



PRINCE EDWARD ISLAND

Regulatory & Appeals Commission

Commission de réglementation et d'appels

ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: March 2, 2022

Docket: LA21021

Type: Planning Act Appeal

INDEXED AS: Douglas MacArthur v. City of Charlottetown

Order No: LA22-06

BETWEEN:

Douglas MacArthur

Appellant

AND:

City of Charlottetown

Respondent

AND:

Pan American Properties Inc.

Developer

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

1. INTRODUCTION

1. This proceeding before the Commission raises a question as to the scope of jurisdiction to hear an appeal from a decision by the City of Charlottetown ("City") to issue permits for the foundations of three townhouses. The statutory jurisdiction of the Commission is found in s. 28(1.1) of the *Planning Act*.¹

2. BACKGROUND

2. On August 26, 2021, the council for the City approved by resolution foundation plans submitted by a developer for three townhouses located on Towers Road in Charlottetown, Prince Edward Island. On the same date, permits were issued by the City for the foundations only. They were described as phase 1 permits. Notice of the permits was published on the public website maintained by the City.
3. On September 15, 2021, Douglas MacArthur (the "Appellant") filed a notice of appeal with the Commission seeking to appeal the permits issued by City.
4. On September 17, 2021, staff at the Commission contacted the parties seeking submissions regarding the jurisdiction of the Commission to hear and decide this appeal.
5. On October 1, 2021, the Appellant delivered written submissions to the Commission.
6. On October 3, 2021, the City delivered written submissions to the Commission.
7. On October 3, 2021, the Appellant delivered additional submissions in writing to the Commission.
8. On October 20, 2021, the City delivered additional submissions in writing to the Commission.
9. On October 21, 2021, the Appellant confirmed by email that he would not be filing any further response to the submissions from the City.
10. Having received thorough submissions from the parties on the question of jurisdiction, staff at the Commission placed this appeal before a panel of the Commission for a decision pursuant to Rule 31 of the Rules of Practice and Procedure published by the Commission.

¹ R.S.P.E.I. 1988, c. P-8.

3. SUBMISSIONS:

Appellant

11. The Appellant submits that the decision by the City related to a development permit and is therefore appealable to the Commission pursuant to s. 28(1.1) (a) of the *Planning Act*. This submission is supported by five main arguments. First, the site in question does not presently have rezoning approval because of an appeal filed with the Commission by another resident of the City. Second, other jurisdictions provide that no development agreement can be signed with a developer while a development is under appeal. Third, legislation in Prince Edward Island names the Commission as the body which hears and decides appeals related to land use. Fourth, the website of the City published notice of the decision in question and the website stated that all of the listed building and development approvals could be appealed to the Commission. Fifth, having stated publicly that the decision could be appealed, the City was precluded from now arguing that the Commission was without jurisdiction to hear and decide this appeal. For these reasons, a building permit could not have been issued by the City and the impugned decision falls within the appellate jurisdiction of the Commission.

City

12. The City submits that the Commission does not have jurisdiction pursuant to s. 28(1.1) (a) of the *Planning Act* because the impugned decision related to the issuance of building permits. Building permits must be appealed under the *Building Codes Act*.² This submission is supported by three main arguments. First, the Commission is a statutory tribunal without inherent jurisdiction and decisions in relation to building permits are not listed as appealable decisions in the *Planning Act*. Second, the decision resulted in permits for foundations only as part of a multi-phase building permit. Third, there is a separate review and appeal process for building permits under the *Building Codes Act* and that process does not include the Commission. For these reasons, the City says that the decision falls outside the appellate jurisdiction of the Commission.
13. As for its website, the City acknowledges that its wording could have been more precise. This lack of precision does not, however, give the Commission jurisdiction to hear and decide this appeal. The City also notes that the *Building Codes Act* does not obligate the City to publish notice of the timing or forum for reviewing and appealing building permits.

4. ISSUE

14. The written submissions filed by the parties raise one main question for the Commission. That question is whether the impugned decision is appealable to the Commission under s. 28(1.1) of the *Planning Act*. The question raised is a legal

² R.S.P.E.I. 1988, c. B-5.1.

one. Having received written submissions from the parties, the Commission will determine this preliminary matter in writing.

5. DISPOSITION

15. For the reasons that follow, the Commission does not have the jurisdiction to hear an appeal from this decision by the City to issue these building permits. 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*.

6. ANALYSIS

16. The Commission is not persuaded by the five main arguments advanced by the Appellant for the following reasons:
 - (a) First, the site in question actually does have zoning approval. The decision by the City to amend its bylaw and official plan to facilitate this mixed-use development was made on December 14, 2020.³ In this jurisdiction, an appeal of a planning decision does not operate as a stay of that decision.
 - (b) Second, the Appellant is right that, in some jurisdictions, a municipality cannot enter into a development agreement while an appeal is outstanding. For example, this is the case in Nova Scotia.⁴ However, in this jurisdiction, there is no similar legislative provision. It is not open to the Commission to read such a provision into the *Planning Act*. Legislating is the responsibility of the Legislature.
 - (c) Third, while one of the general functions described in s. 5(b) of the *Island Regulatory and Appeals Commission Act* is to hear and decide matters relating to land use,⁵ 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 decide the appeal.⁶ According to the Legislature, a development permit can be appealed to the Commission⁷ but a building permit is appealed to a

³ See generally Order LA22-04, *Don Read v. City of Charlottetown* (February 24, 2022).

