

18 November 2021

VIA EMAIL: pjrafuse@irac.pe.ca

Island Regulatory and Appeals Commission
National Bank Tower
5th Floor, 501
134 Kent St.
Charlottetown, PE C1A 8R8

Our File: 15042-226dk

Attention: Philip J. Rafuse, Appeals Administrator

Dear Mr. Rafuse:

**Re: Reply to Notice of Appeal
Docket No. LA21025 – Clare Fagan et al. v. City of Summerside**

Please accept this letter and enclosures on behalf of the City of Summerside (the “City”) in response to your letter dated 28 October 2021. We have electronically filed the City’s Record with respect to the two permits being appealed and intend to provide the Commission with physical copies of the Record on or before 25 November 2021.

❖ **Overview**

In the Notice of Appeal dated 26 October 2021, the Appellants ask the Commission to review two decisions:

- 1) Approval of building permit number 2021-10-0374 (the “**Building Permit**”);
- 2) Approval of site development permit number 2021-9-0351 (the “**Development Permit**”).

Both permits relate to property located at 182 Putters Street, Summerside PE.

While the City is sympathetic to the circumstances described by the Appellants in the Notice of Appeal and related documents, the City requests that the Commission dismiss the appeal or otherwise hold a preliminary hearing due to the following issues with the appeal as presented:

- 1) The Commission has no jurisdiction to review a building permit;
- 2) The grounds of appeal raised with respect to the Development Permit largely do not relate to matters which the Commission can consider;

- 3) The only ground raised by the Appellants which the Commission *can* consider is the issue of 'notice'. Given that the development is an 'as of right' development within the zone, the Appellants were not entitled to be specially notified of the Development Permit application, and the appeal must therefore fail on this ground; and
- 4) The Appellants seek a remedy which the Commission cannot provide.

The City respectfully submits that the Appellants will not be prejudiced by having their appeal dismissed in a summary fashion. Indeed, there is no 'genuine issue to be tried' in this case. While the Appellants raise the issue of notice, the City's bylaws do not require specific notice to neighbours in a case of 'as of right' development. Such notice would only have been provided if the proposed development required an official plan or zoning amendment, or a discretionary or restricted use permit – which was not required in this case.

The City respectfully submits that the Appellants would be better off withdrawing the present appeal and seeking counsel to determine whether there is a more appropriate forum, such as the Supreme Court of Prince Edward Island, in which to obtain an appropriate remedy for any injuries they allege to have suffered.

❖ **Building Permit 2021-10-0374**

The Commission does not have jurisdiction to hear or decide an appeal relating to a building permit.

One of the Commission's roles is to review certain types of municipal planning decisions. Subsection 28(1.1) of the *Planning Act*, RSPEI 1988, c P-8 defines the Commission's jurisdiction (in other words, its authority to review municipal planning decisions). For ease of reference, subsection 28(1.1) is set out below in its entirety:

“(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 development permit,

(i.1) an occupancy permit, in relation to a matter under this Act or the regulations,

(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.”

Noticeably absent from this provision is any mention of a building permit. Indeed, the definition of a “development permit” specifically excludes a ‘building permit’:

*“(e.1) “development permit” means a permit issued for a development under the regulations or pursuant to a bylaw **but does not include a building permit issued under the Building Codes Act;**” [Emphasis Added]*

By Royal Proclamation dated 21 March 2020, the *Building Codes Act*, RSPEI 1988 c B-5.1 came into force on 31 March 2020. The City’s *Building Bylaw* CS-31 came into force on 17 May 2021. The building permit at issue in the present matter, Building Permit 2021-10-0374 (the “**Building Permit**”) was issued 15 October 2021. Thus, the Building Permit is a “*building permit issued under the Building Codes Act*”. Therefore, the Commission has no authority under the *Planning Act* to review the decision to issue the Building Permit.

