



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA10022
Order LA14-04**

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 26th day of September, 2014.

John Broderick, Commissioner
Ferne MacPhail, Commissioner
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

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

Order

[1] In Commission Order LA13-03, issued on March 15, 2013, the Commission recited the circumstances, key facts and much of the evidence with respect to this appeal. The Commission then determined with detailed reasons that it had the jurisdiction to hear the appeal. Order LA13-03 thus forms an essential background for this present Order.

[2] In an effort to set the matter down for a hearing on the merits of the appeal, Commission staff contacted the Appellant and Respondent via email dated May 23, 2013 directed to their respective legal counsel and to the Developer directly. Stephen McKnight, Q.C., counsel for the Respondent Community of Sherbrooke, advised later that same day that the parties were working toward a settlement of the matter. Jonathan Coady, counsel for the Appellant Arthur MacMillan and Trent Clow, the Developer, were copied on Mr. McKnight's email to Commission staff.

[3] On January 9, 2014, Commission staff requested an update with respect to the progress made towards settlement. On January 24, 2014, Commission staff received a response from Mr. Coady requesting that the Commission set a hearing date.

[4] On January 29, 2014, Commission staff contacted counsel and Mr. Clow requesting their available dates during the months of March and April 2014.

[5] On February 11, 2014, Commission staff advised counsel and Mr. Clow that the hearing was scheduled for June 12 and 13, 2014. On May 6, 2014, Commission staff contacted counsel and Mr. Clow to confirm the June 12 and 13, 2014 hearing dates. Counsel then advised Commission staff that they would prefer that the hearing be postponed as Mr. Clow had indicated he was unable to attend.

[6] The hearing of the merits of the appeal was heard on September 25, 2014. Mr. Coady represented the Appellant. Mr. McKnight represented the Respondent. Mr. Clow was present but chose not to participate.

[7] As a preliminary matter, Mr. McKnight advised that the Respondent conceded that it had acted in error by issuing building permit number CS-03-10 (the building permit) allowing the construction of the structure in accordance with the plans as submitted. Mr. McKnight further advised the Commission that the structure located on provincial parcel number 460311 does not comply with section 6(2) of the Sherbrooke Zoning and Subdivision Bylaw.

[8] Mr. Coady reviewed various documents submitted on behalf of the Appellant. Mr. Coady submitted that the appropriate remedy was for the Commission to quash the building permit, citing Commission Orders LA99-08, LA02-02 and LA07-01 as precedents for the Commission quashing a building permit.

[9] Mr. McKnight acknowledged that quashing the building permit was within the purview of the Commission. He emphasized that the Respondent regrets the error, characterized the error as innocent, and submitted that the Community did not act in bad faith.

[10] The Commission finds that the Respondent did err in issuing the building permit. From a review of the record, it is obvious that the Respondent was unaware of how its Bylaw's setback requirements pertain to "structures" as that term has been defined in the Bylaw. This lack of awareness by the Respondent of its own Bylaw is glaringly apparent upon a review of the Respondent's undated letter, received by the Appellant on September 13, 2010, attempting an explanation of Council's decision in issuing the building permit (see paragraph 27 of Order LA13-03).

[11] That said, the plan documents included with the Developer's application for a building permit are confusing. The "site plan" the Developer had filed (see Exhibit A3, Tab 5) indicated that the "dwelling", was 40 feet wide with a 12-foot setback adjacent to the Appellant's property. Based on this site plan alone, the project was presented as complying with the Bylaw's side yard setback requirements. However, the "main floor plan" the Developer filed (Exhibit A3, Tab 4) showed the dwelling with an attached porch totaling 60 feet in width. From comparing these two documents, it is apparent to the Commission that had the site plan accounted for the footprint of the porch in addition to the footprint of the foundation of the house, the setback issue would have been more readily apparent.

[12] The Commission allows the appeal. The building permit was issued by the Respondent in error and the development subsequently built is in violation of section 6(2) of the Sherbrooke Zoning and Subdivision Bylaw. Accordingly, the Commission hereby quashes Building Permit CS-03-10 pertaining to parcel number 460311.

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

IT IS ORDERED THAT

1. **The Appeal is allowed.**
2. **Building Permit CS-03-10 issued by the Respondent Community of Sherbrooke is hereby quashed.**

DATED at Charlottetown, Prince Edward Island, this **26th** day of
September, 2014.

BY THE COMMISSION:

(Sgd.) *John Broderick*

John Broderick, Commissioner

(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.

IRAC141x-SFN(2009/11)