⁴ *Municipal Government Act*, S.N.S. 1998, c. 18, s. 228(1).

⁵ R.S.P.E.I. 1988, c. I-11, s. 5(b).

⁶ 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). See also *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 29, where a majority of the Supreme Court of Canada confirmed: "A decision maker may not exercise authority not specifically assigned to him or her."

⁷ *Planning Act*, *supra* note 1, s. 28(1.1.) (a)(i).

different body.⁸ It is also well-settled that specific legislation prevails over the general legislation.⁹

- (d) Fourth, the information published on the website of the City is not correct. Not all building and development decisions can be appealed to the Commission. The list of appealable decisions was drafted by the Legislature and is found in s. 28(1.1) of the *Planning Act*. The website of a municipality cannot increase or decrease the number of decisions that can be appealed to the Commission. Only the Legislature can make those changes.
 - (e) Fifth, while there may be confusion, frustration or even a feeling of unfairness on the part of a resident when the City publishes a notice saying a decision can be appealed and its legal counsel later takes the correct legal position that the decision cannot be appealed to the Commission, the jurisdiction of the Commission to hear and decide appeals is statutory. That jurisdiction cannot be expanded by consent, acquiescence, or some type of estoppel.¹⁰ It is defined and granted by the Legislature. Errors on a website, while unfortunate, cannot expand the appellate jurisdiction of the Commission.
17. 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 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.
 18. 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

⁸ *Building Codes Act*, *supra* note 2, ss. 24-25.

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

¹⁰ Order LA22-01, *Wooldridge, Boutillier & Chandler v. City of Charlottetown and Perry* (January 27, 2022) at para. 24.

¹¹ Order LA22-02, *Clare Fagan v. City of Summerside* (February 10, 2022) at paras. 9-14 [Order LA22-02].

¹² *Building Codes Act*, *supra* note 2, ss. 24-25.

¹³ Order LA22-02, *supra* note 11 at para. 10.

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

19. When all of the surrounding circumstances are examined in this particular case, the decision made by the City on August 26, 2021 was in relation to building permits. The decision therefore cannot be appealed to the Commission under s. 28(1.1) of the *Planning Act*.
20. Neither the Appellant nor the City devoted any material part of their submissions to the resolution passed by council on August 26, 2021. The Commission found this to be curious because the resolution was the foundation or legal authority for the impugned permits. The resolution was necessary context and centrally important when deciding whether the decision at issue related to a development permit or a building permit. The resolution passed by council approved "the foundation plans for three (3) townhouse dwellings" subject to conditions.¹⁶ In the words of the resolution, those conditions had to be satisfied "before any other phased building permits" were issued.¹⁷ This was the resolution which authorized the permits to be issued. The text of the resolution therefore determined the nature of the permits issued in this case. They were the first of other phased building permits for this site. When the text of the resolution is considered together with the record, it plainly supports the conclusion that the impugned decision by the City was related to building permits.
21. Building permits are not listed as appealable decisions in s. 28(1.1) of the *Planning Act*.
22. The case law of the Commission also specifically confirms that building permits cannot be appealed to the Commission.¹⁸
23. For these reasons, the appeal is dismissed. The Commission does not have jurisdiction to hear and decide this appeal.

7. RECOMMENDATION

24. While the Commission appreciates the acknowledgement from the City that the notice published on its website could have been more precise in this case, the quality and clarity of the publications issued by the City to its residents have been

¹⁴ Written submissions of the Appellant dated October 1, 2021 at para. 5.

¹⁵ See e.g. Order LA22-02, *supra* note 11, which involved a decision by the City of Summerside.

¹⁶ Written submissions of the City dated October 3, 2021 at Appendix "B" [emphasis added].

¹⁷ Written submissions of the City dated October 3, 2021 at Appendix "B" [emphasis added].

¹⁸ Order LA22-02, *supra* note 11 at paras. 9-14.

a concern for the Commission.¹⁹ The City can and should do a better job of communicating its building and development decisions to members of the general public.

25. To provide an example from this case, it is confusing to use one application form for both building and development permits. It is also confusing to issue just one form labelled as both a building and development permit. It is also not accurate to notify the public that all building and development approvals published on the website can be appealed to the Commission. The City should not publish 21-day appeal deadlines for all decisions when some of those decisions are subject to different appeal periods, such as building permits, and other decisions are not subject to any right of appeal, such as a sign permit.
26. The City may consider following the lead of the City of Summerside in this regard. The City of Summerside issues distinct development and building permits. The different appeal deadlines for those decisions are also recorded separately on the website of the City of Summerside.²⁰

8. CONCLUSION

27. For the reasons above, the appeal is dismissed. There is no appeal to the Commission from a building permit.
28. The Commission thanks the Appellant and the City for their submissions.

¹⁹ For recent concerns expressed by the Commission, see Order LA20-05 issued to the City on December 15, 2020; Order LA22-01 issued to the City on January 27, 2022; and Order LA22-04 issued to the City on February 24, 2022.

²⁰ City of Summerside, Permits Issued, online:

<https://www.summerside.ca/i-want-to-apply-for-a-building-renovating-or-demolition-permit/permits-is-sued>

IT IS ORDERED THAT

1. The appeal is hereby dismissed.

DATED at Charlottetown, Prince Edward Island, Tuesday, March 2, 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.