



Prince Edward Island

Justice and
Public Safety

Legal Services
PO Box 2000
Charlottetown PE
Canada C1A 7N8

Île-du-Prince-Édouard

Justice et
Sécurité publique

Services légaux
C.P. 2000
Charlottetown PE
Canada C1A 7N8

November 7, 2023

VIA EMAIL – pjrafuse@irac.pe.ca

Philip J. Rafuse
Appeals Administrator
The Island Regulatory and Appeals Commission
National Bank Tower, Suite 501
134 Kent Street, Charlottetown PE C1A 7L1

Re: Appeal #LA23-009 - Andrea Battison v City of Charlottetown

These submissions are provided on behalf of the Developer, Prince Edward Island Housing Corporation (“Housing Corporation”), regarding the above noted appeal (“Appeal”) filed by Andrea Battison on April 17, 2023 against the City of Charlottetown (“City” or “Council”).

The Appeal is in relation to the approval of a demolition permit (file 001-DEM-23) issued by the City’s Building Inspector and Development Officer for a building located at 231 Richmond Street, PID 340703, Charlottetown, PEI (the “Demolition Permit”).

Preliminary Issues

The Housing Corporation raises two preliminary issues for consideration by the Commission:

1. The Housing Corporation submits that the Commission does not have statutory jurisdiction to hear the appeal of a demolition permit under the *Planning Act*, RSPEI 1988, c P-8 (“*Planning Act*”).
2. In the alternative, the Housing Corporation submits that the Demolition Permit is now expired. The Appeal is, therefore, moot.

Submissions

1. Statutory Jurisdiction

For the reasons below, the Housing Corporation submits that the Commission does not have jurisdiction to hear or decide the appeal of a Demolition Permit. Demolition permits are

governed by the *Building Codes Act* and the City's Building Code Bylaw, not under the *Planning Act*.

a) Commission's Jurisdiction Under the Planning Act

The Commission's statutory jurisdiction to hear and decide appeals is limited by section 28 of the *Planning Act*. The appeals from decisions of a municipal council which are appealable to the Commission are limited to those found at subsection 28(1.1):

28(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; ...

Demolition permits fall under the definition of "permit" under the *Building Codes Act*, RSPEI 1988, c B-5.1 ("*Building Codes Act*")¹ and are expressly excluded from the definition of "development permit" under the *Planning Act*:

1(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]

As such, demolition permits are not appealable under clause 28(1.1)(a)(i) of the *Planning Act*. For greater certainty, nowhere in the *Planning Act* is there any explicit reference to demolition permits or of any statutory requirements which permit the demolition of a building.

b) Building Codes Act Provides a Comprehensive Scheme to Address Demolition Permits

The *Building Codes Act* provides a comprehensive demolition scheme and explicitly states that both the *Building Codes Act* and the *Building Codes Regulations* apply to the demolition of existing buildings.²

The *Building Codes Act* sets out the application process for the issuance of demolition permits³ and no person shall commence demolition of a building unless a permit for the work has been issued.⁴

¹ *Building Codes Act*, clause 1(s)

² *Building Codes Act*, clause 2(1)(b) and the *Building Codes Regulations*, ss. 3(5)

³ *Building Codes Act*, s. 10

⁴ *Building Codes Act*, s. 11

Lastly, where a conflict or inconsistency exists between a provision of the *Building Codes Act* or its regulations and another enactment, the provisions of the *Building Codes Act* and its regulations apply to the extent of the conflict or inconsistency.⁵

c) City Council has Adopted the Building Codes Act and Regulations under its Building Codes Bylaw

The council of a municipality is responsible for the administration and enforcement of the *Building Codes Act* in the municipality.⁶ Section 26 allows a municipality to enact bylaws under the *Building Codes Act*. Council has issued the Building Code Bylaw⁷ stating:

2.1. The PEI Building Code Act and Building Code Regulations 2.1.1. The PEI Building Codes Act & Regulations were adopted by the Province as of March 31, 2020 and are hereby adopted in the Municipality except as may otherwise or additionally be provided for herein. [Emphasis added]

A council of a municipality must appoint building officials for the purposes of administering the *Building Codes Act* and the regulation in the municipality.⁸ Karyn Palmer, who issued the Demolition Permit, is a building official under the *Building Codes Act* for the City of Charlottetown.

d) Appropriate Appeal Mechanism for Demolition Permit is under Building Codes Act

Section 24 of the *Building Codes Act* provides for a review of a decision of a building official by the Chief Building Official who within 10 days after receipt of the decision. There is an appeal to an Appeal Board under section 25 of the *Building Codes Act* within 30 days of the receipt of the decision.

e) Relevant Jurisprudence

The Commission recently made clear in paragraph 17 of *Douglas MacArthur v. City of Charlottetown*, Order LA22-06 ("LA22-06") that decisions made in relation to building permits are not appealable decisions under subsection 28(1.1) of the *Planning Act*:

