



PRINCE EDWARD ISLAND

Regulatory & Appeals Commission

Commission de réglementation et d'appels

ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: February 10, 2022
Docket: LA21025
Type: Planning Appeal

INDEXED AS: Clare Fagan v. City of Summerside

Order No: LA22-02

BETWEEN:

CLARE FAGAN

Appellant

AND:

CITY OF SUMMERSIDE

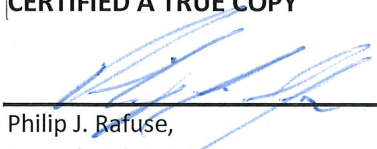
Respondent

ORDER

Panel Members:

J. Scott MacKenzie, Q.C., Chair
M. Douglas Clow, Vice-Chair
Erin T. Mitchell, Commissioner

CERTIFIED A TRUE COPY


Philip J. Rafuse,
Appeals Administrator
Prince Edward Island Regulatory & Appeals
Commission

CONTENTS

1. INTRODUCTION	3
2. BACKGROUND	3
3. SUBMISSIONS FROM THE PARTIES.....	3
CITY	3
APPELLANT	3
4. ISSUE	4
5. DISPOSITION	4
6. ANALYSIS	4
STATUTORY RIGHT OF APPEAL IS LIMITED TO THE DEVELOPMENT PERMIT.....	4
GENUINE ISSUE FOR APPEAL HEARING.....	5
PARTIES	6
ORAL HEARING.....	6
7. CONCLUSION	6

1. INTRODUCTION

1. This proceeding before the Commission raises questions as to the scope of jurisdiction to hear an appeal from a development decision by the City of Summerside (the “City”). This decision as to these preliminary questions is intended to clarify the appeal before the Commission and focus the parties only on matters falling within the statutory authority of the Commission. That authority is found in s. 28(1.1) of the *Planning Act*.¹

2. BACKGROUND

2. On October 26, 2021, the City approved building permit number 2021-10-0374 and development permit number 2021-9-0351 in relation to a site located at 182 Putters Street in Summerside, Prince Edward Island.
3. On October 26, 2021, Clare Fagan (the “Appellant”) filed a notice of appeal with the Commission seeking to appeal the building permit and the development permit issued by the City.
4. On November 18, 2021, the City delivered written submissions to the Commission raising questions as to the jurisdiction to hear and decide this appeal. The City asked that the appeal be dismissed summarily in writing.
5. On January 14, 2022, the Appellant delivered written submissions in reply and contended that the Commission had jurisdiction to hear and determine all of the issues raised in the appeal.

3. SUBMISSIONS FROM THE PARTIES

City

6. The City argues that the Commission does not have jurisdiction to hear an appeal from the building permit. The City points to ss. 24 and 25 of the *Building Codes Act*² which provide a distinct statutory appeal process for building permits. While the City admits that the Commission does have jurisdiction to hear an appeal from the development permit, the City submits that the notice of appeal does not raise a genuine issue requiring a hearing. According to the City, the development in question is an as-of-right development and the City had no obligation to provide notice to the Appellant.

Appellant

7. The Appellant argues that the Commission has jurisdiction to hear an appeal related to both the building permit and the development permit by virtue of s. 5(b) of the *Island Regulatory and Appeals Commission Act*.³ According to the Appellant, the appeal raises a genuine issue for consideration by the Commission, namely the lack of proper

¹ R.S.P.E.I. 1988, c. P-8.

² R.S.P.E.I. 1988, c. B-5.1.

³ R.S.P.E.I. 1988, c. I-11.

notice in relation to the development. This issue is described as a matter of fairness and due process.

4. ISSUE

8. The written submissions filed by the parties raise one main question for the Commission. That question is the proper scope of an appeal to the Commission under s. 28(1.1) of the *Planning Act*. The question raised is a legal one. There is no material dispute between the parties as to the decisions under challenge or the issues raised by the appeal. Having received written submissions from the parties, the Commission will determine this preliminary matter in writing, in accordance with the Commission's *Rules of Practice and Procedure*.

5. DISPOSITION

9. For the reasons that follow, the Commission finds that it does not have the jurisdiction to hear an appeal from the building permit. There is a different appellate process for such permits. Appeals from building permits have not been assigned to the Commission by the Legislature in s. 28(1.1) of the *Planning Act*. The only appealable decision occurred when City approved the development permit. Questions related to the procedural fairness of that development permit are permissible grounds of appeal and may properly be argued by the parties before the Commission at an oral hearing. However, the Commission does not have statutory authority to consider claims grounded in contract or misrepresentation. Those claims fall within the exclusive jurisdiction of the Supreme Court of Prince Edward Island.