Additionally, Sections 24 & 25 of the *Building Codes Act* provide a right of appeal to a person who is aggrieved by a decision of a building official. The aggrieved person may request a review of the decision or order by the Chief Building Official of the Province of Prince Edward Island. A person aggrieved by an Order of the Chief Building Official for the Province of Prince Edward Island may further appeal that decision to the Appeal Board in accordance with Section 25 of the *Building Codes Act*. Thus, due to the recent enactment of the *Building Codes Act* and other consequential amendments, another body is responsible for appeals regarding building permits.

The decision to issue the Building Permit is not a decision to issue a development permit, an occupancy permit, a pre-liminary or final approval of a sub-division, or an amendment to the zoning bylaw or the zoning map established in that bylaw. Thus, the decision to issue the Building Permit is not a municipal planning decision which the Commission has jurisdiction to hear or decide under Subsection 28(1.1) of the *Planning Act*. Therefore, the City respectfully submits that the Commission dismiss the appeal regarding the Building Permit.

The City notes at this point that many of the issues raised in the Notice of Appeal and associated documents relate to the quality of workmanship of homes built by the Developer and to possible misrepresentations around the properties featuring a ‘golf course view’. The City respectfully suggests to the Appellants that the Supreme Court of Prince Edward Island is the more appropriate forum in which to determine such civil disputes between a builder/vendor and a home buyer.

❖ **Development Permit – 2021-9-0351**

Site Development Permit 2021-9-0351 (the “**Development Permit**”) is indeed a “development permit” which the Commission has jurisdiction to review under Subsection 28(1.1) of the *Planning Act*. Notwithstanding this, the City requests that the Commission dismiss the appeal of the Development Permit as the grounds of appeal do not raise a genuine issue requiring a hearing, and because the remedy requested by the Appellants is not one which the Commission is empowered to provide.

On the face of the Notice of Appeal document, the Appellants state that “none of the homeowners immediately in front of this 4-unit rowhouse were notified as required by procedural fairness.” Notably, the Appellants have not cited any provision of any of the City’s bylaws which requires that they be provided with notice. This is because no such provision exists.

Indeed, the City’s *Zoning Bylaw* SS-15 at section 5.10 requires mailed notice to all property owners within 60m (196.8ft) of the subject property in the case of an official plan or zoning bylaw amendment, or a discretionary or restricted use permit. Conversely, sections 3 and 9 of the City’s *Subdivision and Site Development Bylaw* SS-19 establishes the process for reviewing an application for a “Major Development” such as the one for which the Development Permit was issued. There is no requirement in this bylaw to provide notice to the public, whether through the newspaper, via mailout, or otherwise. The only public notice required in the present matter was the notice required by Section 23.1 of the *Planning Act*, which notice was included by the Appellants in their appeal documents.

Procedural fairness concerns, including notice of certain types of planning decisions, are indeed a hallmark of municipal planning law in this province and have been reviewed on many occasions by this Commission. Unfortunately for the Appellant, the project proposed by the Developer in this case is an “as of right” development based on the zoning of the Subject Property. Unlike certain types of applications described above, the City’s bylaws and indeed the law of procedural fairness do not require notice to be sent to neighbours where an applicant requests a development permit for an “as of right” development. When such an application is received, the City checks to ensure that the proposed project complies with the zoning requirements, setback and other related planning matters, as well as practical matters regarding the installation of water, sewer, and electrical services.

❖ **Conclusion**

The City has heard the Appellant’s concerns and believes that the Commission is not the appropriate forum in which to adjudicate their claims. The Commission has no jurisdiction to review the Building Permit, and the Appellants had no right to notice from the City prior to issuing the Development Permit.

Accordingly, the City requests that the Commission dismiss the appeal in its entirety, either immediately without the need for further submissions, or at a preliminary hearing on the issues raised herein.

Yours very truly,


for Derek D. Key, Q.C.
DDK/imm/dlp

Enclosures

cc: Claire Fagan – Appellant
Gordon MacFarlane, Deputy CAO and Human Resources and Legal Affairs Director
Nathan Kember, Developer