

IN THE MATTER OF AN APPEAL

between

DON READ

(APPELLANT)

v

CITY OF CHARLOTTETOWN

(RESPONDENT)

NOTICE OF MOTION

TAKE NOTICE that on the 31 day of May 2021 the Appellant in the above entitled proceedings shall apply to the Island Regulatory and Appeals Commission (**the Commission**) at 134 Kent Street, Charlottetown, Prince Edward Island for the following orders:-

1. An Order pursuant to Commission Rule 61, directing that APM Commercial/Pan American Properties Inc. are not a named party to the proceedings or an added party intervener.
2. An Order pursuant to Rule 61, directing that by virtue of Commission Rule 11 APM Commercial/Pan American Properties Inc. have not been granted status in the proceedings and therefore cannot participate in the appeal hearing.
3. An Order pursuant to Commission Rule 61, directing that by virtue of Commission Rule 30 that the proceedings be adjourned to allow the alternative dispute resolution process between the Appellant and the Respondent to be completed, in circumstances where the Commission relied on submissions made by APM Commercial/Pan American Properties Inc., who did not and do not have status in the proceedings, in determining that the dispute resolution process had completed and in setting a date for the hearing.
4. Such further order and/or alternative relief that to the Commission may seem fit.

THE GROUNDS FOR THIS MOTION ARE:-

Background

1. The Appellant filed the Notice of Appeal (Appeal #LA21001) on 4 January 2021 (**the Notice of Appeal**). The Respondent filed and served a Record of its proceedings with the Commission on or about 17 February 2021 and a Reply to the Notice of Appeal on or about 22 February 2021 (**the Respondent's Reply**). The Appellant filed and served a Response to the City's Reply on 5 March 2021 (**the Appellant's Response**).
2. APM Commercial/Pan American Properties Inc (**the Developer**) has not filed any documents with the Commission, nor has it made any application to the Commission.

Grounds

3. Rule 11(2) provides that the Commission, in complying with its obligations to acknowledge a notice of appeal, may grant status to (1) named parties; and (2) an intervener as follows:-

"11.2 The Commission may grant status to:

a. all named parties; and

b. an intervener in accordance with Rules 14 through 20." (underline added)

Named Party

4. With regard to Rule 11(2)(a), the Developer is not a named party to the appeal. The Developer is not named on the face of the Notice of Appeal, the Respondent's Reply, or the Appellant's Response.
5. By email dated 6 May at 09:07, the Commission's case officer, Mr Rafuse, suggested that by virtue of Commission Rule 4(r) which defines 'party' in respect of an appeal to mean "an appellant, respondent, or developer", means that the developer is automatically granted status in the appeal, whether named on the appeal or not. That interpretation of the Commission Rules must be incorrect.
6. If it was the case that all parties as defined by Commission Rule 4(r) are to be equally acknowledged as parties to the appeal and granted status, regardless of whether or not they are named on the appeal, then Commission Rule 11(2) would simply provide that "the Commission may grant status to all parties". The qualification that status may only be granted to 'named' parties would not be required. It is clear that Commission Rule 11(2) distinguishes between the individuals/entities that may be a party to an appeal, being the Appellant, Respondent or Developer, and the parties that are actually named in an appeal, and provides that only those named parties may be granted status (subject to any application made in accordance with Rules 14 through 20).
7. Furthermore, by email dated 6 May at 12:31, the Commission's case officer noted that:

"The Record filed by the City includes multiple references to, and documents filed by, APM Commercial and its sister companies. For example, Tab 2 of the Record provides the Rezoning & Amendments Application, received by the City on February 11, 2020, which identifies the applicant as APM Commercial. This confirms that the City accurately identified the applicant in its online decision printed out by Mr. Read"

Documents in any appeal are going to name many parties that are not named parties to an appeal. It would be unusual for them not to. In the present circumstances for example, CBCL are also named on a number of documents in the Record filed by the Respondent but that does not make them a named party to the appeal. Any suggestion that by virtue of the fact that a party is named in the Record means they are automatically a named party to an appeal for the purposes of Commission Rule 11(2)(a) must be incorrect.