6. ANALYSIS

Statutory right of appeal is limited to the development permit

10. Subsection 28(1.1) of the *Planning Act* lists the municipal decisions that may be appealed to the Commission by filing a notice of appeal. One of those appealable decisions is a development permit. A building permit is not listed. In fact, 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*." The decision by the City to issue the building permit is not subject to appeal to the Commission.
11. There is a separate and distinct statutory appeal process for a person aggrieved by a decision to issue a building permit under s. 10 of the *Building Codes Act*. The appeal process is set forth in ss. 24 and 25 of the *Building Codes Act*. The decision is first reviewed by the Chief Building Official. The review decision may then be appealed to the Appeal Board constituted under the *Building Codes Act*. There is no appeal to the Commission.
12. While the Appellant points to the general functions of the Commission as described in s. 5(b) of the *Island Regulatory and Appeals Commission Act*, an appeal is a statutory process. If an appeal has not been specifically assigned to the Commission, then the Commission does not have the authority to hear and determine the appeal. In this

case, only the appeal of a development permit has been assigned by the Commission by the Legislature. It is also well-settled that specific legislation prevails over the general legislation.⁴

13. In summary, the appeal before the Commission is limited to the decision by the City to approve the development permit. The Commission has no statutory jurisdiction to hear and determine any appeal in relation to the building permit issued by the City.
14. The Commission has often repeated that it is a creature of statute.⁵ It only has the authority granted by the Legislature. The Legislature has prescribed the list of municipal decisions that can be appealed to the Commission in s. 28(1.1) of the *Planning Act*. Other municipal decisions cannot be appealed to the Commission.

Genuine issue for appeal hearing

15. In its written submissions, the City admits that the Commission has jurisdiction to hear and determine an appeal of its development permit. However, the City argues that the appeal ought to be dismissed nevertheless because there is no genuine issue requiring an appeal hearing. The Commission is not satisfied that dismissal at this stage is appropriate for a number of reasons.
16. The City invokes a “genuine issue requiring an appeal hearing” threshold for the summary dismissal of an appeal in writing. This standard is similar to the one used in civil proceedings for summary judgment. However, no authority for this threshold was provided by the City. The Commission’s *Rules of Practice and Procedure* do not presently provide for the summary dismissal of appeals that do not raise a genuine issue. At present, the summary dismissal of appeals by the Commission generally occurs where a dispositive legal question is raised, such as a question of jurisdiction. There is also generally no dispute as to the material facts or any issues of credibility arising from the record. Summary dismissal will also generally be appropriate where an appeal is vexatious or otherwise an abuse of process. The Commission is, therefore, not satisfied that summary dismissal is appropriate in this case.
17. Both parties have identified notice or procedural fairness as the main issue in this appeal. It is also apparent from the written submissions that both parties disagree on this point and have submissions to make to the Commission on the merits of this issue. Matters of notice and procedural fairness, while legal issues, are often infused with facts. In the circumstances of this case, the Commission exercises its discretion to proceed with an oral hearing on the issue of notice or procedural fairness.
18. Before leaving the subject of the oral hearing, the Commission wishes to address one final matter raised by the Appellant. The notice of appeal filed by the Appellant asserts that there was an earlier representation by the developer related to views of a golf course and seeks an order from the Commission stopping development. The

⁴ *Akpe v IRAC and Grey*, 2018 PECA 5 at paras. 9-10.

⁵ See e.g. Order LA09-11, *629857 N.B. Inc. et al. v. City of Charlottetown* (November 10, 2009), at para. 14; and Order LA15-02, *G. Willikers Ltd. v. Resort Municipality* (February 12, 2015).

Commission is a statutory tribunal without any inherent jurisdiction. In other words, if the Commission has not been granted the authority to decide something by the Legislature, the Commission does not have that authority. These concerns raised by the Appellant, which relate to relief grounded in contract or misrepresentation, are outside the statutory jurisdiction of the Commission. Those issues and any potential injunctive relief fall within the exclusive jurisdiction of the Supreme Court of Prince Edward Island and are not properly before the Commission.

Parties

19. The notice of appeal in this case was filed by the Appellant within the appeal period prescribed by s. 28(1.3) of the *Planning Act*. The Appellant was the only dissatisfied person to do so and therefore the only appellant in this proceeding. In her written submissions to the Commission, the Appellant stated that the submissions were filed on behalf of herself and three other individuals. All were identified as appellants. This is not correct. The only appellant in this proceeding is the Appellant. While it is open to the Appellant to have witnesses at the oral hearing, it is not open to the Appellant to add appellants or parties to this proceeding. Only one dissatisfied person filed an appeal within the prescribed 21-day appeal period. That person was the Appellant alone.

Oral hearing

20. The appeal from the development permit issued by the City will be scheduled for an oral hearing. For the reasons above, the Commission has no jurisdiction to hear any appeal of the building permit approved by the Commission. The issue to be addressed at the oral hearing is the matter of notice or procedural fairness in relation to the development permit. The parties are directed to prepare their evidence and submissions for the Commission accordingly.

7. CONCLUSION

21. The Commission thanks the parties for their helpful submissions in writing and looks forward to an oral hearing that is focused and takes account of this preliminary decision by the Commission.

DATED at Charlottetown, Prince Edward Island, Thursday, February 10, 2022.

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

M. Douglas Clow, Vice-Chair

(sgd) Erin T. Mitchell

Erin T. Mitchell, 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.

NOTE: In accordance with IRAC'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.