



Date Issued: February 10, 2022
Docket: LA21004
Type: Planning Act Appeal

INDEXED AS: Brian R. MacKay v. Minister of Agriculture and Land

Order No: LA22-03

BETWEEN:

Brian R. MacKay

Appellant

AND:

Minister of Agriculture and Land

Respondent

ORDER

Panel Members:

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

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

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1. INTRODUCTION

1. On May 14, 2021, Brian R. MacKay (the “Appellant”) filed a notice of appeal under s. 28(1)(d) of the *Planning Act*¹ with the Island Regulatory and Appeals Commission (the “Commission”) seeking to challenge a decision by the Minister of Agriculture and Land (the “Minister”) to approve a change of use for PID No. 85589 located in Darnley, Prince Edward Island (the “Property”). The Appellant owns a home that is approximately 150 feet away from the Property.

2. BACKGROUND

2. The notice of appeal was accompanied by written submissions. Those submissions alleged that the Property included an illegal burn pit and a manure pile, was an unsightly premise, and contained no fence or sound barrier. The Appellant complained of loud noise from the Property and the fact that a stop work order had not been issued.
3. On May 31, 2021, the Appellant delivered additional correspondence to the Commission. The correspondence alleged that the owner of the Property was running a lumber mill and was responsible for the production of unstamped lumber.
4. On July 6, 2021, the Minister delivered the record to the Commission and the Appellant.
5. A review of the record confirmed that the Appellant had previously objected to the change of use for the Property. In that objection, the Appellant complained of noise, dust, excessive traffic, and the hours of operation.²
6. On July 7, 2021, written submissions were delivered by legal counsel for the Minister.
7. On August 31, 2021, the Appellant delivered further correspondence to the Commission. The correspondence again complained of noise, odours, vibrations, and hazardous waste from the Property. The Appellant stated that the wood chipper and trucks on the Property were disturbing neighbouring properties.
8. On November 15, 2021, the Appellant delivered more correspondence to the Commission. In the words of the Appellant, “all I am asking for is the noise to stop next door.” The Appellant asked that the owner of the Property put up an earthen berm and stop all of the outside work.
9. Staff at the Commission placed this record before the panel for consideration. Having received fulsome submissions in writing from the parties, considered the current public health protocols related to COVID-19, and noted that the record before the Commission raises a legal question as to scope of the Commission’s jurisdiction, the panel exercised its discretion to determine this matter by way of a

¹ R.S.P.E.I. 1988, c. P-8.

² Record at Tab 3.

written submission hearing, in accordance with the Commission's *Rules of Practice and Procedure*.

3. ISSUE

10. This proceeding raises a question as to the scope of the jurisdiction granted to the Commission by the Legislature under s. 28(1)(d) of the *Planning Act*. A decision by the Minister to approve a change of use may be appealed to the Commission. However, the jurisdiction given to the Commission is statutory. It is not unlimited. In other words, the Commission has no inherent jurisdiction to grant relief like a superior court, such as the Supreme Court of Prince Edward Island. This proceeding requires the Commission to examine the record as a whole to ascertain the true nature or essence of the complaints raised by the Appellant and to determine whether those complaints fall within the statutory authority of the Commission.

4. DISPOSITION

11. For the reasons that follow, the Commission is not able to hear and determine the issues raised by the Appellant or to grant the relief being sought by the Appellant. Upon review of the record as a whole, including the notice of appeal, and the correspondence and submissions of the Appellant, the issues raised by the Appellant are grounded in nuisance. Nuisance and the relief from it are matters that must be pursued in the Supreme Court of Prince Edward Island. The Commission has not been assigned the statutory jurisdiction to hear and decide these issues. If the Appellant wishes to have one or more activities on the Property stopped, the proper forum is a superior court. While a decision by the Minister to approve a change of use may be appealed to the Commission, the Commission cannot hear and decide issues that fall outside its statutory jurisdiction.

5. ANALYSIS

12. A decision by the Minister regarding a change of use application may be appealed to the Commission pursuant to s. 28(1)(d) of the *Planning Act*. The Commission has previously interpreted its appellate jurisdiction to include: (i) the consideration of whether the Minister followed the proper process and procedure as required by the *Planning Act* and regulations; and (ii) the consideration of whether the decision made by the Minister is based on sound planning principles having regard to the principles of land use planning, the *Planning Act*, and the regulations.³ The Commission has also previously held that it does not have the authority to hear and determine issues that fall within the jurisdiction of the Supreme Court of Prince Edward Island. It has no inherent jurisdiction like a superior court.⁴ Finally, the Commission has previously found that it does not have jurisdiction over matters of enforcement.⁵ Enforcement is a matter falling within the discretion of the Minister.

³ See e.g. Order LA17-06 at para. 52.

⁴ See e.g. Order LA10-12.

⁵ See e.g. Order LA14-05 and Order LA13-02.

13. The Commission must examine the record as a whole to determine whether the appeal raises issues that fall within its jurisdiction to hear and decide. The search is for the true nature or essence of the appeal. A review of the notice of appeal, written submissions, and correspondence of the Appellant reveals that the issues raised are grounded in nuisance. The nuisance is asserted to arise from noise, dust, odour, vibration, traffic, and hours of operation. As the Appellant himself acknowledged, all he wants is for the noise to stop on the Property.
14. The issues raised by the Appellant do not fall within the jurisdiction of the Commission. They do not point to any defect in procedure or deficiency in relation to sound planning principles. If the Appellant seeks to prevent nuisance, obtain remedies such as a berm or fence, or compel the Minister to enforce laws related to an unsightly premise, unstamped lumber or a hazardous operation, the proper forum is the Supreme Court of Prince Edward Island. As a statutory tribunal, the Commission has only the jurisdiction that has been given to it by the Legislature. The Legislature has not assigned matters of nuisance or enforcement to the Commission under s. 28(1) of the *Planning Act*.
15. The Commission controls its own process and, in doing so, it must guard against hearing and deciding issues that fall within the authority or jurisdiction of another decision-maker. In other words, the Commission cannot permit its statutory appellate jurisdiction to be used in a manner that would result in an abuse of process.
16. In summary, while a decision by the Minister regarding a change of use application may be appealed to the Commission pursuant to s. 28(1)(d) of the *Planning Act*, the Commission is not able to hear and decide issues of nuisance. To do so when those issues fall within the jurisdiction of the Supreme Court of Prince Edward Island would amount to an abuse of its process. The appeal filed by the Appellant is therefore dismissed.
17. Before concluding this matter, the Commission does encourage the Minister to review and consider all of the information provided by the Appellant in this matter with a view to consulting with governmental officials to see what, if any, measures or enforcement steps may be available to mitigate or address the concerns raised by the Appellant. For the reasons above, the Commission makes no findings related to the asserted complaints.
18. The Commission thanks the parties for their submissions in writing.

6. ORDER

19. For the reasons set out above the Commission hereby dismisses the appeal.

IT IS ORDERED THAT

1. The appeal is hereby dismissed.

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.