8. Commission Rule 11(2)(a) clearly distinguishes 'named parties' from the broader definition of 'party' contained in Commission Rule 4(r). The Developer is not a named party to the appeal. Whilst the developer may be affected by the appeal proceedings and decision, no relief or remedy is sought against the Developer. In the normal course of planning appeals procedure, or judicial review procedure, the Developer would be notified of the appeal and, on application, be entitled to be heard as a notice party (intervener).
9. The Developer is not a named party to the appeal, and as such cannot be granted status in the appeal save where an application has been made by the Developer to be added as an intervener, or on application to amend the Notice of Appeal to add them as a named party (under section 27(2) Amendments which allows an amendment to add a party).

Added Party Intervener

10. Commission Rule 11(2)(b) provides that in addition to 'named parties' the Commission may also grant status to an intervener in accordance with Commission Rules 14 through 20. An intervener may be either an Added Party Intervener or a Friends of the Commission Intervener. Of particular relevance to these proceedings is the status of an Added Party Intervener.

11. Commission Rule 14(1)(a) defines an Added Party Intervener as:-

"Added Party Intervener" means an individual or organization, other than the parties to a proceeding, who has a distinct and substantial interest in the proceeding and intends to participate actively in the proceeding. Subject to any condition imposed by the Panel, an Added Party Intervener is vested with all of the rights of a party"

Commission Rule 14(2) confirms that any organisation or individual may apply to the Commission for intervener status in any proceeding.

12. Commission Rule 16 sets the procedure for applications to be added to proceedings as an Added Party Intervener as follows:-

"1. In addition to Rule 15.0 (1), an applicant who wishes to intervene as an Added Party Intervener shall file a written submission including the following information:

(a) the nature of the applicant's interest in the proceeding and a concise statement indicating why that interest is distinct from the parties and adversely affected by the decision of the Commission;

(b) the nature and scope of the applicant's intended participation;

(c) the extent to which the intervention will add to the costs and complexity of the proceeding; and

(d) the facts that the applicant proposes to show in evidence at the proceeding.

2. The written submission shall be served on each party and filed with the Commission."

13. Commission Rule 19 provides that the Commission, having received and reviewed an application has the power to:-

- (a) grant the application;
- (b) grant intervener status with or without conditions, which includes the authority to grant a status that is different from the one requested; or
- (c) decline the application.

14. It seems that in circumstances where a developer's development approval is the subject of an appeal, that a developer may fall within the meaning of Added Party Intervener having a distinct and substantial interest in the proceedings. However, a developer can only be granted status as an Added Party Intervener having made an application in accordance with Commission Rules 15 and 16, and that application having been granted (either with or without conditions) by the Commission in accordance with Commission Rule 19.

15. The Developer has not made an application under Commission Rules 15 and 16 to be added to the proceedings as an Added Party Intervener. Accordingly, the Developer cannot have been granted status in the proceedings as an intervener (or any other status) under Commission Rule 11(2)(b).

Amendment to the proceedings

16. Furthermore, Commission Rule 27 makes specific provision for a party to amend the Notice of Appeal to add a party. It provides:-
- "1. A party may amend a Notice of Appeal or application at any time prior to fourteen (14) days before the hearing date, after which a Notice of Appeal or application may only be amended with the consent of the Commission.
 2. An amendment to add a party may only be done with the consent of the Commission.
 3. An amendment shall bear the date of the Notice of Appeal or application with the original title preceded by the word "amended".
 4. A party amending its Notice of Appeal or application shall indicate text added to the original by underlining it and text deleted from the original by striking through it.
 5. When considering an amendment to the Notice of Appeal or application, the Commission may consider:
 - (a) any prejudice to a person or party;
 - (b) the timelines of notice to the opposite parties; and
 - (c) any other relevant factors.
 6. A party that amends its Notice of Appeal or application shall file it with the Commission and serve a copy of that document on all parties."
17. No application under Commission Rule 27 has been made to add the Developer as a party to the Appeal.