*The Commission agrees with the first and third arguments advanced by the City. It has already been decided by the Commission that it is a statutory tribunal without inherent jurisdiction and that **decisions in relation to building permits are not appealable decisions under the Planning Act.**¹¹ Building*

⁵ Building Codes Act, s. 3

⁶ Building Codes Act, s. 4(2)

⁷<https://www.charlottetown.ca/common/pages/DownloadFileByUrl.aspx?key=wl4%2bwxP0yicvfwmw%2fjlpYwbpg%2b5ZFd87J6YPzqo1q4NcYt17VfNgseansn%2bpoUV6T%2fEVpuSUB31HrNF9HC4IJL2fu9F82uK1%2bRAJiqGZb5SKbhsKplxmqQAQx9%2b1198DmJ19XJiTTwQ%2bU0LrPwkd33FZsiaJp3Y7aGOvDjPzdi5LhoPHFVDSGyRqopUgSAryVa26tg%3d%3d>

⁸ Building Codes Act, s. 8(3)

permits are subject to a separate review and appeal process under the Building Codes Act and that process does not include the Commission.¹² Based on the particular record in this case, and for the reasons which follow, the Commission also accepts the second argument presented by the City. The impugned decision related to building permits, and s. 28(1.1) of the Planning Act does not grant jurisdiction to the Commission to hear and decide appeals from building permits. [Emphasis added]

In paragraph 17 of LA22-06, the Commission addressed the character of building permits in comparison to development permits:

*As the Commission noted previously in Order LA22-02, s. 1(e.1) of the Planning Act defines the phrase "development permit" and states expressly that it "does not include a building permit issued under the Building Codes Act."¹³ Distinguishing between the two permits requires the Commission to examine all of the surrounding circumstances. In his written submissions, the Appellant helpfully described the essence of these different permits. **A development permit specifies the use of land and how a structure is to be situated on that land. A building permit ensures the structure is designed and constructed in compliance with applicable construction codes.**¹⁴ In circumstances like this one, where the City uses the same application for both permits and issues the same form for both permits, this will be a case by case determination based on the context. In other municipalities, the distinction between the two permits is clear from the distinct processes and the faces of the permits.¹⁵ [Emphasis added]*

Unlike the situation in LA22-06, the City's demolition permit application is not also used for development applications; the demolition permit application form is titled "MOVING & DEMOLITION PERMIT APPLICATION" and is utilized only for requests to demolish buildings or to move/relocate buildings. The Demolition Permit also states on its face: "POST THIS IN A CONSPICUOUS LOCATION DURING CONSTRUCTION", which is a requirement under subsection 10(5) of the *Building Codes Act*. Further, the Demolition Permit requires the applicant, as a condition of the Demolition Permit's validity, to comply with Part 8 of the National Building Code (the "Code"). The Code is adopted under section 2 of the *Building Codes Regulations* and Part 8 is titled: "Safety Measures at Construction and Demolition Sites".

The Demolition Permit was issued not to "specify the use of land and how a structure is to be situated on that land", as would be the case for a development permit, but to ensure the demolition of the building at 231 Richmond is completed in compliance with the Code and in accordance with various other regulatory safety requirements.

2. Mootness of Appeal

The Demolition Permit was issued on March 27, 2023 and was valid for 60 days. The permit has now expired, and the appeal is moot.

Despite the mootness of the Appeal, the Housing Corporation suggests that the circumstances merit the Commission's exercise of discretion to hear and decide the jurisdictional question. The Supreme Court of PEI provided in *Llewellyn v. Carter et al.*, 2008 PESCAD 12, at para. 18, factors to consider in determining whether to exercise discretion to decide the issues on such an appeal. Applying those factors to this case, there continues to be an adversarial context to the proceeding; and the expenditure of judicial resources in addressing the issue of jurisdiction on the appeal could serve the parties at a later date (e.g., in the event a further Demolition Permit is obtained).

Conclusion

The Housing Corporation makes the following submissions:

1. That the Demolition Permit was issued under the *Building Codes Act*, and the Building Codes Bylaw. Demolition permits are governed by the *Building Codes Act* and do not meet the definition of a "development permit" under the *Planning Act*. As such, the issuance of the Demolition Permit is not an appealable decision under ss. 28(1.1) of the *Planning Act*. The appropriate appeal process is under the *Building Codes Act*.
2. In the alternative, the Housing Corporation submits that the Appeal is moot due to the expiry of the Demolition Permit and should be dismissed on that basis.

Despite the mootness of the Appeal, the Housing Corporation asks that the Commission direct that a question of jurisdiction be heard, through written submissions, and be determined prior to a hearing on the merits of the appeal. The Housing Corporations seeks dismissal of the appeal for the reasons set out above.

Signed,



Meaghan Hughes & Stephen Flanagan
Legal Counsel to the Developer,
PEI Housing Corporation