacPhail*  
Ferne MacPhail, 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)