Conclusion

18. In accordance with Commission Rule 11(2), parties must be granted status by the Commission to participate in the appeal. It is not the case that parties, as defined by Commission Rule 4(r), are automatically granted status. If so, the provision of Commission Rule 11(2) would not be required. Commission Rule 11(2) is clear that the Commission may grant status to (1) named parties and (2) an intervener. The Developer is not a named party to the appeal. The Developer is not named on the face of the appeal documents and no relief is sought against the Developer. Whilst, it is acknowledged that the Developer is a party with a distinct and substantial interest in the proceedings, the Developer has not made the relevant application under Commission Rules 15 and 16 to be added as an intervener.
19. The Developer, therefore does not have status in the appeal, and to the extent that the Commission relied on submissions or requests made by the Developer in making administrative decisions with respect to the appeals process, those decisions must be reversed. In particular, the decision of the Commission to end the dispute resolution process before it had completed and set a hearing date at the request of the Developer. I refer to the email dated 26 April 2021 at 11:07 from the Commission's case officer which states: -

"On Wednesday April 21, 2021 Mr. Bank's staff called me to formally request a hearing date. The following day the Commission reviewed that request, determined that mediation was at an end and fixed the May 26 date.[...]"

20. As the Commission will be aware Commission Rule 25 Timeliness of Hearings of the Rules of Practice and Procedure – Hearings provides:-
- "1. A hearing will be held within a reasonable time after receipt of a Notice of Appeal.*
 - 2. If alternative dispute resolution is preferred by the parties, the hearing will be held in abeyance or suspended until such time as the dispute resolution process has been completed."*
21. Further Commission Rule 35 Alternative Dispute Resolution (ADR) provides:-
- 1. The Commission or a party may suggest alternative dispute resolution to the parties in order to resolve the dispute.*
 - 2. Alternative dispute resolution may be conducted by Commission staff or by such a person agreed upon by the parties.*
 - 3. If the alternative dispute resolution process is successful, the Commission may issue an order incorporating any settlement agreement reached by the parties.*
 - 4. If the alternative dispute resolution process is unsuccessful, the hearing shall resume."*
22. Both Commission Rules 25 and 35 only make provision for the hearing to resume after the alternative dispute resolution process has been completed. Commission Rule 25(2) expressly states that the hearing will be held in abeyance or suspended until such time as the dispute resolution process has been completed. The Appellant and Respondent agreed to enter into alternative dispute resolution and that process has not been completed. To date, only the Developer has indicated that they are no longer willing to pursue alternative dispute resolution. Furthermore Commission Rule 35(4) states that if the alternative dispute resolution process is unsuccessful, the hearing shall resume. Neither section makes provision for the Commission to unilaterally determine that alternative dispute resolution cannot proceed. In fact, the Rules of Practice and Procedure make specific provision that where ADR is preferred by parties, the hearing will be held in abeyance until such time as the ADR process has been completed.
23. The Commission has erred in making the decision to terminate the dispute resolution process at the request of the Developer, in taking into account the submissions of a party which does not have status in the appeal, and as such that decision must be reversed.

Philip Rafuse <PJRafuse@irac.pe.ca>

May 6, 2021,
9:07 AM

to Tim, don, David, DG, Alex

Good morning,

I have reviewed the Commission's Rules of Practice &
Procedure <http://www.irac.pe.ca/rules/rulesofpracticeandprocedure-hearings.pdf>

Section 4, clause r) reads:

4. Definitions

In these rules:

...

r) "party", in respect of an application, means an applicant; "party", in respect of an appeal, means an appellant, respondent or developer;

Rule 61 speaks to Motions and sets out the requirements, which includes the right to respond by other parties. I will consult with the panel to see if they wish to direct filing dates otherwise than set out in Rule 61.

Sincerely,

Philip

Good morning everyone,

Mr. Read has advised that he cannot attend on May 19. Mr. Read also advised me:

I am available on the original scheduled hearing date of 26 May or any of the other dates proposed by Mr. Hooley.

The Commission has therefore re-scheduled the hearing to **Monday May 31, 2021 commencing at 9:30 a.m.**

Deadline for further documents etc. is **Friday, May 14, 2021 at 4:30 p.m.**

Mr. Read expressed concern to me that he thought mediation was still ongoing. Both Mr. Banks and Mr. Hooley had expressed to me during the Zoom meeting that they were not interested in mediation if the process was to be delayed. On Wednesday April 21, 2021 Mr. Bank's staff called me to formally request a hearing date. The following day the Commission reviewed that request, determined that mediation was at an end and fixed the May 26 date. Mr. Hooley could not be available but provided alternate dates. A May 19 date was set but Mr. Read was not available.

I would note for the record that May 31, 2021 is included in Mr. Hooley's alternate dates referenced by Mr. Read.

Sincerely,

Philip